

COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: CA2235/07
NUMBER: 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

SECOND RESPONDENT'S OUTLINE OF ARGUMENT

1. Preliminary

1.1 This is an Appeal, pursuant to Section 67(1) of the *Land and Resources Tribunal Act* 1999 (the "LRT Act") against the decision of the Land and Resources Tribunal (the "Tribunal") on 15 February 2007 whereby the Tribunal determined that:

- (a) the additional surface area application, under Section 275 of the *Mineral Resources Act* 1989 (the "MR Act") be recommended for grant in whole, without any of the conditions sought by the objectors, Queensland Conservation Council Inc (the "Appellant") and Mackay Conservation Group; and

OUTLINE OF ARGUMENT
Filed on behalf of the Second Respondent

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- (b) the related environmental authority (mining lease) application, under Section 153 of the *Environmental Protection Act* 1974 (the "EP Act") be recommended for grant on the basis of the draft environmental authority for that application, without any of the conditions sought by the objectors¹.
- 1.2 Under Section 67 of the LRT Act, an appeal to this Court may only be made "*on a question of law*".
- 1.3 Notwithstanding that the Notice of Appeal filed in this Court on 14 March 2007 identifies seven grounds of Appeal that are said to raise questions of law, the Appellant's Outline of Argument dated 11 April 2007 identifies the following four issues as lying "*at the heart*" of this Appeal²:
- (a) whether the Appellant was denied natural justice by the Tribunal's "*findings doubting the existence of anthropogenic climate change*³" (that is, findings doubting that anthropogenic emissions of green house gases cause climate change and pose a threat to the environment);
- (b) whether the Tribunal misconceived the role of particulars of objection in refusing to hear closing submissions from the Appellant in relation to any condition that ought to be imposed on the mining activities that differed from the condition specified in the particulars;
- (c) whether the Tribunal misunderstood its role in assessing the merits of the applications and the relevant and reasonable conditions to be recommended (in other words, the Tribunal limited its consideration of the matter to the consideration of the condition specified in the particulars of objection); and

¹ See Page 743 of the Record of Proceedings. The background facts of the case are amply summarised by the Tribunal in paragraphs [1] to [3] of the Reasons for Judgment of 15 December 2007 (as amended on 19 February 2007).

² See paragraphs 3(a) to 3(d) of the Appellant's Outline of Argument dated 11 April 2007.

³ See paragraph 40 of the Appellant's Outline of Argument dated 11 April 2007.

- (d) whether the Tribunal erred in requiring demonstration of a causal link between the green house gas emissions from the proposed mining activities and a discernable environmental impact, when, relevantly, considering the matters listed in Sections 269(4)(j), 269(4)(k) and 269(4)(l) of the MR Act and Section 223(c) of the EP Act.
- 1.4 The Second Respondent accepts that this Appeal ought to be allowed if there is apparent in the Tribunal's decision an error on a question of law that might materially have affected the decision that was reached by the Tribunal.⁴
- 1.5 In short, the Second Respondent submits that the issues raised by the Appellant in this Appeal:
- (a) simply try to relitigate the factual matters raised for the Tribunal's determination at first instance;
 - (b) do not reveal any error on the part of the Tribunal;
 - (c) do not reveal any error on a question of law that might materially have affected the Tribunal's decision;
 - (b) stem from misunderstandings of the Tribunal's Reasons for Decision published on 15 February 2007 (and amended on 19 February 2007).

2. Alleged Departure from the Unchallenged Evidence

- 2.1 The Appellant complains that the Tribunal erred in departing "*from the unchallenged expert evidence presented at the hearing... that anthropogenic emissions of green house gases are causing climate change imposes serious threat to the environment*". At the heart of this complaint is the apparent suggestion that the Tribunal found that

⁴ See *HA Bachrach Pty Ltd & Ors v Caboolture Shire Council* (1992) 80 LGERA 230 at 237-238.

anthropogenic emissions of green house gases are not causing climate change and do not pose a serious threat to the environment.

