Tribunal was acting within jurisdiction. Even though Kokstad had not appealed the order made by the President on 6 December 2005, this did not save those orders from invalidity. As the Tribunal had acted without jurisdiction, its orders of 6 December 2005 were of no effect. The court cited its earlier decision in *Lacey v Juunyjuwarra People and Anor*[5] in relation to the limitations on the Tribunal's jurisdiction.

2. The Court of Appeal made a number of statements in support of its earlier decision in *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation*[6] which decided that the Land and Resources Tribunal (now the Land Court) had no power to hear from an objector except in relation to a matter raised in a 'duly lodged objection'.

3. Section 307(4) of the *Mineral Resources Act*, in requiring an amended application the subject of a partial abandonment to 'proceed in respect of that area in accordance with this part', does not require a restart of the mining lease application proceedings, thus giving rise to fresh objection rights. It simply requires the application to continue from its then current place in the process.

## COURT OF APPEAL SETS ASIDE TRIBUNAL'S RULING ON GREENHOUSE OBJECTIONS*

***Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd & Ors*** [2007] QCA 338

*Mining lease – Coal – Environmental approvals – Objections – Greenhouse gas emissions – Global warming – Climate change – Conditions – Natural justice – Amendment of particulars – Validating legislation.*

### Background

The basic facts of this case involved an application by a mining company (Xstrata and its joint venture partners) for additional surface area mining rights and associated environmental approvals to allow the expansion of its existing Newlands Coal Mine in Central Queensland. Conservation groups, primarily the Queensland Conservation Council (QCC), objected to the grant, with the central issue being objections based upon the greenhouse gas emissions associated with the mining operations and the subsequent use (ie burning) of the coal by third parties.

QCC was seeking conditions to be imposed upon the mining lease which would require the mining company to reduce, offset or abate the greenhouse gas emissions associated with the mining operations and the subsequent 'downstream' use of the coal. Initially, the conservation groups had sought a 100% offset of all such emissions, but later sought to amend the particulars of its objections such that only a 10% offset of the 'downstream' emissions be imposed. The Queensland Land and Resources Tribunal (LRT) did not allow QCC to amend its particulars in this way.

In February 2007 the LRT ruled against QCC and decided not to impose any such greenhouse reduction, abatement or offset conditions.[1] The details of this case and the decision have been

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5 *Lacey v Juunyjuwarra People and Anor* [2004] QCA 297.

6 *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2002] 1 Qd R 347.

* Ben Zillmann, Partner, Allens Arthur Robinson. The author and Allens Arthur Robinson represented Xstrata Coal Queensland Pty Ltd in these proceedings.

1 R*e Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33 (Koppenol P).

reported previously in the April 2007 edition of this journal.[2] For the purpose of this article, what is relevant is that the LRT decided not to impose the conditions sought by the objectors because:

- the LRT was not satisfied it had been demonstrated that a causal link existed between the mine's emissions and any discernable harm or serious environmental degradation caused by global warming and climate change;
- if the conditions were imposed, there would be significant adverse economic and social impacts on the State of Queensland as wealth and jobs would be driven overseas; and
- requiring an individual mine to meet such conditions in the absence of a universally applied policy would be arbitrary and unfair.

**Conduct of the Proceedings before the LRT**

As QCC's appeal turned upon procedural issues, it is important to summarise some key aspects of the manner in which proceedings were conducted before the LRT. In summary, the key procedural facts relevant to the appeal were:

- Xstrata and the Environmental Protection Agency (EPA) (who also opposed the conditions sought by QCC) did not seek to dispute the assertion that carbon dioxide emissions contribute to the 'greenhouse effect' or 'climate change'. Rather, their arguments focused upon the impact of any emissions associated with this particular mine expansion.
- After the conclusion of the hearing, the LRT president (President Koppenol), following the conduct of his own research, provided to all parties two documents. One was a critique of the Stern Report (which criticised both the economics and the science upon which the Stern Report on climate change was based) (the Stern critique), and the other was the Fourth Assessment Report of the Intergovernmental Panel on Climate Change dated February 2007 (the IPCC Report). The LRT invited the parties to make submissions in response to these papers. All parties did so.
- In delivering his judgment, President Koppenol made reference to both the Stern critique and the IPCC Report in the context of commenting on the extent to which climate change may actually be occurring.

**The Appeal**

QCC appealed against the LRT's decision to the Queensland Court of Appeal. It was limited in its appeal to raising questions of law. There were several grounds for QCC's appeal, most of which in some way targeted the conduct of the proceedings before the LRT, although it did attempt to raise on appeal questions as to whether the LRT had incorrectly interpreted the law regarding causation of adverse environmental impacts under the relevant statutes.

The ground of appeal which received most focus was the claim of QCC that it had been denied natural justice due to the manner in which the LRT conducted the proceedings, and in particular due to the LRT relying on the Stern critique and the IPCC Report.

