COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: CA2235/07
NUMBERS: AML207/06 and ENO208/06

Appellant: **QUEENSLAND CONSERVATION COUNCIL INC**

AND

First respondent: **XSTRATA COAL QUEENSLAND PTY LTD & ORS**

AND

Second respondent: **ENVIRONMENTAL PROTECTION AGENCY**

APPELLANT'S OUTLINE OF ARGUMENT

INTRODUCTION

1. This is an appeal from the decision of the presiding member of the Land and Resources Tribunal (the tribunal) in *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33. The decision concerned a combined hearing of an application for additional surface area to a mining lease under the *Mineral Resources Act 1989* (MRA) and an application to amend an environmental authority (mining lease) under the *Environmental Protection Act 1994* (EP Act) for an open cut coal mine.

2. To succeed in this appeal, QCC must show an error of law occurred that could have materially affected the tribunal's decision.[1]

SUMMARY

3. Four issues lie at the heart of this appeal:

   (a) The appellant (QCC) was denied natural justice when the presiding member departed from the unchallenged expert evidence presented at the hearing, that anthropogenic emissions of greenhouse gases are causing climate change and pose a serious threat to the environment.[2] Instead, the presiding member proceeded to make his decision on a fundamentally different basis when this was not already obvious on the known material and in light of the manner in which the proceedings had been conducted, contrary to the expert evidence presented at the hearing, and in fact regarded as important by the presiding member. In doing so the presiding member departed from the principles of natural justice stated by the Court in *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104 at 115, [30].[3]

   (b) The presiding member misconceived the role of particulars after refusing to allow QCC to amend the particulars of the conditions it sought to have imposed at the start of the hearing.[4] After making this ruling, the presiding member refused to hear closing submissions from the appellant on conditions that ought to be imposed on the mine that differed from the particulars, but were otherwise open on the evidence and the relevant statutory criteria. Subsequently, in making his decision the presiding member wrongly limited his consideration to the particulars, rather than

[1] *HA Bachrach Pty Ltd v Caboolture Shire Council* (1992) 80 LGERA 230 at 237-238. The appeal is brought under s 67(2)(b) of the *Land and Resources Tribunal Act 1999*, for which leave to appeal is not required.
[2] Ground 1 of the Notice of Appeal.
[3] Jerrard JA (with whom McMurdo P and Davies JA agreed).
[4] Grounds 2-4 of the Notice of Appeal.

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considering the evidence as a whole for the purpose of recommending conditions that were relevant and reasonable in light of the evidence and the statutory criteria. In doing so, the presiding member misconstrued the requirements of s 268(3) of the MRA and misunderstood the Court's decision in *ACI Operations v Quandamooka Land Council* [2002] 1 Qd R 347 at 350-1 and 360-1.[5] The presiding member also misunderstood the role of particulars as stated in *Mummery v Irvings* (1956) 96 CLR 99 at 110[6] and *Dare v Pulham* (1982) 148 CLR 658 at 664.[7]

(c) Related to his error in understanding the role of particulars, the presiding member misunderstood the tribunal's statutory role is not limited to resolving an *inter partes* dispute within the boundaries imposed by the parties, but serves a wider public role to advise the Ministers generally about the merits of a proposed mine and what conditions are relevant and reasonable in the circumstances.[8] The tribunal's role is identical to the role of the Wardens Court under previous legislation, and the tribunal in this case misunderstood its function as explained in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 479-481, 482, and 486[9] and *Armstrong v Brown* [2004] 2 Qd R 345 at [15].[10] The presiding member failed to fulfill that role by limiting his consideration to the conditions particularised by QCC, rather than considering what conditions were relevant and reasonable in light of the evidence and statutory criteria.

(d) The presiding member mistakenly considered the appellant was required to demonstrate a causal link between the mine's greenhouse gas emissions and a discernable environmental impact when considering the matters listed in s 269(4)(j), (k) and (l) of the MRA and s 223(c) of the EP Act.[11] The presiding member accepted that the mining, transport and use of the coal from the mine would produce 5.6 million tonnes per annum of greenhouse gas emissions for 15 years contributing to a global annual output of 34,000 million tonnes per annum of greenhouse gas emissions.[12] In light of this finding, the presiding member's requirement to show "discernable harm" or a "demonstrated impact on global warming or climate change"[13] must mean he required proof of more than that greenhouse emissions contributing to global warming and climate change. QCC submits that proof of greenhouse emissions from the mine contributing to global warming and climate change is sufficient to enliven the criteria in s 269(4)(j), (k) and (l) of the MRA and s 223(c) of the EP Act. This is particularly so when considering the width of the concept of the public interest and the Precautionary Principle that, "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 natural and ordinary meaning of "any adverse environmental impact" in s 269(4)(j) of the MRA allows consideration of greenhouse emissions contributing to the global phenomena of climate change without demonstrating a further "discernable impact". *Minister for the Environment and Heritage v QCC* (2004) 139 FCR 24 at [53]-[57][14] and the majority in *Massachusetts v Environmental Protection Agency* 549 US __ (2007)[15] are persuasive in this regard.

