SUPREME COURT OF QUEENSLAND

CITATION:	*Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242
PARTIES:	**COAST AND COUNTRYASSOCIATION OF QUEENSLAND INC** (appellant) **v** **PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND** (first respondent) **HANCOCK COAL PTY LTD** ACN 130 249 973 (second respondent) **MINISTER FOR ENVIRONMENT AND HERITAGE PROTECTION** (third respondent)
FILE NO/S:	Appeal No 9986 of 2015 SC No 4249 of 2014 SC No 9505 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 260
DELIVERED ON:	27 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	7 June 2016
JUDGES:	Margaret McMurdo P and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDERS:	**1. Dismiss the appeal.** **2. Order the appellant to pay the second respondent's and third respondent's costs of the appeal.**
CATCHWORDS:	ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – ENVIRONMENTAL PROTECTION LEGISLATION – where the appellant appeals the decision of the primary judge dismissing two applications for statutory orders of review – where the first application related to a decision of the Land Court concerning applications for a mining lease and environmental authority – where the second application concerned a subsequent decision of the third respondent to grant an environmental authority for the proposed mine – where the primary judge concluded that a finding of the

Land Court that the proposed mine would not produce an impact that would constitute or cause environmental harm was open on the evidence and did not reveal legal error in the member's approach – where the appellant submitted that the primary judge erred by allowing the Land Court when construing certain sections of the *Mineral Resources Act* 1989 (Qld) to give zero weight to the environmental harm caused by emissions from the transport and burning of coal after it was removed from the proposed mine – where the second respondent submitted that the appellant wrongly assumed that emissions in connection with the mine would cause environmental harm or an adverse environmental impact – whether under the *Mineral Resources Act* 1989 (Qld) the Land Court needed to consider the impact of activities which would not be carried on under the authority of the proposed mining lease – whether under the *Environmental Protection Act* 1994 (Qld) the Land Court was obliged to give weight to the environmental harm caused by emissions from the mine – whether there was legal error in the Land Court's decision

Environmental Protection Act 1994 (Qld), s 146, s 147, s 223
Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 75
Judicial Review Act 1991 (Qld)
Mineral Resources Act 1989 (Qld), s 2, s 6A, s 269(4)

Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No 4) (2014) 35 QLCR 56; [2014] QLC 12, related
Minister for Environment and Heritage v Queensland Conservation Council Inc & Anor (2004) 139 FCR 24; [2004] FCAFC 190, cited
Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-op Ltd & Ors (2012) 33 QLCR 79; [2012] QLC 13, discussed

COUNSEL: S Keim SC, with C McGrath, for the appellant
No appearance for the first respondent
D Clothier QC, with S Webster, for the second respondent
J Horton QC, with M Eade, for the third respondent

SOLICITORS: Environmental Defenders Office for the appellant
No appearance for the first respondent
Ashurst for the second respondent
Crown Law for the third respondent

[1] **MARGARET McMURDO P:** I agree with Fraser JA that this appeal must be dismissed. I also agree with his Honour's reasons for concluding that it is outside the Land Court's jurisdiction under s 269(4)(j) *Mineral Resources Act* 1989 (Qld) to consider the impact of activities beyond those carried on under the authority of the proposed mining lease, such as the impact of what the Land Court described as "scope 3 emissions." These include environmentally harmful global greenhouse gas emissions

resulting from the transportation and burning of coal after its removal from the proposed mines[1].

[2] For the following reasons, I do not consider that s 223(c) *Environmental Protection Act* 1994 (Qld) should be similarly construed.

[3] The object of the *Environmental Protection Act* is "to protect Queensland's environment while allowing for development that improves the total quality of life both now and in the future in a way that maintains ecological processes on which life depends (***ecologically sustainable development***)".[2] Queensland's environment is part of and affected by the global environment. Harmful global greenhouse gas emissions from the transportation and burning of coal after its removal clearly has the potential to harm Queensland's environment.

