SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors* [2007] QCA 338
PARTIES:	**QUEENSLAND CONSERVATION COUNCIL INC** (objector/appellant) **v** **XSTRATA COAL QUEENSLAND PTY LTD, ITOCHU COAL RESOURCES AUSTRALIA PTY LTD, ICRA NCA PTY LTD and SUMISHO COAL AUSTRALIA PTY LTD** (applicants/first respondent) **ENVIRONMENTAL PROTECTION AGENCY** (statutory party/second respondent)
FILE NO/S:	Appeal No 2235 of 2007 AML No 207 of 2006 ENO No 208 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Land and Resources Tribunal
DELIVERED ON:	12 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	9 August 2007
JUDGES:	McMurdo P, Holmes JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed with costs to be paid by the first respondent** **2. The orders of the Land and Resources Tribunal of 8 May 2007 are set aside** **3. The matter is remitted to the Land Court for determination according to law** **4. The appellant is given leave to amend its particulars of the conditions it seeks to have imposed on the respondents' applications in accordance with the appellant's application filed in the Land and Resources Tribunal on 24 January 2007**
CATCHWORDS:	ENERGY AND RESOURCES – MINERALS – COURTS OR TRIBUNALS EXERCISING JURISDICTION IN MINING MATTERS – QUEENSLAND – OTHER COURTS OR TRIBUNALS – where the Land and Resources

Tribunal raised the issue of whether anthropogenic greenhouse gas emissions have been proven to contribute to climate change – where that issue was not in dispute between the parties – where the Tribunal introduced two new documents relating to that issue and called for submissions from the parties – where the parties submitted that the documents were not directly relevant to the proceedings and related to a fact undisputed in the case – where the Tribunal did not indicate the extent of reliance on the new documents with regard to reaching its decision – where the Tribunal's determination was materially affected by the new documents – whether the parties were afforded procedural fairness with regard to presenting an argument on the new material – whether the appellant was denied natural justice by the Tribunal

ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – ENVIRONMENTAL PROTECTION LEGISLATION – where the appellant objected to applications made under the *Mineral Resources Act 1989* (Qld) and *Environmental Protection Act 1994* (Qld) unless the granting of those applications was subject to conditions requiring a 100 per cent offset of greenhouse gas emissions from the mining, transport and use of the coal from the proposed mine – where the appellant sought to amend its objections from a 100 per cent reduction in emissions to a 10 per cent reduction in emissions – whether amending the particulars would alter or merely narrow the issue contained in the objection – whether the appellant should be allowed to amend the particulars of the objection in the terms sought

Environmental Protection Act 1994 (Qld), s 212, s 218, s 219, s 223, s 238
Land Court Act 2000 (Qld), s 91
Land and Resources Tribunal Act 1999 (Qld), s 49, s 67(2)(b), s 87
Mineral Resources Act 1989 (Qld), s 268(3), s 265, s 269, s 269(4), s 275

Armstrong v Brown [2004] 2 Qd R 345, considered
Commissioner for ACT Revenue v Alphaone Pty Ltd (1994) 49 FCR 576, cited
H A Bachrach Pty Ltd v Caboolture Shire Council (1992) 80 LGERA 230, applied
Kioa v West (1985) 159 CLR 550, applied
Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24, applied
Mummery v Irvings Pty Ltd (1956) 96 CLR 99, applied
Public Service Board of New South Wales v Osmond (1986) 159 CLR 656, cited
Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473, cited
SZBEL v Minister for Immigration and Multicultural and

Indigenous Affairs (2006) 231 ALR 592, considered
Yorke v General Medical Assessment [2003] 2 Qd R 104, considered

COUNSEL: S J Keim SC, with C J McGrath, for the appellant
D J S Jackson QC, with S E Brown, for the first respondent
I R Pepper for the second respondent

