COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: Brisbane
NUMBER: CA9986/15

Appellant:	**COAST AND COUNTRY ASSOCIATION OF QUEENSLAND INC**
	AND
First Respondent:	**PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND**
	AND
Second Respondent:	**HANCOCK COAL PTY LTD**
	AND
Third Respondent:	**MINISTER FOR ENVIRONMENT AND HERITAGE PROTECTION**

APPELLANT'S OUTLINE OF ARGUMENT

Essential Propositions

1. The environmental harm (including that caused by the Scope 3 emissions from the burning of the coal produced) that may arise from the mining activities sought to be authorised is a major matter to be considered by the Land Court pursuant to s. 223 of the *Environmental Protection Act 1994* (Qld) (**EPA**) and s. 269 of the *Mineral Resources Act 1989* (Qld) (**MRA**) in the respective recommendations it is required to make.

2. The structure, subject matter, purpose and text of the EPA renders it impermissible for the Land Court to give no weight to that environmental harm by considering the notional effects of other coal that may be mined to replace in the market the products of this proposed mine.

3. Section 269 of the MRA has the same effect in respect of the recommendation that the Land Court must make under that Act.

4. The First Respondent and the learned trial judge were in error in that they construed both Acts in a manner that gave no weight to the environmental harm caused by the Scope 3 emissions from the burning of the coal produced from the mine proposed by the Second Respondent.

Introduction

5. This is an appeal from the decision of Douglas J. delivered on 4 September 2015[1] in which His Honour dismissed two applications by the Appellant for judicial review.[2]

[1] *Coast and Country Association of Queensland Inc v Smith & Anor; Coast and Country Association of Queensland Inc v Minister for Environment and Heritage & Ors* [2015] QSC 260 (Douglas J) (***CCAQ v Smith & Ors* [2015] QSC 260**).

Name: Environmental Defenders Office (Qld) Inc
Address: 30 Hardgrave Road, West End, Qld, 4101
Phone No: (07) 3211 4466
Fax No: (07) 3211 4655
E: edoqld@edo.org.au

6. The first of the two applications for judicial review[3] concerned the decision of the First Respondent in the Land Court in respect of applications by the Second Respondent for a mining lease under the MRA and an environmental authority under the EPA. Both applications related to the proposed Alpha Coal Mine in the Galilee Basin.[4]

7. The Land Court's reasons summarise the mine, the surrounding area and the application processes under the EPA and MRA.[5] The purpose of the mine is to produce thermal coal that the Second Respondent intends to sell to other companies to be burnt in coal-fired power stations to generate electricity principally overseas, in Asia, most probably India or China.[6] The proposed mine is very large. The Second Respondent's chief operating officer for the Alpha Coal project accepted during the trial that, "If this mine were to proceed [it] would ... be one of, if not the largest coal mine in Australia."[7]

8. In his decision, the First Respondent made a recommendation that neither the environmental authority nor the mining lease be granted.[8] The First Respondent also made an alternative recommendation[9] that both the environmental authority and the mining lease be granted subject to conditions deferring the resolution of certain matters to a separate approvals process under the *Water Act 2000* (Qld) (**Water Act**).[10]

9. Although the First Respondent recommended against the grant of the environmental authority and mining lease on the basis that he was not satisfied concerning the impacts of the proposed mine on groundwater, on the issue of the mine's impact on the environment through the production of greenhouse gas emissions by the burning of coal by end users, the First Respondent's conclusions were favourable to the grant of the environmental authority and mining lease to the Second Respondent.[11] The application in matter No. 4249 of 2014 sought to challenge that part of the First Respondent's findings (and the recommendation to the extent that they reflected those findings).