[4] The term "Environment" is a "key concept" under the *Environmental Protection Act* and is broadly defined as including:

> "(a) ecosystems and their constituent parts, including people and communities; and
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> (b) all natural and physical resources; and
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> (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
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> (d) the social, economic, aesthetic and cultural conditions that affect or are affected by, things mentioned in paragraphs (a) to (c)."[3]

[5] The term "Environmental value" is defined as:

> "(a) a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
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> (b) another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation."[4]

[6] The term "Environmental harm" is defined as:

> "(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.
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> (2) ***Environmental harm*** may be caused by an activity –
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> (a) whether the harm is a direct or indirect result of the activity; or
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> (b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors."[5]

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1 See Fraser JA's reasons [15] to [33].
2 *Environmental Protection Act* s 3.
3 Above, s 8.
4 Above, s 9.
5 Above, s 14.

[7] The Land Court, in determining objections for an environmental authority for mining activities, must consider the following matters listed in s 223 *Environmental Protection Act*:

> "(a) the application documents for the application;
>
> (b) any relevant regulatory 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;
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> (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."

[8] The term "standard criteria" in s 223(c) is defined as including:

> "(a) the principles of ecologically sustainable development as set out in the 'National Strategy for Ecologically Sustainable Development'
>
> …".[6]

[9] That Strategy's Core Objectives are:

> - "to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
> - to provide for equity within and between generations
> - to protect biological diversity and maintain essential ecological processes and life-support systems."

[10] The Strategy's Guiding Principles include:

> - "decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations
> - where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
> - the global dimension of environmental impacts of actions and policies should be recognised and considered
>
> ..."

[11] MacDonald P's reasons in *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth - Brisbane Co-op Ltd & Ors*[7] express a construction of s 223(c) that is certainly open. But I am persuaded the better view is that, the Land Court, in considering

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6 Above, sch 4, Dictionary.

7 (2012) 33 QLCR 79, [588] - [597], discussed in Fraser JA's reasons [39] to [42].

objections for an environmental authority for mining activities under the *Environmental Protection Act*, must consider scope 3 emissions. The *Environmental Protection Act* provides a significantly different legislative scheme to that under the *Mineral Resources Act.* Unlike in the latter act, the very broadly defined object of the *Environmental Protection Act* and its equally broad definitions of environment, environmental value and environmental harm are consistent with a desire to protect Queensland's environment from development, including mining development, which would cause harmful global greenhouse gas emissions. The Land Court in determining the objections was obliged to consider "standard criteria" which incorporate the National Strategy's Core Objectives and Guiding Principles. The terms of these Objectives and Principles are consistent with a concern about harmful global greenhouse gas emissions which would not "enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations"; would not "provide for equity within and between generations"; could damage "biological diversity" and "essential ecological processes and life support systems"; or could raise "threats of serious or irreversible environmental damage."

[12] Section 223(a) and (f) are specifically limited by the words "for the application" and the terms of s 223(d) and (g) are also limiting. In the absence of any such limiting words in s 223(c), and in light of the broadly expressed object and definitions to which I have referred, I can see no warrant to construe s 223(c) narrowly so as to limit it to a consideration of the standard criteria directly relevant to an activity authorised under the *Mineral Resources Act* to take place on land to which the relevant mining tenement relates.

[13] But, as Fraser JA explains,[8] my construction of s 223 has no effect on the result of this appeal as the Land Court in determining the objections made findings of fact that the proposed mining would not detrimentally affect global greenhouse gas emissions. Those factual findings are not amenable to statutory review.

[14] I agree with the orders proposed by Fraser JA.

[15] **FRASER JA:** This is an appeal against a decision by a judge in the Trial Division to dismiss two applications for statutory orders of review under the *Judicial Review Act* 1991 (Qld). The first application sought statutory review of a decision by a member of the Land Court (the first respondent) which, whilst recommending refusal of applications by the second respondent for a mining lease under the *Mineral Resources Act* 1989 (Qld)[9] and an environmental authority under the *Environmental Protection Act* 1994 (Qld),[10] included alternative recommendations that both applications be granted subject to certain conditions. The second application sought statutory review of the subsequent decision of the third respondent ("the EPA Minister") not to refuse but instead to grant an environmental authority for the proposed mine under the *Environmental Protection Act* 1994.

