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LAND AND RESOURCES TRIBUNAL QUEENSLAND

CITATION:	*Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33
PARTIES:	**Xstrata Coal Queensland Pty Ltd, Itochu Coal Resources Australia Pty Ltd, ICRA NCA Pty Ltd & Sumisho Coal Australia Pty Ltd (Applicants)** **- and -** **Queensland Conservation Council Inc and Mackay Conservation Group Inc (Objectors)** **- and -** **Environmental Protection Agency (Statutory Party)**
FILE NO/S:	AML207/06 ENO208/06
PROCEEDING:	Application for grant of Additional Surface Area No. 2 to Mining Lease No. 4761 and related environmental authority (mining lease)
DELIVERED ON:	15 February 2007
DELIVERED AT:	Brisbane
HEARING DATE:	31 January, 1 February 2007 9, 13, 14 February 2007 (Further Submissions)
PRESIDING MEMBER:	Koppenol P
ORDER/S:	**1. Additional surface area application recommended for grant in whole, without any of the conditions sought by the objectors. (at [24])** **2. Related environmental authority (mining lease) application recommended for grant on the basis of the draft environmental authority for the application, without any of the conditions sought by the objectors. (at [24])**
CATCHWORDS:	MINING – COAL MINING LEASE – ADDITIONAL SURFACE AREA APPLICATION – ENVIRONMENTAL AUTHORITY APPLICATION – OBJECTIONS – GREENHOUSE GAS EMISSIONS – GLOBAL WARMING – CLIMATE CHANGE – RECOMMENDATION – CONDITIONS *Mineral Resources Act 1989*, ss 269(4), 275 *Environmental Protection Act 1994*, ch 5, ss 222, 223 *Land and Resources Tribunal Act 1999*, s 49(2)(b)

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Roncevich v Repatriation Commission (2005) 222 CLR 115, referred to
Secretary, Department of Family and Community Services v Verney (2000) 60 ALD 737 (FCA), followed
Gray v The Minister for Planning & Ors [2006] NSWLEC 720, distinguished

COUNSEL: D.J.S. Jackson QC and S. Brown, for applicants
S. Keim SC and C. McGrath, for firstnamed objector
A. Skoien, for statutory party

SOLICITORS: Allens Arthur Robinson, for applicants
Environmental Defenders Office (Qld) Inc, for firstnamed objector
Environmental Protection Agency (self-represented)

Application

[1] This is an application under:
- section 275 of the *Mineral Resources Act 1989* (MRA) for the grant of an additional surface area (Wollombi No. 2) of 722ha to Mining Lease No. 4761 situated at Suttor Creek 129km west of Mackay, for the development of a new open cut coal mining operation to replace current production areas; and
- chapter 5 of the *Environmental Protection Act 1994* (EP Act) for the grant of the related environmental authority (mining lease).

[2] The mining operation will use conventional strip-style open cut methods. After removal of overburden, the coal will be extracted and transported to port for export. The area sought abuts the applicant's existing Suttor Creek Mining Lease, which is a satellite mining operation as part of the overall Newlands Coal Project. The mine will produce an annual average of 1.9Mt of product coal over its proposed mine life of 15 years. Initially, the term will be concurrent with the head lease (ML 4761) which expires in 2011. The mining operations are to be carried out in accordance with the 33-page draft environmental authority issued by the Environmental Protection Agency. The new mine would bring substantial economic benefits to the local region and the State.

[3] The application and related environmental documentation (the application, draft authority and conditions) were objected to by 2 entities on grounds related to greenhouse gas (GHG) emissions.

[4] In such a case, the Tribunal's function is under section 269 of the MRA and sections 222 and 223 of the EP Act—namely to take into account and consider a number of prescribed factors and then to make a recommendation to the Minister for Mines and Energy that the additional surface area application and environmental authority application be granted (with or without conditions) or rejected.

