

BETWEEN: **COAST AND COUNTRY ASSOCIATION OF QUEENSLAND INC**
Applicant

and

PAUL ANTHONY SMITH, ~~MEMBER OF THE LAND COURT OF QUEENSLAND~~
First Respondent

and

HANCOCK COAL PTY LTD
Second Respondent

and

MINISTER FOR ENVIRONMENT AND HERITAGE PROTECTION
Third Respondent

APPLICATION FOR SPECIAL LEAVE TO APPEAL

The Applicant applies for special leave to appeal from the whole of the judgment of the Court of Appeal of the Supreme Court of Queensland given on 27 September 2016.

Part I: Proposed grounds of appeal and orders sought

1. The Court of Appeal erred:

- (a) by failing to hold that the First Respondent (the **Land Court**), when considering objections about the application by the Second Respondent (**Hancock**) for an environmental authority for the Alpha Coal Mine (the **Mine**) under the *Environmental Protection Act 1994* (Qld) (the **EP Act**), erroneously concluded that it had no jurisdiction to consider the environmentally harmful greenhouse gas emissions from the transportation and combustion of coal removed from the Mine;
- (b) by finding that the Land Court had not erred because it was entitled to determine the weight to be given to relevant matters, in circumstances where the Land Court had not given any weight to environmentally harmful greenhouse gas emissions from the transportation and combustion of coal removed from the Mine because it had held it was outside its jurisdiction to consider those matters;
- (c) by holding that, if the Land Court had jurisdiction to consider harmful greenhouse gas emissions from the transportation and combustion of coal removed from the

Date of document: 25 October 2016

Filed on behalf of the Applicant by:

Environmental Defenders Office (Qld) Inc

30 Hardgrave Road, West End, Qld, 4101

25 OCT 2016

THE REGISTRY BRISBANE

Telephone: (07) 3211 4466

Fax: (07) 3844 0766

Email: edoqld@edo.org.au

Ref: Sean Ryan (Principal Solicitor)

Mine, its failure to consider those matters did not affect the result, because of the Land Court's factual finding that there would be no reduction in global greenhouse gas emissions if the Mine were refused.

2. If special leave is granted, the Applicant will seek: (a) orders that the decision of the Land Court on 8 April 2014 under s 222(1) of the EP Act and the decision of the Third Respondent (the **Minister**) on 29 August 2014 under s 225(1) of the EP Act be quashed or set aside under s 30(1)(a) of the JR Act; and (b) an order under s 30(1)(b) of the JR Act remitting the matter (the Applicant's objection about Hancock's application for an environmental authority) to the Land Court for further consideration.

10 **Part II: Special leave questions**

3. The special leave questions in this matter arise in the context of the undisputed factual findings that the Mine, if it is allowed to proceed, will make thermal coal available to be burnt overseas to generate power, the combustion of which will emit (on average) 61 million tonnes of CO₂-equivalent (tCO_{2-e}) greenhouse gases into the atmosphere each year (being 0.16% of total global greenhouse gas emissions). That is, over the 30-year life of the Mine, a total of 1,804,173,620 tCO_{2-e} (the **combustion emissions**).¹
4. *First question.* Are the future harmful environmental effects of climate change resulting from greenhouse gas emissions "environmental harm ... caused by" the Mine within the meaning of s 14(2) of the EP Act: that is, are they an "adverse effect, or potential adverse effect", on "a quality or physical characteristic of the environment that is conducive to ecological health, public amenity or safety", that is "a direct or indirect result" of the Mine, whether resulting from the Mine alone "or from the combined effects of the [Mine] and other activities or factors"?
5. *Second question.* If the answer to the first question is "yes", does a factual finding that there would be no reduction in total global greenhouse gas emissions if a mine is refused require the conclusion that approval of the mine will not cause environmental harm under the EP Act, in circumstances where the mine, if approved, will allow the production of coal the combustion of which will, as a factual matter, contribute to climate change?
6. The answer to the first question is "yes", as McMurdo P concluded (in dissent) in the Court of Appeal.² The answer to the second question is "no".

Part III: Applicant's argument in support of special leave

Harmful effects of climate change

7. As the US Supreme Court recognised in 2007, "[t]he harms associated with climate

¹ See paragraph 11 below.

² *Coast & Country Association of Queensland Inc v Smith* [2016] QCA 242 (**Court of Appeal**) at [2]-[11].

change are serious and well recognized”.³ A joint expert report filed in the Land Court⁴ (the **Joint Report**) stated “[t]he current understanding of climate change is not disputed”, endorsed the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (the **IPCC**) as the “most comprehensive assessment of the subject available”, and opined that the “most appropriate and more recent discussion of global climate change and regional implications for Australia can be found in the Climate Commission’s reports, *The Critical Decade* (2011) and *The Critical Decade 2013* (2013)”⁵.

8. The Land Court accepted the Applicant’s submission that: (a) on the “best case scenario”, where firm and timely action on climate change would limit global emissions to 600 billion tCO_{2-e} by 2050, limiting climate change to 2°C or less, climate change would still have significant negative environmental impacts, including temperature and sea level rises and coral bleaching; and (b) on the “business as usual” scenario, where little or no action is taken on climate change, emissions continue to track at the top of projections, and global warming exceeds 4°C, catastrophic global impacts would occur, including hundreds of millions more people being exposed to increased water stress, 40% or more of all species becoming extinct, millions of additional people potentially being at risk from coastal flooding, and various impacts on human health.⁶

9. The Joint Report stated that “global emissions since 1990 have been consistent with the highest emissions scenarios considered by the IPCC”, and noted that while countries (including Australia) have agreed to take action to limit increases in global mean temperature to less than 2°C above pre-industrial levels, “current international emission reduction commitments ... are inconsistent with this target”.⁷

10. Likely climate change impacts on Queensland, identified in *The Critical Decade 2013*, include: (a) ocean acidification, which has negative impacts on sea life, including corals; (b) changes to overall temperature distribution, resulting in more hot weather, including record-breaking hot weather; (c) bleaching, and possible death, of the Great Barrier Reef; and (d) more intense tropical cyclones, more deaths from heat, and inundation of coastal areas as a result of sea level rise.⁸ The Land Court had “no reason to doubt the eminent expert evidence that was presented” as to the likely adverse climate change consequences that would flow from rising greenhouse gas emissions

³ *Massachusetts v Environmental Protection Agency* 549 U.S. 497 (2007) at 521.