The Court of Appeal found that the LRT, in rejecting the conditions sought by QCC, took into account a critique which put into issue the fact that anthropogenic greenhouse gas emissions contributed to global warming, in circumstances where this fact had been accepted by all parties at

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[2] Ryan Gawrych, 'Environmental Objections – *Re Xstrata Coal Queensland Pty Ltd & Ors*' (2007) 26 ARELJ 17 and Susan Malone, 'Is the Judiciary Warming to Global Warming?' (2007) 26 ARELJ 92.

the hearing. Further, the Court of Appeal found that the LRT did not make clear to QCC that it intended to use the Stern critique in this way and so therefore did not give QCC a fair opportunity to test or refute the critique by other information or submissions. The Court of Appeal considered that this was a denial of natural justice which appeared to have affected the LRT's ultimate decision.

The Court of Appeal also found that the LRT should have allowed QCC to amend its particulars to only require conditions seeking a 10% offset or abatement of downstream emissions.

The Court of Appeal did not find it necessary to rule on any other points of appeal raised by QCC.

The Court of Appeal therefore decided that due to these findings, the decision of the LRT was set aside and the matter was remitted to the Land Court for a rehearing.[3]

**Statutory Response**

On the same day that the Court of Appeal delivered its judgment, the Queensland Government announced that it intended to enact project specific legislation to validate the mining rights and environmental approvals associated with the mine expansion. Those mining rights and environmental approvals had already been granted to the mining company following the initial LRT decision. QCC had not sought a stay of the LRT's decision whilst it waited for the hearing and determination of the appeal.

The grant of the mining rights and the environmental approvals was shortly thereafter validated by special provisions in the *Mining and Other Legislation Amendment Act 2007*.

The press releases from the government made the following comments:

- the government considered the Court of Appeal decision had the potential to invalidate the already granted mining rights and environmental authorities and therefore potentially shut down what was now an operating mine, jeopardising significant investment that had been made to date and a significant number of jobs. The government was not prepared to accept that uncertainty;
- the government noted that Court of Appeal decision turned on a procedural point, and whilst it respected that decision, it was not prepared to let such an issue put at risk the substantial investment in the mine expansion; and
- the government clearly stated that it was a strong supporter of a national emissions trading scheme and that it considered such a scheme was the appropriate way to manage emissions 'rather than an ad hoc approach which singles out particular companies'.

**Implications**

The legislation passed in this instance to validate the mining rights was project specific, and will not necessarily be a precedent that future coal mine applicants can rely on. However, the government's clear statements that it did not support ad hoc conditions regarding greenhouse offsets being imposed upon individual mines or companies, coupled with the fact that the EPA at all times during the proceedings opposed QCC's action to impose such conditions on the Newlands mine, are a strong indication that the Queensland government will not support attempts to impose project specific greenhouse abatement or offset conditions on individual coal mines in Queensland. Rather, the Queensland government will look to universal emissions trading legislation to appropriately regulate the industry in this regard.

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[3] Between the time of the LRT's judgment and the decision of the Court of Appeal, legislation had been passed by the Queensland Parliament which effectively abolished the LRT and transferred its jurisdiction to the Land Court.

Nevertheless, the effect of the Court of Appeal decision is to eliminate the earlier precedent set by the LRT decision. Therefore, new coal mining lease applicants in Queensland will potentially be open to similar objections from conservation groups in the foreseeable future, until the argument is again tested and determined in the courts.

## TASMANIA

### LEGISLATIVE DEVELOPMENTS IN TASMANIA*

#### Electricity Supply Industry Amendment Act 2007

One significant piece of legislation entered into force during the current reporting period. The *Electricity Supply Industry Amendment Act 2007* (Tas) received Royal Assent and commenced on 21 June 2007. The Act amends the *Electricity Supply Industry Act 1995* (Tas) by inserting a new Division 6A to Part 10 of the original Act.

The amending legislation introduces two new charges: the National Energy Market Charge (NEMC) and the Electrical Safety Inspection Service Charge. The purpose of the NEMC is to cover the cost of the State's funding obligations in respect of the Australian Energy Market Commission. Under cl 10.1 of the Council of Australian Governments *Australian Energy Market Agreement* (2004), the costs of funding the Australian Energy Regulator and the Australian Energy Market Commission can be recovered in the form of a levy imposed on the energy industry. Under cl 10.2, the Commonwealth Government is responsible for funding the Regulator and States and Territories fund the Commission.

Under s 121 of the *Electricity Supply Industry Act 1995* (Tas) (as amended by the *Electricity Supply Industry Amendment Act 2007* (Tas)), electricity entities are required to pay an annual charge to the Crown, as determined by the Minister. Information provided in the second reading speech on 19 April 2007 indicates that the estimated charge will be approximately $430,000 per year. Although electricity distributors liable to pay this charge can pass it on to consumers, it is suggested that the impact will be negligible (approximately 51 cents per quarter). This is particularly the case given that the charge replaces previous cost recovery obligations for the funding of the National Electricity Code Administrator.

Under s 121B of the *Electricity Supply Industry Act 1995* (Tas) (as amended by the *Electricity Supply Industry Amendment Act 2007* (Tas)), an Electricity Safety Inspection Charge is payable annually by electricity entities to the Crown to cover the ongoing cost of the operation and administration of the Electricity Safety Inspection Service (ESIS). An ESIS fund is to be established for this purpose. Aurora Energy Pty Ltd, which runs the distribution network for

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