[16] The issues in the appeal are much narrower than the issues considered in the Land Court, and they are also narrower than the issues considered by the primary judge.

[17] The grounds of the appellant's objections to the mining lease and environmental authority which remain relevant in this appeal centred upon the appellant's contention

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8 Fraser JA's reasons [42] to [47].

9 References in these reasons to the *Mineral Resources Act* are to reprint number 13D of that Act.

10 References in these reasons to the *Environmental Protection Act* are to reprint number 11B of that Act.

that environmentally harmful emissions would result from the transportation and burning of coal after it was removed from the proposed mine. Those kinds of emissions fall within a category of emissions which was described in the Land Court as "scope 3 emissions". In the Land Court the appellant contended that the scope 3 emissions together with emissions from other sources would contribute to an increase in the amount of greenhouse gases in the atmosphere, the totality of the global greenhouse gases would contribute to climate change, that climate change would involve environmentally harmful effects, and those effects should be taken into account by the Land Court adversely to the second respondent's applications.

[18] The member of the Land Court who heard the applications and the objections made the following findings of fact upon the evidence adduced at the hearing. Thermal coal extracted from the proposed mine would be processed on the site of the mine, transported by rail to a coal export terminal north of Bowen in Central Queensland, and exported to overseas markets primarily in Asia (most probably in India or China). The coal would be burned in coal fired power stations in those places to generate electricity. Emissions directly associated with the mine would be infinitesimal. Scope 3 emissions would be the primary factor in a combined total of emissions which were real and of concern and could not be dismissed as negligible. Upon the expert evidence, the power stations would burn the same amount of thermal coal and produce the same amount of greenhouse gases whether or not the proposed Alpha Mine proceeded. That was so because thermal coal was plentiful and cheaply available to the power stations from many sources. It was the designed power generating capacity of the power stations, rather than the availability of coal, which determined the amount of coal which would be burned in the power stations. Accordingly, global scope 3 emissions would not fall if the mine did not proceed.

[19] The member's recommendations that the applications for a mining lease and environmental authority be refused were based upon grounds which were unrelated to scope 3 emissions and which are not relevant in this appeal. The member's alternative recommendations that both applications be granted were made subject to conditions which were designed to cater for those unrelated grounds.

[20] In relation to the first application for statutory review, the primary judge concluded that the findings summarised in [18] of these reasons were open on the evidence in the Land Court, upon those findings the conclusion was open that the proposed mine would not produce an impact that would constitute or cause environmental harm, and in so far as this conclusion took into account "the notional environmental harm that might be caused by another coal mine somewhere else in the world" that was not an irrelevant consideration and it did not reveal legal error in the member's approach.[11]

[21] The second application for statutory review was brought on two grounds. The only ground which remains relevant in this appeal was that the EPA Minister's decision was invalid because it was made pursuant to recommendations of the Land Court that were themselves invalid.[12] The primary judge's rejection of that ground was a consequence of his Honour's rejection of each of the grounds of the first application.

[22] The appellant argued that the primary judge's decision to dismiss the applications for statutory review was based upon very similar misconstructions of the relevant provisions of each of the *Environmental Protection Act* and the *Mineral Resources Act*. The grounds of the appellant's appeal are that the primary judge erred:

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11 [2015] QSC 260 at [41], [45], [46].

12 [2015] QSC 260 at [6].

