QCC lodged an objection to the mine expansion and elected to go to a full hearing because of the adverse environmental impacts from the greenhouse gas contributions that the mining, transport and use of the coal from the mine will have - unless conditions are imposed to avoid, reduce or offset those emissions. Over its 15 year lifetime, this mine will produce 28.5 million tonnes of coal, and the mining, transport and use of this coal will produce between 72 and 96 million tonnes of CO2 equivalent (MtCO2-e) emissions. The total emissions from the coal produced from the mine over 15 years is roughly equivalent to 15% of Australia's annual greenhouse emissions or a whopping 0.21% of annual global emissions.

The case aims to have the true costs of greenhouse emissions recognised in assessing new coal mines, and conditions imposed on the mines to avoid, reduce or offset (such as by planting carbon sinks) the emissions from the mining, transport and use of the coal.

QCC secured respected experts, including Emeritus Professor Ian Lowe on climate change science, Dr Hugh Saddler on calculation of greenhouse gas emissions, Ben Keogh on the range of offset measures available, Jon Norling on the economic impacts of climate change, Professor Ove Hoegh-Guldberg on the impacts of climate change on the Great Barrier Reef and Dr Stephen Williams on the broader ecological impacts of climate change.

The case was heard before the Land and Resources Tribunal on 31 January – 2 February 2007. At the hearing, QCC argued Xstrata should be required to avoid, reduce or offset the greenhouse gas emissions from a coal mine expansion.

In a shocking move, Environmental Protection Agency (EPA) appeared against QCC and supported the submissions of Xstrata. The EPA even went so far as to submit to the Tribunal that offsetting some 84 million tonnes of Co2 emissions would not have "the slightest effect upon either global warming or climate change".

The Tribunal's decision was handed down on 15 February 2007. Despite evidence from well respected scientists on the science and effects of global warming, President Koppenol doubted the science of global warming and found in favour of Xstrata.

The decision is online at www.lrt.qld.gov.au/LRT/PDF/Xstrata_a33.pdf and shows just how damaging the remaining few voices that doubt climate change can be to the climate change movement. The decision has excited wide attention, both in Australia and overseas.

QCC is considering seeking a review of the decision based on breach of natural justice and mistake of law.

For updates on other recent Planning and Environment Court and relevant Court of Appeal cases, see Deacons Lawyers' website www.deacons.com.au and follow links to updates by the Environment and Planning section, or Corrs Chambers Westgarth's website www.corrs.com.au and follow links to the Planning Environment and Local Government Practice Area.

VICTORIA

SITA Australia Pty Ltd and PWM (Lyndhurst) Pty Ltd v Greater Dandenong CC [2007] VCAT 156
Unsuccessful challenge to planning permit amendment re hazardous waste

By Elisa de Wit

This recent VCAT decision involved an application by SITA Australia Pty Ltd to amend its planning permits held in respect of its landfill at Lyndhurst. Existing conditions on the permits prohibited the site from taking in "hazardous waste". An earlier VCAT decision had found that the prescribed industrial waste accepted by the site, although authorised under an EPA licence, was hazardous waste using a "natural and ordinary meaning" approach.

The Tribunal amended the permits to delete the relevant conditions and replaced them with a condition requiring the operator of the Lyndhurst landfill to provide the Council with a copy of any amended waste discharge licence issued by the EPA within 7 days of its issue.

The background to the legal proceedings was that the Lyndhurst landfill had been operating for 16 years and during that time had accepted putrescible waste and prescribed industrial waste under two planning permits which allowed the use and development of the land for a private rubbish tip, but prohibited the disposal of 'hazardous wastes'. The landfill also operated pursuant to an EPA licence which had been amended over time to allow the deposit of certain prescribed industrial waste. The planning permits had not been amended to reflect the changes in the EPA licence. A challenge was brought by the Council and local residents group on the basis that the planning permits prohibited the receipt of hazardous waste.

In its decision to amend the planning permits the Tribunal found no evidence that the Lyndhurst landfill was not a safe facility and stated that it did not constitute a hazard that the community needed to fear. The Tribunal said the landfill played a vital role in dealing with prescribed industrial waste until such a time that a long term containment facility was developed and that it was unrealistic and irresponsible to ignore the fact that for the immediately foreseeable future there remained a need to dispose of some prescribed industrial waste.

SOUTH AUSTRALIA

Carter (trustee for the estate of Paul G Schmidt) v Mid-Murray Council [2006] SAERDC 88. What structures require building consent?

By Stuart Henry – Barrister – Carrington Chambers

(Excerpts from paper presented to Planning Institute of Australia (SA) Conference - 8 February 2007)

This case concerned an air strip on a rural property which was originally constructed in 1972. The air strip was constructed by having a local grader operator grade an even strip about 60 metres wide and 825 metres long on the land. In addition, a parking area for air crafts and an emergency runway was created by grading. The grading work involved removing top soil to expose the harder clay surface and removing undulations in the surface of the ground by filling depressions. The final graded surface of the air strip was 150 mm below the nature ground surface. Soil that was removed by grading was mostly placed in a mound or embankment approximately 3 metres wide by half a metre high on the northern side of the air strip. This increased the size of a mound that was already in existence having been created some 50 years ago as part of a flood plan irrigation system in operation.

In June 2003, modifications were made to the air strip. These involved grading the runway area to a depth of approximately 200 mm, and placement of the material together with soil left over from the original grading on either side of the runway to flatten the grade. The graded runway was then resurfaced with approximately 150 mm of imported rubble capped with 50 mm of local crushed rock compacted to a typical road construction standard to create a clearly defined runway. Two flanks were created on either side of the runway by lightly grading and compacting the ground to a width of 15 metres on either side and lightly grading a further area 7½ metres on either side. Finally, fly over areas were created at either end of the runway by lightly grading the ground for some distance from the end of the runway.

The question for the Court was whether these works, which had already been undertaken, required consent as "building work". The Court noted the definitions of "building work" and "building". The Court initially considered that the air strip could be regarded as a "structure", because the air strip is constructed of soil rubble and crushed rock compacted to typical road construction standard. The Court also considered that the earth embankments might also be structures being composed of soil pushed together to create the embankment. However, the Court then went on to consider whether the air strip is a "structure" within the definition of "building" and therefore "building work".

The Court noted the previous ERD Court and Supreme Court case of *M & B Farmer Nominees Pty Ltd* v *DC Mallala*. The Court held that in the M & B Farmer Nominees case, neither Court considered "whether it was the intention of the legislature to bring the construction of any structure within the meaning of development and thus the Development Act".