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 REPLY

QUESTIONS OF LAW

Form

1. The first respondent avers that "the Appellant's Outline of Argument fails to identify the questions of law which this Honourable Court is asked to determine" and "the precise question for consideration by the Court has not been identified by the Appellant"[1] by reference to decisions of the Federal Court.[2] Those decisions involved appeals from the Administrative Appeals Tribunal (AAT) under Order 53 of the *Federal Court Rules 1979*, of which rule 3(2) states:

> (2) The notice of appeal shall be signed by the applicant or his solicitor and shall state:
> (a) the decision of the Tribunal from which the appeal is brought, the members constituting the Tribunal and the date when the decision was made;
> (b) the question or questions of law to be raised on the appeal;
> (c) the order sought; and
> (d) briefly, but specifically, the grounds relied upon in support of the order sought.

2. The form for appeals to the Court differs from the form required for appeals to the Federal Court from the AAT under the *Federal Court Rules*. The right of appeal to the Court under s 67(1) of the *Land and Resources Tribunal Act 1999* is "only on a question of law" but the form for the appeal is stated in r 747(1) of the *Uniform Civil Procedure Rules 1999* (UCPR) as follows:

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[1] First respondent's outline at [1] and [17].

[2] *TNT Skypak International (Aust) Pty Ltd v FCT* (1988) 82 ALR 175 at 178 (Gummow J); *Australian Telecommunications Corporation v Lambroglou* (1990) 12 AAR 515 at 524 (Ryan J); *Birdseye v ASIC* [2003] FCAFC 232; (2003) 76 ALD 321 at 325 (Branson and Stone JJ with whom Marshall J agreed); *Comcare v Etheridge* (2006) 149 FCR 522 at 526-530 (Branson J with whom Spender and Nicholson JJ agreed); *HBF Health Funds Inc v Minister for Health and Ageing* (2006) 149 FCR 291 at 292-293 (Spender, Branson and Siopis JJ). The appellant would add to this list *Ergon Energy Corp Ltd v FCT* (2006) 153 FCR 551 and note the latitude given by Sundberg and Kenny JJ at 565 [51] to "inelegant" drafting of questions of law that did not "expressly state any question at all" but whose "purport was, however, tolerably clear" (noting the dissenting views of Gyles J at 570-573).

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> (1) A notice of appeal must be in the approved form and state—
> (a) whether the whole or part of the decision is appealed from; and
> (b) briefly and specifically the grounds of appeal; and
> (c) the decision the appellant seeks.

3. The Notice of Appeal filed by the appellant on 14 March 2007 complied with the approved form, Form 64 (Version 4), and stated the "briefly and specifically the grounds of appeal" in which the questions of law the appellant sought to raise were identified in the context of the manner in which the presiding member is alleged to have erred. By way of example, the question of law in grounds 1 and 2 of this appeal may be stated as: What, in the circumstances of the hearing before the tribunal, was the minimum content of the requirement "to observe natural justice" as that phrase is used in s 49 of the *Land and Resources Tribunal Act 1999*?[3]

No challenge to findings of fact

4. The respondents submit that the grounds of appeal do not raise questions of law but merely challenge findings of fact. That submission is not supportable by reference to the grounds of appeal.

5. In relation to grounds 1 and 2, the issues involve the construction of s 49 of the *Land and Resources Tribunal Act 1999*, in particular the effect of a technical legal term, "natural justice", which is eminently a question of law.[4] It is not necessary to consider the first respondent's submissions[5] on the question as to whether a misunderstanding of what is required by the common law to afford natural justice is an error of law because s 49 imposes a statutory obligation on the tribunal to afford natural justice. If the tribunal has misunderstood the effect of that legal obligation by misconstruing s 49, that raises a question of law.

6. Grounds 3, 5, 6 and 7 also relate to errors in statutory construction, which raise questions of law. The legal effect of particulars, raised by grounds 2, 3 and 4, is also clearly a question of law.[6]

BREACH OF NATURAL JUSTICE

The factual context

7. The first respondent submits that the appellant's grounds of appeal exceed the right of appeal against a decision of the tribunal "only on a question of law" and declines to traverse paragraphs 5-32 of the appellant's outline because they involve "a detailed

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[3] Adopting a similar approach to Gummow J in *TNT Skypak International (Aust) Pty Ltd v FCT* (1988) 82 ALR 175 at 183, where his Honour stated a question of law in that case in the following terms: "The question of what (on facts as found) is income for the purposes of the Tax Act is as much, in my view, a question of law as the question of what is income and what is capital in a dispute concerning the respective rights of life tenant and remainderman." Similarly, see *Comcare v Etheridge* (2006) 149 FCR 522 at 530 [31] per Branson J.

