Coal mine climate change case challenges the government's use of 'drug dealer's defence' on emissions

ABC Premium News (Australia)

April 4, 2024 Thursday

Length: 1748 words

Byline: by climate reporter Jo Lauder
Highlight: As Queensland environmentalists continue to fight looming coal mine approvals, Australia's Environment Minister Tanya Plibersek is relying on arguments that have come under increasing scrutiny in climate litigation.

Body

There's a case happening at the moment that highlights the strange place we are at in the shift away from fossil fuels.

A Queensland environmental group took federal Environment Minister Tanya Plibersek to court over two coal mine extensions, arguing that she did not consider the impacts of the emissions released when the coal is burnt.

The minister used two arguments that have been deployed for decades to justify Australia's coal exports.

They're known by environmentalists as the "drug dealer's defence" and the "drop in the ocean" argument.

The "drug dealer's defence" can be summed up like this: if we don't sell this coal, someone else will, so it doesn't make a difference.

But with global demand for coal expected to peak as early as 2026, according to the International Energy Agency, can Australia still claim that it's simply meeting the demand of the market?

The second argument made by the minister was that emissions from these mines don't make a significant contribution overall to climate change. Nicknamed the "drop in the ocean" argument, it's also on shaky grounds legally in 2024, with other courts rejecting it.

At the heart of 'living wonders'

Before we get into how these arguments work, here's a bit of background on where the case came from.

Last year, the Environment Council of Central Queensland (ECoCeQ) took the minister to court over proposals to extend Whitehaven's Narrabri Mine and the Mount Pleasant Mine in Muswellbrook, and lost the case.

Ms Plibersek has veto power over major projects if they would impact "matters of national environmental significance", such as protected plants, animals, and ecosystems.

For example, when you hear about a court case to stop a coal mine because it will clear the habitat of an endangered parrot, it's being argued under these laws.

The ECoCeQ nicknamed it the "living wonders" case.

"From the Tarkine to Kakadu, from Ningaloo Reef on the west to the Great Barrier Reef on the east, and everything in between including our koalas, our greater gliders, our pygmy possums… we put them all as living wonders," the council's president Christine Carlisle said.

Under the act, the minister isn't required to consider how the project will contribute to climate change through its emissions.

The mines haven't been approved yet, but the legal action challenged the minister's risk assessment of them before a final decision.

The review of the minister's decision was heard last year by a single Federal Court judge, who ruled that her decision was legal. This latest hearing was an appeal to the full Federal Court.

The council believes the minister didn't properly assess the risks that would come from the emissions when this coal is burnt.

"We maintain every coal mine is contributing to climate harm. And every contribution escalates the climate harms that happen to all our living wonders," Ms Carlisle said.

If we don't supply, someone else will

The drug dealer's argument is referred to legally as "market substitution" and it comes down to supply and demand.

In documents on the Narrabri mine, Ms Plibersek uses a textbook case of market substitution.

"I considered that it is also likely that, if the proposed action does not proceed, the prospective buyers will purchase an equivalent amount of coal from a supplier other than the proponent, which would result in an equivalent amount of greenhouse ***gas*** emissions," she said.

Melbourne Law School's Jacqueline Peel is an expert in climate litigation and says this argument fails to consider the global move away from fossil fuels.

"[It's] the first time we've really seen the market substitution argument being raised at a federal level by the federal environment minister as part of an argument to say there's no need to reconsider approvals for particular coal mines," Professor Peel said.

"Where the courts have an opportunity to really delve into the economic evidence, then they're finding that it is questionable and rejecting a market substitution-style argument."

The drug dealer's defence was dismissed in the Waratah Coal case, where the Land Court of Queensland ruled against Clive Palmer's mine in the Galilee Basin.

The judge found that demand for coal in the coming years was "most likely to be met by operating mines".

"Under a declining demand forecast, coal-for-coal substitution will be limited to the near-term. Increased demand will be short-term and peak soon."

Coal's used-by date fast approaching

Despite predictions that coal demand will peak in the next decade, the proposals before the minister are to keep digging up and shipping coal until 2044 and 2048.

The main destinations for the coal are Japan, South Korea, Malaysia and Taiwan – which all have net zero targets of 2050.

Whitehaven Coal, which owns the Narrabri mine, told the ABC that it sees a need for their coal.