10. The First Respondent found that the Scope 3 emissions were "real and of concern [and] cannot be dismissed as negligible".[12] The Land Court had received undisputed evidence of the very serious threat posed by climate change driven by burning of fossil fuels.[13]

11. This appeal is directed at the learned trial judge's rejection of the Appellant's challenge to the First Respondent's findings on the greenhouse gases issue.[14]

---

[2] Pursuant to ss. 20 (and 21) and 30 of the *Judicial Review Act 1991* (Qld) (**JRA**).
[3] No. 4249 of 2014: see *CCAQ v Smith & Ors* [2015] QSC 260, [1].
[4] Ibid.
[5] *Hancock Coal Pty Ltd v Kelly & Ors & DEHP (No. 4)* [2014] QLC 12 at [21]-[40].
[6] *Hancock Coal Pty Ltd v Kelly & Ors & DEHP (No. 4)* [2014] QLC 12 at [24] and [221].
[7] Ross David Willis, Land Court Transcript 1-43, lines 16-18.
[8] *CCAQ v Smith & Ors* [2015] QSC 260, orders 1 & 2 and [412]-[414].
[9] *CCAQ v Smith & Ors* [2015] QSC 260, orders 1 & 2 and [412]-[414].
[10] The form of the First Respondent's recommendation was a matter for argument below. See *CCAQ v Smith & Ors* [2015] QSC 260, [7] – [17]. That argument is not pursued on appeal.
[11] *CCAQ v Smith & Ors* [2015] QSC 260, [5] referring to the reasons of the First Respondent at *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12, [229] – [232] and [248].
[12] *Hancock Coal Pty Ltd v Kelly & Ors & DEHP (No. 4)* [2014] QLC 12 at [209].
[13] See Appeal Record Book Doc No 4 or the the Joint Climate Expert report to the Land Court. The experts agreed that a recent report by the Australia Climate Commission, *The Critical Decade 2013*, was representative of the nature and extent of possible future impacts of climate change in Australia and in Queensland. That report is document No 5 in the Appeal Record Book. It found, *inter alia*, that "there is a very strong consensus that the climate is changing and that human activities, like the burning of fossil fuels, are the primary cause" and the "changing climate poses substantial risks for health, property, infrastructure, agriculture and natural systems." (p 2). These facts were not disputed by any party before the Land Court.
[14] His Honour's reasons on this issue appear at paragraphs [30] – [46] of the judgment.

12. The second application for judicial review, matter No. 9505 of 2014, sought to set aside the decision of the Third Respondent granting an environmental authority under s. 225(1) of the EPA.[15] The application also sought to challenge what was said to be either a decision or conduct related to the making of a decision[16] of the Minister administering the MRA (**MRA Minister**) in which the MRA Minister assured the Third Respondent that a condition would be attached to the grant of a mining lease requiring further assessment of the groundwater impacts of the proposed mine.[17]

13. The application for relief in Matter No. 9505 of 2014 was expressed to be partially dependent upon the decision and recommendations of the First Respondent being set aside by the Court by way of relief in matter No. 4249 of 2014.[18] The learned trial judge dismissed an argument that the decisions of the Ministers lacked finality.[19] However, His Honour found it unnecessary to decide what would be the impact on the validity of the decisions or conduct of the Ministers were the decision of the First Respondent found to be invalid.[20]

14. For that reason, the relief sought in the notice of appeal includes a request to remit both applications to the trial division to be determined according to law.[21]

Construing the EPA

15. The object of the EPA[22] is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[23] The EPA calls development of this kind "ecologically sustainable development" (**ESD**).[24]

16. The EPA places an obligation on any person on whom the EPA bestows a function or power to perform the function or power in a way that best achieves the object of the EPA.[25]

17. The EPA requires that, in certain circumstances, the administering authority must refer an application for an environmental authority to the Land Court.[26] The EPA provides for an objections decision, namely, a recommendation to the Third Respondent concerning whether the application for an environmental authority should be granted and, if so, on what conditions or the application should be refused.[27] The EPA also prescribes certain criteria which must be considered in making the objections decision.[28]