Statutory provisions

[5] Section 269(4) of the MRA provides as follows:

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"269 Tribunal's recommendation on hearing

…

(4) The tribunal, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, shall take into account and consider whether—

(a) the provisions of this Act have been complied with; and

(b) the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate; and

(c) if the land applied for is mineralised there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and

(d) the land and the surface area of the land in respect of which the mining lease is sought is of an appropriate size and shape in relation to—

(i) the matters mentioned in paragraphs (b) and (c); and

(ii) the type and location of the activities proposed to be carried out under the lease and their likely impact on the surface of the land; and

(e) the term sought is appropriate; and

(f) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and

(g) the past performance of the applicant has been satisfactory; and

(h) any disadvantage may result to the rights of—

(i) holders of existing exploration permits or mineral development licences; or

(ii) existing applicants for exploration permits or mineral development licences; and

(i) the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management; and

(j) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof; and

(k) the public right and interest will be prejudiced; and

(l) any good reason has been shown for a refusal to grant the mining lease; and

(m) taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use."

[6] Sections 222 and 223 of the EP Act provide as follows:

"222 Nature of objections decision

(1) The objections decision for the application must be a recommendation to the MRA Minister that—

(a) the application be granted on the basis of the draft environmental authority for the application; or

(b) the application be granted, but on stated conditions that are different to the conditions in the draft; or

(c) the application be refused.

(2) However, if a relevant mining lease is, or is included in, a significant project and, under section 210, Coordinator-General's conditions were included in the draft, any stated conditions under subsection (1)(b)—

(a) must include the Coordinator-General's conditions; and

(b) must not be inconsistent with a Coordinator-General's condition.

(3) The tribunal must give a copy of the decision to the EPA Minister as soon as practicable after the decision is made.

223 Matters to be considered for objections decision

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

(a) the application documents for the application;

(b) any relevant EPP requirement;

(c) the standard criteria;

(d) to the extent the application relates to mining activities in a wild river area—the wild river declaration for the area;

(e) each current objection;

(f) any suitability report obtained for the application;

(g) the status of any application under the Mineral Resources Act for each relevant mining tenement."

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[7] For the purposes of this matter, I have examined all filed material and taken into account and considered each of the statutory factors set out in sections 269(4) and 223. Having regard to the real issues presented by the contest between the parties,[1] the only factors that now require specific mention are the following:

- adverse environmental impact (section 269(4)(j));
- prejudice to the public right and interest (section 2698(4)(k));
- any good reason shown to refuse (section 269(4)(l)); and
- ecologically sustainable development (ESD) principles (part of the "standard criteria") (section 223(c)).

Objections

[8] Those 4 factors were the basis of the objections. In essence, it was said that this proposed mine would contravene each factor *unless* conditions were imposed on the grant 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."

[9] Queensland Conservation Council Inc (QCC) later particularised its objection so as to require the applicant to avoid, reduce or offset *100%* of the GHG emissions. At the start of the hearing (and perhaps after realising that such a figure would render the mine unviable), it sought to amend that 100% figure for the downstream stage to only 10%. I refused the amendment because the applicant, on notice to QCC, had prepared its case on the basis of the 100% figure and would be prejudiced by the late amendment. Although QCC led various evidence at the hearing, it did not make final submissions that any particular condition should be imposed on the grant of the application.

[10] The other objector, Mackay Conservation Group Inc, did not attend the hearing. It utilised a Tribunal practice direction to participate by relying upon its objection only. That objection sought similar conditions to QCC's but was not particularised. In other words, it sought the imposition of unspecified "conditions" to avoid, reduce or offset the GHG emissions.

[11] QCC led evidence that GHG emissions due to human activities (principally as a consequence of energy use) is contributing to global warming and climate change—which itself is imposing significant economic, social and environmental costs on Australia and the rest of the world. I will mention only 2 of its witnesses.

[12] Emeritus Professor Ian Lowe AO gave evidence that the proposed mine would contribute to the cumulative impacts of global warming and climate change. He was the only QCC witness to address the key issue of causation (GHG emissions:climate change).[2] However, Professor Lowe's assessment of the mine's GHG emissions (which he said he was putting "in context") sought to compare its *minelife* emissions with global *annual* emissions. That was said to give a figure of 0.24% of current annual global release of GHGs. But when the mine's *annual* output of CO_2-e

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[1] *Roncevich v Repatriation Commission* (2005) 222 CLR 115, 136 [64] per Kirby J.

