

Land and Resources Tribunal

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

Applicant: **XSRATA COAL QUEENSLAND PTY LTD AND OTHERS**
 AND
Respondents: **QUEENSLAND CONSERVATION COUNCIL INC,**
 MACKAY CONSERVATION GROUP INC
 AND
Statutory Party: **ENVIRONMENTAL PROTECTION AGENCY**

**QUEENSLAND CONSERVATION COUNCIL
OUTLINE OF ARGUMENT**

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QCC OUTLINE OF ARGUMENT
Filed on behalf of Queensland
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INTRODUCTION

1. Xstrata Coal Queensland Pty Ltd (“Xstrata”) and its joint venturers¹ have applied for an additional surface area to a mining lease under the *Mineral Resources Act 1989* (“MRA”) and an amendment of an environmental authority (mining lease) under the *Environmental Protection Act 1994* (“EP Act”) for an open cut coal mine. The applications are for an additional surface area for extension of the Newlands Coal Mine, Wollombi No 2 Surface Area, at Suttor Creek approximately 129 km west of Mackay, known as the Newlands Wollombi No. 2 Project (“the mine”). The mine will produce up to 2.5 million tonnes per annum (“Mtpa”) of run of mine black coal for a nominal annual average of 1.9 Mtpa product coal over a 15 year mine life, or 28.5 Mt of coal in total.² The coal from the mine will be transported to

¹ Itochu Coal Resources Australia Pty Ltd, ICRA NCA Pty Ltd, and Sumisho Coal Australia Pty Ltd. Details of the joint venture are set out in Xstrata Coal and Sinclair Knight Merz, *Newlands Coal Mine, Extension into the Wollombi no.2 Surface Area, Environmental Impact Statement*, December 2005 (“the EIS”) at page ES-2.

² See EIS, page ES-1. This, also, appears to be the effect of pages 2-1-2-2 EIS (although a reference to “the project will contribute approximately 50% of this amount” at page 2-2 introduces some ambiguity.

domestic and/or export markets for electricity production (thermal or steaming coal) and/or steel production (metallurgical or coking coal).³

2. Queensland Conservation Council Inc (“QCC”) lodged an objection to the Newlands Coal Mine Expansion under the MRA and EP Act on 7 November 2006. The grounds set out in the objection are as follows:
 1. The mine will cause adverse environmental impacts unless conditions are imposed to avoid, reduce or offset the emissions of greenhouse gases that are likely to result from the mining, transport and use of the coal from the mine.
 2. The mine will prejudice the public right and interest unless conditions are imposed to avoid, reduce or offset the emissions of greenhouse gases that are likely to result from the mining, transport and use of the coal from the mine.
 3. There are good reasons to refuse to grant the mining lease or to impose conditions, namely, to avoid, reduce or offset the emissions of greenhouse gases that the mining, transport and use of the coal from the mine will cause.
 4. The mine is not consistent with the principles of ecologically sustainable development due to the contribution that the emissions of greenhouse gases from the mining, transport and use of the coal from the mine will make to global warming unless conditions are imposed to avoid, reduce or offset those emissions.
 5. The mine will not comply with best practice environmental management for coal mining unless conditions are imposed to avoid, reduce or offset the emissions of greenhouse gases that are likely to result from the mining, transport and use of the coal from the mine.
 6. The mine will not comply with the general environmental duty unless conditions are imposed to avoid, reduce or offset the emissions of greenhouse gases that are likely to result from the mining, transport and use of the coal from the mine.
3. The grounds of the objections were based on the considerations listed in s 269(4)(j)-(l) of the MRA and s 223 of the EP Act. The final ground of the objection is based on the general environmental duty in section 319 of the EP Act. However, QCC discontinues its reliance on grounds 5 and 6. The non-reliance on grounds 5 and 6, however, does not alter the conditions for which QCC advocates.
4. The facts and circumstances stated in the objection summarised the amount of coal to be produced, the likely greenhouse emissions from the mining, transport and use of this coal, and the urgent need to reduce greenhouse emissions to avoid climate change. These factual matters have been explored further in the evidence adduced to the Tribunal.
5. On 27 November 2006, the Tribunal made directions for a joint hearing of the application for the grant of the mining tenement, the environmental authority application, the draft environmental authority and the objections and any draft conditions included in the draft environmental authority.⁴ The directions also directed QCC to provide further and better particulars of a number of matters.
6. Further and better particulars were provided by a document filed on 11 December 2006. Those further and better particulars are as follows:
 1. The conditions the Queensland Conservation Council Inc (QCC) seeks to have imposed pursuant to grounds 1 to 6 of the objection are:

³ See EIS, page ES-1.

⁴ See paragraph 2 of the directions dated 27 November 2006.

- (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>.
7. An application to amend those further and better particulars was refused by the Tribunal at the commencement of the hearing. The amended conditions sought by QCC were as follows:

- “(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.
- (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.”

Preliminary matter

- 8. In its ruling on refusing the application for the amendment and in a subsequent ruling as to the permissibility of questions of witnesses, the Tribunal has appeared to indicate that it may consider it impermissible for QCC to adduce any evidence or make submissions in support of any condition that is of a similar kind to that originally particularized but involves a less onerous obligation in terms of the quantum of carbon dioxide (“CO₂”) equivalent emissions which are required by the condition to be avoided, reduced or offset. In making its second ruling, the Tribunal made reference to *ACI Operations v Quandamooka Land Council* [2001] QCA 119; [2002] 1 Qd R 347 (“*ACI*”).
- 9. Whether or not the Tribunal has already ruled against QCC advocating in support of less onerous conditions than those currently particularized, QCC seeks to place on record a number of submissions in support of the proposition that QCC may so advocate and the Tribunal may order such less restrictive conditions. (These submissions were not necessary or feasible at the time because it was not anticipated that the earlier rulings, particularly, the first in time, which related in an application to amend particulars, would result in rulings which might restrict QCC's ability to pursue its case in that way.)
- 10. First, *ACI* has no relevance to the ability of QCC to present its case in the present circumstances. The question in *ACI* was whether an objector could address in

submissions aspects of whether the provisions of the MRA had been complied with which were not raised in the objection. The Court of Appeal, construing s 268(3) of the MRA, held that the objector could not do so.

11. Section 268(3) of the MRA provides that “the tribunal shall not entertain an objection in relation to any ground thereof or any evidence in relation to any ground if the ground is not contained in an objection that has not been duly lodged in respect of the application”. The conditions for which QCC wishes to advocate and the evidence supporting those conditions, clearly, come within the objection and, in particular, grounds 1-4 set out above. In that respect, the objection and the grounds stated therein are analogous to a pleading. Effectively, s 268(3) prohibits seeking to make out a case not raised (or pleaded) in the statutory objection.
12. The Tribunal’s power to make directions includes a power to order further particulars. The delivery of further particulars has an important role in informing parties of the case they can expect to meet. The Tribunal has discretionary powers with regard to adducing evidence outside the particulars. However, that discretionary power does not enliven subs. 268(3) or its statutory prohibition on receiving evidence or submissions. No matter how restrictively, later particulars are worded, the statutory objection and its grounds, for the purpose of subs 268(3) remains what it was when lodged and no statutory prohibition arises on the presentation of evidence because aspects of the case to be presented have been the subject of further and better particulars.
13. Second, although particulars may restrict a party’s ability to adduce evidence, they cannot restrict the Tribunal’s consideration of the criteria in subs 269(4) of the MRA or in s 223 of the EP Act. Nor may the further and better particulars restrict the Tribunal’s obligation to recommend “such conditions as it considers appropriate” in subs 269(3) of the MRA or to make an objections decision as required and specified by s 222. The Tribunal may not, artificially, restrict its consideration of the criteria in the light of the evidence it has received because one party has sought conditions more onerous to the applicant than its evidence has been able to justify.
14. In support of these submissions, we refer the Tribunal to what was said by Dixon CJ and Webb, Fullagar, and Taylor JJ in *Mummery v Irvings* (1956) 96 CLR 99 at 110 as follows:

“If par. 5 of the statement of claim should be regarded as a compendious claim based on a breach of both of these duties [negligence and occupier’s duty], the matter should have been left to the jury in a wider form for the particulars given under this paragraph could not have operated to circumscribe the causes of action sued upon. This is not the function of particulars; their function is to limit issues of fact to be investigated and in doing so they do not modify or alter the cause of action sued upon. In an action, conveniently described as a negligence action, the particular duty ... may be alleged to have been breached in a number of ways and if the plaintiff particularizes the transgression or transgressions relied upon the defendant may, subject to the discretion of the court, hold him to the issue or issues of fact so raised. But the action is still for a breach of the duty specified and the defendant will not defeat the plaintiff’s claim either by establishing that the plaintiff’s injuries resulted from or were consistent with some other breach of the same duty. If the facts, as proved in the case, lead to the conclusion that the plaintiff’s injuries resulted either from one or the other, the plaintiff will succeed.” (Emphasis added)

15. The role of particulars was discussed in similar terms in *Dare v Pulham* (1982) 148 CLR 658 at 664, by Murphy, Wilson, Brennan, Deane and Dawson JJ as follows:

“Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it; they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial; and they give a defendant an understanding of the plaintiff’s claim in aid of the defendant’s right to make a payment into court. Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted must be founded on the pleadings. But where there is no departure from the pleaded cause of action, a disconformity between the evidence and the particulars earlier furnished will not disentitle a party to a verdict based on the evidence. Particulars may be amended after the evidence in a trial has closed, though a failure to amend the particulars to accord precisely with the facts which have emerged in the course of evidence does not necessarily preclude a plaintiff from seeking a verdict on the cause of action alleged in reliance upon the facts established by the evidence”. (Emphasis added and citations in the original deleted.)

16. In *Dare v Pulham*, the Court upheld a jury verdict granting more future economic loss per week than had been particularized as claimed. *A fortiori*, in the present circumstances where the conditions sought are less onerous than those sought in the particulars.
17. Third, the conditions are sought in both aspects of the hearing: that under the MRA and that under the EP Act. Even if the Tribunal considers subs 268(3) applicable to the MRA hearing, no similarly restrictive provision applies to the EP Act hearing. The objections hearing under the EP Act is different in nature to the hearing under the MRA and not limited by subs 268(3) of the MRA. In addition, s 5 of the EP Act places a duty on the Tribunal to perform its function and exercise its power under the EP Act in the way that best achieves the object of the Act.
18. Fourth, the Tribunal is under a duty pursuant to s 49 of the *Land and Resources Tribunal* 1999 to act without undue formality and technicality.⁵ Section 49 provides as follows:
 - 49 Conduct of proceeding**
 - (1) When conducting a proceeding, the tribunal must—
 - (a) observe natural justice; and
 - (b) act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it.
 - (2) For the proceeding, the tribunal—
 - (a) is not bound by the rules of evidence; and
 - (b) may inform itself of anything in the way it considers appropriate; and
 - (c) may decide the procedures to be followed for the proceeding.
19. It is submitted that to prevent a party from advocating for any conditions of the kind particularized because the evidence falls short of making out the commercial viability of the precise condition particularized, suggests a very formal and technical approach to litigation.
20. Fifth, further and better particulars are meant to indicate a range. A particularized claim for damages of a certain quantum would not prevent a plaintiff from pursuing a lesser amount than the amount particularized based on the evidence at trial. It would be anomalous to prevent QCC from seeking conditions of the kind supported by the evidence in this case because they fall short in terms of the quantum of the offsets required.