---

[15] *CCAQ v Smith & Ors* [2015] QSC 260, [3].
[16] For the purpose of JRA, s. 21.
[17] *CCAQ v Smith & Ors* [2015] QSC 260, [4].
[18] *CCAQ v Smith & Ors* [2015] QSC 260, [6].
[19] *CCAQ v Smith & Ors* [2015] QSC 260, [57] – [62]: His Honour's decision on this issue is not challenged in the appeal.
[20] *CCAQ v Smith & Ors* [2015] QSC 260, [56], and [63] – [64].
[21] Orders sought, paragraph 4.
[22] The relevant text of the EPA is reprint 11B setting out the Act as in force on 7 December 2012. The EPA was amended on 31 March 2013 by the commencement of the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012* (**amending Act**). The changes included renumbering of relevant chapters and sections and amending the standard criteria. Section 683 of the EPA, as amended, is a transitional provision that requires the processing of the application and all matters incidental to the processing to proceed as if the amending Act had not been enacted.
[23] EPA, s. 3.
[24] Ibid.
[25] EPA, s. 5: see, also *Environmental Protection Bill 1994 Explanatory Notes* in respect of ss. 3 and 5.
[26] EPA, s. 219(1).
[27] EPA, s. 222(1).
[28] EPA, s. 223.

18. In this way, the EPA bestows a function upon the Land Court which is performed by the member making the objections decision. The obligation imposed by s. 5 of the EPA, therefore, devolves upon the Land Court and the member making the decision.

19. Sections 3 and 5 of the EPA comprise an important aspect of the language and purpose of the EPA against which all provisions must be construed.[29] Those provisions which define the role of the Land Court in making an objections decision must be construed to give effect to harmonious goals including the goal of ESD and performing statutory functions in a way that achieves ESD.[30]

20. The EPA defines concepts which then form building blocks in achieving the legislative scheme. An "environmental value" is either a quality or characteristic of the environment[31] that is conducive to ecological health or public amenity or safety[32] or another quality of the environment identified and declared, by subordinate legislation, to be an environmental value.[33]

21. Another building block is the concept of "environmental harm". Environmental harm is any adverse effect, or potential adverse effect, (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value.[34]

22. The reach of the regulatory provisions of the EPA is influenced by the second half of the definition. Environmental harm may be caused by an activity whether the harm is a direct or indirect result of the activity or whether the harm is from the activity alone or from the combined effects of the activity and other activities or factors.[35]

23. Material environmental harm is environmental harm that is not trivial or negligible in nature, extent or context[36] or meets the requirement of materiality in a number of other ways.[37]

24. Serious environmental harm is environmental harm that is irreversible, of a high impact or widespread[38] or otherwise meets the requirement of seriousness.[39]

25. The concepts of material and serious environmental harm, and the concept of "environmental nuisance",[40] are used by the legislative scheme to create offences relating to environmental harm. The offence of willfully and unlawfully causing[41] serious environmental harm carries maximum penalties of a large fine or up to 5 years imprisonment.[42] Shorn of the element of willfulness, the alternative offence still carries a fine of up to 1,665 penalty units.[43]

26. The statute uses a similar structure for offences of causing material environmental harm.[44]

27. The link between the criminal regulatory role and achieving the statutory purpose of ESD by the authorisation of appropriate development is provided by the concept of unlawfulness. The EPA

---

[29] *Project Blue Sky v ABA* (1998) 194 CLR 355, [69].
[30] *Project Blue Sky v ABA* (1998) 194 CLR 355, [70].
[31] The environment is defined in broad terms in EPA, s. 8.
[32] EPA, s. 9(a).
[33] EPA, s. 9.
[34] EPA, s.14(1).
[35] EPA, s. 14(2).
[36] EPA, 16(1)(a).
[37] EPA, s. 16(1)(b) and (c) and (2).
[38] EPA, s. 17(1)(a).
[39] EPA, s. 17(1)(b) – (d) and (2).
[40] EPA, s. 15.
[41] Section 14 of the EPA, discussed earlier in the text, provides guidance as to the way in which an activity (not defined but clearly including the operations of a coal mine) may, for the purposes of the EPA, cause environmental harm.
[42] EPA, s. 437(1).
[43] EPA, 437(2).
[44] EPA, s. 438.

defines unlawfulness, expressly, by reference to acts that cause[45] serious or material environmental harm.[46] Such an act is unlawful unless it is authorised to be done by some kind of authority under the EPA[47] or other source of lawful authority[48] provided, in the latter case, the actor also complies with the general environmental duty under the EPA.[49]

28. In the case of the Alpha Coal Mine, the relevant authorisation that will prevent the wilful causation of serious environmental harm from being a criminal offence is an environmental authority.[50]

Environmental Authorities for Mining Activities

29. Chapter 5 of the EPA provides a detailed process for the grant of environmental authorities for mining activities.[51]

30. A mining activity means a specified form of activity authorised to take place under the MRA and to which a mining tenement relates.[52]

31. The specified forms of activity include mining under the MRA.[53]

32. A mining project means all mining activities carried out, or proposed to be carried out, under one or more mining tenements, in any combination, as a single operation.[54]

33. The application for the Alpha Coal Mine was for a non-code compliant[55] level 1[56] mining project. The application was lodged on 18 December 2009.