4. These points will be considered in more detail after summarizing the conduct of the proceedings below.

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[5] Respectively, per Davies JA and Mullens J (with whom Makenzie J agreed).
[6] Dixon CJ and Webb, Fullagar, and Taylor JJ.
[7] Murphy, Wilson, Brennan, Deane and Dawson JJ.
[8] Ground 5 of the Notice of Appeal.
[9] Respectively, per Barwick CJ (which whom Murphy J agreed), Gibbs J, and Stephen J.
[10] McMurdo J (with whom McPherson and Jerrard JJA agreed).
[11] Grounds 6 and 7 of the Notice of Appeal.
[12] *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 at [12].
[13] *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 at [21]-[23].
[14] Black CJ, Finn and Ryan JJ.
[15] At pp 20-22 of the majority judgment, per Stevens, Kennedy, Souter, Ginsburg, and Breyer JJ.

CONDUCT OF PROCEEDINGS BELOW

Grounds of objection

5. The appellant (QCC) lodged its objection to the proposed mine on 7 November 2007. There were originally six grounds of objection, but shortly before the hearing QCC discontinued reliance on grounds 5 and 6. Grounds 1-4 were as follows:

> Pursuant to the considerations listed in section 269(4)(j)-(l) of the *Mineral Resources Act 1989* and section 223 of the *Environmental Protection Act 1994*:
>
> 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.

6. The facts and circumstances relied upon in support of the grounds were stated in the objection. They included the facts of the amount of coal proposed to be produced from the mine, the amount of greenhouse gases that would result, and the contribution that this would make to climate change and global warming.

Directions hearing

7. A directions hearing was held on 27 November 2007. The presiding member made several directions orders concerning the conduct of the proceedings and evidence, including that QCC file and serve by 10 December 2006 further particulars of the conditions it would seek to have imposed. The directions made it clear from the outset that the proceedings were to be conducted primarily based on expert evidence.

8. The tribunal's practice directions also influenced the manner in which the proceedings were conducted and the assumption that the normal rules of expert evidence were to be applied. The tribunal has a detailed practice direction (No 11 of 2000), "Guidelines for expert witnesses", which sets out the duty of expert witnesses and the matters that are required to be addressed in their report.

9. QCC, Xstrata, and the Environmental Protection Agency (EPA) complied with the tribunal's directions and practice direction in preparing for, and calling witnesses at, the hearing.

Particulars

10. QCC filed particulars of the conditions it sought to be imposed on 11 December 2007. The particulars sought a condition that 100%[16] of the greenhouse gas emissions from the mining, transport and use of the coal from the mine be avoided, reduced, or offset.

11. Prior to the hearing QCC sought to amend its particulars to seek conditions requiring 100% of emissions from the mining operations and 10% of emissions from the transport and use of the coal to

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[16] As a question of fact the condition sought not 100% but 115% of the emissions from the mine be reduced, avoided or offset. This is because the particularised condition was for 96.44 million tonnes of carbon dioxide equivalent (Mt CO2-e) emissions to be reduced, avoided or offset. This figure was calculated prior to expert evidence being available. The evidence from Dr Saddler, an expert on calculating greenhouse gas emissions who appeared for QCC at the trial, calculated the emissions to be 84.0 Mt CO2-e, so the particularised condition sought to avoid, reduce or offset emissions by 115%.

be avoided, reduced or offset.[17] The presiding member refused QCC's application to amend the particulars of the condition it was seeking at the beginning of the hearing.[18]

Refusal to allow submissions on matters inconsistent with particulars

12. At the commencement of QCC's closing submissions an argument arose as to QCC's ability to make submissions about conditions different from the condition particularised based on the evidence and the relevant statutory criteria. Mr Jackson QC urged the tribunal not to accept QCC's written submissions[19] and Mr Skoien, counsel for the EPA, joined in this submission.[20]

13. In reply to a statement by Mr Keim SC, that "but the tribunal says that it has already ruled [QCC is not] able to argue either the matter itself or the conditions that are dealt with in this document [QCC's written submissions], the presiding member stated:[21]

> Well, I thought I had made that ruling. … Mr Keim, I'm sorry, I'm not all that inclined to accept the document [QCC's written submissions] as an exhibit either. … So perhaps we can resume at 2 and that may give you an opportunity to recast your submissions.

14. The presiding member did not hand back QCC's written outline of argument, but counsel for QCC made no further oral submissions on the conditions that ought to be imposed based on the evidence and statutory criteria.

Evidence presented during the hearing

15. The evidence presented during the hearing was summarised at paragraphs [103]-[127] of QCC's outline of argument and the main point of relevance for the appeal is that all of the experts who appeared before the tribunal accepted (or at least did not dispute) that global warming and climate change were real and caused by anthropogenic emissions of greenhouse gases largely from the burning of fossil fuels. In addition, no party questioned this matter. QCC positively asserted it and both Xstrata and the EPA conceded it (or, at least, did not dispute it) during the hearing.

16. The presiding member did not question the science of climate change or global warming presented to him by the experts during the hearing.

17. The scientific evidence of global warming and climate change was set out in the uncontested evidence of Professor Lowe,[22] Professor Hoegh-Guldberg[23] and Dr Williams[24] presented during the hearing regarding these issues. Dr Saddler[25] also did not doubt the nature of greenhouse gas emissions contributing to global warming and climate change in his calculations of emissions from the mine. Similarly, Mr Keogh did not doubt the nature of global warming and climate change in his evidence regarding greenhouse offsets.[26]

18. None of QCC's witnesses were challenged in relation to these aspects of their evidence and none of the parties questioned the threat posed by global warming or climate change or the scientific certainty regarding climate change.