SOLICITORS: Environmental Defenders Office for the appellant
Allens Arthur Robinson for the first respondent
Environmental Protection Agency for the second respondent

[1] **McMURDO P**:

The background to this appeal

The first respondents to this appeal, Xstrata Coal Qld Pty Ltd and others ("Xstrata"), applied to the Land and Resources Tribunal under s 275 *Mineral Resources Act 1989* (Qld) for the grant of an additional surface area to a mining lease, part of the Newlands coal mine, at Suttor Creek in Central Queensland, 129 kilometres west of Mackay. Xstrata intended to develop a new open cut coal mining operation (the Wollombi pit) to replace current production on the lease. Under s 238 *Environmental Protection Act 1994* (Qld) Xstrata also needed an amendment to the environmental authority associated with the original lease.

[2] The appellant, the Queensland Conservation Council Inc ("QCC"), and the Mackay Conservation Group ("MCG") objected to the grant of the additional surface area to Xstrata's mining lease and to the proposed amendment to the environmental authority without the imposition of conditions. The objections of both QCC and MCG claimed the mine would have adverse environmental impacts unless conditions were imposed to avoid, reduce or offset the greenhouse gas emissions that are likely to result from the mining, transport and use of the coal from the mine. Their objections included:

> "C. The greenhouse gas emissions from the full fuel cycle of the mining, transport and use of the 28.5Mt of coal from the mine for electricity production or steel production will be approximately 72.26-96.44Mt of carbon dioxide equivalent (Mt CO_2-e).
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> …
>
> E. The greenhouse gas emissions from the mining, transport and use of the coal from the mine will contribute significantly to global warming and climate change unless offset by conditions to avoid, reduce or offset those emissions."

[3] MCG elected not to make further submissions nor to appear before the Tribunal at the hearing of the applications and objections. QCC elected to argue its objections at the hearing of the applications.

[4] The Tribunal held a directions hearing on 27 November 2006. It made a number of orders, including that there would be a joint hearing of the applications and the objections; all evidence in chief was to be in affidavit form and QCC was to file and serve by 10 December 2006 further particulars of:

> "a. the conditions it would seek to have imposed pursuant to … the objection;

> b. the significance of the contribution of the mine to global warming and climate change, as referred to in paragraph E of the facts and circumstances relied upon in support of the grounds of objection; and
> c. the calculation of emissions of 72.26 to 94.44Mt in paragraph C of the facts and circumstances set out in the Queensland Conservation Council's notice of objection."

It also made other procedural orders for disclosure, filing and serving affidavits and to narrow matters upon which expert witnesses disagreed. The matter was set down for hearing on 31 January 2007.

[5] QCC provided its further and better particulars relevantly in these terms:

> "(a) That [Xstrata] avoid, reduce or offset the likely greenhouse gas emissions from the mining, transport and use of the coal from the mine of an amount totalling the current maximum estimated production of greenhouse gas emissions of 96.44 million tonnes of carbon dioxide equivalent … ."

[6] On 24 January 2007 QCC applied to the Tribunal for an order that it be permitted to amend its particulars. QCC still contended that conditions should be imposed on the granting of Xstrata's applications requiring it to avoid, reduce or offset all greenhouse gas emissions from the carrying out of the proposed mining operations. The amendment it sought was to require that Xstrata avoid, reduce or offset 10 per cent of those likely greenhouse gas emissions instead of the 100 per cent earlier particularised.

[7] QCC's application to amend its particulars was heard at the commencement of the hearing of Xstrata's applications and the objections to them on 31 January 2007. Xstrata opposed the amendment contending that it would be unfairly prejudiced because its expert reports and economic and financial calculations had been prepared to meet a 100 per cent case; an adjournment to obtain reports to meet the 10 per cent case would cause costly delays. The Tribunal considered that to allow the amendment would substantially change the case Xstrata had to meet. It held that as it was made at a very late stage, and Xstrata was not able to meet the proposed amended objection without an adjournment, Xstrata would be so prejudiced that the application should be refused. The hearing of the substantive matters then proceeded. After all evidence and information had been received, the Tribunal did not allow QCC to make submissions outside its particularised objections. Late on 1 February 2007 the hearing concluded and the Tribunal reserved its decision on Xstrata's applications and the objections to them.