- 2.2 Putting aside the question of whether or not such “*departure*” by the Tribunal could constitute a denial justice, the Appellant’s complaint is unfounded simply because the Tribunal made no such finding that departed from the evidence present at the hearing. The Tribunal did not make a finding that anthropogenic emissions of green house gases are not causing climate change and do not pose a threat to the environment.
- 2.3 While the Tribunal did, after the hearing, identify, bring to the parties attention, and consider, two further documents (not mentioned at trial) in relation to the causal link between global warming induced climate change and green house gas emissions, and the impacts of such climate change, the Tribunal simply did not make a finding that disputed either the causal link between anthropogenic green house gas emissions and climate change or the threat that climate change poses to the environment⁵.
- 2.4 It is quite apparent from the reasoning of the Tribunal that, as one would expect, the key focus for the Tribunal’s consideration of this case was the absence of any causal link between the undoubted green house gas emissions from the proposed mining activities and either global warming or climate change.
- 2.5 As is made clear by contents of paragraphs 24, 25 and 28 of the Appellant’s Outline of Argument dated 11 April 2007, the Appellant was well aware of the effect of the two additional documents identified by the Tribunal and, in response to the Tribunal’s request for further submissions in respect of those two documents, the Appellant:
- (a) did not seek further time to consider the matter;
 - (b) did not ask for further opportunity to call evidence or make further submissions; and

⁵ The import of the two additional documents (so far as the Tribunal’s Reasons reveal) appears to be limited to consideration of the extent of the contribution of greenhouse gas emissions to global warming and climate change and the consequences of that global warming and climate change. These were two matters that were not “conceded” by the Respondents at the hearing. However, given the absence of any causal link between the

(c) did bring to the Tribunal's attention its view that the contents of the two documents differed from the expert evidence presented during the hearing.

2.6 In all of the circumstances, there has been do denial of natural justice as a result of the use by the Tribunal of the two additional documents.

3. Particulars of Objection and the Tribunal's Statutory Function

3.1 Both of these issues raised by the Appellant relate to the refusal by the Tribunal to allow the amendment of the Appellant's particulars of its objection. Initially the Appellant particularised its objection in such a way that it sought a condition requiring the avoidance, reduction or offset of 100% of the green house gas emissions from the proposed mining activities⁶. However, during the hearing, the Appellant subsequently sought to amend its particulars of objection so that the proposed condition required avoidance, reduction, or offset of just 10% of the green house gas emissions from the proposed mining activities.⁷

3.2 The Appellant complains that, following the refusal of this application to amend the particulars of objection⁸, the Tribunal erred in:

(a) not allowing the Appellant to make closing submission as if the particulars of objection had, in fact, been amended (contrary to the ruling of the Tribunal); and/or

emissions from the proposed mining activities and the phenomena of global warming and climate change, they were also two matters that were not directly material to the Tribunal's ultimate decision.

⁶ With these green house gas emissions identified as including the emissions from the mining activities themselves as well as the emissions from transportation of the mined material and the use of that mined material.

⁷ Again, with green house emissions from mining activities to include emissions from mining activities themselves and emissions from transportation and use of the mined material.

⁸ There is no complaint that the refusal of the amendment was improper.

- (b) not giving due consideration to all potential reasonable and relevant conditions, including the condition for which the Appellant would have agitated if its particulars of objection had in fact been amended.