34. The right to apply for an environmental authority is linked to being an applicant for a mining tenement.[57] The application must be made to the mining registrar in the approved form.[58]

35. The EPA provides a discretion in the administering authority (the chief executive)[59] for an environmental impact statement to be required in the case of non-code compliant applications.[60]

36. The chief executive may dismiss an application for a non-code compliant application for a level 1 mining project.[61] If the chief executive does not refuse the application, a draft environmental authority must be prepared.[62]

37. The applicant for a non-code compliant application for an environmental authority (mining lease) for a level 1 mining project must give and publish a notice about the application.[63] The timing of

[45] Again, calling up EPA, s. 14.
[46] This is expressly stated in EPA, s. 493A(1).
[47] EPA, s. 493A(2).
[48] EPA, s. 493A(3)(a).
[49] EPA, s. 493A(3)(b): the general environmental duty is defined in EPA, s. 319.
[50] Reference to environmental authority is found in s. 493A(2)(d) EPA.
[51] Chapter 5 comprises ss. 146 – 309. "Mining activities" recalls the reference to "an activity" in EPA, s. 14(2).
[52] EPA, s. 147(1).
[53] EPA, s. 147(2)(a).
[54] EPA, s. 149.
[55] See EPA, s. 148(2).
[56] See EPA, s. 151(1).
[57] EPA, s. 153(1).
[58] EPA, s. 154(1).
[59] EPA, schedule 4.
[60] EPA, ss. 161-163: see, also, ss. 197 (stage 2) and 198-199.
[61] EPA, ss. 173 and 207.
[62] EPA, ss. 175(1) and 208-210.
[63] EPA, s. 211(1).

the giving of notice is required to be linked to the corresponding notice for the mining lease application under the MRA, s. 252B.[64] The content of the notice is prescribed and must include the closing date for objections.[65]

38. During the objection period, the public must be allowed access to the application documents to inspect, to take extracts, and must be allowed a copy of the documents on the payment of the appropriate fee.[66]

39. Any entity may make an objection about the application, the draft environmental authority or a condition in that draft.[67] The chief executive must accept an objection[68] if it complies with the basic prescribed requirements.[69] Such an objection is described as a properly made objection.[70]

40. The existence of a current objection (accepted[71] and not withdrawn[72]) at the close of the objection period mandates referral to the Land Court for an objections decision.[73] Each objector is a party to that proceeding.[74] The Land Court has power to give directions for the objections decision hearing.[75] The directions must, however, ensure that the objections hearing happens as closely as possible to the corresponding hearing under the MRA in respect of the application for the mining tenement.[76]

41. The objections decision must be in the form of a recommendation concerning the grant or otherwise and the conditions of the environmental authority.[77] Primacy is given to conditions imposed by the Coordinator-General under s. 210 of the EPA.[78]

42. The Minister must consider the objections decision but is not bound to follow the Land Court's recommendation.[79]

43. The EPA lays down a non-exhaustive set of criteria which must be considered by the Land Court in making the objections decision.[80]

44. The criteria include the application documents for the application;[81] each current objection;[82] and the status of any application under the MRA for each relevant mining tenement.[83]

45. The mandated consideration of the application documents is consistent with the circumstance that the effect of the grant of an environmental authority is to authorise environmental harm[84] that is otherwise rendered unlawful[85] by the EPA.