1. "… in construing the *Environmental Protection Act* 1994 (Qld) as allowing the Land Court, when considering whether or not to recommend the grant of an environmental authority for the Alpha Coal Mine, to give zero weight to the environmental harm caused by the Scope 3 greenhouse gas emissions produced in transporting and burning the coal obtained as a result of that coal mine, on the basis of the Land Court's finding of harm caused by other mining activities not being those of the Alpha Coal Mine".
2. "… in construing section 269(4)(j), (k) and (l)[13] of the *Mineral Resources Act* 1989 (Qld) as allowing the Land Court, when considering whether or not to recommend the grant of a mining lease for the Alpha Coal Mine, to give zero weight to the adverse environmental impact caused by the operations to be carried on under the authority of the proposed mining lease due to the Scope 3 greenhouse gas emissions produced in transporting and burning the coal obtained as a result of that coal mine, on the basis of the Land Court's finding of adverse environmental impact caused by other mining activities not being those of the Alpha Coal Mine."

Section 269(4)(j) of the *Mineral Resources Act*

[23] It is convenient first to discuss one of the appellant's arguments about the construction of the *Mineral Resources Act*. Section 269(4) of *the Mineral Resources Act* provides:

> "The Land Court, 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

[13] The appellant's arguments focused upon paragraphs (j) and (k).

(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."

[24] The mining lease sought by the second respondent is for the purpose of mining coal. So far as is directly relevant to the argument, s 6A(1) of the *Mineral Resources Act* defines "mine" as meaning, "to carry on an operation with a view to, or for the purpose of–

(a) winning mineral from a place where it occurs; or

(b) extracting mineral from its natural state; or

(c) disposing of mineral in connection with, or waste substances resulting from, the winning or extraction."

[25] Section 6A(4) provides that "extracting" does not include "a process in a smelter, refinery or anywhere else by which mineral is changed to another substance".

[26] The Land Court member considered that the potential scope 3 emissions should not be taken into account under s 269(4)(j). In that respect, the member followed a decision of the then President of the Land Court, *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-op Ltd & Ors and Department of Environment and Resource Management* ('*Xstrata*').[14] In that factually similar case, MacDonald P held that "operations to be carried on under the authority of the proposed mining lease" in s 269(4)(i), and thus "operations" in s 269(4)(j), did not comprehend the transportation of the mined coal to the port or the burning of that coal in power stations overseas. The primary judge upheld that construction and the appellant did not seek to challenge that aspect of the decision.

[27] The appellant argued that the potential contribution to global warming of scope 3 emissions resulting from the transportation and burning of the coal nevertheless amounted to "adverse environmental impact caused by" mining the coal. One aspect of this argument turned upon the meaning of the word "mine". The appellant argued that paragraph (c) of s 6A(1) comprehended the sale of mined coal to consumers who would burn the coal to produce electric power. If so, it would not necessarily follow that scope 3 emissions caused by the transportation or burning of the coal amounted to an impact caused by the sale of the coal for the purposes of s 269(4)(j). That question need not be decided. The word "mine" does not comprehend a disposition of or any other dealing with title to minerals. Paragraphs (a) and (b) refer only to physical activities. Consistently with those provisions and the requirement in paragraph (c) for a connection between those physical activities (or waste substances resulting from them) and the "disposing of mineral", paragraph (c) also comprehends only physical activity. I would affirm MacDonald P's conclusion to that effect in

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14 (2012) 33 QLCR 79 at [528] – [530].

Xstrata.[15] Title to minerals is regulated by different provisions of the same Act. By force of s 8(2) of the same Act, the Crown has the property in coal found in Queensland (except in certain narrowly defined circumstances which need not be considered here). In that context, s 310 provides that "minerals lawfully mined under the authority of a mining lease cease to be the property of the Crown or person who had property therein and become the property of the holder of the mining lease subject however to the rights to royalty payments under this Act of the Crown or any other person". That title to lawfully mined minerals (including coal) is not made subject to any qualification other than the rights of those entitled to royalty payments. The startling proposition that the *Mineral Resources Act* regulates private sales or other dispositions of a mineral owner's otherwise unqualified title to lawfully mined minerals finds no foothold in any statutory provision to which the appellant referred.