⁵ See *ACI v Quandamooka* [2001] QCA 119; [2002] 1 Qd R 347 at [75]-[76].

21. The Tribunal is urged, in the light of above submissions, to consider what conditions are made out by the evidence without considering itself bound to recommend conditions exactly in accord with those originally particularized or not at all. If the Tribunal has already made a final ruling on this point, QCC, nonetheless, seeks to place on record its arguments in support of conditions requiring that the applicant reduce, avoid or offset greenhouse gas emissions to an extent shown to be reasonable by the evidence before the Tribunal.

Substantive matters

22. The evidence adduced by QCC and these submissions are directed in support of the submissions that conditions of the kind particularized, be included in the Tribunal's recommendation pursuant to s 269(3) of the MRA or in the Tribunal's objections decision pursuant to s 222(1)(b) of the EP Act.
23. QCC's objection and the conditions it seeks to impose are addressed to requiring the taking of reasonable and practical steps to avoid or mitigate some part of the contribution to the buildup of greenhouse gases (and the global warming and climate change caused by that buildup) which would result from the mining and transport of the coal of the proposed mine and from the use of that coal by its end users. The conditions should discriminate between the greenhouse gases caused by mining (which should be the subject of a full accounting) and those related to transport and end use (for which it is submitted a 10% accounting is reasonable on the evidence). The purpose of mining the coal from this mine is to sell it to produce electricity and manufacture steel, both of which will, inevitably, it is submitted, result in a significant amount of greenhouse gas emissions.⁶
24. It is submitted that mitigating or avoiding the impact of greenhouse gases produced by each of the mining activities; the transport; and the end use are matters relevant to the decisions which the Tribunal is authorized to make and the proposed conditions are conditions which the Tribunal can, lawfully, recommend. That submission will be developed by reference to the specific provisions which, respectively, prescribe the matters to be considered by the Tribunal and by considering the statutory and legal context of those provisions. After considering the statutory criteria and statutory context, these submissions will summarise the evidence and the way in which that evidence supports the imposition of the conditions sought by QCC as a reasonable response to the applications for the mining lease and environmental authority in respect of the release of greenhouse gases from the mining, transport and use of the coal from the mine.
25. QCC notes, as a further introductory matter, that, while an international legal framework exists that aims to regulate greenhouse gas emissions, QCC does not specifically rely upon that framework in this case.⁷ Rather, QCC relies upon the

⁶ See Professor Lowe's report (15 January 2007) at p 12, para [34].

⁷ Notably, the *United Nations Framework Convention on Climate Change 1992* ("UNFCCC") (ATS 1994 No 2. Entry into force for Australia 21/3/94). As a contracting party to the UNFCCC, Australia is obliged to take climate change into account and cooperate in avoiding dangerous climate change. Australia has signed but not ratified a protocol created under the UNFCCC, the *Kyoto Protocol to the UNFCCC 1997* ("the Kyoto Protocol") (reported in [2005] ATNIF 1), which requires Australia to limit its greenhouse gas emissions to 108% of its 1990 levels during the period between 2008 and 2012. Australia has recently entered into the *Asia-Pacific Partnership on Clean Development and Climate* ("AP6") with India, Japan, South Korea, and the United States. The AP6 focuses on expanding investment and trade in cleaner energy technologies, goods and services in key market sectors without setting binding targets for reductions of greenhouse gases.

statutory criteria stated in the Queensland legislation applying to the Tribunal's decisions.

STATUTORY CRITERIA

Mineral Resources Act 1989

26. The MRA specifies matters to be taken into account by the Tribunal in making its recommendation in subs 269(4) as follows:

- “(4) The tribunal, 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.” (Emphasis added.)

27. QCC, particularly, relies on paragraphs (j), (k) and (l) of the sub-section to establish the relevance of the matters raised in its objection.

Environmental Protection Act 1994

28. Section 223 of the EP Act sets out the matters that must be considered by the Tribunal in making an objections decision under that Act as follows:

“223 Matters to be considered for objections decision

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

- (a) the application documents for the application;

- (b) any relevant EPP 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.” (Emphasis added.)

29. QCC, particularly, relies upon paragraph (c) of s 223 to establish the relevance of the matters raised in its objection. The “standard criteria” referred to in s 223(c) are defined in the Schedule (Dictionary) of the EP Act as follows:

“*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
- (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) an environmental management 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 applicable 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.” (Emphasis added.)

30. The principles of ecologically sustainable development (“ESD”) set out in the *National Strategy for Ecologically Sustainable Development* (“National Strategy for ESD”) are:⁸

- 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

⁸ Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development* (AGPS, Canberra, 1992). Available at <http://www.environment.gov.au/psg/igu/nsesd/index.html> (viewed 30 January 2007).

- the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised
- 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.” (Emphasis added)

STATUTORY CONTEXT

31. Subsection 269(4) of the MRA and s 223 of the EP Act provide the criteria for the Tribunal’s decisions in the objection hearing; however, these criteria must be understood within their statutory context and interpreted consistently with the objects, nature, scope and terms of the two Acts.⁹

Relationship between the two Acts

32. It is useful, it is submitted, to consider the legislative history of the relationship between the MRA and the EP Act. As originally enacted, the MRA was intended to deal with all aspects of the approval and regulation of mining in Queensland. The enactment of the EP Act in 1994 provided another layer of regulation of mining as an environmentally relevant activity (“ERA”). In 2000, the Acts were amended.¹⁰ The primary purpose of the amendments was explained in the explanatory notes to the *Environmental Protection and Other Legislation Amendment Bill 2000*.¹¹

“The Bill incorporates the legislative changes necessary to implement the government decision to transfer the environmental regulation of mining from DME to the EPA. The amendments primarily amend the *Environmental Protection Act 1994* and the *Mineral Resources Act 1989*. The Bill enables DME to continue to administer mining tenures under the *Mineral Resources Act 1989* and provides for environmental regulation of mining activities by the EPA under the *Environmental Protection Act 1994*.”

33. The 2000 amendments focused the MRA on the tenure aspects of mining. However, environmental impacts of mining remain relevant to the objects of the MRA and s 269(4) considerations for the grant of a mining lease. The 2000 amendments focused the EP Act on the environmental assessment and regulation of mining. Both Acts provide a procedure for any person to object to a mining lease and for a joint hearing of the objections in the Tribunal.

Mineral Resources Act 1989

34. The principal objects of the MRA are stated in s 2 as follows:

“2 Objectives of Act

The principal objectives of this Act are to—

- (a) encourage and facilitate prospecting and exploring for and mining of minerals;
- (b) enhance knowledge of the mineral resources of the State;
- (c) minimise land use conflict with respect to prospecting, exploring and mining;
- (d) encourage environmental responsibility in prospecting, exploring and mining;
- (e) ensure an appropriate financial return to the State from mining;

⁹ The emphasis on context, both within the statute and more broadly, in construing provisions has been emphasized by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-384, [69]-[70] and [78].

¹⁰ By the *Environmental Protection and Other Legislation Amendment Act 2000*.

¹¹ *Environmental Protection and Other Legislation Amendment Bill 2000 – Explanatory Notes*, p 2.

- (f) provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals;
- (g) encourage responsible land care management in prospecting, exploring and mining.” (Emphasis added.)

35. The MRA provides an approval process for a mining lease in ss. 232-318. The application for the Newlands Wollombi No. 2 Surface Area was for an additional surface area to an existing mining lease under s 275 of the MRA. Subsection 275(2) of the MRA provides that an application for an additional surface area to a mining lease “shall be made and dealt with in the same manner as if it were an application for a mining lease”.

36. Sections 268 and 269 provide for the hearing of the application for an additional surface area and “any objections thereto”. Section 268 of the MRA provides in part as follows:

“268 Hearing of application for grant of mining lease

- (1) On the date fixed for the hearing of the application for the grant of the mining lease and objections thereto, the tribunal shall hear the application and any objections thereto and all other matters that pursuant to this part are to be heard, considered or determined by the tribunal in respect of that application at the one hearing of the tribunal.
- (2) At a hearing pursuant to subsection (1) the tribunal shall take such evidence, shall hear such persons and inform itself in such manner as it considers appropriate in order to determine the relative merits of the application, objections (if any) and other matters and shall not be bound by any rule or practice as to evidence.
- (3) The tribunal shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application. ...”

37. Subsection 269(4) of the MRA, which sets out the matters that the Tribunal shall take into account and consider when making a recommendation to the Minister for Mines and Energy, has been set out earlier in these submissions. For convenience, the subsection is repeated as part of a larger extract from s 269 as follows:

“269 Tribunal’s recommendation on hearing

- (1) Upon the hearing by the tribunal under this part of all matters in respect of an application for the grant of a mining lease, the tribunal shall forward to the Minister—
 - (a) any objections lodged in relation thereto; and
 - (b) the evidence adduced at the hearing; and
 - (c) any exhibits; and
 - (d) the tribunal’s recommendation.
- (2) The recommendation of the tribunal upon an application for the grant of a mining lease shall consist of—
 - (a) a recommendation to the Minister that the application should be granted or rejected in whole or in part; and
 - (b) in the case of an application that relates to land that is the surface of a reserve and the owner of that reserve does not consent to the grant of a mining lease over that surface area, a recommendation to the Minister as to whether the Governor in Council should consent to the grant of the mining lease over that surface area and, if so, recommend the conditions (if any) to which the mining lease should be subject.
- (3) A recommendation may include a recommendation that the mining lease be granted subject to such conditions as the tribunal 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 tribunal, 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 tribunal recommends to the Minister that an application for the grant of a mining lease be rejected in whole or in part the tribunal shall furnish the Minister with the tribunal's reasons for that recommendation. ...” (Emphasis added)

Consistency between MRA and EP Act conditions

38. QCC does not contend, either in the text of its filed objection or in this hearing that the application for the grant of a mining lease should be refused either in whole or in part. QCC contends that, in recommending that the mining lease be granted, particular conditions be recommended. Sub-section 269(4), in setting out the matters which must be “taken into account and considered” does not, specifically, refer to the recommendation “that the mining lease be granted subject to such conditions as the tribunal considers appropriate”.¹² It is clear, it is submitted, however, that, when subs 269(4) refers to the Tribunal’s “making a recommendation that an application for a mining lease be granted in whole or in part”, it includes the consideration of what, if any, conditions, the Tribunal considers appropriate to recommend. It follows that the criteria in subs 269(4) are criteria which apply to the Tribunal’s consideration of whether and what conditions it considers appropriate to recommend as part of the recommendation that the mining lease be granted (in whole or in part).