[8] By a letter dated 5 February 2007[1] the Tribunal wrote to the parties in these terms:

> "…since the President reserved his decision in this matter last Thursday, he has become aware of two documents which may be relevant to his decision. They are:
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> - *The Stern Review: A Dual Critique*, Vol 7 No 4, World Economics Journal, October-December 2006, pages 165-232.
> - *Climate Change 2007: The Physical Science Basis (Summary for Policymakers)*, Intergovernmental Panel on Climate

[1] It seems that the parties may not have received the letter until about midday on 7 February 2007; see Appeal Book, vol 3, 528.

> Change Working Group 1 Fourth Assessment Report, Paris, February, 2007, pages 1-21.
>
> In the circumstances, the President has directed that each party be given an opportunity to make any submissions concerning those two documents by 5.00 pm this Friday, 9 February 2007.
>
> Any submissions that you may wish to make should be delivered or faxed to me, for passing on to the President."

[9] Xstrata, in its brief submissions responding to the letter, stated:

> "3. The fact that climate change is occurring and that greenhouse gas emissions contribute to that climate change through global warming were not matters disputed by [Xstrata] for the purposes of the hearing of the application. [Xstrata] accepted that there is a body of scientific evidence which supports the argument that greenhouse gas ('GHG') emissions do contribute to what is commonly referred to as 'climate change' or 'global warming'. [Xstrata] was also prepared to proceed with its case on the basis that there may be some consequences of climate change for the environment, although what those consequences may be is, in [Xstrata's] submission, uncertain.
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> 4. Neither matter assumed any importance in [Xstrata's] case because there was no evidence that the GHG emissions from the proposed mine which is the subject of the application will have any discernible separate effect. …
>
> …
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> 13. As stated in paragraphs 2 to 4 above, [Xstrata] has been prepared to proceed in this case on the basis that GHG emissions do contribute to climate change. Neither the IPCC report nor the Stern review provides any support for finding that any impact flows from the mining activities of this particular mine which (sic) the subject of consideration by the Tribunal. Therefore, it is [Xstrata's] submission that the IPCC paper does not impact upon [Xstrata's] case, or the recommendation that should be made to the Minister about this particular application." (footnotes omitted)

[10] On 9 February 2007 QCC filed by email its submissions in response to the letter. It contended that the Tribunal should not have regard to the documents referred to in the letter as they were contrary to the uncontested evidence at the hearing. It urged the Tribunal not to accept the views expressed in the first document which was highly critical of the 2006 *Stern Review on the Economics of Climate Change* ("the *Stern Review*").

[11] The second respondent to this appeal, the Environmental Protection Agency ("EPA"), a statutory party before the Tribunal and in this appeal, also made submissions in response to the letter. These included:

> "2.2 In short the EPA, like [Xstrata], have conducted this case on the basis of an assumption that global greenhouse gas emissions contribute to global warming and climate change. …

…

> 2.4 In the light of the way in which the parties have conducted the case, therefore, there is no particular relevance to be attributed to the various questions raised in the Stern review and the fourth assessment report about the validity of the connection between greenhouse gas emissions and global warming and climate change."