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[17] See the Application in a Proceeding filed on behalf of QCC (24 January 2007).
[18] Transcript, p 24, lines 7-11.
[19] Transcript, pp 145-146.
[20] Transcript, p 147, lines 1-12.
[21] Transcript, p 148, lines 42-57.
[22] Professor Ian Lowe, "A brief summary of the science of global warming and climate change" (15 January 2007), pp 3-7.
[23] Professor Ove Hoegh-Guldberg, "Likely ecological impacts of global warming and climate change on the Great Barrier Reef by 2050 and beyond" (19 January 2007), especially pp 7-10.
[24] Dr Stephen Williams, "Likely ecological impacts of global warming and climate change on the Wet Tropics World Heritage Area" (24 January 2007), especially paragraph [9].
[25] Dr Hugh Saddler, "Greenhouse gas emissions associated with the proposed Newlands Wollombi No 2 Project" (12 January 2007), pp 5 and 16.
[26] Mr Ben Keogh, "Greenhouse gas emission offset opportunities: Newlands Coal Mine Wollombi No 2 Surface Area Project" (15 January 2007).

19. The expert witnesses for Xstrata, Dr Turatti (a greenhouse emissions expert) and Mr Stanford (an economist), did not dispute the science of global warming or that the greenhouse gas emissions from the mine will contribute to it. The Joint Expert Report of Dr Turatti and Dr Saddler noted, "Dr Turatti agrees with the description of the global greenhouse effect given on page 5 of Dr Saddler's report."[27] Mr Stanford noted in his report for Xstrata that:

> There is now strong evidence to suggest that the world is growing warmer, the climate is changing and that this is related, at least in part, to anthropogenic causes. The emission of greenhouse gases, particularly carbon dioxide (CO_2), has increased significantly since the beginning of the industrial revolution, and as the overwhelming majority of climate change scientists suggest, this has created an 'enhanced greenhouse effect'. There is broad agreement that the way to address the problem is to reduce net emissions of greenhouse gases so as to stabilise and later reduce carbon concentrations in the atmosphere.[28]

20. It is also of some significance to note that, while the rules of evidence do not apply in the tribunal[29], the conduct of the hearing effectively applied the rules of evidence in relation to expert evidence. The presiding member made directions that "all evidence in chief is to be in affidavit form" and concerning the filing of expert reports and expert conferences. The expert witnesses complied with the practice direction No 11 of 2000. The hearing was also conducted on the normal basis of giving evidence: examination-in-chief; cross-examination; and re-examination. Professor Hoegh-Guldberg and Dr Williams, who dealt with the science of climate change and the impacts on the Great Barrier Reef and Wet Tropics, respectively, were not required for cross-examination. Professor Lowe was cross-examined by the EPA,[30] but no questions to him challenged his opinion 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.[31]

21. During the hearing, senior counsel for Xstrata, Mr Jackson QC, challenged Mr Norling's expertise in relation to the macro-economic issues and the economic impacts associated with climate change, as set out in the Stern Report.[32] This challenge did not extend to the accuracy of the macro-economics contained in the Stern Report itself or the scientific findings in the Stern Report, merely Mr Norling's summaries and application of the Stern Report.

22. In short, while the tribunal was not bound by the rules of evidence, the presiding members's directions on 27 November 2007, the tribunal's own practice direction No 11 of 2000, and the actual practise during the hearing were entirely consistent with the rules of evidence in relation to expert evidence. Experts generally limited their evidence to matters within their expertise and one witness was challenged for speaking outside his area of expertise. The tribunal upheld objections on this basis.[33]

Matters that occurred after the hearing

23. The hearing concluded on 1 February 2007. However, on 5 February 2007, the senior case manager for the tribunal wrote to the parties stating:

> … the President … has become aware of 2 documents which may be relevant to his decision. They are:
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> - *The Stern Review: A Dual Critique*, Vol 7 No 4, World Economics Journal, October-December 2006, pages 165-232.
> - *Climate Change 2007: The Physical Science Basis (Summary for Policymakers)*, Intergovernmental Panel on Climate Change Working Group 1 Fourth Assessment Report, Paris, February, 2007, pages 1-21.

[27] Joint Experts Report – Drs Fred Turatti and Hugh Saddler (18 January 2007), p 1.
[28] Affidavit of Jonathan Geoffrey Stanford (12 January 2007), p 3.
[29] Due to subs 49(2) of the *Land and Resources Tribunal Act* 1999 (Qld).
[30] Transcript, pp 127-134.
[31] Lowe, n 22, p 6, [13].
[32] Transcript, pp 65-88.
[33] Transcript, pp 65-78.

> In the circumstances, the President has directed that each party be given an opportunity to make any submissions concerning those 2 documents by 5:00pm this Friday 9 February 2007.
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> Any submissions that you may wish to make should be delivered or faxed to me, for passing on to the President.

24. The first document (the Carter-Byatt critique) was in two parts. The first part disputed the science of climate change as accepted by The Stern Review[34]. The second part criticised the economic analysis conducted in the Stern Review. The two parts were inter-related by the fact that the second part assumed that the criticisms made in the first part of the critique were valid. None of the authors were witnesses before the tribunal.