¹² Subsection 269(3) of the MRA.

39. Section 276 makes provision for a number of standard conditions. It provides as follows:

“276 General conditions of mining lease

- (1) Each mining lease shall be subject to—
- (a) a condition that the holder shall use the land comprised in the mining lease bona fide for the purpose for which the mining lease was granted and in accordance with this Act and the conditions of the mining lease and for no other purpose; and
 - (b) a condition that the holder must carry out improvement restoration for the mining lease; and
 - (c) a condition that the holder, prior to the termination of the mining lease for whatever cause, shall remove any building or structure purported to be erected under the
 - (d) authority of the mining lease and all mining equipment and plant, on or in the land comprised in the mining lease unless otherwise approved by the Minister; and
 - (e) ...
 - (f) a condition that the holder shall furnish as prescribed all prescribed reports, returns, documents and statements whatever; and
 - (g) a condition that the holder give materials obtained under the holder’s mining operations to the Minister at the times, in the way and in quantities the Minister reasonably requires by written notice to the holder; and
 - (h) ...
 - (i) a condition that the holder shall maintain during the term of the lease the marking out of the land the subject of the mining lease including any survey pegs but that boundary posts or cairns need not be maintained after the land has been surveyed; and
 - (j) ...
 - (k) a condition that the holder—
 - (i) shall pay the rental as prescribed; and
 - (ii) shall pay the royalty as prescribed; and
 - (iii) shall pay all local government rates and charges lawfully chargeable against the holder in respect of the land comprised in the mining lease; and
 - (iv) shall deposit as required by the Minister any security from time to time under this Act; and
 - (l) a condition that the holder shall comply with this Act and other mining legislation; and
 - (m) such other conditions as are prescribed; and
 - (n) such other conditions as the Governor in Council determines.
- (2) The Governor in Council may, on the recommendation of the Minister, grant a mining lease without the imposition of the conditions specified in subsection (1)(c) and (i).
- (2A) If a mining lease is granted over land that includes a wild river area, the mining lease is subject to any relevant conditions stated in the wild river declaration for the area.
- (3) A mining lease may be subject to a condition that mining operations under the mining lease shall commence within a specified period after its grant or as otherwise approved in writing by the Minister.
- (4) Conditions may be imposed in respect of a mining lease that require compliance with specified codes or industry agreements.
- (5) Despite subsections (1) to (4), a condition must not be determined, imposed or prescribed if it is the same, or substantially the same, or inconsistent with, a relevant environmental condition for the mining lease.
- (7) A mining lease granted after the commencement of the *Mineral Resources Amendment Act 1998* is subject to a condition that the holder comply with the At Risk agreement.” (Emphasis added)

40. “Relevant environmental condition” is defined in the schedule to the MRA as follows:

“**relevant environmental condition**, for a mining tenement, means a condition of an environmental authority (mining activities) under the Environmental Protection Act relating to the tenement.”

41. In the present circumstances, a “relevant environmental condition” means a condition of the environmental authority (mining lease) which is also the subject of QCC’s objection and, also, the subject of the present hearing. It would seem to follow from subs 276(5) of the MRA that, while QCC submits that the Tribunal has jurisdiction to consider and may recommend that the conditions sought by QCC be attached to either or both the mining lease and environmental authority, the Ministers may only attach such conditions to one or other of the two documents sought by the applicant.
42. General principles for the imposition of conditions will be considered below, following consideration of the statutory criteria in s 269(4) of the MRA and the EP Act.

Paragraph 269(4)(j) MRA – “any adverse environmental impact caused by the operations”

43. Section 269(4)(j) of the MRA provides that the Tribunal “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 there will be any adverse environmental impact caused by those operations and, if so, the extent thereof”.
44. First, it is clear from the terms of the preceding paragraph, paragraph 269(4)(i) that “operations” means the “operations to be carried on under the authority of the proposed mining lease”. Thus, the consideration required by paragraph 269(4)(j) MRA is consideration of “adverse environmental impact caused by [the operations to be carried on under the authority of the proposed mining lease]”.
45. Section 234 of the MRA gives some indication of what operations may be carried on under the authority of a mining lease. Section 234 of the MRA provides, relevantly, as follows:¹³

“234 Governor in Council may grant mining lease

- (1) The Governor in Council may grant and cause to be issued to an eligible person or persons, a mining lease for all or any of the following purposes—
- (a) to mine the mineral or minerals specified in the lease and for all purposes necessary to effectually carry on that mining;
 - (b) such purposes, other than mining, as are specified in the mining lease and that are associated with, arising from or promoting the activity of mining.
- (2) However, coal seam gas can not be specified in a mining lease.” (Emphasis added)

46. “Mine” (the verb) is defined in s 6A of the MRA as follows:

“6A Meaning of mine

- (1) **Mine** means to carry on an operation with a view to, or for the purpose of—
- (a) winning mineral from a place where it occurs; or
 - (b) extracting mineral from its natural state; or
 - (c) disposing of mineral in connection with, or waste substances resulting from, the winning or extraction.

¹³ The definition of “mining lease” in the schedule to the MRA, essentially, being circular adds nothing to s 234 of the MRA.

- (2) For subsection (1), extracting includes the physical, chemical, electrical, magnetic or other way of separation of a mineral.
- (3) Extracting includes, for example, crushing, grinding, concentrating, screening, washing, jigging, tabling, electro winning, solvent extraction electro winning (SX-EW), heap leaching, flotation, fluidised bedding, carbon-in-leach (CIL) and carbon-in-pulp (CIP) processing.
- (4) However, extracting does not include—
 - (a) a process in a smelter, refinery or anywhere else by which mineral is changed to another substance; or
 - (b) testing or assaying small quantities of mineral in teaching institutions or laboratories, other than laboratories situated on a mining lease; or
 - (c) an activity, prescribed under a regulation, that is not directly associated with winning mineral from a place where it occurs.”
- (5) For subsection (1), disposing includes, for example, the disposal of tailings and waste rock.
- (6) A regulation under subsection (4)(c) may prescribe an activity by reference to the quantities of minerals extracted or to any other specified circumstances.”¹⁴

47. “Operations” in paragraphs 269(4)(i) and (j) means the physical activities associated with winning and extracting the coal product. Applying “adverse environmental impact caused by those operations” in its most narrow and direct sense, it includes the global warming impacts of greenhouse gases released by carrying out those physical activities.¹⁵

48. It is submitted, however, that “adverse environmental impact caused by those operations”, in greenhouse gas terms, is not restricted only to the effects of the greenhouse gases emitted by activities such as driving vehicles on the mine site or using electricity to power mine site activity. It is submitted that the statutory context of paragraph 269(4)(j) requires a construction of “adverse environmental impact caused by those operations” that includes indirect downstream impacts. Because the operations are for the purpose of winning coal for export for ultimate use in power generation or steel making,¹⁶ impacts of those operations include the winning of the coal (to which the operations are directed) and the impacts of transporting and using that coal, including the global warming impacts of the greenhouse gases produced by that that transport and use.¹⁷

49. Part of the statutory context which indicates that “adverse environmental impact caused by those operations” include indirect and downstream impacts of use of the product produced by the operations is the broad meaning given to “environment” in the MRA. “Environment” is defined in the Schedule (Dictionary) of the MRA as having the meaning given by the EP Act. Section 8 of the EP Act provides this definition:

“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

¹⁴ Parts 7-10, ss 15A-48, of the *Mineral Resources Regulation 2003* provide further administrative provisions relevant to mining leases; however, no activities are prescribed for s 6A(4)(c) of the MRA.

¹⁵ These have been quantified, for example, by Dr Saddler as 0.091 MtCO₂-e per annum and 1.37 Mt CO₂-e overall.

¹⁶ EIS, page 1-12.

¹⁷ Dr Saddler quantifies the transport greenhouse gas released as approximately 8% of the corresponding figure for mining. The greenhouse gases produced by eventual use, however, are of a greater order, quantified by Dr Saddler as 5.5 Mt CO₂-e per annum and 82.5 Mt CO₂-e overall.

attributed scientific value or interest, amenity, harmony and sense of community;
and

(d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).” (Emphasis added.)

50. The broadly defined meaning of “environment”, contextually, indicates against a narrow or restricted construction of “adverse environmental impact caused by [mining] operations”. The use of a broadly defined concept comprehends that “impacts of mining operations” may be other than localised and may arise indirectly.
51. “Impact” is not defined in the MRA or EP Act and its meaning in paragraph 269(4)(j) MRA has not been specifically considered, to our knowledge, previously, by the Tribunal or the Court of Appeal.
52. The ordinary meaning of “impact”, in the context of paragraph 269(4)(j) MRA, is “influence or effect [exerted by a new idea, concept, ideology, etc.]”.¹⁸ The question for the Tribunal posed by the paragraph becomes “whether there will be any adverse environmental influences or effects caused by the mining operations conducted pursuant to the mining lease”.
53. The meaning of “impact” was considered specifically in the context of environmental impact assessment in *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; [2004] FCAFC 190 at [53]-[57] (“the Nathan Dam Case”). The Full Court held in relation to the meaning of the phrase “all adverse impacts” in s 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”):

“‘Impact’ in the relevant sense means the influence or effect of an action: *Oxford English Dictionary*, 2nd ed, vol VII, 694-695. As the respondents submitted, the word ‘impact’ is often used with regard to ideas, concepts and ideologies: ‘impact’ in its ordinary meaning can readily include the “indirect” consequences of an action and may include the results of acts done by persons other than the principal actor. Expressions such as ‘the impact of science on society’ or ‘the impact of drought on the economy’ serve to illustrate the point. Accordingly, we take s 75(2) to require the Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect. “Impact” in this sense is not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter. Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an ‘impact’ of a proposed action. ...

It is sufficient in this case to indicate that ‘all adverse impacts’ includes 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.” (Emphasis added)

54. Sub-section 75(2) of the EPBC Act, which was the subject of consideration in the extract from the Nathan Dam Case, provides as follows:

“(2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:

¹⁸ *The Macquarie Dictionary* (Revised 3rd ed, The Macquarie Library, 2001), p 950.