[28] The appellant also argued that the word "impact" in s 269(4)(j) should be given a meaning which affords that paragraph a breadth of application similar to that which was attributed to a provision considered by the Full Court of the Federal Court in *Minister for Environment and Heritage v Queensland Conservation Council Inc & Anor* (the "Nathan Dam case").[16] The statutory provision in issue in that case was s 75(2)(a) of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth). Section 75(1) conferred upon a Commonwealth minister the obligation to decide whether a particular action was a "controlled action". A consequence of a ministerial decision that a proposed action was a controlled action was that relevant impacts of that action would require assessment under a different part of that Act. Section 75(2) provided that, if it were relevant for the Minister to consider the impacts of an action:

> "(a) The Minister must consider all adverse impacts (if any) the action:
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> (i) has or will have; or
>
> (ii) is likely to have;
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> on the matter protected by each provision of Part 3; …"

[29] The action which was the subject of the proposal referred to the Minister in that case was "the construction and operation" of the Nathan Dam.[17] The court found that the expression "all adverse impacts" included "each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not",[18] so that the Minister had erred in law in excluding reference to the use of water downstream from the dam for growing and ginning cotton, being a use within the contemplation of the proponent of the action.[19] The analysis upon which the appellant relied is encapsulated in the following passage of the court's reasons:

> "… "Impact" in the relevant sense means the influence or effect of an action: *Oxford English Dictionary* (2nd ed). As the respondents submitted, the word "impact" is often used with regard to ideas, concepts and ideologies: "impact" in its ordinary meaning can readily include the "indirect" consequences of an action and may include the results of acts done by persons other than the principal actor. Expressions such as "the impact of science on society" or "the impact of drought on the

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15 33 QCLR 79 at [580].
16 (2004) 139 FCR 24.
17 139 FCR 24 at [56].
18 139 FCR 24 at [57].
19 139 FCR 24 at [56], [60].

> economy" serve to illustrate the point. Accordingly, we take s 75(2) to require the Environment Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect. "Impact" in this sense is not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter. Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an "impact" of a proposed action. …"[20]

[30] The appellant emphasised the breadth of meaning which that passage attributed to the word "impact". The appellant's arguments on this topic did not attribute sufficient weight to the very different text and context in which the word "impact" appears in s 269(4)(j) of the *Mineral Resources Act*. The Full Court of the Federal Court was at pains to make it clear that its construction of the Commonwealth legislation was not influenced by concepts developed in relation to other environmental protection legislation, including legislation in the Australian States, and that it was also not helpful to have regard to different phrases.[21] Conversely, the Full Court's construction does not guide the proper construction of the very different provisions of the *Mineral Resources Act*. A more liberal construction of "all adverse impacts" in the Commonwealth legislation is suggested by a combination of different matters. In s 75(2)(a), the adjective "all" qualifies "adverse impacts" and there is no expressed requirement for a causal relationship between the "action" and the "impact" such as is found in the words "caused by" in s 269(4)(j)). The contextual consideration that s 75(2)(a) is a "gateway" provision is also relevant. Satisfaction of that provision triggered a further study about the proposed action, which ultimately would lead to a decision about the action. That context suggests that the provision might be expected to comprehend a broader range of "impacts" than s 269(4), which identifies those matters which the Land Court must consider in formulating its recommendations to the relevant Minister. Also, the "action" in the Nathan Dam Case comprehended not only the construction of the dam but also the downstream irrigation which would result from its operation.

[31] The relevant limitation in s 269(4)(j) is not found in the word "impact" alone but in the composite expression "impact caused by those operations". In the context of s 269(4)(i), s 269(4)(j) allows consideration only of impacts caused by "operations to be carried on under the authority of the proposed mining lease". The relevant operations in this case are confined to mining coal within the boundaries of the proposed mining lease. Each preceding paragraph of s 269(4) is similarly directed to the regulation of that proposed use.

[32] The objectives of the Act expressed in s 2 do not support the appellant's argument. Section 2 sets out in seven sub-paragraphs what is stated to be the "principle objectives" of the *Mineral Resources Act*. They include, "(d) encourage environmental responsibility in prospecting, exploring and mining" and "(g) encourage responsible land care management in prospecting, exploring and mining." The expression "in… mining" in those

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20 139 FCR 24 at [53].