---

[64] EPA, s. 211(2).
[65] EPA, s. 212.
[66] EPA, s. 213.
[67] EPA, s. 216.
[68] EPA, s. 217(1).
[69] Such as: is written; is signed by each person making the objection; states the grounds of the objection and the facts and grounds and facts and circumstances relied on in support; and is made within time.
[70] EPA, s. 217(2).
[71] The chief executive has a discretion to accept objections that fall short of a properly made objection: EPA, s. 217(3)
[72] The EPA makes express provision for withdrawal, amendment and replacement: s.218.
[73] EPA, s. 219(1).
[74] EPA, s. 219(4)(c).
[75] EPA, s. 220(1).
[76] EPA, s. 220(2).
[77] EPA, s. 222(1).
[78] EPA, s. 222(2).
[79] EPA, s 225.
[80] EPA, s. 223.
[81] EPA, s. 223(a).
[82] EPA, s. 223(e).
[83] EPA, s. 223(g).

46. A decision maker[86] is obliged to take into account those matters which either the express words of the statute, or a consideration of the subject matter, scope and purpose of the Act,[87] indicate so to be mandatory considerations.

47. In the present case, the express reference to the application documents[88] suggests that the environmental harm that may arise from the mining activities sought to be authorised is a matter that must be considered in making an objections decision.

48. The suggestion is reinforced by the subject matter,[89] scope[90] and purpose[91] of the EPA. It is submitted that a proper construction of the EPA, as the statute conferring the jurisdiction,[92] requires a conclusion that the environmental harm that may arise from the mining activities[93] sought to be authorised is required to be a principal focus of the Land Court in making an objections decision.

49. For this reason, the learned trial judge was correct in concluding that greenhouse gas emissions were a relevant issue for the First Respondent to consider in making the objections decision.[94]

50. The criteria to be considered in making an objections decision include the "standard criteria".[95] The "standard criteria" include the principles of ESD as set out in the *National Strategy for Ecologically Sustainable Development* (**the National Strategy**); the character, resilience and values of the receiving environment; and the public interest.[96]

51. The learned trial judge extracted the principles of ESD from the National Strategy as follows:

> "The Core Objectives are:
>
> - to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
> - to provide for equity within and between generations
> - to protect biological diversity and maintain essential ecological processes and life-support systems
>
> The Guiding Principles are:
>
> - decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations
> - where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
> - the global dimension of environmental impacts of actions and policies should be recognised and considered
> - the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised

---

[84] EPA, s. 493A(2)(d).
[85] EPA, ss. 437-440.
[86] In this case, the Land Court in the person of the First Respondent.
[87] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).
[88] EPA, s. 223(a).
[89] An Act about the protection of Queensland's environment (EPA long title) and the Environmental Protection Act (EPA, s. 1, short title).
[90] Inter alia, see EPA, s. 4(1): Integrated management program that is consistent with ESD and (6): integrating environmental values into land use planning and management of natural resources.
[91] EPA, s. 3: the object of the Act is ecologically sustainable development.
[92] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 (Mason J).
[93] A broad approach to this harm is indicated by EPA, s. 14(1): any adverse effect or potential adverse effect and (2): direct or indirect, and includes cumulative effects.
[94] *CCAQ v Smith & Ors* [2015] QSC 260, [34].
[95] EPA, s. 223(c).
[96] EPA, schedule 4.

- the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised
- cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms
- decisions and actions should provide for broad community involvement on issues which affect them.

These guiding principles and core objectives need to be considered as a package. No objective or principle should predominate over the others. A balanced approach is required that takes into account all these objectives and principles to pursue the goal of [ecologically sustainable development]."[97]

The Impact of Scope 3 Emissions and the Weight to be Given

52. The learned trial judge found that the First Respondent did not err in concluding that he should not take the Scope 3 emissions of the mine into account[98] because the First Respondent found that there would be no reduction of greenhouse gas emissions if the mine was refused because the coal from the mine would be replaced by other coal[99] which might result in an increase in such emissions.[100]

53. In the context of judicial review on the ground of taking into account irrelevant considerations, limitation on matters which may be considered may either be express or implied. Implied limitations on the factors which may be considered may be found in the subject matter, scope and purpose of the Act.[101]

54. To give no weight to environmental harm of an activity on the grounds of the putative of actions of others causing similar or "replacement" harm sits awry with the scope of the EPA as expressed in the long and short titles of the Act, namely, the protection of Queensland's environment. While the replacement harm was raised in this case in the context of greenhouse gas emissions, it could apply in a similar manner to destruction of local environments and species extinction on the ground that new mines in Russia or China would destroy more wildlife.