- 3.3 It is respectfully submitted that the first of the alleged errors arises from a misunderstanding of both the role of an objector in objection hearings and the effect of the particulars of objection. Quite apart from the constraints ordinarily imposed upon litigants (in adversarial proceedings) arising from particularisation of the case to be adduced (and met)⁹, the particular statutory provisions relating to objections hearings under the MR Act and the EP Act make it clear that objectors cannot complain of a denial of natural justice if they are prevented from adducing evidence, or making submissions, in respect of a ground of objection that differs from the ground of objection duly lodged¹⁰. Accordingly, given the refusal of the application to amend the particulars of the Appellant's objection, there is no denial of natural justice rising from the obvious consequence of that refusal, being that the Appellant was restricted to making submissions in respect of its particularised grounds of objection¹¹.
- 3.4 The second complaint by the Appellant in respect of the way in which the particulars of objection were dealt with by the Tribunal is able to be dealt with by the Second Respondent relatively briefly. It is quite erroneous to assert that the Tribunal misunderstood either the role of particulars or the role of the Tribunal in failing to consider other possible conditions in respect of avoidance, reduction or offset of green house gas emissions, because the Tribunal clearly did consider such other possible conditions.
- 3.5 In paragraph 9 of the Reasons for Judgment¹² the Tribunal noted the refusal of the Appellant's application to amend its particulars of objection. However, in paragraph 10 of the Reasons for Judgment¹³ the Tribunal immediately noted that the objection by Mackay Conservation Group Inc (in identical terms to the original objection by the

⁹ See, for instance, *Mummary v Irvings Pty Ltd* (1956) 96 CLR 99.

¹⁰ See Section 268(3) of the MR Act and Section 218 of the EP Act.

¹¹ See *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* (2002) 1 Qd R 347.

¹² See page 747 of the Record of Proceedings.

¹³ See page 747 of the Record of Proceedings.

Appellant) was not particularised and that, accordingly, it “*sought the imposition of unspecified “conditions” to avoid, reduce or offset*” green house gas emissions. Then, importantly, in making its findings of fact in respect of the objections by the Appellant and Mackay Conservation Group Inc, the Tribunal determined, in paragraphs 22 and 23 of the Reasons for Judgment¹⁴, that “*it would not be appropriate in ... to impose on the grant of this mining lease additional Surface Area Application or Environmental Authority Application, conditions as to the avoiding, reduction, or offsetting of [green house gas emissions]*”.

3.6 Hence, it is quite clear that, irrespective of the specific limitations placed upon the Appellant in making submissions in the case, the Tribunal did not similarly limit its own consideration of the matters raised by the two applications and, as a matter of fact, determined that:

(a) the absence of any causal link between the green house gas emissions from the proposed mining activities and global warming and climate change did not support the imposition of the condition requiring of the avoidance, reduction or offset of green house gas emissions; and

(b) quite apart from the absence of this causal link, any such condition would have potential to drive wealth and jobs overseas and cause serious adverse economic and social impacts for the State of Queensland.

3.7 It is respectfully submitted that the Appellant’s complaints about the way in which the Tribunal dealt with the particulars of objection and the Tribunal’s role in determining the two applications do not reveal any error of law that might materially have effected the Tribunal’s decision.

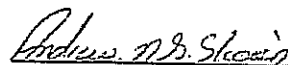
4. Discernable Environmental Impact

4.1 It is respectfully submitted that there is no substance to the Appellant’s complaints about the way in which the Tribunal dealt with the evidence concerning green house

¹⁴ See page 750 of the Record of Proceedings.

gas emissions, global warming and climate change. Putting aside for the moment the fact that the complaints by the Appellant do not raise any allegation of an error on a question of law, it is quite apparent that the Tribunal made no error at all.

- 4.2 The Tribunal did not find that:
- (a) the proposed mining activities would not emit green house gases; or
 - (b) there is no link between green house gas emissions and global warming or climate change.
- 4.3 Rather, the Tribunal's refusal to impose conditions to avoid, reduce or offset green house gases was based upon the absence of any evidence to show that there would be any effect (let alone any significant effect) upon either global warming or climate change as a result of the green house gases that would be emitted from the prosed mining activities.
- 4.4 It is submitted that the conclusions of the Tribunal in respect of green house gas emissions, global warming, climate change, adverse economic and social impacts, arbitrary conditions requiring avoidance, reduction or offset of green house gases, and the absence of universally applied policies for green house gas production, all indicate that the Tribunal properly exercised its functions under Sections 269 of the MR Act and 223 of the EP Act.
- 4.5 The conclusions of the Tribunal all deal with matters of fact and do not reveal any error (let alone any error on a question of law).



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9 July 2007