25. The second document referred to by the tribunal was a summary released by the Intergovernmental Panel on Climate Change (IPCC) of the first of three parts of the IPCC's Fourth Assessment Report (AR4). The IPCC is the leading international scientific body concerned with climate change and global warming. A number of expert witnesses relied upon the IPCC's Third Assessment Report, published in 2001, in their evidence concerning the scientific basis of climate change. Professor Lowe and Professor Hoegh-Guldberg foreshadowed the contents of the AR4 in their evidence.[35]

26. On 7 February 2007, Xstrata filed further submissions on *Gray v Minister for Planning & Ors* [2006] NSWLEC 720, to which QCC filed a reply on 9 February 2007.

27. Xstrata and QCC filed written submissions on the two documents raised by the tribunal on 9 February 2007. EPA filed late written submissions on Gray's Case and the documents raised by the Tribunal on 14 February 2007.

28. QCC submitted that the tribunal should not have regard to the Carter-Byatt critique in relation to the scientific evidence or economic impacts of global warming and climate change as it was contrary to the expert evidence presented during the hearing. QCC submitted that the tribunal could refer to the latest IPCC report as it confirmed and updated the expert evidence presented during the hearing.

29. However, Xstrata and the EPA both submitted that the tribunal could have regard to the Carter-Byatt critique to assert that there remains scientific uncertainty as to the potential causes and impacts of climate change.

30. On 14 February 2007, QCC filed a written submission concerning the fact that the submissions of Xstrata and the EPA raised matters which went beyond the evidence and that were not put to any of the expert witnesses called at the hearing, stating (footnote in original):

> QCC does not know how the Tribunal proposes to make use of the two documents or the submissions of Xstrata and the EPA; however, QCC raises the requirements in subs 49(1) of the *Land and Resources Tribunal Act 1999* that the Tribunal must observe the rules of natural justice[36] and must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it.

31. No further correspondence was received from the tribunal concerning this matter and the tribunal handed down its decision on 15 February 2007, dismissing QCC's objections and recommending the applications for the mines be granted without any conditions sought by QCC or any conditions addressing greenhouse gas emissions.

32. QCC appealed to the Court of Appeal on 14 March 2007.

GROUND 1: DENIAL OF NATURAL JUSTICE

33. At the trial the fact that anthropogenic emissions of greenhouse gases are causing climate change and pose a serious threat to the environment was not in dispute and was not questioned by the parties, the

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[34] Stern N, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2006).
[35] Lowe, n 22, p 6, [14]; and Hoegh-Guldberg, n 23, p 7, [23].
[36] Of possible relevance in these circumstances is the decision in *York v General Medical Assessment Tribunal* [2002] QCA 519; [2003] 2 Qd R 104.

expert witnesses or the presiding member. After the hearing had concluded, the presiding member raised two documents with the parties that "may be relevant" to his decision. He gave no indication as to how they were relevant, how he was intending to use them, or what findings of fact he might make based upon them.

34. QCC made a written submission to the tribunal on 14 February 2007, concerning the fact that it did not know how the tribunal proposed to make use of the two documents and raising the requirements in subs 49(1) of the *Land and Resources Tribunal Act 1999* that the Tribunal must observe the rules of natural justice. When making this submission, QCC also provided to the tribunal a copy of the decision in *York v General Medical Assessment Tribunal* [2002] QCA 519; [2003] 2 Qd R 104.

35. By providing a copy of the Carter-Byatt critique to the parties, the tribunal appears to have been avoiding the breach of natural justice that occurred in *Wall v Windridge* [1999] 1 Qd R 329. In that case, the applicant for a mining lease under the MRA supplied information to the mining warden, who received it privately without referring it to the appellant, who was an objector to the granting of the lease. The Court of Appeal found the mining warden breached the rules of natural justice by relying on material that came to his attention after the objections hearing which he did not raise with an objector.

36. However, merely providing a copy of two documents to the parties that "may be relevant" does not provide adequate notice to the parties of how the tribunal may use the documents in the context where one of the documents is wildly contrary to the issues in dispute between the parties and detailed expert evidence presented by them during the hearing. The Carter-Byatt critique was published in an economics journal and criticized an economics analysis in the Stern Review. Xstrata had challenged the macro-economic analysis of Mr Norling based on the Stern Review,[37] but Mr Stanford, Xstrata's own macro-economic expert, accepted it as "the major report on the economics of climate change"[38] and stated he agreed with it during cross-examination.[39] Mr Stanford agreed "absolutely" with the emphasis of the negative economic costs of business-as-usual policies in the Stern Review.[40] It was not obvious that the tribunal was concerned with anything more than the macro-economic issues raised in cross-examination of Mr Norling, and it was not apparent that the tribunal was questioning the entire basis of the science of climate change which was not in dispute at any stage between the parties nor raised with any of the expert witnesses.

37. The reference to the IPCC summary report was understood by QCC to be further confirmation of the science of climate change. However, the presiding member considered the IPCC summary report and formed adverse views based on a graph presented in the report that he considered was not well explained and did not support the IPCC's concerns about anthropogenic climate change inducing many serious changes in the global climate system.[41] Such finding was, in no way, obvious on the known material, particularly, when the presiding member had asked no questions during the hearing of the expert witnesses who might have responded to his concerns in this regard.