[2] The other QCC witnesses addressed other issues: Professor Ove Hoegh-Guldberg and Dr Stephen Williams dealt with ecological impacts of global warming and climate change (but specifically *excluding* the contribution of GHG emissions thereto), Dr Hugh Saddler with the calculation of the project's GHG emissions and Mr Ben Keogh with GHG emissions offsets.

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(5.6Mt) is compared with global *annual* output of CO_2-e (34,000 Mt), the correct figure is not 0.24% but (as I calculate it) 0.016%. In other words, Professor Lowe's figure was 15 times too high. Professor Lowe ultimately accepted in cross-examination that the mine's annual contribution to annual global GHG emissions was "very small". Dr Jonathan Stanford (an expert witness for the applicants) said that such a very small figure would make *no difference* to the rate of global warming—an assessment which I accept.

[13] Mr Jon Norling spoke about the economic effects of climate change. Like Professor Lowe, he placed great emphasis upon:

- the British Government's 2006 *Stern Review on the Economics of Climate Change* (the Stern Review),[3] which concluded that there would be very serious consequences for humanity because of global warming-induced climate change if GHG emissions were not severely cut; and
- assessments by the Intergovernmental Panel on Climate Change (IPCC).

Regrettably, Mr Norling grossly exaggerated references in the Stern Review to sea level rises: for example, converting Stern's "if" certain ice sheets melt over "centuries to millennia", to "when" they melt over "the next several centuries" and suggesting that sea levels could rise 5m to 12m over the next century—when Stern predicted only 0.09m to 0.88m and IPCC only 0.18m to 0.59m.

[14] The applicants and EPA argued that QCC had not demonstrated that this new mine would have any discernible separate effect on global warming or climate change. Although they did not dispute that there is scientific evidence that GHG emissions (including from human-induced causes) contribute to global warming and climate change, there was no concession as to the *extent* of that contribution or its *consequences*.[4] Those issues have been the subject of recent scientific papers.

Scientific papers

[15] The Stern Review relevantly advocated an urgent and substantial decarbonisation of atmospheric concentrations, with particular emphasis on coal-related GHG emissions.

[16] However, the Stern Review has been severely criticised on both scientific and economic grounds. Papers recently published by Professor Robert Carter *et al* and Professor Sir Ian Byatt *et al* concluded that Stern's claim that the scientific evidence for GHG-induced serious global warming and climate change was overwhelming was just an assertion and was wrong—and that the Stern Review was:

- biased, selective and unbalanced;
- scientifically flawed;
- a vehicle for speculative alarmism; and
- not a basis for informed and responsible policies.[5]

Those authors also said that climate prediction is an uncertain new area and not a mature science and that the rates of modern temperature change observed fall well within the rates of minor warmings and coolings inferred for the Holocene (the last

3 *<www/hm-reasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm>*.
4 At the directions hearing on 27 November 2006, I alerted QCC to the need to prove those factors: Ts pp 10-11.
5 *World Economics*, Vol 7, No 4, October-December 2006, pp 165-232.

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~10,000 years of the Earth's history) in, eg, the GRIP ice core (a 3,029m long ice core drilled in Greenland from 1989 to 1992).

[17] Finally, the Fourth Assessment Report of the Intergovernmental Panel on Climate Change's *Summary for Policymakers* was released on 2 February 2007.[6] It relevantly concluded that is very likely that human-induced GHGs are causing global warming, and that most of the observed increases in globally averaged temperatures since the mid-20th century are very likely due to the observed increase in anthropogenic (human-caused) GHG concentrations. However, a close examination of the global mean temperature chart (Fig SPM-3), which was said to support that view, reveals that the last 106 years had 3 periods of cooling (1900-1910, 1944-1976, 1998-2006) and 2 periods of warming (1910-1944, 1976-1998) and that temperatures rose only 0.5°C from 1900 to 2006. The largest temperature change in the 20th century was a 0.75°C rise between 1976 and 1998, But the fact that very similar rises have previously occurred (1852-1878, 0.65°C and 1910-1944, 0.65°C) was not specifically mentioned or causally explained in the Summary. Also not mentioned or causally explained is the fact that temperatures have actually fallen 0.05°C over the last 8 years.

