

- 6 MAY 2014

REGISTRY: BRISBANE
NUMBER:



FILED
BRISBANE
Applicant:

**COAST AND COUNTRY ASSOCIATION OF
QUEENSLAND**

AND

First Respondent:

**PAUL ANTHONY SMITH, MEMBER OF THE
LAND COURT OF QUEENSLAND**

AND

Second Respondent:

HANCOCK COAL PTY LTD

APPLICATION FOR A STATUTORY ORDER OF REVIEW

Application to review the decisions of First Respondent made on 8 April 2014 in *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12:

1. Recommending under section 269 of the *Mineral Resources Act 1989* (MRA) that the Second Respondent's application for a mining lease for the Alpha Coal Mine either be:

(a) rejected; or

(b) granted, subject to the condition that the approval be subject to the Second Respondent first obtaining licences to take, use and interfere with water under paragraphs 206(1)(a) and (b) of the *Water Act 2000* such that all concerns pursuant to the precautionary principle are resolved.

2. Recommending under section 222 of the *Environmental Protection Act 1994* (EPA), as in force on 30 March 2013 prior to the commencement of the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012*, that the Second Respondent's application for a non-code compliant environmental authority (mining lease) for a level 1 mining project for the Alpha Coal Mine either be:

(a) refused; or

(b) granted, subject to the following additional conditions:

- (i) that approval be subject to the Second Respondent first obtaining licences to take, use and interfere with water under paragraphs 206(1)(a)

APPLICATION FOR A STATUTORY
ORDER OF REVIEW
Filed on Behalf of the Applicant
Form 54, Version 1
Uniform Civil Procedure Rules 1999
Rule 566

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and (b) of the *Water Act 2000* such that all concerns pursuant to the precautionary principle are resolved;

- (ii) the draft Environmental Authority be amended by the insertion in table 15 of three additional monitoring points, one located on each of the Anderson's, Currie's and Ms Cassoni's properties, with each given the parameter of water level, with at least one reading every twelve hours by electronic data reader; and
- (iii) that there be a condition in the draft Environmental Authority to the effect that the Second Respondent enter into make-good agreements with the Curries, the Andersons, and Ms Cassoni, within either twelve months of the grant of ML 70426, or before commencement of mining activities, whichever is the sooner.

The Applicant is aggrieved by the decisions because -

1. The Applicant was at all material times and is an association incorporated in Queensland whose objects include the protection of the natural environment.
2. The Applicant made a properly made objection under section 260 of the MRA to the grant of the mining lease for the Alpha Coal Mine.
3. The Applicant made a properly made objection under section 216 of the EPA to the grant of the environmental authority (mining lease), the draft environmental authority and the conditions of the draft environmental authority for the Alpha Coal Mine.
4. The Applicant called evidence, made submissions and otherwise actively participated in the objection hearings before the First Respondent held concurrently under section 268 of the MRA for the application for the mining lease and under section 220 of the EPA for the application for the environmental authority (mining lease) for the Alpha Coal Mine.
5. The Applicant had a right that the objections hearings would be heard by the First Respondent and recommendations would be made by the First Respondent according to law.

The grounds of the application are -

Making alternative recommendations

1. The MRA and the EPA do not contemplate or authorise the making of alternative recommendations that the applications for a mining lease and environmental authority either be refused or rejected or, alternatively, approved subject to conditions.
2. The First Respondent acted beyond power and did not observe the procedures that were required by law in deferring, to a separate, future approvals process, under the *Water Act 2000*, consideration of central issues relevant to the grant of the mining lease under the MRA and the environmental authority under the EPA.