- (a) the Minister must consider all adverse impacts (if any) the action:
 - (i) has or will have; or
 - (ii) is likely to have;
 on the matter protected by each provision of Part 3; and
- (b) must not consider any beneficial impacts the action:
 - (i) has or will have; or
 - (ii) is likely to have;
 on the matter protected by each provision of Part 3.”

55. In the Nathan Dam Case, the “action” being considered was a dam intended to allow, *inter alia*, the growing of cotton in areas not previously able to be used for agriculture through using water stored by the dam. The impacts which the minister had ruled out of his consideration were potential impacts of the run off from cotton farms on the Great Barrier Reef some further hundreds of kilometres downstream. The effect of the decision, at first instance and confirmed on appeal, was that those indirect, downstream impacts on the Reef were impacts of the action for the purpose of the EPBC Act.

56. It is submitted that the reasoning in Nathan Dam is applicable to the present construction question. The construction of a dam is, essentially, a physical activity whose direct impacts on the environment are localised and, relatively, restricted. The dam, like a coal mine, produces product intended for use elsewhere. That product, by being available for use, makes possible activities for which it would not, otherwise, be used. These activities are, in each case, contemplated by the proponent of the action. These subsequent activities have, potentially, broader and more far reaching effects. That is, if the coal stays in the ground (the operations do not occur), it cannot be used for steelmaking or power generation. Similarly, if the water is not stored, it cannot be used for cotton growing. In both cases, the subsequent (facilitated) activities involve the actions of other people but without breaking, as a matter of ordinary usage, the causal relationship between the original physical activities and the effects of the subsequent activities. In both cases, “impact” is used in the phrase being construed and is used in the context of legislation providing for environmental impact assessment and, in both cases, decisions may be made (or recommended) that the proposal be approved, approved with conditions, or not approved. The analogy between the provision in Nathan Dam and paragraph 269(4)(j) is very close, in our submission.¹⁹

57. The construction is also supported by the use of “any”, in paragraph 269(4)(j) MRA as a determiner or pronoun to qualify “adverse environmental impact”. The obligation to consider whether “there will be any adverse environmental effect ...” in paragraph 269(4)(j) is analogous to the express requirement to consider “all adverse effects, if any” in subs.75(2) EPBC Act. It is submitted that the legislature

¹⁹ Pain J applied the decision in the Nathan Dam Case in considering the causal relationship between emissions from the use of coal in power stations and the effects of climate change and global warming in *Gray v Minister for Planning* [2006] NSWLEC 720, particularly at [98]-[100]. In *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029, Morris J applied the Nathan Dam Case and held that a planning scheme amendment to facilitate an expansion of a coal mine must consider the indirect impacts of greenhouse gas emissions resulting from the burning of the coal at the nearby Hazelwood Power Station in Victoria. See, in particular, paragraphs [42]-[47]. In *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736, Dowsett J found that the decision-maker under the EPBC Act had considered the greenhouse gas emissions from the mining, transport and use of coal from two coal mines in deciding that the mines were not controlled actions under s 75 of the EPBC Act. However, Dowsett J doubted, in *obiter dicta*, the need to consider greenhouse gas emissions from the use of coal from coal mines under the principles in the Nathan Dam Case at [72].

has acknowledged that impacts of the mining operation may be many and varied, direct and indirect.²⁰ Read in context and in light of the objects of the Act, “any” means in whatever quantity or number, great or small.²¹

58. In *Parramatta v Hale* (1982) 47 LGRA 319, the provision under consideration by the New South Wales Court of Appeal was paragraph 90(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) which provides, effectively:

“In determining a development application, a consent authority shall take into consideration such of the following matters as are of relevance to the development that development application: ... (b) the impact of that development on the environment ... and, where harm to the environment is likely to be caused, any means that may be employed to protect the environment or to mitigate that harm; ...” (Emphasis added)

59. Moffitt P’s discussion the application of paragraph 90(1)(b) at page 342 is as follows:

“As the consideration is of “any” means that may be employed to protect or mitigate, the authority would not discharge its responsibility if it considered just one means, unless of course this means protected the environment and is secured when the consent is given ...”

60. In the context of a coal mine, producing coal for electricity and steel production, both of which are known, inevitably, to result in the emission of significant amounts of greenhouse gases which, in turn, contribute to climate change, the “adverse environmental impact” of the mining operations as used in paragraph 269(4)(j) MRA includes, it is submitted, the contribution those greenhouse gases will make to climate change, including as a result of the downstream activities of transporting and using the coal which has been won by the mining activities.

Paragraph 269(4)(k) – “the public right and interest will be prejudiced”

61. The starting point for a consideration of questions of “public right or interest” in a mining statute is *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 (“*Sinclair*”).²² The provision under consideration in *Sinclair* was Regulation 39(2) of the *Mining Regulations of 1971* (“the 1971 Regulations”) which required that the mining warden refuse an application if he were of the opinion that “the public right or interest will be prejudicially affected by the granting of the application”.²³

²⁰ See generally, *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 342 per Moffitt P.

²¹ “Any” is defined in the *The Macquarie Dictionary* (Revised 3rd ed, The Macquarie Library, 2001), p 80, as, “**any** / *determiner* / 1. one, a, an, or (with plural noun) some, whatever or whichever it may be: *if you have any witnesses, produce them*. 2. in whatever quantity or number, great or small: *have you any butter?* 3. every: *any schoolchild would know that*. 4. (with a negative) none at all. 5. a great or unlimited (amount): *any number of things*. – *pronoun* 6. (*construed as singular*) any person; anybody, or (*construed as plural*) any persons: *he does better than any before him; unknown to any*. 7. any single one or any one’s; any thing or things; any quantity or number: *I haven’t any*. – *adverb* 8. in any degree; to any extent; at all: *do you feel any better?; will this route take any longer?*”

²² There is no material distinction between a public right or the public interest for the purposes of this hearing but these submissions will focus on the public interest as the more relevant term. There are public rights to a healthy and pleasant environment, protected through the tort of public nuisance, as well as a public interest in a healthy and pleasant environment.

²³ The wording is taken from the paraphrase in the reasons of the mining warden extracted by Barwick CJ at page 477.

62. The objections under consideration in *Sinclair* read as follows:²⁴

- “(a) Until it can be shown that it is in the public interest to grant a mineral lease over the area, no such lease should be recommended;
- (b) The area over which the leases are sought are aesthetically attractive and should be preserved in its natural state;
- (c) A comprehensive survey of the whole of Fraser Island is required to determine the best use in the long term of all the natural resources of the Island and until such a survey has been carried out no further sand mining leases should be granted on the island;
- (d) Sandmining in this area would be generally against the public interest.”

63. Barwick CJ said, in respect of the objections in *Sinclair*:²⁵

“It cannot be doubted, in my opinion, that the matters raised and evidenced by the objector were matters of general public interest.”

64. Barwick CJ went on to say:²⁶

“The interest, of course, must be the interest of the public and not mere individual interest which does not involve a public interest. Clearly enough, the material evidenced by the appellant did relate to a public interest not limited to the interests of a less than significant section of the public.”

65. There appears to be nothing in the statutory context of paragraph 269(4)(k) of the MRA that suggests that the phrase “public right and interest” should be given a more narrow meaning than the phrase carried in the context of the 1971 Regulations. The issues raised by the objector in *Sinclair* were broadly concerned with environmental issues and included concern with longer term land use planning. The conditions that QCC advocates in this hearing involve the relationship between the resource sought to be exploited and very significant global problems to which the removal and use of the resource will contribute. In particular, the condition seeks some mitigation of the contribution of that removal and use to the problem in return for society’s ability to remove and use the resource. It is difficult to imagine an issue associated with a recommendation that raises more squarely the public right and interest. It is also submitted that removal and use of the resource does prejudice the public right and interest by contributing to the problem of global warming while, at the same time, delivering other benefits. The proposed condition constitutes a response relevant to paragraph 269(4)(k) of the MRA by seeking to mitigate the prejudice while, at the same time, allowing the removal and use.

66. Also in *Sinclair*, Jacobs J noted that determining where the public interest lies is a balancing exercise:²⁷

“The public interest is an indivisible concept. The interest of a section of the public is a public interest but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by the public interest in having the mining operation proceed. It does not however affect the quality of that interest. ...

On an inquiry of the kind which the warden is required to make it is not possible to describe any onus of proof of a public interest against the grant of a mining lease.

²⁴ Extracted from the reasons of Barwick CJ at page 476.

²⁵ (1975) 132 CLR 473 at 479.

²⁶ (1975) 132 CLR 473 at 480.

²⁷ (1975) 132 CLR 473 at 487.

Nevertheless, generally speaking, there appears to me to be disclosed by the Act an intention that the grant of a mining lease should be recommended unless the grant would be against the public interest. The grant is not dependent on the existence of minerals in the area granted but the proved existence of such minerals and the proved or expected quantity thereof are factors to be considered in determining where the public interest lies, and conversely the absence of such minerals must be weighed against the amount of damage to the environment which mining of the area will produce. The words “public interest” are so wide that they comprehend the whole field of objection other than objection found on deficiencies in the application and in the required marking out of the land applied for.” (Emphasis added.)

67. McMurdo J (with the concurrence of McPherson and Jerrard JJA.) referred to *Sinclair* in *Armstrong v Brown* [2004] 2 Qd R 345 at [15]. His honour said:

“*Sinclair* was a case dealing with an earlier statutory regime, but to some extent the statements relied upon are relevant to the operation of s 269.”

68. The decision in *Armstrong* was not about the extent of “public right and interest”. However, the Court of Appeal agreed with the approach that economic viability and the likely profitability of the mining for which a lease was sought is a relevant consideration in respect of the matters referred to in paragraph 269(4)(c) of the MRA even though economic viability is not expressly mentioned in that paragraph (which talks about “acceptable level of development and utilisation of the mineral resources”). The Court of Appeal approved of the approach to that same question by Kingham DP in *Salmon v Armstrong* [2001] QLRT 72. It is submitted that, while not concerned with paragraph 269(4)(k) of the MRA or the construction of “public right and interest”, the approach of the Court of Appeal indicates the continued relevance of the decision in *Sinclair* and, also, indicates that a restrictive or narrow approach is not favoured in construing each of the paragraphs in subs 269(4) of the MRA.

69. Tamberlin J recently provided a useful summary of the concept of the public interest in *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70; [2005] FCAFC 142 at [8]-[12]:²⁸

“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.”

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. ...

The expression “the public interest” is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination. By way of example, town planning legislation frequently lists a number of factors that a local council or planning body is required to take into account when

²⁸ Tamberlin J went on to consider some of the case law on the concept. His judgment, as part of a majority, was upheld in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 and his summary of the law on the meaning of “the public interest” was not doubted.

making a determination, with a concluding consideration being a generalised reference to the public interest and the circumstances of the case. ...