[4] *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78-79 (Isaacs J); *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287-288 per Neaves, French and Cooper JJ, approved in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395-397 and *Yu Feng Pty Ltd v Maroochy Shire Council* [2001] 1 Qd R 306 at 334-336 (Fitzgerald P) and 342-343 (Pincus JA).

[5] First respondent's outline at [12]. As the first respondent notes, in *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 at 31-32 Gray ACJ and North J found an allegation of denial of procedural fairness raises a question of law but Gyles J dissented at 45-46.

[6] Two well-known authorities on the role and legal effect of particulars cited previously in the appellant's outline are *Mummery v Irvings* (1956) 96 CLR 99 at 110 and *Dare v Pulham* (1982) 148 CLR 658 at 664.

reconsideration of the factual matrix of evidence before the Tribunal."[7] This is despite the first respondent conceding that "what is the content of a duty to act fairly depends on the circumstances of a case"[8] with reference to *Kioa v West* (1985) 159 CLR 550 at 585 per Mason J.[9] The first respondent's submission, which the appellant understands to amount to a suggestion that the factual circumstances of the proceedings below are not relevant for the Court to consider due to the limited nature of the appeal "on a question of law", does not accord with the approach taken by the Court in previous appeals under the Act.[10] In *ACI Operations v Quandamooka Land Council* [2002] 1 Qd R 347 at 352-353[11] and *Armstrong v Brown* [2004] 2 Qd R 345 at 346-350,[12] the Court considered the factual matrix of the proceedings before the tribunal to determine whether a ground of appeal was made out. Indeed, as illustrated by *Armstrong v Brown* at 349-350, it will normally be impossible to consider whether the tribunal has misconstrued the requirements of natural justice afforded by s 49 of the Act without understanding the factual circumstances of the case that are said to show the breach.[13] That is the purpose of setting out the circumstances of the proceedings below in paragraphs 5-32 of the appellant's outline.

8. Questions of law cannot be considered as hypothetical points in isolation from the facts of a case. *ACI Operations* and *Armstrong v Brown*, illustrate this point as does *Wise v Maroochy Shire Council* [1999] 2 Qd R 566, where the Court considered the lawfulness of town planning conditions in their factual context in an appeal on an error of law from the Planning and Environment Court.

9. Similarly, as all parties accept[14,15] that the appeal should only be allowed if it appears the tribunal erred on question of law that could have materially affected the tribunal's decision, the questions of law upon which the appeal is based cannot be divorced from the tribunal's reasons and the factual circumstances of the case.

10. Even where an administrative decision-maker or trial court quotes the relevant statutory provisions or legal test for determining an issue, it is necessary to read the whole of their reasons and understand the facts of the case to determine whether the correct approach was taken in substance not merely in form. *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 is an example of this. There, the Mining Warden expressly referred to the "public interest" but, read as a whole, his reasons indicated he misunderstood the concept and, consequently, his recommendation was set aside. Another example is *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 at 114,

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[7] First respondent's outline at [15].
[8] First respondent's outline at [18].
[9] See also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2006) 231 ALR 592 at 598 [26] and the extensive consideration given to the factual circumstances in that case.
[10] Similarly, this approach does not accord with the approach taken generally to appeals involving alleged breaches of natural justice. For example, see the extensive consideration of the factual circumstances in *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 577-583 (Northrop, Miles and French JJ); *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104 at 107-112 (Jerrard JA with whom McMurdo P and Davies JA agreed); and *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2006) 231 ALR 592 at 593-597 and 601 [38] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).
[11] Mullins J with whom Davies JA and Mackenzie J agreed.
[12] McMurdo J with whom McPherson and Jerrard JJA agreed.
[13] This is also illustrated by *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104 at 111 [17] where no transcript of the proceedings below existed and the Court considered the appellant's solicitor's filenote as evidence of what occurred in the proceedings below.
[14] Appellant's outline of argument at [2]; first respondent's outline at [14]; and second respondent's outline at [1.4]. All parties cite *HA Bachrach Pty Ltd v Caboolture Shire Council* (1992) 80 LGERA 230 at 237-238.
[15] The situation is somewhat different in respect of the natural justice grounds. See paragraph 14 below.