"High-quality thermal coal has an important role to play in supporting global energy security during the decarbonisation transition in the coming decades, particularly in Asia where there continues to be strong and growing demand for its use in high-efficiency, low-emissions coal-fired power stations," a Whitehaven spokesman said.

The International Energy Agency expects global coal demand to drop this year, even in the absence of stronger climate action.

"Beyond projects already committed as of 2021, there are no new ***oil*** and ***gas*** fields approved for development in our pathway, and no new coal mines or mine extensions are required," the agency stated.

Not seeing the forest for the trees

The other argument used by the minister gets to the heart of the global nature of climate change.

It's that the greenhouse ***gas*** emissions from the mines are small globally, therefore they would not be a "substantial cause" of climate change impacts.

"Any contribution from the proposed action to global greenhouse ***gas*** emissions would be very small," Ms Plibersek outlined in documents on the project.

Professor Peel says this argument is all about the trees and not the forest.

"Cumulatively, those greenhouse ***gas*** emissions are what is causing the climate change impacts that we're seeing."

Arguably, this mindset has got the world to where it is today.

"It's an argument that's easily able to be deployed by most governments and corporations around the world, because obviously, climate change is a global problem and there are many contributors to that problem," Professor Peel said.

To ECoCeQ's president this argument is "fatalistic".

"It's making an assessment that the rest of the world is going to do nothing. And in that way, it's deflecting responsibility for us doing something," Ms Carlisle said.

"Both of these arguments, we say, are irrational, illogical. And we're asking the court to determine whether they are also unlawful under the act."

And there are international examples of cases where this argument has been thrown out.

A landmark ruling in the Netherlands against ***oil*** and ***gas*** giant ***Shell*** recently rejected both arguments made by the company.

"The court acknowledges that RDS [***Shell***] cannot solve this global problem on its own," the judgement read.

"However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the ***Shell*** group, which it can control and influence."

While international cases don't set a legal precedent here in Australia, these decisions can still be invoked in local cases.

In the ***Shell*** case, the court agreed with climate scientists' assessment that all emissions add to the problem.

"It is also important here that each reduction of greenhouse ***gas*** emissions has a positive effect on countering dangerous climate change. After all, each reduction means that there is more room in the carbon budget," the court said.

A recent UN reportfound the number of climate change cases around the world had doubled, and Professor Peel said Australia was at the forefront of that trend.

"We have the second highest number of cases globally, only exceeded by the US," she explained.

"Climate litigation itself has grown substantially in the last five years, since the conclusion of the Paris Agreement internationally."

So how is the federal government managing emissions?

The environment minister has a strong reason for why she isn't responsible for factoring in climate change impacts into these decisions: because that's the job of Australia's current climate change laws.

Instead the government is looking to the revamped Safeguard Mechanism, which requires Australia's biggest polluters reduce their emissions every year.

"Labor has already changed the law," Ms Plibersek told the ABC.

"Our strong new climate laws, developed with the Greens and independents, allow the Minister for Climate Change and Energy to stop coal and ***gas*** projects adding to Australia's emissions."

"The government's reformed Safeguard Mechanism ensures all large industrial facilities, including new and existing coal mines, reduce emissions," Minister for Climate Change and Energy Chris Bowen told the ABC.

"Any new or expanded mines must comply with baselines under the Safeguard Mechanism."

Whitehaven Coal confirmed that the mine's direct emissions will fall under these regulations.

"We are investing in initiatives to decarbonise our operations and continuing to evaluate site-based abatement opportunities.

"We have also commenced the approval application process for a solar farm on land adjacent to the existing Narrabri mine that would provide more than one-third of the mine's electricity," a Whitehaven Coal spokesman told the ABC.

"We acknowledge Australia's commitment to net zero carbon emissions by 2050 and will continue to align our decarbonisation ambition and business practices with the emissions reduction requirements set by the Australian government. Net zero emissions does not mean no emissions."

But something is missing from this process; the emissions from when that coal is burnt overseas.

While the current laws mean the government isn't responsible for those emissions, the impact of them is felt globally, including in Australia.

The ECoCeQ says that's why the environment minister needs to factor climate change into her decisions.

"I just think the minister has one job, which is to protect the environment, and that she's unable to do that properly without properly scrutinising the effect of climate harms from coal and ***gas*** proposals," Ms Carlisle said.

The full Federal Court is expected to announce its decision on the case in the coming months.

MACH Energy, which owns the Mount Pleasant Mine, declined to comment on the case.

Load-Date: April 4, 2024

End of Document