The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where “the public interest” resides. ...” (Emphasis added)

70. This reasoning was not questioned on appeal to the High Court where Hayne J also noted in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [55]-[56]:

“It may readily be accepted that most questions about what is in ‘the public interest’ will require consideration of a number of competing arguments about, or features or ‘facets’ of, the public interest. As was pointed out in *O’Sullivan v Farrer*²⁹:

‘[T]he expression “in the public interest”, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view’³⁰.” (Emphasis added)

71. It is submitted that the reference to “encourage environmental responsibility in prospecting, exploring and mining” as one of the objects of the MRA in paragraph 2(a) of the MRA militates in favour of not restricting “public right and interest” in paragraph 269(4)(k) from extending to a consideration of the relationship between the resource sought to be exploited and very significant global problems to which the removal and use of the resource will contribute and ways in which that contribution can be mitigated.³¹ Equally, the more narrow context of paragraph 269(4)(k) of the MRA includes paragraph 269(4)(j), with its express comprehension of “any adverse environmental impact”. This also suggests that the phrase, which is of widest import should not construed, restrictively, in the context of environmental impacts.

Paragraph 269(4)(l) – “any good reason has been shown for a refusal”

72. Section 269(4)(l) of the MRA is an extremely wide consideration that is limited only by the structure and objects of the Act.³² Clearly, there must be a *good* reason, as opposed to a reason that is extraneous to the purposes of the Act.³³ In *Campbell v United Pacific Transport* [1966] Qd R 465, at 472, Gibbs J. stated, when considering whether “good reason” had been shown by an applicant plaintiff for leave to proceed after six years without a step in the proceedings:

“In my opinion the question whether good reason has been shown must depend on all the circumstances of the particular case.”

²⁹ (1989) 168 CLR 210 at 216.

³⁰ *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.

³¹ In *Telstra v Hornsby* [2006] NSWLEC 133; (2006) 146 LGERA 10, at [121]-[124], Preston CJ used the subject matter, scope and purpose of the environmental assessment legislation being applied by him to conclude that “public interest” included consideration of the principles of ESD.

³² In accordance with the normal rules of statutory interpretation and administrative decision-making. See generally, *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 338-345 per Moffitt P; *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710; *Packham v Minister for the Environment* (1993) 31 NSWLR 65.

³³ *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492.

73. As discussed in the context of paragraph 269(4)(k), paragraph 2(d) of the MRA includes, as an objective of the MRA: to “encourage environmental responsibility in prospecting, exploring and mining”. For the reasons stated in respect of paragraph 269(4)(k) and its reference to prejudice of “the public right and interest”, “good reason ... for a refusal to grant” comprehends the matters raised by QCC’s objection and proposed conditions. There is nothing in the statutory context which suggests that the phrase should be read down to exclude those matters.
74. It is submitted, however, that the inclusion of two very broad criteria, namely, those in paragraphs 269(4)(k) and (l) involves a mutual reinforcement of the breadth of each criterion. It would be easier to conclude that, if only one “catch all” criterion had been included, it should be read down by reference to parts of the statutory context. The inclusion of two such criteria is a very strong indication that each criterion should be construed according to its generous terms.
75. Further, in considering whether “good reason has been shown for a refusal to grant the mining lease”, one can, it is submitted, consider matters which might, in the absence of the power to recommend “that the lease be granted subject to [appropriate] conditions”, lead to a refusal. That is, in considering whether “any good reason has been shown for a refusal”, one need not conclude that a refusal is the necessary recommendation. That is, one may consider matters which militate in favour of or towards a refusal even if, at the end of that consideration, the matters are more properly dealt with by the recommendation of conditions rather than a refusal.³⁴

Environmental Protection Act 1994

Preliminary

76. The objects of the EP Act are stated in s 3 as follows:

“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*).”

77. As the Tribunal is exercising a power under the EP Act, s 5 places an obligation on the Tribunal:

“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.”

78. Chapter 5, ss 146-309, of the EP Act provides the process for applying for, and amending, environmental authorities for mining activities, including an environmental authority (mining lease).³⁵ Sections 147 and 149 of the Act define “mining activity” and “mining project” as follows:

³⁴ This consideration has also been discussed in slightly different and more general terms above.

³⁵ Note that, as occurred in the case of the Newlands Coal Mine Expansion, an environmental impact statement may be prepared for a mining activity under Chapter 3, ss 37-72, of the EP Act.

“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.”

“149 What is a *mining project*

A *mining project* means all mining activities carried out, or proposed to be carried out, under 1 or more mining tenements, in any combination, as a single integrated operation.”

79. The application for the Newlands Wollombi No. 2 Project, lodged on 6 April 2005, was for an amendment of a non-standard environmental authority (mining lease) under s 238 of the EP Act.³⁶ An EIS was prepared under Chapter 3 of the EP Act and the application was processed under Part 6 of Chapter 3 of the EP Act.³⁷
80. The EP Act provides for any person to object to the amendment of an environmental authority (mining lease) under Part 6 of Chapter 3 of the EP Act. The right to object and the process for the objections decision hearing is set out in ss 216-226. Section 222 states the nature of the objections decision to be made by the Tribunal in the following terms:

“222 Nature of objections decision

- (1) The objections decision for the application must be a recommendation to the MRA 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.
- ...
- (3) The tribunal must give a copy of the decision to the EPA Minister as soon as practicable after the decision is made.”

81. It is clear from the terms of s 222 that an “objections decision” includes the decision as to what, if any, further conditions are to apply to a decision that an application be granted.

³⁶ Note that, since the *Environmental Protection and Other Legislation Amendment Act 2004* on 1 January 2005, the terminology for new mining activities under the EP Act has changed from “non-standard” and “standard” environmental authorities to “level 1” and “level 2” environmental authorities (as defined in s 151).

³⁷ The decisions made by the EPA concerning the level of assessment are set out in the Statement of Dean Ellwood (revised 30 January 2007).

82. While the application considered by the Tribunal relates, ostensibly, only to the “mining activity” the subject of the application (which, in this case does not include the transport and use of the coal), it is clear from the criteria that must be considered by the Tribunal that its consideration of the application must be considered in its proper context, rather than in an artificial isolation.³⁸ This matter will be developed further with reference to the criteria that must be considered by the Tribunal.

83. Section 223 states the matters to be considered, relevantly as follows:

“223 Matters to be considered for objections decision

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

- (a) the application documents for the application;
- (b) any relevant EPP 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.”

84. Although set out previously, for convenience, we set out the statutory definition of “the standard criteria” again, as follows:

“*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
- (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) an environmental management 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 applicable 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.” (Emphasis added)

85. We also set out again, for convenience, the ESD principles as set out in the National Strategy for ESD:

³⁸ In a similar manner to the reasoning of the New Zealand Court of Appeal in *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 4)* [1981] 1 NZLR 531 at 534, the mine must not be divorced from other activities (in this case the sale and intended use of the coal from the mine) that “alone could give it industrial meaning and with which it clearly would be inextricably involved.”

- 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
- 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.” (Emphasis added)

86. The considerations prescribed by s 223 of the EP Act operate at a number of levels. The standard criteria call up a number of criteria including the ESD principles. The ESD principles, themselves, have a number of sub-criteria. Criteria of particular relevance to the conditions for which QCC advocate which appear at various of the levels will be discussed in turn.

Principles of ESD involving long-term and global considerations

87. The first and third principles of ESD involve weighing economic and global considerations in decision-making. They are discussed together because they raise analogous considerations which are at the heart of the ESD principles. The first principle requires that the objections decision be neither short sighted nor mono-dimensional, requiring that economic, social and equity considerations be taken into account. The point picks up some of what Dr Stanford discusses under the heading inter-generational equity (at pages 3-4 of his report). The principle emphasises that environmental impacts of the operations (action) authorised by the mining lease be subject to an environmental authority that recognises the global dimension of the environmental impacts of those operations. Each of these principles of ESD could well have been drafted to ensure that the Project was only allowed to proceed on the basis of conditions which mitigated the greenhouse gas and global warming impacts of the mining operations and the subsequent use of the coal product won by those operations.

88. Limiting the consideration of greenhouse gas emissions from the mining of the coal from the mine alone would be piece-meal and inconsistent with the first principle of ESD, that decision making processes should, effectively, integrate both long and short-term economic, environmental, social and equity considerations. This principle seeks to assess the true effects of activities in a holistic rather than piece-meal way.

89. The first principle of ESD reflects the concept of Intergenerational Equity, which Pain J recently considered in *Gray v Minister for Planning* [2006] NSWLEC 720 at [118]-[126]. Of particular relevance after the matters her Honour discussed at [122]:

“In terms of environmental impact assessment which takes into account the principle of intergenerational equity ... one important consideration must be the assessment of cumulative impacts of proposed activities on the environment. ... failure to consider cumulative impact will not adequately address the environmental impact of a particular development where often no single event can be said to have such a significant impact

that it will irretrievably harm a particular environment but cumulatively activities will harm the environment.”

90. Pain J found in *Gray v Minister for Planning* [2006] NSWLEC 720 at [126] that:

“a failure to take the principle of intergenerational equity into account by a requirement for a detailed [greenhouse gas] assessment in the [environmental assessment report] if the major component of [greenhouse gases] which results from the use of the coal, namely scope 3 emissions. is not required to be assessed. That is a failure of a legal requirement to take into account the principle of intergenerational equity.” (Emphasis added.)

91. Although a decision made in the context of judicial review under a different legislative regime, the conclusions of Pain J are particularly apposite to the present discussion in that the failure complained of in *Gray*, as can be seen from the words in the citation underlined, was a failure to require that an Environmental Assessment Report for a proposed coal mine include an assessment of scope 3 emissions.

92. Limiting the consideration of greenhouse gas emissions from the mining of the coal from the mine would be inconsistent with the third principle of ESD, in that the global dimension of environmental impacts of actions and policies should be recognised and considered. The third principle requires consideration of impacts across the globe as well as the resulting impacts upon the Queensland environment of climate change, itself.

Second principle of ESD: the Precautionary Principle

93. The second principle of ESD is now widely known as “the Precautionary Principle”.³⁹ Failing to consider the impacts of greenhouse gas emissions from the mine contributing to climate change because the impacts of climate change or the contribution of these particular emissions are uncertain, would be inconsistent with this principle. Pain J observed in *Gray v Minister for Planning* [2006] NSWLEC 720 at [131] that:

“inherent in the precautionary principle ... is the need for careful evaluation to avoid serious or irreversible damage to the environment and an assessment of the risk weighted consequences for various options. The role of environmental assessment is to assist in providing information to the decision-maker to enable him or her to consider that scientific uncertainty in relation to the serious, irreversible environmental threat, in this case climate change/global warming ... Amongst several matters identified as necessary to include in environmental assessments to inform the precautionary approach [are] that long term, ongoing or cumulative impacts of a project including the use and disposal of associated products and by products should be assessed.”