where the High Court found a judge of the Local Government Court who had stated the correct legal test in declining to impose a condition on a subdivision had erred in law. The Court considered the whole of the trial judge's reasons to conclude he applied "a test more stringent than the law allows and in applying it his Honour erred in law." Similarly, in the present appeal it is necessary to read the whole of the presiding member's reasons in the factual context of the proceedings to understand whether he imposed the wrong tests in applying the relevant statutory provisions. To do so is a necessity, not an attempt, impermissibly, to re-agitate findings of fact.

Statutory context

11. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2006) 231 ALR 592 at 598 [26], Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ emphasized the statutory framework within which a decision-maker exercises a statutory power is of critical importance when considering what procedural fairness requires. The statutory framework of the *Mineral Resources Act 1989* (MRA) and *Environmental Protection Act 1994* (EP Act) provided the appellant with a statutory right to object and be heard by the tribunal in relation to its objections.[16] The significance of affording a fair hearing to objectors is emphasized by both statutes' only requiring a hearing by the tribunal if there are objections to a mine. Where no objections are lodged, the tribunal may dispense with a hearing under the MRA[17] and the tribunal's function under the EP Act <u>only</u> arises if there is a current objection.[18]

No requirement for formal finding

12. The respondents submit that the tribunal did not make a finding of fact that emissions of anthropogenic greenhouse gases do not contribute to global warming.[19] The tribunal's factual findings are contained in paragraph 21 of the reasons where the tribunal's conclusions are expressed in a confused way. The presiding member mixes together general findings with respect to the cause and effect of global warming and specific findings with respect to causal links between the particular mine's greenhouse gas emissions and what he calls "any discernable harm". Despite the confused expression of the findings, the analysis in the preceding five paragraphs, 15-20, in which the presiding member sets out his reasoning and the way in which he has drawn on the two documents, clearly, indicates that his use of the two documents has, at a minimum, been influential in respect of the conclusions set out in paragraph 21.

13. In any event, it is not necessary for the tribunal to have made formal findings of fact on an issue for there to be a breach of natural justice. The principal issue raised, in relation to the alleged breach of natural justice in ground 1 of the appeal, is whether the presiding member proceeded to make his decision by reference to an analysis or approach that was regarded as important to him but which, on the material before the tribunal and the way in which the hearing had proceeded, took the parties (or one of them) by surprise. If so, the presiding member departed from the principles of natural justice stated by the Court in

[16] See ss. 260-269 of the MRA and ss. 216-223 of the EP Act.
[17] Section 270 of the MRA.
[18] See ss 219 and 227-228 of the EP Act.
[19] First respondent's outline at [5]; second respondent's outline at [2.2]-[2.3] ant [4.2]. The second respondent's outline at [1.3] places reliance on a reference to "findings doubting the existence of anthropogenic climate change" at [40] in the appellant's outline but does not refer to the principle stated in *York*, quoted at [38] of the appellant's outline.

York v General Medical Assessment Tribunal [2003] 2 Qd R 104 at 115, [30].[20] It is not necessary that the approach resulted in a particular formal finding.

Materiality

14. The first respondent submits that the documents raised by the presiding member were "not material to his decision" and "ultimately assumed little significance".[21] That submission is difficult to support with reference to the presiding member's reasons, as explained in paragraph 12 above. It also defies the significance that the courts normally attach to a denial of procedural fairness where "The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures."[22] In the circumstances of the breach of natural justice by the Mining Warden in *Wall v Windridge* [1999] 1 Qd R 329 at 340, Moynihan and Ambrose JJ held "it is not necessary to establish that the deprivation of natural justice was to the prejudice of the appellant." Citing this approach in *Queensland Police Credit Union Ltd v Criminal Justice Commission* [2000] 1 Qd R 626 at 634-635, McPherson JA[23] stated:

> Once it is shown that there is a right to procedural fairness in the form of an opportunity of being heard in a proceeding, 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 made use of. The position may, in some instances, be different where it is shown that the opportunity, even if granted, would in fact or law have been of no avail. In practice, however, cases of that kind are … necessarily rare.