⁴ Joint Expert Report to the Land Court by Professor Roger Jones, Professor David Karoly and Dr Chris Taylor, dated 30 and 31 July 2013 (Exhibit MCB2 to the Affidavit of Michael Berkman, dated 25 October 2016).

⁵ Joint Report, p2.

⁶ *Hancock Coal Pty Ltd v Kelly (No 4)* (2014) [2014] QLC 12 at [206]. The relevant parts of the Land Court’s reasons are Exhibit MCB1 to the Affidavit of Michael Berkman, dated 25 October 2010.

⁷ Joint Report, p2.

⁸ Relevant pages are Exhibit MCB4 to the Affidavit of Michael Berkman, dated 25 October 2010.

“should nothing be done to alter the course that the world is heading down”.⁹

Contribution to climate change of emissions from burning coal from the Mine

11. If the Mine proceeds: (a) 839.6 million tonnes of thermal coal will be produced over the life of the mine;¹⁰ (b) this coal will be transported to Asia (probably India or China) to be burned in power stations to generate electricity;¹¹ (c) the emissions from combustion of this coal will be 1,804,173,620 tCO_{2-e},¹² about 1/333 of the 600 billion tCO_{2-e} “budget” remaining if mean temperature increases are to be limited to 2°C above pre-industrial levels; (d) the combustion emissions will represent the most significant proportion, by far, of all emissions resulting from the Mine;¹³ (e) the average annual scope 1 and 2 emissions (859,672 tCO_{2-e}) would represent 0.002% of global greenhouse gas emissions, which the Land Court accepted are “infinitesimal”; and (f) the average annual “scope 3” emissions (61 million tCO_{2-e}) would represent 0.16%, or 1/625, of total global greenhouse gas emissions per year, of which the Land Court said “particularly considering the possible local, State and global consequences which may flow from increased [greenhouse gas] emissions, a factor of 1 as to 625 is both real and of concern. It cannot be dismissed as negligible”.¹⁴

12. One of five key findings in *The Critical Decade 2013* was that “[m]ost of the available fossil fuels cannot be burned if we are to stabilise the climate this century”. The reasons for this recommendation included that: (a) “[t]he burning of fossil fuels represents the most significant contributor to climate change”; (b) “emissions from using all the world’s fossil fuel reserves would be around five times this budget [which] would lead to unprecedented changes in climate so severe that they will challenge the existence of our society as we know it today”; and (c) “[i]t is clear that most fossil fuels must be left in the ground and cannot be burned”.¹⁵

The Applicant’s objections and the Land Court proceeding

13. Hancock applied for an environmental authority (mining activities) (s 153(1)). Because the administering authority did not refuse Hancock’s application (under s 207(1)), Hancock was given a draft environmental authority (s 208). The Applicant (among others) objected (under s 216(1)) stating the grounds of the objection and the facts and

⁹ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [231].

¹⁰ Expert Report of Dr Chris Taylor, pp 8-12 (Exhibit MCB3 to the affidavit of Michael Berkman, dated 25 October 2016). The Joint Report agreed that the predictions in Dr Taylor’s report (prepared on behalf of Hancock Coal) were not disputed.

¹¹ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [221].

¹² Taylor Report, p12.

¹³ They comprise 98.7% of the emissions from transportation and combustion after the coal is extracted (referred to in the Land Court as “scope 3 emissions”), and dwarf the emissions that will be produced by operations at the Mine and generation of electricity for use at the Mine (scope 1 emissions and scope 2 emissions): Taylor Report, pp 8, 10 and 11.

¹⁴ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [209].

¹⁵ *The Critical Decade 2013*, p5 (emphasis added).

circumstances relied on in support of the grounds (as required by s 217(1)(a) and (f)). The objections triggered the requirement to refer Hancock's application to the Land Court (s 219), which then had to decide either to refuse the application for an environmental authority or to grant that application (either on the basis of the draft environmental authority, or on different conditions) (s 222(1)).

14. In making its decision, which is administrative rather than judicial,¹⁶ the Land Court was required to consider, among other things, the grounds for objections¹⁷ and the "standard criteria".¹⁸ At the relevant time,¹⁹ the standard criteria included "the principles of ecologically sustainable development as set out in the 'National Strategy for Ecologically Sustainable Development'",²⁰ which incorporated considerations of intergenerational equity, protection of biological diversity and maintenance of essential ecological processes and life support systems, and the precautionary principle.²¹
15. The Applicant's grounds contended that the Land Court was required to consider the "standard criteria" with respect to "environmental harm" (as defined), including "the harm from emissions from the transport and use of the coal which are an indirect result of the mining activity; and ... the harm from climate change resulting from the combined effect of the mining activity and other activities and factors".

The EP Act

16. For the reasons that follow, McMurdo P was correct to conclude that the Land Court was required, when considering the Applicant's objection to an environmental authority for the Mine, to consider *both* the harmful climate change effects on the environment resulting from the combustion emissions *and* the "standard criteria" in respect of those effects.²² It did neither.
17. The object of the EP Act 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". In that object, the

¹⁶ *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260 at [2]; *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107 at [28]-[45].