94. The weight of the evidence before the Tribunal is very strongly demonstrative of the existence of human induced global warming and of its present and future effects both in Queensland and elsewhere. It is unlikely, it is submitted, that the Tribunal’s fact finding will need to draw upon the second ESD principle. The principle does, however, exhort the Tribunal not to recommend in a way which postpones measures to prevent or, in this case, mitigate the serious environmental degradation caused by global warming.

³⁹ See particularly, *Telstra v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10.

Principles of ESD involving economic considerations

95. The fourth and fifth principles of ESD emphasise a need to balance economic and environmental considerations. The two principles are also intended to balance the exhortations of the first, second and third principles. The conditions for which QCC advocates have been drawn, in the light of the economic evidence before the Tribunal, to achieve that balance. The conditions address the environmental and intergenerational equity objectives while, at the same time, avoiding an impost on the Project that would impact adversely upon the ability of the Project to function profitably and to provide further input into a strong Queensland economy that can enhance Queensland's capacity for further environmental protection, including mitigating and preventing global climate change.
96. The sixth principle of ESD urges cost effective and flexible policy instruments. In making the principles of ESD applicable to the objections decision, the EP Act recognises the environmental authority as a policy instrument which can be used to achieve ESD objectives. By drawing upon the evidence before the Tribunal, the Tribunal's recommendation can employ a flexible approach and impose conditions which balance the environmental and economic and long term and short term objectives which the ESD principles as a whole express. QCC has sought to draft its proposed conditions to achieve the benefits of cost effectiveness and flexibility offered by the sixth ESD principle.

Other paragraphs of s 223

97. Although not specifically raised or relied upon in the objection, other paragraphs in s 223 EP Act are relevant to the Tribunal's objection decision. These include: paragraph 223(a) "the application documents for the application"; paragraph 223(e) "each current objection"; and paragraph 223(g) "the status of any application under the [MRA] for each relevant mining tenement".
98. The Tribunal will draw upon the application documents for the application, including the EIS, in order to ascertain a number of factual matters relating to the objections decision. The expert witnesses have drawn upon those documents in a number of respects in order to have a factual substratum to form their opinions.
99. The Tribunal will make reference to QCC's objection as part of its inquiry. The objection is given a statutory status as something that must be "considered" as part of the decision. Of course, where the inquiry has received input from a number of experts, the bare contents of the objection will be given less weight and the Tribunal will assess and draw upon the evidence it has received.
100. Equally, the Tribunal will place some emphasis upon the fact that it is in a position to make its recommendation concerning the mining lease at the same time as it considers the objections decision.

Other elements of standard criteria

101. Although not developed at great length in these submissions as part of the substantive argument, a number of other components of the standard criteria will be of assistance to the Tribunal in considering the objections decision. These include paragraphs (d) "any applicable environmental impact study, assessment or report"; (e) the character, resilience and values of the receiving environment; (f)

“all submissions made by the applicant and submitters”; (h) “the financial implications of the requirements under an instrument, or proposed instrument [in this case, the environmental authority] 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”

102. Suffice to say two things. First, the evidence of Mr Norling addresses the financial implications of the proposed conditions. Second, the submissions made with regard to public interest made with regard to paragraph 269(4)(k) of the MRA are relied upon in respect of paragraph (i) of the definition of “standard criteria”. However, the statutory context of paragraph (i), both in a broad sense in the subject matter, scope and purpose of the EP Act as a whole and the more narrow context of the definition of “standard criteria” and the other paragraphs of s 223, give an even stronger basis for the already wide ambit of “public interest” to include the mitigation of the global warming impacts of greenhouse gases released by the use of coal from the Project than was the case with similar words used in paragraph 269(4)(k) of the MRA.

EVIDENCE RELEVANT TO THE TRIBUNAL’S RECOMMENDATION REGARDING CONDITIONS

103. The evidence presented in this hearing addresses three broad issues:
- (a) the problem of climate change and global warming, and the severe impacts that these are likely to have on the global and Queensland environments;
 - (b) the calculation of greenhouse gases from the mining, transport and use of the coal from the mine and the contribution that this will make to climate change and global warming; and
 - (c) what reasonable and practical measures can be imposed to address the greenhouse gas emissions from the mine?

Climate change and global warming

104. Professor Lowe sets out the basic science of climate change and global warming, which is not in dispute.⁴⁰ He notes that the average temperature of the Earth is now warmer than at any time since human records began and it is clear that much of this increase is due to human activities releasing greenhouse gases to the atmosphere.
105. The Intergovernmental Panel on Climate Change (“IPCC”), the leading international body on climate change science, concluded in its Third Assessment Report in 2001 that mean global temperatures increased by $0.6 \pm 0.2^{\circ}\text{C}$ over the 20th century primarily due to anthropogenic emissions of greenhouse gases from the combustion of fossil fuels, agriculture, and land-use changes.⁴¹ In 2001 the IPCC projected that, without reductions in anthropogenic emissions of

⁴⁰ Professor Lowe, “A brief summary of the science of global warming and climate change” (15 January 2007), pp 4-6.

⁴¹ Lowe, n 40, para 13.

greenhouse gases, mean global temperatures will increase from 1990 levels by between 0.4 to 1.1°C in 2025, 0.8 to 2.6°C in 2050, and 1.4 to 5.8°C in 2100.⁴²

106. For Australia, the consequences of anthropogenic global warming and climate change have been: an increase in average temperature of 0.5°C since 1955 and 0.7°C since 1910; an increase in the frequency of very hot days; a decrease in the frequency of very cold nights; more frequent, persistent and intense droughts; more frequent heavy rainfall events; decreased winter rainfall, especially in southern Australia; sea levels increasing about 2 cm per decade; and increasingly frequent extreme events such as category five tropical cyclones, severe east coast low pressure systems and intense bushfires.⁴³
107. In the specific case of Australia, the most obvious economic costs are the impact of reduced agricultural production, the increased cost of water supply and the increasing costs of severe weather events.⁴⁴
108. Professor Hoegh-Guldberg noted the likely severe ecological impacts of climate change and global warming on the Great Barrier Reef due to the expected temperature increases projected by the IPCC:⁴⁵

“Change to the health of our ecosystems as a result of climate change is inevitable. Even under the best case scenario, losses of at least 50% of the Reef’s living coral cover are likely to occur by 2050. ... Coral cover will decrease to less than 5% on most reefs by the middle of the century under even the most favourable assumptions. This is the only plausible conclusion if sea temperatures continue to rise. Reefs will not disappear but they will be devoid of coral and dominated by other less appealing species such as macroalgae and cyanobacteria.”

109. Dr Stephen Williams also noted the likely severe ecological impacts of climate change and global warming on the Wet Tropics World Heritage Area.⁴⁶

“... we may be facing an unprecedented loss of biodiversity in any montane biota, an environmental catastrophe of global significance. ... despite formal and enforced protection of the rainforests of the Australian Wet Tropics World Heritage Area, most of the endemic vertebrates are severely threatened by predicted climate changes over the remainder of this century.”

110. However, both Professor Hoegh-Guldberg and Dr Williams emphasise the large difference in expected impacts depending on whether effective mitigation measures are effective in reducing the temperature increases that occur due to global warming and climate change.⁴⁷ Dr Williams notes:⁴⁸

“Ultimately, the impacts of global climate change will depend on two factors: first, the final realized degree of change and, second, the resilience of the ecosystem in question. The first factor needs to be addressed globally and at a governmental level by reducing global greenhouse gas emissions.

⁴² Lowe, n 40, para 14.

⁴³ Lowe, n 40, para 17.

⁴⁴ Lowe, n 40, para 19.

⁴⁵ Professor Hoegh-Guldberg, “Likely ecological impacts of global warming and climate change on the Great Barrier Reef by 2050 and beyond” (19 January 2007), paragraphs 10-12.

⁴⁶ Dr Stephen Williams, “Likely ecological impacts of global warming and climate change on the Wet Tropics World Heritage Area” (24 January 2007), paragraph 17.

⁴⁷ Hoegh-Guldberg, n 45, pp 36-37, paras [133]-[136]; Williams, n 46, pp 11-12, paras [22] and [30].

⁴⁸ Williams, n 46, pp 11-12, paras [22] and [30].

... minimizing greenhouse gas emissions and sequestering carbon to realize minimum, rather than mid-range or maximum, expected climate warming could save a substantial percentage of terrestrial species from extinction.”

Calculation of greenhouse gas emissions from the mine and their contribution to climate change

Calculation of greenhouse gas emissions

111. Dr Turatti and Dr Saddler are in close agreement on the calculation of greenhouse emissions estimated to occur in carrying out the mining operations to which the mining lease and environmental authority apply. Both used the *GHG Protocol* (“the *Protocol*”) as “the de facto working standard for estimating corporate greenhouse emissions”.⁴⁹ Mr Ellwood, who appears for the EPA and makes a number of statements apparently outside his expertise, considered that it was impossible to calculate greenhouse gas emissions without knowing how, when, and where the coal will be transported and used⁵⁰ but his views are not supported by Dr Saddler or Dr Turatti.⁵¹
112. The *Protocol* accounts for greenhouse gases emissions using the concept of “scopes” as follows:
- (a) Scope 1 emissions are direct greenhouse emissions for an activity.
 - (b) Scope 2 emissions are greenhouse emissions from the generation of electricity purchased for an activity, which physically occur whether the electricity is generated.
 - (c) Scope 3 emissions are other indirect emissions resulting from an activity, such as emissions from the generation of raw materials (“upstream emissions”) or use of products (“downstream emissions”).
113. The *Protocol* provides that “Companies shall separately account for and report on scopes 1 and 2 at a minimum” but Scope 3 emissions are an optional category that may be accounted for due to a number of factors.⁵²
114. Dr Turatti calculated total Scope 1 and 2 emissions from the mining activity over 15 years to be 1.363 million tonnes of carbon dioxide equivalent (“Mt CO₂-e”).⁵³ This figure is slightly lower than Dr Saddler’s figure (of 1.37 Mt CO₂-e).⁵⁴ For the purposes of narrowing the issues in dispute, QCC accepts the lower figure of Dr Turatti.
115. Dr Saddler calculated Scope 3 emissions from the transport and use of the coal from the mine over 15 years to be 82.58 Mt CO₂-e.⁵⁵ Dr Turatti did not calculate a

⁴⁹ Dr Saddler, “Greenhouse gas emissions associated with the proposed Newlands Wollombi No 2 Project” (12 January 2007), p 6 (The *Protocol* is Appendix 3 to Dr Saddler’s report); Dr Turatti, “Expert witness report to the Land and Resources Tribunal” (15 January 2007), p 2-1; Dr Saddler and Dr Turatti, “Joint experts report” (18 January 2007), p 1.