CAUSATION

Subject-matter, scope and purpose of legislation

15. The respondents submit that the presiding member committed no error of law by requiring "a demonstrated causal link between this mine's greenhouse gas emissions and any discernable harm … caused by global warming and climate change."[24] It might be argued that this reasoning defies the commonsense approach to causation normally applied by the common law but the statutory context of the tribunal's decision is a more important consideration.[25] The presiding member's finding was made with specific reference to the principles of ecologically sustainable development (ESD) in the EP Act. The language of the principles of ESD have already been set out in the appellant's outline,[26] but other, important matters to consider in determining whether, on the proper construction of the EP Act, the presiding member erred in law in requiring discernable harm to be demonstrated from this mine alone are the subject-matter, scope and purpose of the Act.[27] The object of the EP Act, stated in s 3, is ESD. Section 5 imposes an obligation on the presiding member, in performing the functions and exercising the powers under ss 220 and 222 of the Act, to do so in the way that best achieves the object

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[20] See also *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 (Northrop, Miles and French JJ) and *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2006) 231 ALR 592 at 599-603 [29]-[49] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).
[21] First respondent's outline at paragraphs 21(c) and 22.
[22] *Re Refugee Tribunal & Anor; Ex parte Aala* (2000) 204 CLR 82 at 109 [59] per Gaudron and Gummow JJ.
[23] With whom Pincus JA and Derrington J agreed.
[24] At [21] of the tribunal's reasons for decision.
[25] *Henville v Walker* (2001) 206 CLR 459 at 489-491, [96] and [98], per McHugh J.
[26] At p 16, [88].
[27] It is trite to say that these matters are central to the construction of all legislation, including whether an administrative decision-maker has considered an irrelevant consideration: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

of the Act. The Act provides an extremely wide scope to achieve its object by regulating activities impacting on the environment. The central concept around which the structure of the Act is built[28] is the concept of "environmental harm", defined in s 14 as follows:

> **14 Environmental harm**
> (1) ***Environmental harm*** is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.
> (2) ***Environmental harm*** may be caused by an activity—
> (a) whether the harm is a direct or indirect result of the activity; or
> (b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.

16. The presiding member's reasoning in requiring a demonstrated causal link between "this mine's GHG emissions and any discernable harm … caused by global warming and climate change" does not reflect the wide scope and plain language of the EP Act, which can regulate environmental harm "whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors". While the term is not specifically referred to in s 223 as a relevant consideration for the tribunal, or specifically listed in the standard criteria, the environmental harm caused by a mining activity is clearly a relevant consideration from the subject-matter, scope and purpose of the EP Act and the tribunal's role in recommending whether an environmental authority is granted and what conditions should be imposed. Environmental harm that is authorised under an environmental authority for a mining activity provides a defence to the general offence provisions for causing unlawful environmental harm in ss. 436-438 of the EP Act.

17. The subject-matter, scope and purpose of the MRA are very different to the EP Act, but, equally, the MRA does not require a separate discernable impact from a mine when considering the matters in s 269(4)(j), (k) and (l), for the reasons stated in paragraphs 69-86 of the appellant's outline of argument.

18. An analogy for greenhouse gas emissions contributing to climate change that is useful to consider in assessing the presiding member's approach is that of a factory discharging a contaminant into a river. The discharge from one factory alone may be minute and able to be absorbed by the river water without discernable harm being evident. However, if 100 factories on the river each discharge the same contaminant such that, cumulatively, it reaches levels that cause discernable adverse effects on the river's health, then each of those discharges needs to be controlled to protect the river. If the approach taken by the presiding member were adopted, no action could be taken against any of the factories under the EP Act.[29] This illustrates the presiding member's error in considering the greenhouse gas emissions from this mine that contribute to global warming and climate change, along with other emissions, past, present and future. The presiding member's approach defeats the object and wide scope of the EP Act.

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Counsel for the appellant
25 July 2007

[28] Noting the central definitions in ss 8 (environment), 9 (environmental value), 14 (environmental harm), 15 (environmental nuisance), 16 (material environmental harm), 17 (serious environmental harm), and the general offence provisions for causing unlawful environmental harm in ss 436-438 of the EP Act.

[29] The processes in the EP Act for approving activities such as a factory discharging a contaminant into a river also hinge on regulating "environmental harm", but to consider this analogy in a mining context, discharges of a contaminant from a mine tailings dam into a river can be considered rather than discharges from a factory.