55. The argument that allows "replacement harm" to negate the application of the EPA to environmental harm of the activities which are the subject of the application for the authority may be mutually applied to other countries' environmental protection legislation. A mine may be approved under identical legislation in Russia or China on the ground that the Alpha Coal Mine will provide "replacement" harm. This is unlikely to be an intended product of the EPA, taking into account its scope, subject matter and purpose.[102]

56. The express purpose of the EPA is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[103] By taking into account "replacement" harm in order to give zero weight to actual environmental harm caused by the activity for which the authority is sought, the decision maker loses the ability to distinguish

---

[97] *CCAQ v Smith & Ors* [2015] QSC 260, [35].
[98] The finding of the First Respondent might be more correctly stated as giving zero weight to the effects of the Scope 3 emissions.
[99] The First Respondent found that the evidence before him "would necessarily lead to the conclusion that global Scope 3 emissions will not fall if Alpha does not proceed as the coal will simply be sourced from somewhere else" and the mine "will have no impact on Scope 3 emissions": *Hancock Coal Pty Ltd v Kelly & Ors and DEHP (No. 4)* [2014] QLC 12 at [229]-[232] and [248]. We have referred to the effect of these notional emissions from the elsewhere sourced coal as "replacement harm" in submissions which follow. In adopting this approach, the Land Court followed the reasoning in *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-Op and DERM* [2012] QLC 013; (2012) 33 QLCR 79 at [488]-[605] (MacDonald P).
[100] *CCAQ v Smith & Ors* [2015] QSC 260, [40]. See, also, [41] – [46].
[101] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J).
[102] See, particularly, the broad definition of "environment" in EPA, s. 8
[103] EPA, s. 3.

between proposals which pursue ESD and those which are inconsistent, therewith. In addition, the decision maker loses the ability to recommend conditions which would minimise the environmental harm caused by a particular proposal. The express object of the Act is inconsistent with failing to promote ESD through taking into account "replacement" harm.

57. By taking into account "replacement" harm, the Land Court is eschewing a way of performing its function in a way that allows for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[104]

58. Taking into account "replacement" harm is inconsistent with the structure of the EPA. The purpose of granting an environmental authority is to render lawful activities which cause, directly or indirectly, serious or material environmental harm.[105] The approach taken by the First Respondent renders any environmental harm lawful (and, thereby, not needing any form of authorisation) if equivalent "replacement" harm may be identified. It is an unusual concept in criminal law to be absolved on the basis that "if I don't do it, someone else will".[106] As pointed out above, such reasoning, if correct, could apply to other forms of harm under the EPA. It could also apply to other environmental impact assessment legislation including in other jurisdictions.

59. By giving zero weight to the environmental harm caused by the Scope 3 emissions, the First Respondent failed to consider a significant part of the environmental harm that would be caused by the proposed activities. It has been argued above that the environmental harm of the proposed activities is a principal factor mandated by the EPA to be taken into account. This is a factor, in itself, which indicates that using "replacement" harm to give zero weight to a mandatory factor is not intended when regard is had to subject matter and scope of the Act.

60. One of the standard criteria is the character, resilience and values of the receiving environment.[107] By having regard to the "replacement" harm, the First Respondent has failed to give any weight to the harm done to the receiving environment and its character, resilience and values in respect of the harm caused by the Scope 3 emissions. The adoption of that standard criterion provides a further indication that "replacement" harm is not a permissible factor to consider.

61. The Core Objectives of the National Strategy refer to enhancing individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations.[108] By relying on "replacement" harm to place zero weight on the environmental harm likely to be caused by the Scope 3 emissions of the proposed activities, the First Respondent is placing no weight on the first of the core objectives in that the impact on future generations caused by those emissions is given zero weight.

62. The same comments are made in respect of, and are applicable to, the second and third core objectives of the National Strategy, namely, to provide for equity within and between generations and to protect biological diversity and maintain essential ecological processes and life-support systems.