21 139 FCR 24 at [52], [53].

paragraphs describes the area of activity within which "environmental responsibility" is intended to be encouraged by the Act, so far as that is relevant in this appeal. There is no tension between those stated objectives and the member's construction of s 269(4)(j) which was upheld by the primary judge.

[33] It follows that, as MacDonald P also concluded in *Xstrata*,[22] it is outside the Land Court's jurisdiction under s 269(4)(j) to consider the impact of activities which would not be carried on under the authority of the proposed mining lease. Any impact of scope 3 emissions is not a relevant consideration under that paragraph. I would affirm the primary judge's decision that the Land Court member was correct in considering that the scope 3 emissions should not be taken into account under that paragraph.

The Environmental Protection Act

[34] Chapter 5 of the *Environmental Protection Act* provides for "environmental authorities for mining activities".[23] So far as is relevant here, a "mining activity" is "an activity …that, under the Mineral Resources Act, is authorised to take place on …land to which a mining tenement relates…"[24].

[35] The relevant function of the Land Court under that Act is to make a decision under Subdivision 1 of Division 7 of that Act upon the appellant's objection to the second respondent's application for an environmental authority.[25] The required "objections decision for the application" is a recommendation to the EPA Minister that the application be granted on the basis of the draft environmental authority for the application, or that the application be granted on stated conditions that differ from conditions in the draft, or that the application be refused.[26] As soon as practicable after such a decision is made, the Land Court is obliged to give a copy of the decision to the MRA Minister (and, if a relevant mining lease concerns a "significant project", the State Development Minister), and those Ministers must advise the EPA Minister about any matter they consider may help the EPA Minister to make a decision.[27] Thereafter the EPA Minister must make a decision that the application be granted on the basis of the draft environmental authority, or that it be granted on conditions stated in the Minister's decision that differ from conditions in the draft, or that the application be refused.[28]

[36] The directly relevant provision is s 223. It provides:

> "In making the objections decision for the application, the Land Court must consider the following–
> (a) the application documents for the application;
> (b) any relevant regulatory 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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22 33 QCLR 79 at [530] – [531].
23 *Environmental Protection Act*, s 146(1).
24 *Environmental Protection Act*, s 147(1)(a).
25 *Environmental Protection Act*, s 219(1).
26 *Environmental Protection Act*, s 222(1).
27 *Environmental Protection Act*, s 224(2).
28 *Environmental Protection Act*, s 225.

[37] The "standard criteria" mentioned in paragraph (c) are defined in the definitions schedule with reference to 12 paragraphs, the last of which refers to "any other matter prescribed under a regulation". It is sufficient for present purposes to reproduce three other paragraphs: "the principles of ecologically sustainable development as set out in the 'National Strategy for Ecologically Sustainable Development'"; "any applicable environmental impact study, assessment or report"; and "the public interest".

[38] The "National Strategy for Ecologically Sustainable Development" sets out the following principles:

> "**The Core Objectives are**:
>
> - to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
> - to provide for equity within and between generations
> - to protect biological diversity and maintain essential ecological processes and life-support systems
>
> **The Guiding Principles are**:
>
> - decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations
> - where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
> - the global dimension of environmental impacts of actions and policies should be recognised and considered
> - the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised
> - the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised
> - cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms
> - decisions and actions should provide for broad community involvement on issues which affect then.
>
> These guiding principles and core objectives need to be considered as a package. No objective or principle should predominate over the others. A balanced approach is required that takes into account all these objectives and principles to pursue the goal of [ecologically sustainable development]."

Relevance of scope 3 emissions under s 223 of the *Environmental Protection Act* and s 269(4)(k) of the *Mineral Resources Act*

[39] In *Xstrata*,[29] MacDonald P acknowledged that the matters which s 223 of the *Environmental Protection Act* obliged the Land Court to consider, particularly the

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[29] 33 QLCR 79 at [586] – [603].

