Land and Resources Tribunal

REGISTRY: Brisbane
NUMBERS: AML 207/2006
ENO 208/2006
TENURE IDENTIFIER: 4761-ASA 2

Applicant: **XSTRATA COAL QUEENSLAND PTY LTD & OTHERS**

AND

Respondents: **QUEENSLAND CONSERVATION COUNCIL INC, MACKAY CONSERVATION GROUP INC**

AND

Statutory Party: **ENVIRONMENTAL PROTECTION AGENCY**

QUEENSLAND CONSERVATION COUNCIL'S SUBMISSIONS ON AMENDMENT OF THE PARTICULARS OF CONDITIONS AND XSTRATA'S APPLICATION TO ADJOURN THE HEARING

Introduction

1. QCC applies to amend the particulars of the conditions it seeks to be imposed on the applicant as follows:[1]

> "1. The conditions the Queensland Conservation Council Inc (QCC) seeks to have imposed pursuant to grounds 1 to 6 of the objection are:
>
> ~~(a) That the applicant avoid, reduce or offset the likely greenhouse gas emissions from the mining, transport and use of the coal from the mine of an amount totaling the current maximum estimated production of greenhouse gas emissions of 96.44 million tonnes of carbon dioxide equivalent (MtCO2-e).~~
>
> ~~(b) That annually from the date the mining lease is granted until the end of the use of coal from the mine, the applicant file a report that is not false or misleading setting out how condition 1(a) has been complied with by:~~
>
> ~~(i) serving a copy of the report on the Environmental Protection Agency; and~~
>
> ~~(ii) posting a copy of the report on a publicly available page of the applicant's website at http://www.xstrata.com.~~
>
> (a) That the holders of the mining lease and the environmental authority, whether by themselves or their agents, avoid, reduce or offset greenhouse gas emissions in an amount totaling 1.363 million tonnes of carbon dioxide equivalent (MtCO2-e), being the amount of emissions estimated to occur in carrying out the mining operations to which the mining lease and environmental authority apply.

[1] Pursuant to sub-rule 5(2) *Land and Resources Tribunal Rules* 2000.

QCC SUBMISSIONS ON AMENDING PARTICULARS & ADJOURNMENT
Filed on behalf of Queensland Conservation Council Inc

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(b) That the holders of the mining lease and the environmental authority, whether by themselves or their agents, avoid, reduce or offset greenhouse gas emissions in an amount totaling 8.258 MtCO2-e, being an amount equivalent to 10% of the estimated greenhouse gas emissions from the transport and use of the coal anticipated to be mined pursuant to the mining lease and environmental authority.

(c) That annually from the date the mining lease is granted until the end of the use of coal from the mine, the holders of the mining lease and the environmental authority file a report that is not false or misleading setting out how conditions 1(a) and 1(b) have been complied with by:

(i) serving a copy of the report on the Environmental Protection Agency; and

(ii) posting a copy of the report on a publicly available website."

2. The applicant, Xstrata, opposes QCC's application to amend these particulars on the grounds that the application is late; it, substantially, changes the case Xstrata is required to answer; and Xstrata needs time to prepare for the amended case it is required to answer.

History of this matter

3. At the directions hearing on 27 November 2006, Xstrata sought particulars of the condition that QCC sought to be imposed. Xstrata sought a hearing commencing 29 January 2007, whereas QCC submitted a March hearing was required to allow the parties to prepare their cases in the circumstances.[2]

4. Counsel for QCC indicated the form of the condition that QCC was seeking at the directions hearing, making it clear that the amount of greenhouse gases required to be offset would be subject to expert evidence and what the Tribunal considers reasonable, as follows:

> "Obviously it's a matter for the Tribunal what conditions are ultimately imposed, but, in terms of the form, it would be something like: that the applicants avoid, reduce or offset the likely greenhouse gas emissions from the mining, transport and use of the coal from the mine of an amount totalling X million tonnes of CO_2 equivalent and that X would be subject to expert evidence and what the Tribunal considers reasonable. For instance, the X might be 50 million tonnes of CO_2 emission. So there wouldn't be a specific order of how you do it, just the outcome of your proposing to have this mine which is going to produce this amount of coal which will, on the evidence, lead to, we understand, 72 to 96 million tonnes of carbon dioxide equivalent emissions, then you should either reduce them or avoid them or offset them by a certain amount."[3]

> "Well ultimately we're contending for a condition that there be X amount offset [and] if the evidence is, at the end of the day, that the total amount that's likely to be produced is 72 and the Tribunal decides that it's reasonable to require them to capture 50% of that, then that will be 36 million tonnes of coal, but if the evidence ultimately is that that will be 96 million tonnes of coal, then the condition that we've imposed, if the Tribunal decides they should capture 50% of their emissions, would be 48 million tonnes of coal."[4]

> "The applicants will be required to offset a percentage of or the whole of their emissions so that when they sell the coal they're effectively selling coal that they know

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[2] Transcript of directions hearing, 27 November 2006, p 19, lines 1-40. See also the draft directions orders handed up by the parties on 27 November 2006.