[104] EPA, s. 5.
[105] EPA, s. 493A(2).
[106] If it were, no hired killers could be prosecuted
[107] EPA, schedule 4.
[108] The learned trial judge's extract from the National Strategy is set out above.

Construing the Mineral Resources Act

63. The principal objectives of the MRA include to encourage and facilitate prospecting and exploring for and mining of minerals.[109]

64. The objectives also include the encouragement of environmental responsibility[110] and responsible land care management in prospecting, exploring and mining.[111]

65. "Mine" is defined as a verb to mean to carry on an operation with a view to, or for the purposes of winning mineral from the place where it occurs; extracting mineral from its natural state and disposing of mineral in connection with the winning or extraction.[112]

66. The Minister is given authority to grant a mining lease for purposes which include the mining of specified minerals and for all purposes necessary to effectually carry on that mining.[113]

67. The MRA provides for the information that must be included in an application for a mining lease.[114] This commences a set of procedures which, as has been seen above, is closely aligned with the corresponding steps under the EPA.[115]

68. The mining registrar, when appropriately satisfied as to various preliminary matters (including those prescribed in s. 245 MRA), must prepare, for the applicant for a mining lease, a certificate of application.[116]

69. The certificate of application is one essential trigger for fixing the closing date for the submission of objections to the proposed mining lease.[117]

70. The other necessary trigger is the receipt by the mining registrar, pursuant to s. 208 of the EPA, of the draft environmental authority.[118]

71. The mining registrar both fixes the last day for objections[119] and gives to the applicant a certificate of public notice.[120]

72. The applicant must both post[121] and advertise in an approved newspaper the certificate which advises the last objection day.[122]

73. Objections (by any entity) are to be lodged with the mining registrar[123] and served on the applicant.[124] The objection must state the grounds of the objection and facts or circumstances relied upon in support of that objection.

---

[109] MRA, s. 2(a): "Mineral" is defined in MRA, s. 6. It is broad enough to include coal.
[110] MRA, s. 2(d).
[111] MRA, s. 2(g).
[112] MRA, s. 6A(1).
[113] MRA, s. 234(1).
[114] MRA, s. 245.
[115] For example, EPA, s. 211(2).
[116] MRA, s. 252(1).
[117] MRA, s. 252A(1)(a).
[118] MRA, s. 252A(1)(b)(ii).
[119] MRA, s. 252A(2)(a).
[120] MRA, s. 252A(2)(b).
[121] MRA, s. 252B(1)-(3).
[122] MRA, s. 252B(4)-(5).
[123] MRA, s. 260(1).

74. The process of a hearing in the Land Court is conditional upon the receipt of a properly made objection.[125] No objection hearing before the Land Court is required by the MRA if no properly made objection has been lodged.

75. The mining registrar must within 5 days after the last objection day refer the properly made objections to the Land Court for hearing.[126]

76. The Land Court must fix a hearing and give notice.[127]

77. The Registrar may recommend to the Minister that an application be rejected (for non-compliance) without a Land Court hearing.[128] The Minister may so reject for non-compliance.[129] There is no similar rule for granting an application without a hearing.

78. The Land Court is obligated to hear the application and the objections and to determine the relative merits of the application and objections and other matters.[130]

79. The Land Court must forward to the MRA Minister the material and evidence before it along with its recommendation.[131] The recommendation must consist of a recommendation that the application be granted or rejected in whole or in part.[132] The recommendation may include that the application be granted subject to such conditions as the Land Court considers appropriate.[133]

80. The matters that are required to be taken into account and considered by the Land Court in making its recommendation under the MRA include whether the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management;[134] whether there will be any adverse environmental impacts caused by those mining operations and, if so, the extent of that impact;[135] whether the public right and interest will be prejudiced;[136] whether the mining lease is an appropriate land use;[137] whether any good reason has been shown for a refusal to grant the mining lease;[138] and whether, taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use.[139]

81. The MRA Minister must consider any Land Court recommendation as well as the matters which the Land Court had to take into account.[140]