38. Jerrard JA (with whom McMurdo P and Davies JA agreed) stated in *York v General Medical Assessment* [2003] 2 Qd R 104 at 115, [30]:

> I agree with the conclusion of the learned primary judge that a number of the possible grounds on which the Tribunal may have reached its decision could fairly be described as an adverse conclusion arrived at which would not obviously be open on the known material (*Commissioner for ACT Revenue v Alphaone* at FCR 591-592; *Somaghi v Minister for Immigration* at FCR 108 and 120, that last reference being to observations by Gummow J citing remarks of Deane J in *Kioa v West* at CLR 633). Those judgments emphasise the importance in procedural fairness of giving

[37] Transcript, pp 65-88. The essence of the challenge was Mr Norling's application of the Stern Review. No challenge was made of the accuracy of the review itself.

[38] Affidavit of Mr Jonathon Stanford (12 January 2007), p 4.

[39] Transcript, p 56, lines 25-38.

[40] Transcript, p 56, lines 30-31.

[41] *Re Xstrata Coal Queenslands Ltd & Ors* [2007] QLRT 33 at [17]-[18].

> an opportunity to present information or argument on a matter not already obvious but in fact regarded as important by the decision maker.

39. Jerrard JA cited the judgment of Gibbs CJ in *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666 in support of this principle:[42]

> Upon examination it will be seen that all of these cases decide, not that reasons must be given for a decision finally reached, but that a person or body which is considering making a decision which will adversely affect another should generally give notice to that other of the reasons why the proposed action is intended to be taken so that the person affected will have a fair opportunity to answer the case against him.

40. The presiding member's findings doubting the existence of anthropogenic climate change in the proceedings below were not obvious on the known material, particularly, in light of the fact that an entire hearing had been conducted on a different basis, in which numerous expert witnesses called who were not challenged by any party or the tribunal in their views that anthropogenic emissions of greenhouse gases are causing climate change and pose a serious threat to the environment.

41. The manner in which the presiding member proceeded involved a serious breach of natural justice. Once it is shown that there is a right to procedural fairness in the form of an opportunity of being heard in a proceeding before a tribunal, a person aggrieved is ordinarily entitled to relief against adverse consequences of being denied that right without having to establish in detail how the opportunity would have been availed of.[43]

GROUNDS 2-4: ROLE OF PARTICULARS

42. The presiding member appeared to rule that s 268(3) of the MRA prevented QCC from making submissions inconsistent with its particulars of the conditions it sought both in relation to the hearing under the MRA and the objections hearing under the EP Act. The presiding member appeared to base his reasoning, on this issue, on *ACI Operations v Quandamooka Land Council* [2002] 1 Qd R 347 (*ACI*).

43. The presiding member's refusal to allow QCC to make submissions on the conditions that ought to be imposed involved an error of law that led to a breach of natural justice concerning the right to be heard.

44. The first reason why the presiding member's refusal to allow QCC to make submissions on the conditions that ought to be imposed involved an error of law is that s 268(3) of the MRA does not prevent submissions being made on matters raised in the grounds of objection but inconsistent with particulars provided pursuant to the direction of the tribunal. The presiding member's reasoning involved two separate errors of law: a misunderstanding of what constitutes "the objection" in s 268(3); and the function of particulars.

45. *ACI* had no relevance to the ability of QCC to present its case in the 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, construing s 268(3) of the MRA in *ACI*, held that the objector could not do so.

46. 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 wished to advocate and the evidence supporting those conditions, clearly, came within the objection and, in particular, grounds 1-4 set out above. In that respect, the objection and the grounds stated therein were analogous to a pleading. Effectively, s 268(3) prohibits seeking to make out a case not

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[42] *York v General Medical Assessment* [2003] 2 Qd R 104 at 115, [32].

[43] *Queensland Police Credit Union Ltd v Criminal Justice Commission* [2000] 1 Qd R 626, citing *Wall v Windridge* [1999] 1 Qd R 329 at 336–337 (Pincus JA) and 340 (Moynihan and Ambrose JJ).

raised (or pleaded) in the statutory objection. There is no basis in law to equate particulars of grounds with the grounds themselves.

47. 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 function of particulars was explained in *Mummery v Irvings* (1956) 96 CLR 99 at 110[44] and in *Dare v Pulham* (1982) 148 CLR 658 at 664.[45]

48. The tribunal has discretionary powers with regard to adducing evidence outside the particulars. However, that discretionary power does not enliven subs 268(3) nor 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), remain what they were 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. Therefore, subs 268(3) provided no lawful basis for not allowing counsel for QCC from making submissions in support of such conditions as the evidence supported.

49. 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. Since the matters were live before the tribunal and advocacy by QCC was not precluded by subs 268(3), the refusal to allow QCC to make such submissions was unjustified.

50. 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 proceedings before the tribunal, where the conditions sought were less onerous than those sought in the particulars.

51. Third, the conditions were sought in both aspects of the hearing: that under the MRA and that under the EP Act. Even if the tribunal considered 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.

52. Fourth, 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 fell short in terms of the quantum of the offsets required.

53. In the light of these matters the presiding member should have considered what conditions were made out by the evidence without considering itself bound to recommend conditions exactly in accord with those originally particularized or not at all. Accordingly, the presiding member should have allowed counsel for QCC to make submissions in support of such conditions as QCC considered were made out by the evidence.

54. The presiding member's refusal to hear counsel for QCC on the issue of what conditions were reasonable based on the evidence and the statutory provisions amounted to a breach of natural justice due to a legal error.