[3] Transcript of directions hearing, 27 November 2006, p 9, lines 7-17.

[4] Transcript of directions hearing, 27 November 2006, p 14, lines 10-19. Note that the references to "millions of tonnes of coal" should have been to "millions of tonnes of carbon dioxide equivalents."

> is going to be used and that a certain amount – maybe the whole amount, maybe it's 100% of their emissions – are going to be captured by a condition that's imposed upon them."[5]
>
> "Ultimately, the condition that will be sought will be for a particular amount of emissions to be captured or reduced and that would be, as I say, the form of the condition. Ultimately, the evidence will, as I would understand it, go to showing how such a condition is relevant and reasonable, but, ultimately, the condition is about an outcome, not about directing a particular means of achieving that outcome."[6]

5. It was made clear at the directions hearing that the condition ultimately sought would depend on the evidence and what the Tribunal considered reasonable. What is "reasonable" depends, *inter alia*, on the likely impacts of greenhouse gas emissions on the environment and costs to the Project of complying with the condition requiring the proponent to reduce, avoid or offset those emissions. It has been accepted by QCC that these matters must also be considered in the context of the overall profitability of the mine so that any condition will not make the mine economically unfeasible.[7]

6. The decision to set the date of the hearing, at the request of the applicant, only 9 weeks from the direction hearing (including over Christmas) meant that the time table within which to comply with the directions was tight. This was not a timetable where one could confer at length with one's witnesses for the purpose of providing the particulars which were ordered. In the absence of knowing what the evidence would be as to costs of offsets or the extent of the economic viability of the mine, the further and better particulars which were filed on 11 December 2006, were drawn to specify, as the amount required to offset, "the current maximum estimated production of greenhouse gases." At that time, based on the methodology set out in the Australian Greenhouse Office Workbook, QCC understood the maximum estimated production of greenhouse gases from the mining, transport and use of the coal to be 96.44 million tonnes of carbon dioxide equivalent (Mt CO_2-e). In any event, the evidence as to the likely economic viability of the project in the light of particular offset requirements was not able to be calculated until the likely

[5] Transcript of directions hearing, 27 November 2006, p 14, lines 32-36.
[6] Transcript of directions hearing, 27 November 2006, p 23, lines 24-26.
[7] This flows, for example, from the objectives of the MRA in s.2 such as paragraphs 2(a) "encourage and facilitate … mining of minerals" and 2(d) "ensure an appropriate financial return to the State from mining" and the criteria in sub-s.269(4) such as paragraphs 269(4)(c) whether, if the land applied for is mineralized, there will be an acceptable level of development and utilization of the mineral resources …" and 269(4)(k) "whether the public right and interest will be prejudiced". It also flows from s.3 EP Act which expresses the object of that Act as "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 which maintains the ecological processes on which life depends" and the criteria in s.243 which include the standard criteria which are defined to include in paragraph (h) of the definition "the financial implications of the requirements under an [an environmental authority]" and the principles of ESD, also part of the standard criteria, which include as the first ESD principle, "decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations" and as the fourth principle, "the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised".

proportions of coking and steaming coal were provided by the applicants by their solicitors' letter dated 11 January 2007.[8]

7. QCC was keen to avoid any delays in the hearing so as to lose the dates available from the Tribunal and convenient to the applicant and the Tribunal. The particulars provided in December were the best that could be provided at that time and in those circumstances. The particulars specified the worst case scenario for the applicant. However, as the parties' knowledge base has improved as a result of receiving the experts' reports from all parties, QCC has felt it incumbent on itself to particularise a less onerous condition if, as has occurred, its consideration of the totality of the foreshadowed evidence indicates that a less onerous condition was appropriate to pursue and that the more onerous condition was not supported by the evidence.

8. The evidence material to what level of offsetting would be reasonable to impose in the circumstances of this project was, effectively, finalised with the joint report of Dr Turatti and Dr Saddler, filed on 23 January 2007, in which substantial agreement was reached on the calculation of greenhouse gas emissions from the mine.

9. After considering the totality of the evidence, QCC notified the other parties and filed its application, on 24 January 2007, to amend its particulars to reflect the less onerous form of condition than that particularised in December 2006. These conditions were set out above.

10. Xstrata sought clarification of the basis for the amended particulars on 25 January 2007, which was provided by QCC that afternoon, as requested.[9]

11. It is submitted that Xstrata is not placed at a disadvantage nor does it have to meet a case different to that, originally particularised. While QCC sought the 100% offset condition, there was no obligation on the Tribunal to conclude that a condition of that kind should be imposed. The Tribunal could have applied the relevant criteria in the context of the evidence before it; found the case for imposing an offsetting condition convincing; but been unwilling, in the light of the relevant criteria, to require that all of the carbon emissions be offset; and recommended a condition of the kind that is now the subject of the application for leave to amend. That is, the case now complained of was open on the unamended particulars.