¹⁷ At the relevant time, the relevant provisions were ss 217(1)(f) and 223(e) (Reprint 11B). Now, see EP Act ss 182(3)(b) and 191(e).

¹⁸ At the relevant time, the relevant provision was s 223(c) (Reprint 11B). Now, see EP Act s 191(g).

¹⁹ As the Land Court explained in *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [61], the applicable provisions were those in force as at 11 December 2012, which are contained in Reprint 11B of the EP Act. The provisions of the EP Act dealing with the objections process have been amended to simplify the process, but not in a way that affects the ongoing relevance of the Court of Appeal's decision.

²⁰ EP Act Sch 4, definition of "standard criteria".

²¹ Court of Appeal at [9]-[10] (McMurdo P). The "standard criteria" have now been amended, now requiring reference to "principles of environmental policy as set out in the Intergovernmental Agreement on the Environment", including "the precautionary principle", "intergenerational equity" and "conservation of biological diversity and ecological integrity".

²² Court of Appeal at [11].

primary purpose – protection of the environment – is tempered by a secondary purpose – allowing development, provided it improves the total quality of life and is ecologically sustainable.²³ Given that object, it would be astonishing if the Land Court, when hearing an objection about an environmental authority, had no jurisdiction to consider the harmful climate change effects on the environment resulting from the combustion emissions. Yet that is what the Land Court, and the Court of Appeal, have held.

18. The EP Act pursues its object in part by making it an offence to “unlawfully cause serious environmental harm”²⁴ or to “unlawfully cause material environmental harm”.²⁵

10 “Serious environmental harm” includes environmental harm “that is irreversible, of a high impact or widespread”.²⁶ “Material environmental harm” includes environmental harm “that is not trivial or negligible in nature, extent or context”.²⁷ These definitions readily accommodate the harmful effects of climate change.

19. The reach of the offences summarized above turns on the meaning of “environmental harm”. That key concept is defined in s 14(1) of the EP Act as “*any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance*” (emphasis added). “Environmental value” includes “a quality or physical characteristic of the environment”²⁸ that is conducive to ecological health or public amenity or safety”.²⁹

20. Critically, s 14(2) contains clear rules about causation, providing that “environmental harm” may “*be caused by an activity ... whether the harm is a direct or indirect result of the activity; or whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors*” (emphasis added).

21. Section 493A relevantly provides that “an act that causes serious or material environmental harm”³⁰ is “unlawful”, unless it is permitted by, among other things, an “environmental authority”.³¹ It is also a (much less serious) offence simply to carry out a mining activity without an environmental authority.³²

22. Accordingly, an environmental authority is the relevant mechanism by which the

²³ See *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632–33 [40]–[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

²⁴ EP Act s 437(2).

²⁵ EP Act s 438(2).

²⁶ EP Act s 17(1)(a).

²⁷ EP Act s 16(1)(a).

²⁸ “Environment” is given a broad, inclusive definition: see EP Act s 8.

²⁹ EP Act s 9(a).

³⁰ EP Act s 493A(1).

³¹ EP Act s 493A(2)(d).

³² At the relevant time, the relevant provisions were ss 147 and 426 (Reprint 11B). Now, see EP Act ss 107, 110 and 426(1).

secondary purpose of the EP Act – allowing ecologically sustainable development – is attained. The Land Court’s function in hearing objections is at the fulcrum of the two competing purposes of the EP Act. It is one of the most important independent safeguards of the primary purpose: protecting the environment. The Land Court must perform its function “in the way that best achieves the object of [the EP] Act”.³³

23. It is fundamental to the protective purpose of the EP Act that the Land Court consider the mandatory considerations specified in s 223 of the EP Act, including the “standard criteria”, by reference to *every* “environmental harm” (s 14(1)) that might be “caused by” (s 14(2)) the acts for which the environmental authority is sought, especially where those environmental harms would be serious or material (were they to occur).

24. The grant of an environmental authority fundamentally alters the consequences for a person who does an act that “causes” material or serious environmental harm: without that authority, such an act carries serious criminal consequences; with it, the same act is lawful. The grant of the environmental authority permits a person to do the authorised acts, *whatever* environmental harm those acts might cause. In those circumstances, it is plainly imperative that the Land Court consider, in advance of authorising an act, *all* environmental harms that might result (directly, indirectly or cumulatively) from that act, for otherwise it may authorize environmental harms it has not even considered. Only if the Land Court properly considers all such harms can it properly determine whether to grant or refuse to grant the authority, or what conditions might suffice to mitigate against, or repair, potential or likely environmental harms.

25. For this reason, the Land Court can only performs its function in the way that best achieves the object of the EP Act if it has regard to the mandatory considerations by reference to all environmental harms that might be “caused by” the acts sought to be authorised, at least where such harms are squarely raised by the objections that found the Land Court’s jurisdiction. As McMurdo P held, the harmful climate change effects on Queensland’s environment of the combustion emissions fall within the definition of “environmental harm” in s 14 of the EP Act. For that reason, the Land Court was required to consider the standard criteria in respect of that harm.³⁴

26. Section 14(2) of the EP Act expressly incorporates concepts of direct, indirect and cumulative impacts. The Land Court’s acceptance of the expert evidence on climate change impacts,³⁵ and its conclusion that the possible environmental consequences (a “potential adverse effect”) of the combustion emissions were “both real and of

³³ EP Act, s 5.

³⁴ Court of Appeal at [11].

³⁵ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [233]-[237].

concern”,³⁶ required consideration of those consequences as a form of “environmental harm” that the grant of an environmental authority for the Mine would permit.