[44] Dixon CJ and Webb, Fullagar, and Taylor JJ.
[45] Murphy, Wilson, Brennan, Deane and Dawson JJ.

GROUND 5: THE TRIBUNAL'S STATUTORY FUNCTION

55. The presiding member appears to have failed to understand his statutory role under the MRA and EP Act. In making his recommendations, he appears to have proceeded on the mistaken basis that he was bound and required to consider only the condition particularised by QCC. This means he failed to properly exercise his discretions under the MRA and EP Act to recommend conditions that were relevant and reasonable based on the evidence presented to him and the statutory criteria.

56. Barwick CJ (which whom Murphy J agreed) stated in *Sinclair* at 479 that the function of the mining warden in recommending a mining lease be granted under the legislation prior to the MRA was "much greater than the mere oversight of the formalities of the application." Barwick CJ emphasized in *Sinclair* at 480 and 481 that the mining warden was not limited to considering only the objections raised by the objectors and that, quite apart from any objection, the mining warden's function under the legislation was to consider the substance of the application for a mining lease:

> … the warden failed to understand that irrespective of the interests of the objector or their number and, indeed, irrespective of the existence of an objection on that ground, he was bound to consider whether the granting of the application would prejudicially affect the public interest. … the warden failed to appreciate that, in order to warrant a recommendation of acceptance of the applications, it was not enough that the formalities for application had been observed. It was essential that there be material before him, quite apart from any objection, which would warrant an affirmative conclusion on the substance of the applications that the recommendations should be made. (emphasis added).

57. Barwick CJ also emphasized in *Sinclair* at 481 the importance of the hearing before the mining warden proceeding according to law and explained the role of the hearing, a role that remains unchanged under the MRA for the tribunal. Gibbs J and Stephen J agreed in *Sinclair* at 482 and 486, respectively, that the mining warden was not limited to considering only the objections raised by the objectors and that the warden had an independent role in deciding the application for a mining lease.

58. McMurdo J, in considering s 269 of the MRA in *Armstrong v Brown* [2004] 2 Qd R 345; [2004] QCA 80, stated at [15]:

> *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. What *Sinclair* shows is that the Tribunal should not recommend the grant of a mining lease unless the circumstances warrant that recommendation, having regard to the purposes for which the Crown should give a right to mine its minerals.

59. The presiding member appears to have only considered the condition particularised by QCC as requiring 100% offset of emissions.[46] He does not clearly state that he considered only the condition requiring offsetting 100% of emissions. However, at paragraph [22] he relied on Mr Stanford's evidence, who was *instructed* and in fact *assumed* that the particularised condition for the 100% offset would make the mine unviable.[47] On the basis of these instructions and this assumption Mr Stanford concluded the conditions sought by QCC would cause "carbon leakage" whereby the mining of coal would move to another country with less stringent regulations than Australia.[48]

60. The presiding member did not refer to the evidence of Mr Norling (which was accepted by Xstrata and not challenged on these points) that the estimated revenue from the mine will be $3.37b and total profit $1185m (subject to the proviso that Mr Norling did not know the value of the existing assets).[49]

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[46] Noting that, as explained in footnote 16, in fact the particularised condition sought a 115% offset of the actual emissions from the mining, transport and use of the coal from the mine.
[47] Affidavit of Jonathon Stanford (12 January 2007), p 2, [5], and pp 11-14.
[48] Affidavit of Jonathon Stanford (12 January 2007), pp 14-16.
[49] Mr Jon Norling, "Economic analysis of greenhouse emissions from the proposed extension of the Newlands Coal Mine, Wollombi No 2 Surface Area" (January 2007).

Mr Norling estimated 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".[50]

61. The presiding member also did not refer to the evidence of Mr Keogh that the costs of offsetting greenhouse gas emissions were currently between $5.75 and $15 per tonne of carbon dioxide equivalent. Consequently, the cost of offsetting the greenhouse gas emissions from the 1.363 millions tonnes of carbon dioxide equivalents (Mt CO2-e)[51] of emissions from the mining operation itself would cost between $7.8m and $20.4m. The cost of offsetting 10% of the emissions (totaling 8.258 Mt CO2-e) from the transport and use of the coal from the mine would be between $47.5m and $123.9m.

62. If the presiding member had correctly considered his duty to recommend relevant and reasonable conditions to the Minister, combining the cost of offsets in the evidence of Mr Keogh with Mr Norling's evidence could only have led him to conclude that offsetting the greenhouse gas emissions from the mining operation, itself, would not affect the economic viability of the mine. On the basis of this evidence he could also only have concluded that offsetting 10% of the emissions from the transport and use of the coal would also not have affected the economic viability of the mine.

63. As Gibbs J said in *Sinclair* at 482 in relation to the mining warden's duty:

> It is of course entirely a matter for the warden to determine what weight should be attached to the various considerations in favour of and against the granting of an application and to decide for himself whether his recommendation will be that the application should be granted or that it should be rejected.

64. The tribunal's function under the MRA and EP Act is very similar to the mining warden's function under the legislation in question in *Sinclair* and, similarly, the presiding member, ultimately, had a discretion not to recommend a condition be imposed to offset a reasonable amount of the greenhouse gas emission from the mine. However, by failing to consider any other amount of greenhouse emissions being offset other than the 100% particularised by QCC, he failed to understand the nature of his duty under the MRA and EP Act and erred in the exercise of his function under those Acts.