12. In fact, QCC is being castigated for seeking to make the hearing as clearly delineated and efficient as possible. QCC might have proceeded on the basis that it were still seeking the more onerous and originally particularised condition and, simply, conceded at the end of the evidence that it was unable to make out a case for a condition that thorough going but that the evidence supported a more lenient form of condition. Rather than do that, QCC has been scrupulously fair and indicated, as early as possible, the form of condition that it considered would be

[8] This letter is exhibited to the affidavit of Anita Curtis O'Hart, (sworn 31 January 2007) as document (e) of exhibit ACO-1. See also report of Mr. Norling for the comparative prices of coking and steaming coal at page 18. Mr. Norling cites the letter of the applicants' solicitors at pages 5 and 6. The proportions of coking and steaming coal were also necessary to be able to finalise calculations of the amount of CO_2e greenhouse gases. See report of Dr. Saddler, page 4.

[9] The correspondence is exhibited to the affidavit of Anita Curtis O'Hart (sworn 31 January 2007). The request from the applicants' solicitors is document (g) and the response from QCC's solicitors is document (h), in each case, of exhibit ACO-1 to that affidavit.

supported by the evidence. This is now sought to be used as a basis of avoiding the early hearing for which the applicant, previously, so strongly, advocated.

13. It is submitted that leave should be granted and the adjournment refused.

Consideration of the evidence

14. QCC has some difficulty understanding how the applicant's evidence is rendered incomplete because of the proposed amendment. It is difficult to see how the less onerous conditions, in any way, affect the evidence of Dr Turatti, Mr Whyte, or Mr Thorne. One can perceive that Mr Stanford's evidence does not address the issue of whether the project is economically feasible in the light of the less onerous condition. Mr. Stanford did not, however, seek to address that issue in respect of the original particulars. Rather, as he advises, he was told to assume that the conditions sought by QCC "makes the mine no longer economically viable".[10] He has given no evidence of the cost of offsets for the whole or a reduced amount of emissions, nor has Dr Turatti or Xstrata's other witnesses. He has not carried out his own assessment of the economic viability of the mine (under the condition originally particularised or any version of that) but merely assumed that the conditions sought by QCC will make the mine economically unviable. It is difficult, therefore, to see that Dr. Stanford is in a position where he has to recalculate figures or do any other time consuming task which prevents the case from proceeding.

15. Neither does any other relevant witness, whose reports have been provided by the applicant, appear to address any evidentiary question whose terms or whose results are changed by the proposed amendment. Issues of economic feasibility and the impact of the costs of offsetting are dealt with by Mr. Norling[11] (using figures as to the cost of offsets provided by the evidence of Mr. Keogh).[12] Both Mr. Norling and Mr. Keogh are witnesses engaged by QCC.

Conclusion

16. QCC made it clear at the directions hearing that the condition, ultimately, made by the Tribunal would depend on the evidence adduced to the Tribunal and the Tribunal's assessment of what was reasonable. The particulars provided in December were the best that could be provided and assumed a "worst case" scenario (from the applicant's point of view) to set an upper limit for the condition. The Tribunal could have recommended (and QCC could have sought in its final address) the conditions which are sought to be the subject of the amendment without the amendment having been made. However, out of fairness and, in the interests of an efficient hearing, when consideration of the totality of the evidence indicated that a less onerous condition was appropriate to pursue, QCC took the step of filing and serving the application to amend.

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[10] Affidavit of Jonathon Geoffrey Stanford (12 January 2007), page 1, para [5], and p 14.

[11] Jon Norling, "Economic analysis of greenhouse gas emissions from the proposed extension of the Newlands Coal Mine, Wollombi No 2 Surface Area" (January 2007), pp 20-21.

[12] Based on the report by Mr Keogh, "Greenhouse gas emissions offset opportunities: Newlands Coal Mine Wollombi No 2 Surface Area Project" (15 January 2007). Mr Keogh's report indicates the cost of offsetting the entire 84.0 Mt CO_2-e would be between $483m and $1,260m.

17. It is difficult to discern how Xstrata's case, as observed from the reports obtained by it, is disadvantaged or requires adjustment because of the changed particulars.

18. If, however, the Tribunal is minded to grant the adjournment sought by Xstrata, it is submitted the adjournment should be on the basis that:

    (a) The only further evidence Xstrata may present is limited to evidence which, *bona fide*, has been rendered necessary by the amendment; and

    (b) Each party bear their own costs of the adjournment.[13]

STEPHEN KEIM SC and CHRIS MCGRATH
Counsel for QCC
31 January 2007

[13] Noting s 50 of the *Land and Resources Tribunal Act 1999.*