27. In *Queensland Conservation Council Inc v Minister for the Environment and Heritage*³⁷ (*QCC v MEH*), the Minister submitted that the expression “all adverse impacts” that the proposed dam was “likely to have”, as used in the *Environment Protection and Biodiversity Act 1999* (Cth) (the *EPBC Act*), was limited to impacts likely to arise directly from the construction and operation of the dam, and did not extend to the secondary impacts of activities that might be undertaken by cotton-growers as a result.³⁸

At first instance, Kiefel J rejected that argument, holding that the secondary impacts of cotton-growing that would be able to occur in consequence of the construction of the dam had to be considered in deciding whether to approve the dam.

28. Justice Kiefel’s judgment was upheld on appeal.³⁹ A Full Court of the Federal Court held that the word “impact” could readily include the “indirect” consequences of an action, and could “include the results of acts done by persons other than the principal actor”.⁴⁰ The Full Court accepted that the Minister had erred by excluding from the concept of impacts “the consequences of conduct of persons other than the proponent of the proposed action and activities which were not proposed as part of that action and did not form an inherent or inextricable part of it”.⁴¹ Their Honours observed that the expression “all adverse impacts” included “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”.⁴²

29. The reasoning in *QCC v MEH* (where “adverse impacts” was interpreted *implicitly* to include indirect and cumulative impacts) supports, *a fortiori*, the conclusion that the combustion emissions fall within s 14(2) of the EP Act (which *expressly* includes all potential direct, indirect and cumulative effects), given that the very purpose of the Mine is to produce coal to be burned in power plants, which will inevitably contribute to the harmful effects of climate change on many aspects of Queensland’s environment.

The Land Court’s error in determining its jurisdiction

30. Having determined that the harmful consequences of the transport and combustion emissions was “real and of concern”, and could not be dismissed as “negligible”, the Land Court posed the “core question” as being “can this Court take into account [those]

³⁶ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [209].

³⁷ [2003] FCA 1463.

³⁸ [2003] FCA 1463 at [25]. See also *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 4)* (1981) 1 NZLR 530 at 534.

³⁹ *Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.

⁴⁰ (2004) 139 FCR 24 at 38 [53].

⁴¹ (2004) 139 FCR 24 at 39 [55].

⁴² (2004) 139 FCR 24 at 39 [57].

emissions for the purpose of these proceedings?”⁴³ If answered that question “no”. In doing so, it applied the holding in *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-op Ltd (Xstrata)*⁴⁴ that the Land Court’s jurisdiction under the EP Act did not extend to consideration of the harmful effects of combustion emissions.⁴⁵ That conclusion had the consequence that the Land Court refused to consider environmental harm other than harm caused *directly* by the acts that would be authorized by an environmental authority.

31. In *Xstrata*, the Land Court: (a) relied on its reasons for deciding that it could not consider impacts of combustion emissions under s 269(4)(j) of the *Mineral Resources Act 1989* (Qld), when determining an objection to grant of a mining lease, to determine that its jurisdiction under the EP Act was similarly limited;⁴⁶ and (b) accepted that, because an environmental authority was sought for a “mining activity”, which was defined by s 147 of the EP Act to “include only, in effect, the digging of the coal out of the ground and directly related activities, such as coal processing on the relevant mining tenement ... there [was] no scope for consideration of [greenhouse gases] emitted from, or potential environmental impacts arising from, the activities of transporting and using the coal”.⁴⁷

32. In essence, the reasoning in *Xstrata* was that: (a) the application related to the “activity” of mining, not transportation and combustion; (b) the climate change harm from the transportation and combustion emissions was caused by the activities of transportation and combustion; and, therefore (c) the climate change harm from transportation and combustion emissions was not caused by the mining activity. That reasoning is premised on the proposition that harm can be caused by only one activity. That premise is fundamentally at odds with s 14(2) of the EP Act. It is akin to the argument, rejected in *QCC v MEH*, that the impacts of cotton-growing on the Great Barrier Reef were impacts of cotton-growing, and therefore could not be impacts of the dam.⁴⁸

33. The question whether the environmentally harmful effects of climate change are a harm that results *indirectly* from coal mining, in combination with effects of other activities and factors, was simply not addressed by the Land Court in either *Xstrata* or the decision below. Section 14 of the EP Act was not even referred to in *Xstrata*. That case therefore did not provide a proper foundation for the Land Court’s conclusion that it lacked jurisdiction to consider the combustion emissions.

⁴³ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [210].

⁴⁴ *Hancock Coal Pty Ltd v Kelly (No 4)* [2012] QLC 13.

⁴⁵ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [212], [216]; *Xstrata* at [597].

⁴⁶ *Xstrata* at [597].

⁴⁷ *Xstrata* at [598].

⁴⁸ See *Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24 at 39 [55] and [56] and 40 [60].

The Supreme Court and Court of Appeal

34. The Applicant's application for judicial review of the Land Court's decision included the ground that the Land Court erred by failing to appreciate that it was required to consider the criteria specified in s 223(c) of the EP Act by reference to the likely environmental harm, as defined in s 14, that would be authorised by the grant of the environmental authority that had been sought.
35. The primary judge held that the reasoning in *Xstrata* justified the reasoning of the Land Court in asking the "core question" whether it could take transportation and combustion emissions into account under the EP Act, and determining that it was beyond the jurisdiction of the Land Court to do so.⁴⁹ In so holding, the primary judge did not refer to s 14 of the EP Act.
36. On appeal, McMurdo P correctly held that the Land Court was required to consider the standard criteria in s 223(c) by reference to the combustion emissions (and therefore, implicitly, that the Land Court had jurisdiction to do so).⁵⁰
37. By contrast, Fraser JA (with whom Morrison JA agreed) recognised that the primary judge had affirmed the Land Court's adoption of *Xstrata* as precluding consideration of combustion emissions under the EP Act.⁵¹ However, Fraser JA did not determine whether the primary judge had thereby erred. Instead, he held that even if transportation and combustion emissions "were also relevant in the consideration required by s 223 of the [EP Act], that would not affect the result of the appeal" because the Land Court "took [those] emissions into account in a way which is not amenable to statutory review on either view of the legislation".⁵² That was said to follow because the EP Act did not *preclude* the Land Court from taking into account the evidence before it that there would be no reduction of global greenhouse gas emissions if the Mine were refused. His Honour emphasised that it was for the Land Court to decide what weight to give to the relevant evidence.⁵³ In those circumstances, his Honour held that "there was no legal error such as would justify statutory review".⁵⁴
38. The Applicant does not challenge the Land Court's factual finding that there would be no reduction of global greenhouse gas emissions if the Mine were refused,⁵⁵ or the proposition that it was for the Land Court to decide the weight to give to the relevant