⁵⁰ Statement by Dean Ellwood (revised 30 January 2007), p 6, para [7].

⁵¹ Much of Mr Ellwood’s evidence appears to constitute legal submissions disguised as statements of fact.

⁵² Saddler, n 49, p 7, citing p 30 of the *Protocol*.

⁵³ Turatti, n 49, p 3-4.

⁵⁴ Saddler, n 49, p 9.

⁵⁵ Saddler, n 49, pp 12-14.

separate figure for Scope 3 emissions from the transport and use of the coal. He made an assessment of the emissions from the full fuel cycle to calculate Scope 1, 2 and 3 emissions as 87.0 Mt CO₂-e.⁵⁶ As Dr Saddler's figure for Scope 3 emissions is lower than Dr Turatti's, QCC assumes his calculation is not in dispute.

Context of emissions from the mine in terms of national and global emissions

116. One way in which the scale of the greenhouse emissions from the mine can be understood is to compare the emissions from the mine with Australian and global greenhouse gas emissions. It can be acknowledged that the emissions from the mine will occur over a 15 year period, therefore, comparing the total emissions from the mine to the annual emissions from Australia and globally is somewhat incorrect and over-emphasises the scale of the mines emissions. However, given that the emissions of CO₂ are additive and will remain in the atmosphere for 15-200 years,⁵⁷ whether the emissions from the mine occur in a single year or over 15 years is immaterial.

117. Dr Saddler, with whom Professor Lowe agrees, notes that:⁵⁸

- (a) the annual greenhouse gas emissions from the mining, transport and use of the 28.5 Mt of coal from the mine (5.6 Mt CO₂-e/yr) are equivalent to approximately 1% of Australia's direct, annual emissions based on 2004 levels of emissions (of 564.7 Mt CO₂-e);
- (b) the total greenhouse gas emissions from the mining, transport and use of the 28.5 Mt of coal from the 15 year life of the mine (84 Mt CO₂-e) are equivalent to approximately 15% of Australia's direct, annual greenhouse gas emissions based on 2004 levels of emissions (of 564.7 Mt CO₂-e);
- (c) the annual greenhouse gas emissions from the mining, transport and use of the 28.5 Mt of coal from the Project (5.6 Mt CO₂-e/yr) are equivalent to approximately 0.02% of international annual emissions based on 2000 levels of emissions (of 34 Gt CO₂-e); and
- (d) the total greenhouse gas emissions from the mining, transport and use of the 28.5 Mt of coal from the 15 year life of the Project (84 Mt CO₂-e) are equivalent to approximately 0.24% of international annual greenhouse gas emissions based on 2000 levels of emissions (of 34 Gt CO₂-e).

Reasonable and practical measures to address the greenhouse gas emissions

Cost of offsets

118. Dr Turatti and Mr Keogh note that there are a number of practical ways in which the applicants can avoid, reduce or offset the emissions from the mining, transport and use of the coal from the mine. Dr Turatti discussed measures such as dragline electrical efficiency and mine-wide electrical efficiency, which the applicants

⁵⁶ Turatti, n 49, p 4-8.

⁵⁷ Lowe, n 40, p 9, para [8].

⁵⁸ Saddler, n 49, pp 15-16; Lowe, n 40, p 10.

currently undertake, as well as offset programs such as forestry based offsets.⁵⁹ Mr Keogh summarised the current cost of offsets in his report as follows:⁶⁰

Table 1: Summary of offset prices with annual and total costs

Market	Price per tonne of CO ₂ -e (AUD)	Annual Offset Cost (times 5.6 Mt CO ₂ -e) \$('000)	Total Offset Cost (times 84 Mt CO ₂ -e) \$('000)	Per tonne coal used Annual (AUD)
Kyoto (CDM/JI)	\$ 5.75	32,000	483,000	16.95
EU-ETS	\$ 10.13	56,728	850,920	29.86
GGAS	\$ 12.00	67,000	1,008,000	35.37
GHF	\$ 6.00	33,600	504,000	17.68
CCX	\$ 5.75	32,200	483,000	16.95
Retail (estimate \$15.00)	\$ 15.00	84,000	1,260,000	44.21

119. Based on the offset schemes set out in his report, Mr Keogh concluded that:⁶¹

“Using current market data and the emission figures provided to me it would cost between \$483 million (AUD) and \$1.26 billion (AUD) to offset the total expected emissions of 84.0 Mt CO₂-e from the mining, transport and use of the coal from the mine. Offsetting only the direct emissions from the mining operations, of 1.37 Mt CO₂-e, would cost between \$7.9 million and \$20.6 million. The lowest cost per tonne was for the Kyoto or CCX offsets which added approx \$16.00 to each tonne of coal used up and the highest was \$43.00 per tonne coal used for retail, with an average of \$26.84.”

120. Based on Mr Keogh’s figures, where the cost of offsets are currently between \$5.75m and \$15m per Mt CO₂-e, the cost of offsetting the particularised level of emissions, 96.44 Mt CO₂-e, or the actual emissions, 84.0 Mt CO₂-e, are as follows:

Table 2: Estimated costs of offsetting the total emissions from the mine as particularised or as established in the evidence

Amount of CO ₂ -e offset (Mt CO ₂ -e)	Lowest estimate cost (AUS\$)	Highest estimated cost (AUS\$)
96.44	554,530,000	1,446,600,000
84.0	483,000,000	1,260,000,000

121. Considering that \$375m was the maximum amount Mr Norling considered the mine could pay for offsets while remaining economically viable, the Tribunal may consider lesser amounts of offsets more reasonable, particularly for the Scope 3 emissions. Taking a conservative approach to come well within the total cost of \$375m, the estimated current costs⁶² of imposing conditions to offset the Scope 1 and 2 emissions and 10% of the Scope 3 emissions are as follows:

⁵⁹ Turatti, n 49, pp 6-1 – 6-7.

⁶⁰ Ben Keogh, “Greenhouse gas emissions offset opportunities: Newlands Coal Mine Wollombi No 2 Surface Area Project” (15 January 2007), p 6.

⁶¹ Keogh, n 60, p 13.

⁶² Based on Mr Keogh’s figures, where the cost of offsets are currently between \$5.75m and \$15m per Mt CO₂-e.

Table 3: Lowest and highest estimated costs of offsetting 100% of Scope 1 and Scope 2 emissions and 10% of Scope 3 emissions

Amount of CO₂-e offset (Mt CO₂-e)	Lowest estimate cost (AUS\$)	Highest estimated cost (AUS\$)
1.363	7,837,250	20,445,000
8.258	47,483,500	123,870,000
<u>TOTAL = 9.621</u>	<u>55,320,750</u>	<u>144,315,000</u>

122. It may be that the figures presented in the above table are “worst case” scenarios as the applicant may well be able to find means to avoid or reduce greenhouse emissions itself more cheaply, without needing to purchase offsets. It can be assumed that the applicant will use the cheapest available means to comply with conditions.

Economic viability of the mine if conditions are imposed on emissions

123. Mr Stanford noted the danger of “carbon leakage” (i.e. greenhouse emitting industries moving to jurisdictions where lesser regulations and hence costs are imposed) where offset requirements on producers are imposed in the absence of a complete global system and the need for caution in that respect. In his report, as instructed, he assumed that the conditions imposed to offset greenhouse emissions would make the mine unviable.⁶³ Mr Norling’s evidence indicates that assumption is not correct for offsets costing less than \$375m. Although Mr. Norling’s sections 3 and 4 (of his report) were the subject of intense cross-examination, his evidence as to issues financial feasibility and the expected financial performance of the Project was not challenged at all.

124. The evidence of Mr Norling is that the estimated revenue from the mine will be \$3.37b and total profit \$1185m (subject to the proviso that Mr Norling does not know the value of the existing assets).⁶⁴ Mr Norling estimates that the level of profits able to offset the mine’s emissions whilst still achieving a profitable mining operation “may not be greater than \$375m”.⁶⁵

Voluntary greenhouse measures by the Xstrata Group

125. Mr Whyte explained some of the programs that the Xstrata Group of companies currently are involved in to address climate change issues associated with coal mining.⁶⁶ For example, the Xstrata Group contributed US\$25m to the FutureGen Clean Coal Project in 2006 and contributes AUS\$200,000 each year to the Cooperative Research Centre for Greenhouse Technologies.⁶⁷ Professor Lowe and Dr Turatti noted some of these programs in their reports.⁶⁸

⁶³ Affidavit of Jonathon Geoffrey Stanford (12 January 2007), p 14.

⁶⁴ Mr Jon Norling, “Economic analysis of greenhouse emissions from the proposed extension of the Newlands Coal Mine, Wollombi No 2 Surface Area” (January 2007).

⁶⁵ Norling, n 64, p 21.

⁶⁶ Affidavit of Colin George Whyte (12 January 2007), pp 20-21.

⁶⁷ Whyte, n 66, pp 1-4.

⁶⁸ Lowe, n 40, pp 11-12; Turatti, n 49, pp 6-6 – 6-7.

126. It can be noted that the applicant for the mining lease and environmental authority, Xstrata Coal Queensland Pty Ltd, is not said to undertake any of these activities. Rather a different company, Xstrata Coal Pty Ltd, participates in these programs on behalf of the Xstrata Group of companies. To place these programs in their financial context, in 2005 the Xstrata Group (including a number of further divisions to Xstrata Coal) had an annual total earnings before interest and tax (“EBIT”) of \$2,509m, including EBIT from coal operations accounts for \$1,079m.⁶⁹
127. These facts set the context in which the reasonableness of the conditions sought by QCC can be judged; however, before turning to consider this matter, the legal principles for imposing conditions need to be set out.

LEGAL PRINCIPLES FOR IMPOSING CONDITIONS

128. The Tribunal’s powers to recommend conditions under the MRA and EP Act are broad.
129. Section 269(3) of the MRA states that the Tribunal’s recommendation “may include a recommendation that the mining lease be granted subject to such conditions as the tribunal considers appropriate ...”. The plain meaning of “appropriate” in this context is “suitable or fitting for a particular purpose”.⁷⁰
130. There is no express test for the condition making power in the EP Act. Subsection 222(1)(a) of the EP Act simply allows the Tribunal to recommend that “the application be granted, but on stated conditions that are different to the conditions in the draft [environmental authority]”. In contrast, subs 210(1) of the EP Act states that the EPA, “may include conditions in the draft environmental authority it considers necessary or desirable.” As a general matter, in recommending conditions under the EP Act the Tribunal must exercise its power “in the way that best achieves the object of the Act.”⁷¹
131. Despite the Tribunal’s broad powers to recommend conditions in both Acts, it is submitted that condition making powers generally should be exercised in accordance with two broad principles: conditions must be relevant and reasonable.
132. “Relevant” means that the condition falls within the proper limits of a government authority’s functions under legislation, as imposed to maintain the proper standards in government, local development or some other legitimate sense (e.g. the provision of public land; rational development of roads; foreshore protection; preserve a rail corridor).⁷² Conditions to address the direct and indirect environmental impacts of mining operations, including greenhouse gas emissions, are clearly relevant to the recommendations made by the Tribunal under both the MRA and EP Act.
133. The courts have long constrained such seemingly wide discretions to impose conditions on development within the grounds of reasonableness – that a

⁶⁹ Norling, n 64, p 19.

