

Land and Resources Tribunal

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

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

**QCC'S REPLY TO APPLICANT'S WRITTEN
SUBMISSIONS ON GRAY'S CASE**

1. These submissions provide a brief reply to the applicant's written submissions on *Gray v Minister for Planning & Ors* [2006] NSWLEC 720 (Gray's Case).
2. The principal importance of Gray's Case for the Tribunal's decision in these proceedings is Pain J's discussion of the principles of ecologically sustainable development (ESD), including the Precautionary Principle, in the context of assessing the greenhouse gas emissions of a large coal mine. The applicant seeks to distinguish the case in relation to Pain J's finding regarding the causal effect of downstream emissions. For reasons that will be addressed below, QCC respectfully disagrees with the applicant's submissions on this point and, in addition, QCC submits that the relevance of the case is more broadly applicable to the matters the Tribunal must consider in these proceedings than simply the question of causation.
3. The applicant emphasises that it does not concede the greenhouse gas emissions from the Newlands Coal Mine Expansion the subject of the applications before the Tribunal will have any discernable separate effect on climate change. It does this while not disputing that the greenhouse gas emissions from the mine will contribute to global warming.¹ The applicant submits this for several reasons set out in paragraph 1.15 of its written submissions.

¹ Submissions on behalf of the Applicant as to *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [1.15].

QCC SUBMISSIONS ON
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4. The first reason stated by the applicant as to why it says the mine will not have any discernable separate effect, that the coal is replacing existing coal production and not in addition to it, is an illogical argument on the face of the application before the Tribunal under the *Mineral Resources Act 1989* (MRA). The application under the MRA is for an additional surface area to be added to an existing mining lease. It necessarily involves an additional amount of coal (in this case 28.5 million tonnes of coal) being made available for mining that would not otherwise be permitted to be mined. Even if the amount of coal physically produced from the Newlands Coal Mine does not increase as a result of the approval in the short or medium term, the approval necessarily extends the potential working life of the mine by increasing the total amount of coal available to be mined. Were this not the case (i.e. if there truly would no increase in production from the Newlands Coal Mine) then there would be little or no economic benefit of this mine because it would merely be replacing existing potential production with an existing workforce. The applicant contradicts itself by claiming, on one hand, that there will be considerable economic benefits from the mine while asserting, on the other hand, that the mine merely replaces production from other areas of the mine. If the mine were replacing existing potential production that will not occur once the application for the mine is granted there would presumably be little economic benefit in granting the application sought.

5. The second reason stated by the applicant as to why it says the mine will not have any discernable separate effect is that:

“the emissions from the mine could have no significant impact on global warming because they are not on any analysis significant. In the present case there is no evidence that the emissions from this mine will have any effect or impact upon the environment at all. Saying that such GHG emissions generally contribute to the cumulative impact of global warming and climate change is not sufficient when dealing with the application for an individual mining lease. Such a distinction is fundamental.”² (footnotes omitted)

6. The Tribunal is not required to make a finding that there will be a “significant impact” on the environment to enable it to consider the impacts or recommend conditions be imposed in relation to them. The matters the Tribunal is required to consider in subs 269(4) of the MRA and s 223 of the *Environmental Protection Act 1994* (EP Act) do not impose this test. In particular, paragraph 269(4)(j) refers to “any adverse environmental impact caused by” the mining operations. Paragraphs 269(4)(k) and (l) of the MRA, dealing with the public interest and “any good reason”, and the principles of ESD in the standard criteria of s 223 of the EP Act, envisage an even wider scope for the Tribunal’s consideration.

7. The applicant cites “Professor Lowe at [23]” in footnote 16 of its submissions in support of its proposition that “there is no evidence that the emissions from this mine will have any effect or impact upon the environment at all”; however, this misquotes his evidence. Professor Lowe actually says at paragraph [23] of his report:

“An initial point to understand in assessing the contribution that these emissions will make to climate change and global warming is that greenhouse gas emissions are additive, i.e. any emissions add to the amount of greenhouse gases already in the

² Submissions on behalf of the Applicant as to *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [1.15]. This repeats what the applicant stated in its written submission at the hearing, filed 1 February 2007, paragraphs 1.31 and 1.32.

atmosphere. While different greenhouse gases persist in the atmosphere for different lengths of time, CO₂ remains in the atmosphere for around 50-200 years. As a consequence of this, CO₂ emitted into the atmosphere from the mine could influence the atmospheric concentrations of CO₂ for up to two centuries. It is not possible to link these emissions to any particular impact on a specific part of the environment in Queensland, Australia or globally, other than to contribute to greenhouse gases in the atmosphere and thereby contribute to global warming and climate change. The impacts of greenhouse gas emissions from this mine should, therefore, be understood as contributing to the cumulative impacts of global warming and climate change." (footnote omitted, emphasis added)