⁴⁹ *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260 at [39], fn 31. As Fraser JA observed on appeal, a fair reading of the primary judge's reasons as a whole shows that his Honour affirmed the member's adoption.

⁵⁰ Court of Appeal at [2] and [11].

⁵¹ Court of Appeal at [42].

⁵² Court of Appeal at [42]. McMurdo P agreed on that point (at [13]).

⁵³ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [232].

⁵⁴ Court of Appeal at [45].

⁵⁵ *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [232].

considerations. However, neither of those matters justified the dismissal of the appeal.

39. Fraser JA's holding that it was for the Land Court to determine the *weight* to be given to particular factual findings is of no relevance to this case, because the Land Court expressly held that it had no *jurisdiction* under the EP Act to consider environmental harm caused by the combustion emissions. That is plainly not a conclusion about weight. It is a conclusion that involved a misconstruction of the EP Act that caused the Land Court to ask itself the wrong question, and thereby to decline to perform part of its statutory function. That is a paradigm case of jurisdictional error.⁵⁶ In those circumstances, Fraser JA's finding that the Land Court was not *precluded* from taking the above factual finding into account is beside the point, for it does not engage with what the Land Court did in this case.

40. The Court of Appeal's reliance on the Land Court's factual finding encounters the further difficulty that that finding was made in circumstances where the Land Court had held that it had no jurisdiction to assess the combustion emissions against the standard criteria, as was required by s 223(c) of the EP Act, and therefore had not assessed those matters. That factual finding can therefore shed no light on the decision that the Land Court would have made had it considered the precautionary principle, intergenerational equity and the need to protect biological diversity and maintain essential ecological processes and life support systems *by reference to the harm caused by the combustion emissions*. For example, it might have recommended different conditions be imposed on any environmental authority.

41. Finally, the Land Court finding that "there [would] be no reduction" of global greenhouse gas emissions if the Mine were refused suggests that the Land Court considered that the Mine would cause environmental harm only if it had an immediate impact on emission levels. But that is not so. The Mine will cause environmental harm because, in the words of *The Critical Decade 2013* (adopted by the Joint Report), in order to avoid "unprecedented changes in climate so severe that they will challenge the existence of our society as we know it today *it is clear that most fossil fuels must be left in the ground and cannot be burned*".⁵⁷

42. In this application, the Applicant does not submit that coal mining can *never* be approved under the EP Act. It advances the more modest proposition that, before an environmental approval is given for coal mining activity, the Land Court must *consider* the indirect environmental harm that may result, including by reason of climate change. No such consideration occurred in this case. Nor will it occur in any future case unless

⁵⁶ See, e.g., *Craig v South Australia* (1995) 184 CLR 163 at 179.

⁵⁷ *The Critical Decade 2013*, p5 (emphasis added).

special leave is granted, because existing authority (followed by the Land Court, and upheld in the courts below) holds that the Land Court has no jurisdiction to consider environmental harm of that kind.⁵⁸ That authority is wrong. It should be corrected.

Part IV: The Applicant does not seek any special order on costs.

Part V: Authorities on which Applicant relies

- *Minister for the Environment & Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24
- *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463
- 10 • *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-op Ltd* (2012) 33 QLCR 79 at [586]-[603]

Part VI: The applicable provisions are set out in the Annexure.

Date: 25 October 2016

S P DONAGHUE

Owen Dixon Chambers
s.donaghue@vicbar.com.au
(P) 03 9225 7919

Counsel for the Applicant

C MCGRATH

University of Queensland
chris.mcgrath@uq.edu.au
(P) 07 3346 7405

E M NEKVAPIL

Owen Dixon Chambers West
emrys@vicbar.com.au
(P) 03 9225 6831



Environmental Defenders Office (Qld) Inc
Solicitors for the Applicant

To: The First Respondent, Level 8, 363 George Street, Brisbane, Qld, 4000
The Second Respondent, Level 18, 110 Mary Street, Brisbane QLD, 4000
The Third Respondent, Level 7, 400 George Street, Brisbane, Queensland, 4000

20

TAKE NOTICE: Before taking any step in the proceedings you must, within 14 DAYS after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the applicant.

THE APPLICANT IS REPRESENTED BY: Environmental Defenders Office (Qld) Inc,
30 Hardgrave Road, West End, Qld, 4101, Telephone: (07) 3211 4466; Fax: (07) 3844 0766;
Email: edoqld@edo.org.au

⁵⁸ In addition to the judgment below, see, e.g., *Xstrata; Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48 at [441]-[457] (MacDonald P).

ANNEXURE: APPLICABLE PROVISIONS

The applicable provisions are still in force at the date of making the Application save for those that are identified otherwise.

Applicable provisions of the *Environmental Protection Act 1994* (Qld) reprint No. 11B, as in force at 7 December 2012

10 **3 Object**

The object of this Act 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 (*ecologically sustainable development*).

...

5 Obligations of persons to achieve object of Act

If, under this Act, 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 this Act.

20 ...

8 Environment

Environment includes—

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
- 30 (d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).