---

[124] MRA, s. 260(4).
[125] MRA, s. 265(1).
[126] MRA, s. 265(2).
[127] MRA, s. 265(3).
[128] MRA, s. 266.
[129] MRA, s. 267.
[130] MRA, s. 268(1) and (2).
[131] MRA, s. 269(1).
[132] MRA, s. 269(2)(a).
[133] MRA, s. 269(3).
[134] MRA, s. 269(4)(i).
[135] MRA, s. 269(4)(j).
[136] MRA, s. 269(4)(k).
[137] MRA, s. 269(4)(l).
[138] MRA, s. 269(4)(l).
[139] MRA, s. 269(4)(m).
[140] MRA, s. 271.

82. The learned trial judge upheld a construction of the MRA and found that the adverse environmental impact of the Scope 3 emissions (from the transport and burning of coal won in the proposed mine) did not come within the meaning of "any adverse environmental effects caused by the operations to be carried on under the authority of the proposed mining lease".[141]

83. It is submitted that His Honour's construction takes an impermissibly narrow construction of mining (which includes winning, extracting and disposal (presumably by sale to consumers who will burn that coal, as is the case here) of the mineral in question).[142]

84. His Honour's construction also fails to give sufficient effect to the phrase "the extent of any adverse environmental impact"[143] which mandates a broad and not a narrow consideration.

85. New Zealand authority[144] construing approvals legislation suggests that, in legislation of that kind, consideration of the environmental effects of proposals should not be considered in a context that is devoid of industrial meaning.[145]

86. The Full Court of the Federal Court of Australia[146] has held that the phrase "all adverse impacts" of an action, as it appears in s. 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), also a form of impacts assessment and approvals legislation, should be construed to include "each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not".[147]

87. In the present case, the adverse environmental impacts of the Scope 3 emissions are clearly within the contemplation of the Second Respondent since the evidence reveals that the disposal of the mineral authorised by the sought after lease is sale overseas to be burned for the generation of electricity.

88. Neither the text of, nor the legislative context in which s. 269(4)(j) of the MRA appears, gives any reason for failing to construe "any adverse environmental impact caused by the operations to be carried on under the authority of the proposed mining lease" other than in its naturally broad meaning.

89. Both the learned trial judge and the First Respondent were in error in construing s. 269)(4)(j) to exclude the adverse environmental effects of the Scope 3 emissions of the mine.

90. Construed properly, s. 269(4)(j) focuses on the adverse impacts of the mine. For reasons analogous to those expressed above in respect of s. 223 EPA, it was impermissible for the First Respondent to place no weight on the actual adverse environmental effects of the Scope 3 emissions by considering notional "replacement" harm.

---

[141] *CCAQ v Smith & Ors* [2015] QSC 260, [37]–[38].
[142] MRA, s. 6A(1), cited above.
[143] MRA, s. 269(4)(j).
[144] That country's Court of Appeal.
[145] *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 4)* [1981] 1 NZLR 530, 534.
[146] *Minister for Environment and Heritage v QCC* [2004] 139 FCR 24 (Nathan Dam Case).
[147] *Minister for Environment and Heritage v QCC* [2004] 139 FCR 24, [57] (Nathan Dam Case).

91. Construed consistently with the language and purpose of all the provisions of the statute,[148] especially, s. 269(4)(j), both public right and interest,[149] and whether any good reason has been shown for a refusal to grant the mining lease,[150] the MRA required that the adverse environmental effects of the Scope 3 emissions of the mine be taken into account and given weight.

92. The learned trial judge and the First Respondent, to the extent they failed to do so, were in error.

Conclusion

93. Both the First Respondent and the learned trial judge were in error in their construction of the relevant provisions of both the EPA and the MRA.

94. The construction errors affected the result at first instance and in the Land Court.

95. The decision at first instance should be set aside and the matter remitted to the trial division for further consideration according to law.

Stephen Keim SC
Dr Chris McGrath
30 October 2015

Prepared on behalf of the Appellant
Filed in the Registry on 30 October 2015

[148] *Project Blue Sky v ABA* (1998) 194 CLR 355, [69].
[149] MRA, s. 269(4)(k).
[150] MRA, s. 269(4)(l).