8. The applicant's submission that the contribution of emissions from the mine to the general impact of climate change "is not sufficient when dealing with the application for an individual mine" is, with respect, precisely where it misunderstands the significance of Gray's Case and the objections raised by QCC against the mine. QCC's fourth ground of objection to the mine is that:

"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"

9. QCC's fourth ground of objection reflects the standard criteria that the Tribunal must consider under s 223 of the EP Act and the principles discussed in Gray's Case by Pain J. The relevant principles of ESD, as stated in the *National Strategy for Ecologically Sustainable Development*, are:

- decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations
- where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
- the global dimension of environmental impacts of actions and policies should be recognised and considered
- the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised
- 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)

10. The applicant's submissions that the contribution of greenhouse gas emissions "to the cumulative impact of global warming and climate change is not sufficient when dealing with the application for an individual mining lease" is contrary to the first, second and third principles of ESD. The point of these principles is to consider the impacts of development in their true context, not in isolation as contended for by the applicant (and the Environmental Protection Agency³).

11. The first principle of ESD reflects the concept of Intergenerational Equity, which Pain J considered in Gray's Case 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

³ EPA, "Outline of submissions of the Statutory Party", filed 1 February 2007, paras 4.4 and 4.6.

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.”

12. Pain J found in Gray’s Case 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.)

13. 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’s Case, 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.

14. 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.

15. The second principle of ESD is now widely known as “the Precautionary Principle”.⁴ 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’s Case 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.”

16. 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.

17. QCC submits, with respect, that the applicant’s summary of the “four questions that have to be considered by the LRT” displays a misunderstanding of the significance

⁴ See particularly, *Telstra v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10.

of Gray’s Case and the principles of ESD that the Tribunal must consider in accordance with s 223 of the EP Act. QCC submits the principles of ESD are particularly significant because the object of the EP Act itself is ESD (s 3) and the Tribunal is under a statutory duty to perform its function and exercise its powers under the EP Act “in the way that best achieves the object of [the] Act” (s 5).

18. The first of the applicant’s “four questions”, whether it is relevant under the terms of the MRA or the EP Act to consider downstream emissions, can not be answered in any other way than “yes” considering the principles of ESD that the Tribunal must consider in accordance with s 223 and s5 of the EP Act.
19. The second of the applicant’s “four questions”, whether the greenhouse gas emissions from the mining, transport and use of the coal “have been shown to have any impact on the environment at all” is answered by Professor Lowe at paragraph [23] of this evidence, set out above, (a point upon which he was not challenged by the applicant) and the principles of ESD.
20. The applicant submits that a specific impact was conceded in Gray’s Case but that is incorrect. The Director-General conceded nothing more than “that burning the thermal coal from the Anvil Hill Project will cause the release of substantial GHG in the environment which will contribute to climate change/global warming”.⁵
21. In Gray’s Case the Director-General did not concede there would be any specific or identifiable impact on the Australian or NSW environment and Pain J did not find that there would be any such impact. Pain J stated at [97] and [100]:

“[97] Given the quite appropriate recognition by the Director-General that burning the thermal coal from the Anvil Hill Project will cause the release of substantial GHG in the environment which will contribute to climate change/global warming which, I surmise, is having and/or will have impacts on the Australian and consequently NSW environment it would appear that Bignold J’s test of causation based on a real and sufficient link is met. While the Director-General argued that the use of the coal as fuel occurred only through voluntary, independent human action, that alone does not break the necessary link to impacts arising from this activity given that the impact is climate change/global warming to which this contributes. In submissions the parties provided various scenarios where this approach would lead to unsatisfactory outcomes such as, in the Director-General’s submissions, the need to assess the GHG emissions from the use of ships built in a shipyard which use fossil fuels. Ultimately, it is an issue of fact and degree to be considered in each case, which has been recognised in cases such as *Minister for Environment and Heritage v Queensland Conservation Council Inc and Another* (2004) 139 FCR 24, by the Full Court at [53]. ...

[100] I consider there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A.”

22. QCC’s understanding is that the fact that the mining, transport and use of the coal from the Newlands Coal Mine will release greenhouse gases contributing to global warming and climate change is not in dispute in these proceedings⁶, although whether these emissions can be said to be “substantial” is raised by the applicant. The applicant expressly refuses to concede this point at paragraph 1.9 of its

⁵ *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [97].