9 Environmental value

Environmental value is—

- (a) a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
- (b) another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation.

...

14 Environmental harm

10 (1) *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, and includes environmental nuisance.

(2) *Environmental harm* may be caused by an activity—

- (a) whether the harm is a direct or indirect result of the activity; or
- (b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.

...

16 Material environmental harm

20 (1) *Material environmental harm* is environmental harm (other than environmental nuisance)—

- (a) that is not trivial or negligible in nature, extent or context; or
- (b) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount but less than the maximum amount; or
- (c) that results in costs of more than the threshold amount but less than the maximum amount being incurred in taking appropriate action to—
 - (i) prevent or minimise the harm; and
 - (ii) rehabilitate or restore the environment to its condition before the harm.

30 (2) In this section—

maximum amount means the threshold amount for serious environmental harm.

threshold amount means \$5000 or, if a greater amount is prescribed by regulation, the greater amount.

17 Serious environmental harm

(1) **Serious environmental harm** is environmental harm (other than environmental nuisance)—

- (a) that is irreversible, of a high impact or widespread; or
- (b) caused to an area of high conservation value or special significance; or
- (c) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount; or
- (d) that results in costs of more than the threshold amount being incurred in taking appropriate action to—
 - (i) prevent or minimise the harm; and
 - (ii) rehabilitate or restore the environment to its condition before the harm.

(2) In this section—

threshold amount means \$50000 or, if a greater amount is prescribed by regulation, the greater amount.

147 What is a mining activity

(1) A **mining activity** means an activity mentioned in subsection (2) that, under the Mineral Resources Act, is authorised to take place on—

- (a) land to which a mining tenement relates; or
- (b) land authorised under that Act for access to land mentioned in paragraph (a).

(2) For subsection (1), the activities are as follows—

- (a) prospecting, exploring or mining under the Mineral Resources Act or another Act relating to mining;

- (b) processing a mineral won or extracted by an activity under paragraph (a);
- (c) an activity that—
 - (i) is directly associated with, or facilitates or supports, an activity mentioned in paragraph (a) or (b); and
 - (ii) may cause environmental harm;
- (d) rehabilitating or remediating environmental harm because of a mining activity under paragraphs (a) to (c);
- (e) action taken to prevent environmental harm because of an activity mentioned in paragraphs (a) to (d);
- (f) any other activity prescribed for this subsection under a regulation.

...

153 Who may apply

- (1) A person may apply for an environmental authority (mining activities) only if the person is the holder of, or the applicant for, a relevant mining tenement.

...

207 Administering authority may refuse application

- (1) The administering authority must, within the period prescribed under a regulation (the *refusal period*), consider the application and decide either to refuse it or allow it to proceed under divisions 5 to 7.

...

208 Obligation to prepare draft environmental authority

- (1) This section applies if the administering authority does not, within the refusal period, decide to refuse the application.
- (2) The authority must give the applicant and the mining registrar a draft environmental authority within the later of the following periods to end—
 - (a) 5 business days after the refusal period ends;
 - (b) if the applicant and the authority have, within the later of the periods under paragraph (a) or (b) to end, agreed to a longer period for the preparation of the draft—the longer period.

- (3) The draft must—

- (a) be in the approved form; and
- (b) include proposed conditions for the environmental authority; and
- (c) comply with this division.

...

217 Acceptance of objections

- (1) The administering authority must accept an objection if it—
 - (a) is written; and
 - (b) is signed by or for each entity (signatory) who made the objection; and
 - (c) states the name and address of each signatory; and
 - 10 (d) is made to the administering authority; and
 - (e) is received on or before the last day of the objection period; and
 - (f) states the grounds of the objection and the facts and circumstances relied on in support of the grounds.
- (2) An objection that complies with subsection (1) is called a *properly made objection*.
- (3) The authority may accept a written objection even if it is not a properly made objection.

...

219 Referral to Land Court

- 20 (1) If there is a current objection relating to the application when the objection period for the application ends, the administering authority must, within 10 business days, refer the application to the Land Court for a decision under this subdivision (the objections decision).
- (2) The referral must be made by filing with the registrar of the Land Court—
 - (a) a notice, in the approved form, referring the application to the Land Court; and
 - (b) a copy of the application documents for the application and each current objection.
- (3) The referral starts a proceeding before the Land Court for it to make the objections decision.

30

...

222 Nature of objections decision

(1) The objections decision for the application must be a recommendation to the EPA Minister that—

- (a) the application be granted on the basis of the draft environmental authority for the application; or
- (b) the application be granted, but on stated conditions that are different to the conditions in the draft; or
- (c) the application be refused.

(2) However, if a relevant mining lease is, or is included in, a significant project and, under section 210, Coordinator-General's conditions were included in the draft, any stated conditions under subsection (1)(b)—

- (a) must include the Coordinator-General's conditions; and
- (b) must not be inconsistent with a Coordinator-General's condition.

(3) The Land Court must, as soon as practicable after the decision is made, give a copy of the decision to each of the following—

- (a) the MRA Minister;
- (b) if a relevant mining lease is, or is included in, a significant project—the State Development Minister.

223 Matters to be considered for objections decision

In making the objections decision for the application, the Land Court must consider the following—

- (a) the application documents for the application;
- (b) any relevant regulatory requirement;
- (c) the standard criteria;
- (d) to the extent the application relates to mining activities in a wild river area—the wild river declaration for the area;
- (e) each current objection;
- (f) any suitability report obtained for the application;
- (g) the status of any application under the Mineral Resources Act for each relevant mining tenement.

...

225 EPA Minister's decision on application

(1) The EPA Minister must make 1 of the following decisions (the *Minister's decision*)—

- (a) that the application be granted on the basis of the draft environmental authority for the application;
- (b) that the application be granted, but on conditions stated in the Minister's decision that are different to the conditions in the draft;
- (c) that the application be refused.