65. A related question to the function of the tribunal under the MRA and EP Act concerns the principles by which it ought to recommend that conditions be imposed on a mine. The tribunal's powers to recommend conditions under the MRA and EP Act are broad.

66. 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".[52]

67. 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."[53] The object of the EP Act, stated in s 3, is ecologically sustainable development.

68. The statutory criteria required to be considered by the tribunal under paragraphs 269(4)(j), (k) and (l) of the MRA and s 223 of the EP Act, and the objects of both Acts, collectively and individually, are sufficient to support the proposition that conditions may be imposed requiring reduction, avoidance or

[50] Norling, n 49, p 21.
[51] "Carbon dioxide equivalents" is the standard unit for reporting greenhouse gas emissions. See the report of Professor Lowe, n 22, p 9, footnote 11.
[52] *The Macquarie Dictionary* (Revised Edition, 2001), p 87.
[53] Section 5 of the EP Act.

offsetting of greenhouse gas emissions from the mining, transport and use of coal from this project as both relevant and reasonable[54] in the circumstances to the grant of a mining lease or an environmental authority for mining.[55] The tribunal failed to exercise its discretion in this manner and, thereby, failed to perform its functions under the MRA and EP Act.

GROUNDS 6-7: DISCERNABLE ENVIRONMENTAL IMPACT

69. The presiding member accepted that the mining, transport and use of the coal from the mine would produce 5.6 million tonnes per annum of greenhouse gas emissions for 15 years contributing to a global annual output of 34,000 million tonnes per annum of greenhouse gas emissions.[56] Xstrata and the EPA had disputed that the tribunal ought to consider the greenhouse emissions from the transport and use of the coal from the mine, but the presiding member appears to have ruled in QCC's favour on this point.[57]

70. In light of this finding, the presiding member's requirement to show "discernable harm" or a "demonstrated impact on global warming or climate change"[58] must mean he required proof of more than greenhouse emissions contributing to global warming and climate change. That is, he appears to have required that one could show that this particular adverse impact, on this particular day, at this particular spot, was cased by these emissions. QCC submits that proof of greenhouse emissions from the mine contributing to global warming and adverse climate change is sufficient to enliven the criteria in s 269(4)(j), (k) and (l) of the MRA and s 223(c) of the EP Act as long as one can infer that an adverse process is contributed to (made worse) albeit in ways which may not be able to be discerned or demonstrated.

Paragraph 269(4)(j) MRA – "any adverse environmental impact"

71. "Impact" is not defined in the MRA or EP Act. The ordinary meaning of "impact", in the context of paragraph 269(4)(j) of the MRA, is "influence or effect [exerted by a new idea, concept, ideology, etc.]".[59] The question 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".

72. The natural and ordinary meaning of "any adverse environmental impact" in paragraph 269(4)(j) of the MRA allows consideration of greenhouse emissions contributing to the global phenomena of climate change without demonstrating a further "discernable impact". The decisions of the Full Federal Court in *Minister for the Environment and Heritage v QCC* (2004) 139 FCR 24 at [53]-[57][60]

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[54] It is trite law that relevance and reasonableness are the traditional tests limiting powers to impose conditions on development: cf. *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554; *Maroochy Shire Council v Wise* [1999] 2 Qd R 566 at 569-571.

[55] 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].

[56] *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 at [12].

[57] The figures of 5.6 and 34,000 million tonnes per annum of greenhouse gas emissions were taken from the report of Professor Lowe, n 22, pp 9-10, [22]-[27], who in turn relied upon the report of Dr Saddler, n 25, pp 14-16.

[58] *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 at [21]-[23]. The ordinary meaning of "discernible" is capable of being discerned. The ordinary meaning of "discern" is: 1. to perceive by the sight or some other sense or by the intellect; see, recognise, or apprehend clearly. 2. to distinguish mentally; recognise as distinct or different; discriminate … 3. to distinguish or discriminate. The relevant ordinary meaning of "demonstrate" is: 1. to make evident by arguments or reasoning; prove. 2. to describe and explain with the help of specimens or by experiment. 3. to manifest or exhibit: *The Macquarie Dictionary* (Revised 3rd ed, The Macquarie Library, 2001), pp 542 and 510.

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

[60] Black CJ, Finn and Ryan JJ.

and the majority of the United States Supreme Court in *Massachusetts v Environmental Protection Agency* 549 US __ (2007)[61] are persuasive in this regard.

73. The majority in *Massachusetts v EPA* accepted the fact that anthropogenic global warming is real based on the scientific evidence presented to them. In relation to the causal link between emissions of greenhouse gases from automobiles in the United States and global warming, the majority reasoned:[62]

> *Causation*
>
> EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions "contributes" to Massachusetts' injuries.
>
> EPA nevertheless maintains that its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them. For the same reason, EPA does not believe that any realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries. That is especially so because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease.
>
> But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. …
>
> And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere [it] accounts for more than 6% of worldwide carbon dioxide emissions. … Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.
>
> *The Remedy*
>
> While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. … Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

74. As the legislation in issue in *Massachusetts v EPA*, which referred to "any air pollutant", paragraph 269(4)(j) of MRA refers to "any" 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, which was in dispute in the Nathan Dam Case. It is submitted that the legislature has acknowledged that impacts of the mining operation may be many and varied, direct and indirect.[63] Read in context and in light of the objects of the Act, "any" means in whatever quantity or number, great or small.[64]

75. QCC submits that the presiding member erred in requiring proof of more than the amount of greenhouse gas emissions from the mine contributing to global warming and the generally adverse impacts of climate change to enliven paragraph 269(4)(j) of MRA.[65]

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[61] At p 20 of the majority judgment, per Stevens, Kennedy, Souter, Ginsburg, and Breyer JJ.