3. In making alternative recommendations, the First Respondent misconstrued the tests to be applied, respectively, in making recommendations under section 269 of the MRA and section 222 of the EPA in that:

- (a) The First Respondent was bound to consider whether the grant of the mining lease and the environmental authority satisfied all statutory requirements, including that the proposed mining activity would produce a net benefit to Queensland;
- (b) The First Respondent could only recommend the grant of the approvals where His Honour was satisfied the grant of the mining lease and the environmental authority met all statutory requirements, including that the proposed mining activity would produce a net benefit to Queensland; and
- (c) Having found on the evidence presented to the Court during the objections hearing that:
 - (i) he was not satisfied that approval of the proposed mining activity complied with the precautionary principle in relation to the potential impacts on groundwater and ecology;
 - (ii) he was not satisfied that the proposed mining activity would not cause unacceptable adverse environmental impacts;
 - (iii) he was not satisfied that the proposed mining activity would not prejudice the public right and interest;
 - (iv) good reason had been shown for the refusal of the grant of the mining lease given the unsatisfactory nature of the evidence relating to groundwater,

the first respondent was bound to recommend to the relevant Ministers that the application for the mining lease be rejected and the application for the environmental authority be refused.

Climate change

In His Honour's reasoning regarding climate change:

- 4. The First Respondent misconstrued the EPA in that His Honour failed to give effect to the expansive definition of "environmental harm" contained in section 14.
- 5. The First Respondent misconstrued sections 222 and 223 of the EPA in that His Honour:
 - (a) Failed to appreciate that the grant of an environmental authority with which the objections decision was concerned gave lawful authorisation to the causation of environmental harm, including serious environmental harm, which was otherwise rendered unlawful by sections 437, 438 and 493A of the EPA;

- (b) Failed to appreciate that the likely environmental harm, as defined in section 14 of the EPA, so authorised was relevant to the objections decision; and
 - (c) Failed to appreciate that the criteria specified in paragraph 223(c) of the EPA were required to be considered by reference to the likely environmental harm, as defined in section 14 of the EPA, that would be authorised by the grant of the environmental authority applied for.
6. Either as a result of the construction errors referred to in the preceding grounds or otherwise, the First Respondent excluded from his consideration the environmental harm from the transport and use of coal that would be produced by the conduct of the mining activities that would be authorised by the environmental authority the subject of the objections decision. This was an error of law and fact in that, in light of the express provision of section 14 of the EPA, the adverse effects of the transport and use of coal that would be produced by the conduct of the mining activities constitute adverse effects and potential adverse effects of those mining activities (whether temporary or permanent and of whatever magnitude, duration or frequency) on environmental values including direct or indirect results and results from the activity alone or from the combined effects of the activity and other activities or factors. These adverse effects, therefore, constitute environmental harm authorised by the environmental authority the subject of the objections decision and therefore come within the matters that must be considered for the purpose of making that decision.
 7. Either as a result of the construction errors referred to in the preceding grounds or otherwise, the First Respondent excluded from his consideration the environmental harm that would be caused by the transport and use of the coal produced by the mining activities that would be authorised by the environmental authority the subject of the objections decision in part on the basis of evidence before him that other notional coal mining operations would notionally cause equivalent harm. Such evidence and the conclusions drawn from such evidence are irrelevant matters that ought not be considered by the First Respondent or given weight. Inter alia, by considering and giving weight to those matters, the First Respondent removed from his consideration (or gave zero weight to) the environmental harm that would in fact be caused by the mining activities, a matter that His Honour was bound to consider by the combined effect of sections 14, 222, 223 and 493A of the EPA.
 8. Further and in the alternative to ground 7, by considering and giving weight to the impacts that would arise from other notional mining activities, the First Respondent misdirected himself in that the objections decision required him to assess the likely environmental harm of the mine the subject of the application and not the likely impacts that might be caused by other notional activities.
 9. Further and in the alternative, the First Respondent misconstrued the Court's jurisdiction as not extending to a consideration of activities which do not expressly fall within the activities authorised by an environmental authority and thereby excluded from consideration the environmental harm caused by the transport and use of the coal produced by the mining activities that would be authorised by the environmental authority the subject of the objections decision. In addition to sections 14 and 493A of the EPA, the principles of ecologically sustainable development as set out in the 'National Strategy for Ecologically

Sustainable Development' and the public interest that His Honour was required to consider under the standard criteria in paragraph 223(c) of the EPA required the Court to consider the environmental harm from the transport and use of coal that would be produced by the said mining activities.