...

10

426 Environmental authority required for mining activity

A person must not carry out a mining activity unless the person holds, or is acting under, an environmental authority (mining activities) for the activity.

Maximum penalty—

- (a) for a mining activity that is part of a level 1 mining project—400 penalty units; or
- (b) for a mining activity that is part of a level 2 mining project—165 penalty units.

...

437 Offences of causing serious environmental harm

20

(1) A person must not wilfully and unlawfully cause serious environmental harm.

Maximum penalty—4165 penalty units or 5 years imprisonment.

(2) A person must not unlawfully cause serious environmental harm.

Maximum penalty—1665 penalty units.

(3) In a proceeding for an offence against subsection (1), if the court is not satisfied the defendant is guilty of the offence charged but is satisfied the defendant is guilty of an offence against subsection (2), the court may find the defendant guilty of the offence against subsection (2).

Note—

See section 493A (When environmental harm or related acts are unlawful).

438 Offences of causing material environmental harm

- (1) A person must not wilfully and unlawfully cause material environmental harm.
Maximum penalty—1665 penalty units or 2 years imprisonment.
- (2) A person must not unlawfully cause material environmental harm.
Maximum penalty—835 penalty units.
- (3) In a proceeding for an offence against subsection (1), if the court is not satisfied the defendant is guilty of the offence charged but is satisfied the defendant is guilty of an offence against subsection (2), the court may find the defendant guilty of the offence against subsection (2).

10 *Note—*

See section 493A (When environmental harm or related acts are unlawful).

...

493A When environmental harm or related acts are unlawful

- (1) This section applies in relation to any of the following acts (*relevant acts*)—
- (a) an act that causes serious or material environmental harm or an environmental nuisance;
 - (b) an act that contravenes a noise standard;
 - (c) a deposit of a contaminant, or release of stormwater run-off, mentioned in section 440ZG.

20 *Note—*

See chapter 8, part 3 (Offences relating to environmental harm), section 440Q (Offence of contravening a noise standard) and section 440ZG (Depositing prescribed water contaminants in waters and related matters).

- (2) A relevant act is unlawful unless it is authorised to be done under—
- (a) an environmental protection policy; or
 - (b) a transitional environmental program; or
 - (c) an environmental protection order; or
 - (d) an environmental authority; or
 - (e) a development condition of a development approval; or

- (f) a standard environmental condition of a code of environmental compliance for a chapter 4 activity; or
 - (g) an emergency direction.
- (3) However, it is a defence to a charge of unlawfully doing a relevant act to prove—
- (a) the relevant act was done while carrying out an activity that is lawful apart from this Act; and
 - (b) the defendant complied with the general environmental duty.
- ...
- 10 (6) A reference in this section to an act includes an omission and a reference to doing an act includes making an omission.
- ...

Schedule 4 – Definitions

standard criteria means—

- (a) the principles of ecologically sustainable development as set out in the ‘National Strategy for Ecologically Sustainable Development’; and
- (b) any applicable environmental protection policy; and
- (c) any applicable Commonwealth, State or local government plans, standards, agreements or requirements; and
- 20 (d) any applicable environmental impact study, assessment or report; and
- (e) the character, resilience and values of the receiving environment; and
- (f) all submissions made by the applicant and submitters; and
- (g) the best practice environmental management for activities under any relevant instrument, or proposed instrument, as follows—
 - (i) an environmental authority;
 - (ii) a transitional environmental program;
 - (iii) an environmental protection order;
 - (iv) a disposal permit;
 - (v) a development approval; and

- (h) the financial implications of the requirements under an instrument, or proposed instrument, mentioned in paragraph (g) as they would relate to the type of activity or industry carried out, or proposed to be carried out, under the instrument; and
- (i) the public interest; and
- (j) any relevant site management plan; and
- (k) any relevant integrated environmental management system or proposed integrated environmental management system; and
- (l) any other matter prescribed under a regulation.

10

Applicable provisions of the *Environmental Protection Act 1994* (Qld), as in force at the date of application.

3 Object

[unchanged, see above]

...

5 Obligations of persons to achieve object of Act

[unchanged, see above]

...

20

8 Environment

[unchanged, see above]

9 Environmental value

[unchanged, see above]

...

14 Environmental harm

[unchanged, see above]

...

16 Material environmental harm

[unchanged, see above]

30

...

17 Serious environmental harm

[unchanged, see above]

...

107 What is a resource activity

A *resource activity* is an activity that involves—

- (a) a geothermal activity; or
- (b) a GHG storage activity; or
- (c) a mining activity; or
- (d) a petroleum activity.

10

...

110 What is a mining activity

A *mining activity* is—

- (a) an activity that is an authorised activity for a mining tenement under the Mineral Resources Act; or
- (b) another activity that is authorised under an approval under the Mineral Resources Act that grants rights over land.

...

182 Submitter may give objection notice

- (1) This section applies if the administering authority decides to approve the application or makes a decision under section 170(2)(b).
- (2) A submitter may, by written notice (the objection notice) to the administering authority, request that its submission be taken to be an objection to the application.
- (3) The objection notice must—
 - (a) be given to the administering authority within 20 business days after the notice under section 181(1) is given; and
 - (b) state the grounds for the objection.

20

...

191 Matters to be considered for objections decision

In making the objections decision for the application, the Land Court must consider the following—

- (a) the application;
- (b) any response given for an information request;
- (c) any standard conditions for the relevant activity or authority;
- (d) any draft environmental authority for the application;
- (e) any objection notice for the application;
- (f) any relevant regulatory requirement;
- (g) the standard criteria;
- (h) the status of any application under the Mineral Resources Act for each relevant mining tenure.

...