"standard criteria", contemplated account being taken of the global impacts of a project, including consideration of greenhouse gas emissions, but MacDonald P held that the function of the Land Court in that respect was limited to considering only such of those matters as resulted from a "mining activity" as defined in s 147, namely, an activity authorised under the *Mineral Resources Act* to take place on land to which the relevant mining tenement relates. MacDonald P therefore held that scope 3 emissions (which do not result from any activity authorised under a mining lease) were irrelevant to the Land Court's function under the *Environmental Protection Act*.

[40] MacDonald P also held that under s 269(4)(k) of the *Mineral Resources Act*, "[t]he issue of climate change is clearly a matter of general public interest and a matter which may militate against the grant of the proposed leases" and that "it is only one of a number of matters that the Court must weigh up in considering whether the public right and interest will be prejudiced by the project".[30] MacDonald P referred to evidence which was to much the same effect as expert evidence in the present matter; stopping the project would not result in any substantial difference in the levels of greenhouse gases in the atmosphere.[31] MacDonald P concluded that, balancing all of the relevant factors, the climate change objections in that case did not justify refusal of the proposed mining leases on public interest grounds.

[41] The Land Court member adopted those conclusions.[32] In relation to this topic the primary judge made observations to the following effect. Greenhouse gas emissions were a relevant issue in respect of the environmental approval under the *Environmental Protection Act* because they were made relevant by the National Strategy for Ecologically Sustainable Development which formed part of the "standard criteria" which s 223(c) of that Act required the Land Court to consider.[33] The primary judge found that the member agreed "with the decision of the President of the Land Court in *Xstrata* in relation to the operation of s 223 of the EPA to the effect that the Land Court's jurisdiction was limited to a consideration of the activities that fell within the scope of the environmental approval and that references to "public interest" in that decision should be taken to include the consideration of scope 3 emissions."[34] In the same context, the member concluded that scope 3 emissions should not be taken into account, "because the clear and unambiguous facts showed that there would be no reduction of greenhouse gas emissions if the Alpha Mine was refused and because, depending on the source of replacement coal, such replacement coal may well on the evidence result in an increase in such emissions".[35]

[42] Although aspects of those observations arguably suggest that the member considered that the reference to "the public interest" in the standard criteria also allowed for consideration of scope 3 emissions also under s 223(c) of the *Environmental Protection Act*,[36] upon a fair reading of the primary judge's reasons as a whole the primary judge affirmed the member's adoption of MacDonald P's analysis in *Xstrata*. Upon that view, scope 3 emissions are potentially relevant under only s 269(4)(k) of the *Mineral Resources Act*, as an aspect of the member's consideration whether the public right and interest would be prejudiced. In any event, if scope 3 emissions were

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30 33 QLCR 79 at [576].
31 33 QLCR 79 at [581], with reference to the evidence summarised at [559] – [563].
32 *Hancock Coal Pty Ltd v Kelly & Ors* [2014] QLC 12 at [212], [216] – [218], [232].
33 [2015] QSC 260 at [34].
34 [2015] QSC 260 at [39].
35 [2015] QSC 260 at [40].
36 Particularly at [2015] QSC 260 [34] and [39] (second sentence).

also relevant in the consideration required by s 223 of the *Environmental Protection Act*, that would not affect the result of this appeal. That is so because the member took scope 3 emissions into account in a way which is not amenable to statutory review on either view of the legislation.

[43] The Land Court member concluded that it was not in the public interest for the mining lease to be granted because of the unsatisfactory nature of evidence concerning matters unrelated to scope 3 emissions, but that, the public right of interest otherwise would not be prejudiced by the grant of a mining lease.[37] The member's conclusion that the public right and interest otherwise would not be prejudiced by the grant of the mining lease was informed by his findings that if the proposed mine did not proceed the power stations that would have burned coal from the mine would instead burn the same quantity of coal from other mines and there would be no difference in the amount of scope 3 emissions.