[18] If a comparison is made of temperatures over the last 55 years (1951-2006), as the IPCC presumably did in reaching its conclusion, the chart shows that average temperatures increased from 13.85°C (1951) to 14.45°C (2006)—an increase of 0.6°C. As "most" of that increase is said by the IPCC to be due to increases in GHGs, it follows that the temperature increase of concern is about 0.45°C (0.45°C being 75% of or "most" of 0.6°C). With all respect, a temperature increase of only about 0.45°C *over 55 years* seems a surprisingly low figure upon which to base the IPCC's concerns about its inducing many serious changes in the global climate system during the 21st century.[7]

[19] The Carter-Byatt critique of the Stern Review was not mentioned at the hearing. I became aware of it a few days later, at about the same time as the IPCC's 4th Report Summary was released. On my directions, the parties' attention was drawn to these papers and their submissions about them invited. Each party made written submissions. Only QCC objected to my considering the Carter-Byatt critique. No party objected to the IPCC Summary being considered. No party requested a reopening of the hearing for the opportunity to make further oral submissions or to call further evidence.

[20] This Tribunal is empowered by statute to "inform itself of anything in the way it considers appropriate".[8] Having become aware of these papers and regarding them as relevant, it would have been inappropriate for me to have just ignored them. As the Federal Court (Cooper J) said in an analogous context in 2000:[9]

> "... the tribunal would not be entitled to ignore material of which it had notice which demonstrated that earlier material was incorrect, incomplete or misleading".

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6 *<www.ipcc.ch/SPM2feb07.pdf>*.
7 IPCC Report, p 10.
8 *Land and Resources Tribunal Act 1999*, section 49(2)(b).
9 *Secretary, Department of Family and Community Services v Verney* (2000) 60 ALD 737, 749 [52], applying *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 44-45.

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Conclusion

[21] QCC submitted that I should have regard to ESD principles "to mitigate the serious environmental degradation caused by global warming". The difficulty with that submission is that, whilst I have considered the ESD principles and QCC's detailed submissions concerning their operation, it is based upon an *assumption* concerning the cause and effect of global warming. In the present case, I am not satisfied that that assumption (relevantly, a demonstrated causal link between this mine's GHG emissions and any discernable harm—let alone any "serious environmental degradation"—caused by global warming and climate change) has been shown by QCC to be valid.[10] Indeed even if this mine's GHG emissions were eliminated *completely*, QCC failed to show that that would have the slightest effect on global warming or climate change.[11]

[22] Having regard to all of the evidence before me, I am not satisfied that:
- the proposed coal mine would:
  - cause any adverse environmental impact which could not be managed by the draft environmental authority;
  - prejudice the public right and interest;
- any good reason has been shown to refuse the subject applications; and
- ESD principles operate to require the applications to be conditioned as advocated by the objectors.

[23] Consequently, it would not be appropriate in my view 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 GHGs. Apart from having no demonstrated impact on global warming or climate change, any such condition would have (as Dr Stanford said) the real potential to drive wealth and jobs overseas and to cause serious adverse economic and social impacts upon the State of Queensland. Absent universally applied policies for GHG reduction, requiring this mine (and no others) to limit or reduce its GHG emissions would be arbitrary and unfair. That cannot be what our law requires.

Recommendation

[24] Having taken into account and considered each of the factors set out in section 269(4) of the MRA and section 223 of the EP Act, I recommend to the Honourable the Minister for Mines and Energy that:
- this additional surface area application be granted in whole, without any of the conditions sought by the objectors; and
- the related environmental authority (mining lease) application be granted on the basis of the draft environmental authority for the application, without any of the conditions sought by the objectors.

[10] Cf *Gray v The Minister for Planning & Ors* [2006] NSWLEC 720, where causation was not in issue.

[11] Professor Lowe said that he did not know of any process which would allow anyone to quantify the impact on global warming of any particular reduction in CO_2 emissions—although if the United States and China completely ceased emissions, that would be significant and lead to a *more slowly changing climate*: see Ts 01.02.07 pp 129, 133.

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