⁷⁰ *The Macquarie Dictionary* (Revised Edition, 2001), p 87.

⁷¹ Section 5 of the EP Act.

⁷² *Lloyd v Robinson* (1962) 107 CLR 142; *Maroochy Shire Council v Wise* [1999] 2 Qd R 566.

condition must “fairly and reasonably relate to the proposal development”.⁷³ In the planning and environment jurisdiction, a condition is “reasonably required” if, when taking into account the fact of the development and the changes the development is likely to produce (e.g. increase traffic to a road and bridge), such condition is reasonably required by the circumstances.⁷⁴ Put in another way, the question is whether there is a relevant nexus between the use of the land and the condition sought to be imposed, that nexus being that the proposed use creates such a change in existing affairs that the condition is a reasonable response to it.⁷⁵

134. *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 provides a useful illustration of the nature of the reasonably required test. The facts of the case concerned a disputed condition attached to a development approval under the *Local Government Act 1953* (Qld), in which the Cardwell Shire Council sought to require payment of a monetary contribution for repairs to a bridge. The bridge was located outside of the site of the proposed residential subdivision on a public road. The trial judge accepted that the repairs were needed in part because of the increased traffic that would result from the development. Despite this, the trial judge refused to allow the condition because it related to works outside of the site of the proposed subdivision. The High Court overturned this decision and stated the test to be applied (at 113) as follows:

“The statutory test that has to be applied by a local authority in deciding whether to attach conditions to its approval in a case such as the present is whether the conditions are reasonably required by the subdivision. This means that the local authority, in deciding whether a condition is reasonably required by the subdivision, is entitled to take into account the fact of the subdivision and the changes that the subdivision is likely to produce – for example, in a case such as the present, the increased use of the road and of the bridge – and to impose such conditions as appear to be reasonably required in those circumstances.”

135. QCC submits that the decision in *King Ranch* is particularly relevant to the arguments raised by the applicant and the EPA against imposing conditions on the emission of greenhouse gases by third parties during the transport and use of the coal. The conditions that QCC seeks imposed on the applicants are similar to those imposed in *King Ranch*, where the impacts of the subdivision occurred offsite and due to the increased traffic from third parties. If the Tribunal were to limit its consideration to merely the direct, on-site impacts of the “mine” or the “mining operation” (under the MRA) and the “mining activity” (under the EP Act), it would, with respect, make the same error as the learned judge made in *King Ranch*. Conditions under the MRA and EP Act are not limited to the direct impacts of the mine, mining operation or mining activity but, it is submitted, may extend to regulate any foreseeable impacts of these activities.
136. QCC submits that, while not expressly set out in the MRA or EP Act, the principles of relevance and reasonableness provide universal principles for the

⁷³ *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554; *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636; *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490 at 499-500 per Walsh J; *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; *Maroochy Shire Council v Wise* [1999] 2 Qd R 566 at 569-571.

⁷⁴ *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 at 113 (HCA).

⁷⁵ *Wootton v Woongarra Shire Council* (1985) 56 LGRA 301, Ryan J at 303 (Full Ct Qld); *Felixstowe Pty Ltd v Gladstone City Council* (1994) 85 LGERA 234 at 239 (CA Qld); *Townacre Development Pty Ltd v Thuringowa City Council* (1995) 86 LGERA 165 at 176 (CA Qld).

imposition of conditions in decision-making that should be applied by the Tribunal. It is QCC's fundamental submission that the evidence before the Tribunal supports the proposition that conditions may be imposed requiring reduction, avoidance or offsetting of greenhouse gas emissions from the mining, transport and use of coal from this project which are both relevant and reasonable in the circumstances.⁷⁶

CONDITIONS QCC SUBMITS ARE RELEVANT AND REASONABLE ON THE EVIDENCE

137. QCC particularised a condition that, on the evidence, would mean the mine is economically unfeasible but the evidence of the impacts of climate change and the contribution that the mine will make to global warming create a case that needs to be answered in some way. The question for the Tribunal is what is reasonably required in the circumstances established in the evidence here?
138. Using \$375m as an upper limit for conditions requiring greenhouse gas offsets, this would allow up to 25.0 Mt CO₂-e of greenhouse emissions to be offset, assuming the worst case that offsets cost \$15m per Mt CO₂-e.

Separating Scope 1 and 2 emissions from Scope 3 emissions

139. It is logical, as the *Greenhouse Gas Protocol* adopted by Dr Turatti and Dr Saddler does, to separate the emissions from the carrying out the mining activity (Scope 1 and 2) and the emissions from the transport and use of the coal (Scope 3). The applicant is clearly directly responsible for the emissions from the carrying out of the mining activity. Assigning responsibility to the applicant for these emissions is consistent with the "polluter pays" principle identified by Mr Stanford.⁷⁷
140. Dr Turatti calculated the Scope 1 and Scope 2 emissions from the mine would be 1.363 Mt CO₂-e.⁷⁸ The cost of such a condition would be between \$7,837,250 and \$20,445,000, based on offsets costing \$5.75m – \$15m per Mt CO₂-e. A condition requiring this amount of greenhouse emissions to be offset, it is submitted, would be relevant and reasonable according to the objects and criteria stated in the MRA and EP Act, discussed above.
141. Dr Saddler calculated the Scope 3 emissions from the transport and use of the coal from the mine as 82.58 Mt CO₂-e. Offsetting the whole of these emissions would make the mine economically unviable but, taking a conservative approach, a condition requiring 10% of these emissions to be offset will come well within the upper limit of \$375m at which the mine remains economically viable. The

⁷⁶ The Court would be assisted by the approach taken, respectively, in the Nathan Dam Case, *Gray v Minister for Planning* [2006] NSWLEC 720, and *ACF v Minister for Planning* [2004] VCAT 2029, in concluding that the proposed conditions are relevant. *A fortiori*, in that both *Gray* and *ACF* involved specific findings that greenhouse emissions from the ultimate use of coal was relevant to planning or environmental impact considerations concerning the approval of a coal mine. Note also the criticisms by Payne J in *Gray* at [92]-[93] of the comments of Dowsett J in *WPSQ Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 at [72].

⁷⁷ Stanford, n 63, p 12.

⁷⁸ This is lower than Dr Saddler's figure of 1.37 Mt CO₂-e.

estimated current costs⁷⁹ of imposing conditions to offset the 10% of the Scope 3 emissions, 8.258 Mt CO₂-e, are between \$47 and \$123m.

142. The cost of offsetting the whole of the Scope 1 and 2 emissions, and 10% of the Scope 3 emissions is between \$55 and \$144m (as set out in Table 3 above).

Technical issues

143. There are a number of technical issues that need to be addressed in attempting to formulate a valid condition for the Tribunal's consideration:
- (a) First, due to subs 276(5) of the MRA, noted above, the conditions in the mining lease must not be the same, or substantially the same, or inconsistent with, a condition in the environmental authority. As conditions addressing greenhouse gas emissions relate to environmental matters, the most logical place for these conditions is the environmental authority.
 - (b) Second, for consistency with the structure of the draft environmental authority, these conditions could be inserted into the conditions relating to "Air" as condition A7.
 - (c) Third, if the condition is inserted into the environmental authority, the wording of the particularised conditions should delete the reference to "the holders of the mining lease" and change the reference to the "date the mining lease is granted" to refer to the "anniversary date for the environmental authority."
 - (d) Fourth, as the environmental authority relates to the whole of the Newlands Coal Mine, the particularised conditions should note they apply specifically to the Wollombi No. 2 Surface Area.

Conditions

144. QCC submits that, in the context of the statutory criteria stated in s 269(4) of the MRA and s 223 of the EP Act, the evidence summarised above supports a recommendation being made to the Ministers that the application for an additional surface area and amendment of the environmental authority should only be granted if the following conditions are imposed as A7 in the draft environmental authority:
- (a) That the holder of the environmental authority, whether by itself or its 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 at the Wollombi No. 2 Surface Area.
 - (b) That the holder of the environmental authority, whether by itself or its 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 from the Wollombi No. 2 Surface Area.

⁷⁹ Based on Mr Keogh's figures, where the cost of offsets are currently between \$5.75m and \$15m per Mt CO₂-e.

(c) That on the anniversary date for the environmental authority until the end of the use of coal from the Wollombi No. 2 Surface Area, the holder of the environmental authority file a report that is not false or misleading setting out how conditions (a) and (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.

145. The third of these conditions promotes transparency and accountability of the applicant's compliance with the first and second conditions.

146. QCC submits that these conditions are reasonable in light of the statutory criteria stated in s 269(4) of the MRA and s 223 of the EP Act and the evidence of:

- (a) the likely severe impacts of global warming and climate change on the Queensland and global environment, including the Great Barrier Reef and Wet Tropics World Heritage Areas;
- (b) the scale of the greenhouse gas emissions from the mining, transport and use of the coal from the mine in the context of national and global emissions;
- (c) the cost of imposing the conditions, in total being between \$55m and \$144m; and
- (d) the fact that the mine will remain economically viable (and hence contribute to the economic wellbeing of Queensland) as the cost of imposing the conditions is well within the level of profits able to offset the mine's emissions whilst still achieving a profitable mining operation estimated by Mr Norling to be \$375m from a total profit of \$1185m.

CONCLUSION

147. QCC's objection to the Newlands Coal Mine Expansion raises very significant legal and factual issues for regulating greenhouse gas emissions from coal mining in Queensland. It builds upon a growing body of Australian case law that suggests the greenhouse gas emissions from the mining, transport and use of coal should be considered when assessing the environmental impacts of a coal mine. Legal principle and commonsense supports considering and regulating direct and indirect greenhouse gas emissions from coal mines to effectively respond to the threat of climate change in a responsible manner.

148. Conditions should be imposed to avoid, reduce or offset the whole of the likely greenhouse gas emissions from carrying out of the mining operations and 10% of the emissions from the transport and use of the coal from the mine. The evidence indicates that these are both reasonable and practicable conditions. These conditions are required, in our submission, by the nature of the Tribunal's functions under the MRA and EP Act.⁸⁰

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1 February 2007

⁸⁰ As discussed in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473.