⁶ Noting the applicant’s submissions noted at footnote 2 above.

submissions but then changes it's submission at paragraph 1.15 to accept the emissions will contribute to global warming. If there is any question of fact to be answered on this issue, it is answered by Professor Lowe (and he was not challenge on this point) at paragraph [34] of this report:

“Based on currently available technology ... it should be assumed for the purposes of assessing the potential impacts of the mine that all of the greenhouse gas emissions from the mining, transport and use of the coal will be emitted to the atmosphere and contribute to global warming and climate change.”

23. In Gray's Case, Pain J “surmised” from the Director-General's concession that “climate change/global warming ... is having and/or will have impacts on the Australian and consequently NSW environment.” There is also no dispute about this issue in these proceedings and the evidence of Professor Lowe, Professor Hoegh-Guldberg and Dr Williams is categorically in agreement with this point.
24. It is apparent from paragraph [97] and [100], read in the context of the whole judgment, that Payne J merely found that global warming/climate change was impacting on the Australian and NSW environment, that the emissions from the burning of the coal from the mine would contribute to global warming/climate change, and that the link between the two required the impacts of the emissions to be assessed under the NSW legislation. In these proceedings the same findings are open to the Tribunal on the evidence before it.
25. The third of the applicant's “four questions” is whether there is a power to impose a condition in relation to downstream emissions. The applicant contends there is not “because such a condition could be said to be fairly and reasonably relate to the mining operations or the mining activities”. With respect, the applicant misunderstands the distinction between the Tribunal's powers to recommend a condition and the Tribunal's discretion whether to make such a recommendation or not. The Tribunal has power to recommend a condition be imposed concerning downstream emissions from the use of the coal by third parties.⁷ The question for the Tribunal is whether the Tribunal should exercise its discretion to recommend such a condition be imposed by the Ministers.
26. The fourth of the applicant's “four questions” correctly identifies the issue of whether it is reasonable to impose a condition in relation to emissions from the proposed mine in any event. The applicant's submission that such a condition is not reasonable because the approval “has no effect on the level of emission from the mine” has been addressed earlier in these submissions.

Dowsett J's decision in the Wildlife Whitsunday Case

27. The applicant refers to the obiter dicta comments of Dowsett J in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 (the Wildlife Whitsunday Case) at [72] “with respect to causation”.⁸ Again, with respect, this misunderstands that in these proceedings the Tribunal is required by the principles of ESD (and consideration of the public interest) to consider the mine in its wider context and

⁷ An analogous situation was considered *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110, as discussed in QCC's outline of argument (1 February 2007) at [134]-[135].

⁸ Submissions on behalf of the Applicant as to *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720 at [1.16].

that it is not necessary for the Tribunal to make any finding of fact concerning a specific impact on a part of the environment in Australia or Queensland.

28. The Wildlife Whitsunday Case was a judicial review case where the issue was whether the Minister’s delegate had failed to consider a relevant consideration or applied the wrong legal test in assessing the impacts of two proposed coal mines due to the emission of greenhouse gases from the mining, transport and use of the coal on the matters protected by Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). Dowsett J found that the delegate had considered these direct and indirect impacts and found they were not likely to have a significant impact on the matters protected under Part 3 of the EPBC Act (which are all located in Australia). Due to the judicial review nature of the proceedings – which necessarily does not address the merits of the decision – the applicant in that case was not permitted to lead evidence concerning the likely amount of greenhouse gas emissions or any causal link between the emissions and an impact on the matters protected by Part 3 of the EPBC Act.
29. In Gray’s Case at [92], Pain J noted Dowsett J’s obiter dicta comments in the Wildlife Whitsunday Case and went on to comment at [93]:

“That case was reviewing a decision of the relevant Commonwealth Minister of the Environment not to declare a particular action to be a controlled action. I do not find it persuasive if it is relied on by the Respondents as suggesting that the impacts of GHG emissions produced from coal mined in NSW are beyond the scope of environmental impact assessment procedures in NSW. I do not know what evidence was before Dowsett J as to what measurement of GHG emissions is feasible, for example. This case concerns different circumstances, namely what is required by a detailed GHG assessment in the context of an environmental assessment of a large coal mine under the EP&A Act.”

Conclusion

30. The importance of Gray’s Case is Pain J’s discussion of the principles of ESD, including the Precautionary Principle, in the context of assessing the greenhouse gas emissions of a large coal mine. With respect, the “four questions” suggested by the applicant largely misunderstand the nature of the issues in these proceedings and the principles of ESD and the public interest that the Tribunal is required to consider in accordance with s 269(4) of the MRA and s 223 of the EP Act.

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9 February 2007

⁹ Stephen Keim SC is currently on annual leave.