426 Environmental authority required for particular environmentally relevant activities

- (1) A person must not carry out an environmentally relevant activity unless the person holds, or is acting under, an environmental authority for the activity.
Maximum penalty—4500 penalty units.

...

437 Offences of causing serious environmental harm

...

- (3) A person must not wilfully and unlawfully cause serious environmental harm.
Maximum penalty—6250 penalty units or 5 years imprisonment.
- (4) A person must not unlawfully cause serious environmental harm.
Maximum penalty—4500 penalty units.

438 Offences of causing material environmental harm

- (1) A person must not wilfully and unlawfully cause material environmental harm.
Maximum penalty—4500 penalty units or 2 years imprisonment.
- (2) A person must not unlawfully cause material environmental harm.
Maximum penalty—1665 penalty units.

...

493A When environmental harm or related acts are unlawful

[unchanged, see above]

...

Schedule 4 – Definitions

standard criteria means—

- (a) the following principles of environmental policy as set out in the Intergovernmental Agreement on the Environment—
 - (i) the precautionary principle;
 - (ii) intergenerational equity;
 - (iii) conservation of biological diversity and ecological integrity; and
- (b) any Commonwealth or State government plans, standards, agreements or requirements about environmental protection or ecologically sustainable development; and
- (d) any relevant environmental impact study, assessment or report; and
- (e) the character, resilience and values of the receiving environment; and
- (f) all submissions made by the applicant and submitters; and
- (g) the best practice environmental management for activities under any relevant instrument, or proposed instrument, as follows—
 - (i) an environmental authority;
 - (ii) a transitional environmental program;
 - (iii) an environmental protection order;
 - (iv) a disposal permit;
 - (v) a development approval; and
- (h) the financial implications of the requirements under an instrument, or proposed instrument, mentioned in paragraph
- (g) as they would relate to the type of activity or industry carried out, or proposed to be carried out, under the instrument; and
- (i) the public interest; and

- (j) any relevant site management plan; and
- (k) any relevant integrated environmental management system or proposed integrated environmental management system; and
- (l) any other matter prescribed under a regulation.

Applicable provisions of the *Mineral Resources Act 1989* (Qld)

269 Land Court's recommendation on hearing

- 10 (1) Upon the hearing by the Land Court under this part of all matters in respect of an application for the grant of a mining lease, the Land Court shall forward to the Minister—

- (a) any objections lodged in relation thereto; and
- (b) the Land Court's recommendation.

Note—

For other relevant provisions about forwarding documents, see section 386O.

- 20 (2) For subsection (1)(b), the Land Court's recommendation must consist of—
- (a) a recommendation to the Minister that the application be granted or rejected in whole or in part; and
 - (b) if the application relates to land that is the surface of a reserve and the owner of the reserve has not consented to the grant of a mining lease over the surface area, the following—
 - (i) a recommendation to the Minister as to whether the Governor in Council should consent to the grant over the surface area;
 - (ii) any conditions to which the mining lease should be subject.
- 30 (3) A recommendation may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers appropriate, including a condition that mining shall not be carried on above a specified depth below specified surface area of the land.
- (4) The Land Court, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, shall take into account and consider whether—
- (a) the provisions of this Act have been complied with; and

- (b) the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate; and
- (c) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and
- (d) the land and the surface area of the land in respect of which the mining lease is sought is of an appropriate size and shape in relation to—
 - (i) the matters mentioned in paragraphs (b) and (c); and
 - (ii) the type and location of the activities proposed to be carried out under the lease and their likely impact on the surface of the land; and
- (e) the term sought is appropriate; and
- (f) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and
- (g) the past performance of the applicant has been satisfactory; and
- (h) any disadvantage may result to the rights of—
 - (i) holders of existing exploration permits or mineral development licences; or
 - (ii) existing applicants for exploration permits or mineral development licences; and
- (i) the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management; and
- (j) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof; and
- (k) the public right and interest will be prejudiced; and
- (l) any good reason has been shown for a refusal to grant the mining lease; and
- (m) taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use.

- (5) Where the Land Court recommends to the Minister that an application for the grant of a mining lease be rejected in whole or in part the Land Court shall furnish the Minister with the Land Court's reasons for that recommendation.

...

Applicable provisions of the *Judicial Review Act 1991* (Qld)

30 Powers of the court in relation to applications for order of review

(1) On an application for a statutory order of review in relation to a decision, the court may make all or any of the following orders—

(a) an order quashing or setting aside the decision, or a part of the decision, with effect from—

10

(i) the day of the making of the order; or

(ii) if the court specifies the day of effect—the day specified by the court (which may be before or after the day of the making of the order);

(b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions (including the setting of time limits for the further consideration, and for preparatory steps in the further consideration) as the court determines;

20

(c) an order declaring the rights of the parties in relation to any matter to which the decision relates;

(d) an order directing any of the parties to do, or to refrain from doing, anything that the court considers necessary to do justice between the parties.

(2) On an application for a statutory order of review in relation to conduct that has been, is being, or is proposed to be, engaged in for the purpose of the making of a decision, the court may make either or both of the following orders—

(a) an order declaring the rights of the parties in relation to any matter to which the conduct relates;

30

(b) an order directing any of the parties to do, or to refrain from doing, anything that the court considers necessary to do justice between the parties.

(3) On an application for a statutory order of review in relation to a failure to make a decision, or in relation to a failure to make a decision within the period

within which the decision was required to be made, the court may make all or any of the following orders—

- (a) an order directing the making of the decision;
- (b) an order declaring the rights of the parties in relation to the making of the decision;
- (c) an order directing any of the parties to do, or to refrain from doing, anything that the court considers necessary to do justice between the parties.

- 10 (4) The court may, at any time, of its own motion or on the application of a party, revoke, vary, or suspend the operation of, an order made by it under this section.

[END OF ANNEXURE]