

Article Information

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Metgasco's success against NSW Minister for Resources and Energy: ensuring those in power act within power

Last week's decision of Justice Button of the NSW Supreme Court, which quashed two decisions made by the Minister's delegate relating to the suspension of operations by Metgasco under its Petroleum Exploration Licence (PEL), and which may set up a claim by Metgasco for compensation, serves as a lesson to holders of licences to carefully scrutinise actions taken in relation to them by the Minister or his representatives to ensure that rights are not interfered with invalidly.

Metgasco's PEL16 relates to a conventional gas exploration well in the Northern Rivers of New South Wales. In 2013, local residents began protesting Metgasco's activities and established a camp at the site as a centre for the protests.

On 14 May 2014, Metgasco received a letter from the Director of the Office of Coal Seam Gas (OCSG) (the Delegate) asserting that Metgasco was not complying with a condition of PEL16 relating to community consultation. That condition required the consultation to be undertaken in accordance with a Guideline prepared by NSW Trade and Investment. The letter from the Delegate suspended activities under PEL16 until Metgasco could demonstrate that it had complied with the condition.

Metgasco requested an immediate trading halt, which was removed on 16 May 2014. Immediately after trading resumed, Metgasco's share price dropped by about 40 percent.

Metgasco requested a review of the 14 May 2014 decision by the Delegate. It was invited to make submissions in relation to that decision. Although it did so, it also commenced judicial review proceedings in relation to the 14 May 2014 decision. Following receipt of the submissions, the Delegate wrote to Metgasco on 26 June 2014 recording the decision to "confirm the suspension of Metgasco's activities". The letter asserted that Metgasco had not engaged in effective consultation or developed a community consultation plan that contained a detailed description or analysis of stakeholders. That decision to confirm the suspension was also challenged by Metgasco.

Relevantly, the provisions of the *Petroleum (Onshore) Act 1991 (NSW)* (the Act) required the Minister, before any suspension of activities, to give the licence holder written notice of the proposed suspension and the reasons for it, and to give the licence holder a reasonable opportunity to make representations and take those into consideration. These requirements had clearly not been followed in relation to the 14 May 2014 decision, his Honour remarking, in finding the decision to be invalid:

"...the letter of 14 May 2014 came as a bolt from the blue to Metgasco. That occurred in the context of Parliament having explicitly commanded that, before a suspension was to occur, a statutory regime of procedural fairness needed to be implemented. It was not."

His Honour then went on to find the 26 June 2014 decision to be invalid because it purported to confirm a decision which was, itself, invalid. There was also no power in the Act to "confirm" a decision. In doing so, his Honour noted that the decisions damaged Metgasco substantially, and exposed the company to criminal sanction.

Metgasco also raised a number of other grounds to support its arguments that the second decision was unlawful. Although strictly speaking unnecessary to decide, his Honour gave reasons in relation to one argument that will be of particular interest to those subject to community consultation conditions.

Metgasco argued that the focus of the reasons for the 26 June 2014 decision was a failure to engage in effective consultation and that the Delegate had taken into account irrelevant considerations, namely that the outcome of the consultations had not been that the community supported Metgasco's activities or that Metgasco had failed to persuade the community.

His Honour noted that the Guideline set out requirements in relation to the activities of the person or body engaging in consultation, rather than focusing on the results of the consultation. His Honour considered that the notion of "effective" consultations within the Guidelines focussed on the quality of the *process* rather than on the outcome.

Holders of exploration licences should take heed of this decision and ensure that decisions made in relation to their licences are made validly, strictly conforming with the requirements of the Act. Those the subject of community consultation requirements should also take note to establish effective processes for consultation. If that consultation does not result in communities being persuaded in favour of the exploration, that should nonetheless be sufficient to demonstrate compliance with the condition.