10. Either as a result of the construction errors identified in the preceding grounds or otherwise, the First Respondent failed to consider the character, resilience and values of the receiving environment for the environmental harm from the transport and use of coal that would be produced by the conduct of the mining activities that would be authorised by the objections decision. His Honour was required to consider such matters under the standard criteria in paragraph 223 (c) of the EPA.
11. Either as a result of the construction errors identified in the preceding grounds or otherwise, the First Respondent failed to consider the duration of the environmental harm from the transport and use of coal that would be produced by the conduct of the mining activities that would be authorised by the objections decision. His Honour was bound to consider such matters under sections 14 and 17, paragraph 223(c), and section 493A of the EPA.
12. Further and in the alternative, the First Respondent misconstrued and failed to comply with the duty imposed by section 5 of the EPA that requires that, where a function or power is conferred on a person, the person must perform the function or exercise the power in the way that best achieves the object of the Act of ecologically sustainable development. Section 5 imposes a positive duty to use any power or function exercised under the Act to protect the Queensland environment by only allowing activities that are consistent with the object of the EPA. The First Respondent was bound to recommend refusal of the environmental authority in circumstances where it was not shown that the mine was consistent with the object of the EPA.
13. Further and in the alternative, the First Respondent misconstrued paragraph 269(4)(j) of the MRA in that His Honour construed the words "any adverse environmental impact of the operation" to exclude from the purview of that phrase those adverse environmental effects of the mining operations the subject of the application for the mining lease which would result from subsequent use and transport of the coal which was extracted during the course of those mining operations.
14. Further and in the alternative, the First Respondent misconstrued paragraph 269(4)(k) of the MRA in that His Honour construed the words "the public right and interest will be prejudiced" to exclude from the purview of that phrase those adverse environmental effects of granting the application for the mining lease which would result from subsequent transport and use of the coal which was won and extracted during the course of those mining operations carried out pursuant to the lease.
15. Further and in the alternative, the First Respondent misconstrued paragraph 269(4)(l) of the MRA in that His Honour construed the words "any good reason has been shown for a refusal to grant the mining lease" to exclude from the purview of that phrase those adverse environmental effects of granting the application for the mining lease which would result from subsequent transport and use of the coal which was won and extracted during the course of those mining operations carried out pursuant to the lease.

16. Further and in the alternative, the First Respondent misconstrued paragraphs 269(4)(j), (k) and (l) of the MRA by considering and giving weight to the impacts that would arise from notional other mining activities notionally in substitution for the mining activity that would result from the grant of the application for the mining lease in that the First Respondent was required to assess the likely environmental impact of the mining activity that would be authorised by the mining lease the subject of the application and not the likely impacts that might be caused by other notional activities.

The applicant claims -

1. An order setting aside the parts of the decisions of the First Respondent specified in paragraphs 1(b) and 2(b) of this Application for a Statutory Order of Review.
2. In the alternative to 1:
 - (a) An order setting aside the decisions of the First Respondent; and
 - (b) An order remitting the consideration of the application for the mining lease and the environmental authority back to the First Respondent to be decided according to law.
3. Costs.

TO THE RESPONDENTS:

A directions hearing in this application (and any claim by the applicant for an interlocutory order) will be heard by the Court at the time, date and place specified below. If there is no attendance before the Court by you or by your counsel or solicitor, the application may be dealt with and judgment may be given or an order made in your absence. Before any attendance at that time, you may file and serve a notice of address for service

APPOINTMENT FOR DIRECTIONS HEARING

Time and date: 10am 19/5/14

Place: QEII Courts of Law Complex
415 George Street, Brisbane Qld 4000

Signed:



Dated: 6 May 2014

PARTICULARS OF THE APPLICANT:

Name: Coast and Country Association of Queensland Inc
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Hardgrave Road, West End, Qld, 4101

Applicant's solicitor's name: Sean Ryan
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Signed: 

Description: Solicitors for Applicant

Dated: 6 May 2014

This application is to be served on:

Paul Anthony Smith
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Land Court of Queensland
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Hancock Coal Pty Ltd
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