[62] *Massachusetts v Environmental Protection Agency* 549 US __ (2007) at pp 20-22 of the majority judgment (per Stevens, Kennedy, Souter, Ginsburg, and Breyer JJ).

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

[64] "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?*

[65] The impacts of climate change and the contribution made by the emissions of the mine to global warming were addressed by Professor Lowe, n 22, pp 6-11, particularly at [23]-[24]. The unchallenged evidence of Professor Hoegh-Guldberg, n 23, and Dr Williams, n 24, addressed the impacts of climate change on the Great Barrier Reef and Wet Tropics, respectively.

Paragraph 269(4)(k) MRA and s 223(c) EP Act – "the public interest"

76. Paragraph 269(4)(k) of the MRA requires the tribunal to consider whether the "public right or interest will be prejudiced" by the grant of the mining lease and s 223(c) of the EP Act, which requires consideration of the "standard criteria" under the Act, similarly requires the "public interest" to be considered.

77. The starting point for a consideration of questions of "public right or interest" in this context is *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 479-480 and 487.[66] Jacobs J stated at 487:

> 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.

78. The principles that the concept of the "public interest" is of the widest import was summarised by Tamberlin J in *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at 75-76, [8]-[12] where his Honour stated:[67]

> 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. …

79. This reasoning was not questioned on appeal to the High Court in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45, where Hayne J also noted 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*[68]:
>
> '[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'[69]. (Emphasis added)

80. QCC submits 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.[70] 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.

81. QCC submits that the presiding member erred in requiring proof of more than greenhouse gas emissions contributing to climate change before the "public interest" in paragraph 269(4)(k) of the MRA and s 223(c) of the EP Act was enlivened.

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[66] Respectively, per Barwick CJ and Jacobs J. McMurdo J (with the concurrence of McPherson and Jerrard JJA) referred to *Sinclair* in *Armstrong v Brown* [2004] 2 Qd R 345 at [15] as still relevant to interpreting the MRA.

[67] 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.

[68] (1989) 168 CLR 210 at 216.

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

[70] 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.

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

82. Section 269(4)(l) of the MRA is an extremely wide consideration that is limited only by the structure and objects of the Act.[71] Clearly, there must be a *good* reason, as opposed to a reason that is extraneous to the purposes of the Act.[72] 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."

83. 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.

84. 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.

85. 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.[73]

86. QCC submits that the presiding member erred in requiring proof of more than greenhouse gas emissions contributing to climate change before the "any good reason has been shown for a refusal" in paragraph 269(4)(l) of the MRA was enlivened.

Section 223(c) EP Act – the standard criteria

87. The consideration of the principles of ESD under the EP Act also does not appear to require a specific causal link to be established between the greenhouse emissions from the mine and a discernable environmental effect. The objects of the EP Act are stated in s 3 is to protect Queensland's environmental within the context of ecologically sustainable development (ESD). As the tribunal was exercising a power under the EP Act, s 5 placed an obligation on the tribunal to "perform the function or exercise the power in the way that best achieves the object of this Act."

88. Section 223 states the matters to be considered by the tribunal in an objections hearing. These include the "standard criteria" which are defined in the dictionary of the EP Act to included "the principles of ecologically sustainable development as set out in the 'National Strategy for Ecologically Sustainable Development". There are seven ESD principles set out in the National Strategy for ESD, of which the first three are:

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[71] 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.

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

[73] This consideration has also been discussed in slightly different and more general terms above.

- 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

89. The first and third principles of ESD involve weighing economic and global considerations in decision-making. 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 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.

90. Global warming is a complex, global problem and, consequently, refusing to consider the contribution of greenhouse gases to global warming and climate change because no causal link can be shown between the specific emissions and any specifically discernable environmental effect is 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.

91. 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.

92. The second principle of ESD is now widely known as "the Precautionary Principle".[74] The presiding member's apparent refusal to consider the impacts of greenhouse gas emissions from the mine contributing to climate change because the impacts of climate change and the contribution of these particular emissions are uncertain, was inconsistent with this principle.[75] In fact, the presiding member appears to have required much more than certainty, generally considered. He appears to have required specific causal links between the emissions of this mine and specific impacts at some place and time on the environment.

93. QCC submits that the presiding member misconstrued these principles by requiring proof of more than greenhouse gas emissions contributing to climate change before the power to recommend reasonable conditions to reduce, avoid or offset the mine's emissions was enlivened

CONCLUSION

94. There were clear error of laws in the proceedings below that could have materially affected the tribunal's decision. The appeal should be allowed and the matter remitted to a differently constituted tribunal to be dealt with according to law.

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Counsel for the appellant
11 April 2007

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[74] See particularly, *Telstra v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10.
[75] See the observations of Pain J in *Gray v Minister for Planning* [2006] NSWLEC 720 at [131].