[44] The appellant argued that the *Environmental Protection Act* required that adverse environmental effects of scope 3 emissions be taken into account under s 223 adversely to the second respondent's application; that Act was said to render it impermissible for the Land Court to give no weight to the environmental harm which would be caused by the transportation and burning of coal mined from the mine upon the basis of the effect of replacement coal being transported and burned in the same power stations. The appellant's argument involved detailed analysis of many provisions of the *Environmental Protection Act*, but it ultimately depended upon the proposition that attributing zero weight to the environmental harm of an activity on the grounds that activities by others would produce similar or "replacement" harm was inconsistent with the object and purpose of the *Environment Protection Act*.

[45] As was submitted for the second respondent, the appellant's argument wrongly assumed that scope 3 emissions in connection with the mine would cause environmental harm or an adverse environmental impact. The same flaw in the appellant's arguments infected both grounds of its appeal (see [22] of these reasons). Those grounds expressly assume that environmental harm or adverse impact would be caused by scope 3 emissions associated with the proposed mine and that the Land Court reasoned that no weight should be given to that environmental harm because equivalent harm would be caused by other mining activities. Rather, the member took into account his finding that the power stations would burn the same amount of coal and produce at least the same amount of scope 3 emissions whether or not the mine proceeded; if the mine proceeded it would not increase the amount of global greenhouse gases or any environmental impact resulting from those gases. As the second respondent submitted, the finding in the Land Court was not that there was "replacement harm", but that there would be the "same or greater harm" if the mine did not proceed than if it did proceed. Furthermore, whether that is a correct analysis is not to the point. The appellant's applications for statutory review did not involve a merits review but depended upon the existence of one of the legal errors contended for in the applications for statutory review. Because neither of the *Mineral Resources Act* and the *Environmental Protection Act* precluded the member from taking into account the accepted evidence that scope 3 emissions and any consequential effect upon the climate would not be increased by the mine proceeding, there was no legal error such as would justify statutory review.

[46] The appellant argued that the Land Court member was obliged to give weight to environmental harm which might be caused by scope 3 emissions and in doing so was

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37 [2014] QLC 12 at [232].

obliged to disregard the fact found by the member that the same amount of emissions would occur if the mine did not proceed. That argument is difficult to reconcile with the expressed requirement in s 223 that the function of the Land Court is to "consider" the standard criteria and other matters identified in that section. The word "consider", like expressions such as "have regard to" and "take into account", leaves it to the Land Court to decide what, if any, weight should be given to each of the matters set out in s 223.[38] The same analysis is applicable in relation to the requirement in s 269(4) of the *Mineral Resources Act* that the Land Court "shall take into account and consider" the identified matters.

[47] Accepting that the concept of "environmental harm" is of great significance in other aspects of the operation of the *Environmental Protection Act*, the relevant function of the Land Court is not qualified by any requirement about the manner in which it must consider the identified matters or about the weight to be given to any of the relevant considerations. I am unable to accept the appellant's argument that any such qualification is implied in that Act. The appellant particularly relied upon sections 3 and 5. Section 5 obliges a person upon whom a function or power is conferred to perform that function or exercise that power in the way that best achieves the object of the Act. Section 3 describes the object of the Act as being, "… to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends …". Even upon the premise that the Land Court was obliged to seek to further that object when considering the recommendations to be made to the EPA Minister, the member was not obliged to ignore evidence to the effect that global greenhouse gases would not be increased by the mine proceeding.

[48] The appellant has not made out either of the grounds of its appeal.

[49] The primary judge dismissed the application against the EPA Minister on the ground that the Land Court's recommendations were valid. That decision should be affirmed on the same ground. It is unnecessary to consider the additional arguments for the EPA Minister to the effect that the Minister's decision was made within jurisdiction and would be valid even if the Land Court's decisions were set aside.

Proposed orders

[50] I would dismiss the appeal and order the appellant to pay the second respondent's and third respondent's costs of the appeal.

[51] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.

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[38] See *Rathborne v Abel* (1964) 38 ALJR 293 at 295, 301; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.