[12] On 14 February 2007 QCC made the following further written submissions to the Tribunal "on natural justice and fair and proper consideration of issues" in response to the letter:

> "1. Following the conclusion of the objections hearing on 1 February 2007, on 5 February 2007 the Tribunal wrote to the parties to give an opportunity to make any submissions concerning two documents that the Tribunal had become aware of that 'may be relevant to the decision'. The correspondence did not state how those documents might be relevant or what use the Tribunal proposed to make of them.
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> 2. On 9 February 2007 the applicant, Xstrata, and QCC filed written submissions on the two documents raised by the Tribunal. Today, 14 February 2007, the Environmental Protection Agency (EPA), filed further submissions on the two documents and in reply to the submissions of Xstrata and QCC.
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> 3. The submissions of Xstrata and the EPA raise matters which go beyond the evidence and that were not put to any of the expert witnesses called at the hearing.
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> 4. QCC does not know how the Tribunal proposes to make use of the two documents or the submissions of Xstrata and the EPA; however, QCC raises the requirements in sub-s 49(1) of the *Land and Resources Tribunal Act 1999* that the Tribunal must observe the rules of natural justice and must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it." (footnotes omitted)

[13] The Tribunal delivered its reasons the next day.[2] It made orders recommending to the Minister for Mines and Energy that Xstrata's application for additional surface area be granted in whole without any of the conditions sought by the objectors and that the related environmental authority mining lease application be granted without any of the conditions sought by the objectors. I will shortly return to consider these reasons, which referred to the two documents the subject of the letter of 5 February, in more detail.

[14] QCC appeals against those orders under s 67(2)(b) *Land and Resources Tribunal Act 1999* (Qld). It asks this Court to allow the appeal and set aside those orders. It originally asked that the matter be remitted to be dealt with according to law by a differently constituted Land and Resources Tribunal. Latterly it has requested instead that the matter be remitted to the Land Court[3] to which the jurisdiction of

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2 *Re Xstrata Coal Qld Pty Ltd & Ors* [2007] QLRT 33.

3 Appellant's further submissions filed 8 October 2007.

the Land and Resources Tribunal has been recently transferred[4]. To succeed, it must show an error of law which could have materially affected the Tribunal's decision: *H A Bachrach Pty Ltd v Caboolture Shire Council*,[5] applying Mason J's observations in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*.[6]

The alleged errors of law

[15] Mr Keim SC, who appears with Mr McGrath for QCC, contends that the Tribunal made the following appealable errors of law. First, QCC was denied natural justice contrary to the obligations placed on the Tribunal under s 49(1) *Land and Resources Tribunal Act*.

[16] The second appealable error of law is said to be that the Tribunal erred in refusing to allow QCC to amend its particulars of the conditions it sought to have imposed on Xstrata's applications. The Tribunal erred in construing s 268(3) *Mineral Resources Act* and the law relating to particulars. It compounded this error in refusing to allow QCC to make submissions on the conditions that ought to have been imposed based on the evidence before the Tribunal and the applicable statutory criteria, even though these conditions may have differed from those particularised.

[17] QCC's third contention is that the Tribunal erred in interpreting its statutory role. This role goes beyond resolving disputes between Xstrata and QCC to the wider public interest role of advising the Minister of the merits of Xstrata's applications and what conditions were relevant and reasonable to them in all the circumstances. The Tribunal was legally obliged to consider what conditions were relevant and reasonable in the light of the evidence and statutory criteria, irrespective of the proposed conditions particularised by QCC.

[18] Mr Keim submits that the fourth appealable error of law is that the Tribunal wrongly required QCC to demonstrate a causal link between the greenhouse gas emissions associated with the proposed mine and a discernible environmental impact when considering the matters listed in s 269(4)(j), (k) and (l) *Mineral Resources Act* and s 223(c) *Environmental Protection Act*.

The Tribunal's reasons

[19] It is helpful to next review the Tribunals' reasons. These were as follows.

[20] The mining lease and the mining operation proposed to be conducted on it were to accord with a 33 page draft environmental authority issued by the EPA and would bring substantial economic benefits to the region and the State.[7] Because there were objections, the Tribunal was required to make a recommendation to the Minister that the additional surface area application and environmental authority application be either granted (with or without conditions) or rejected.[8] The Tribunal set out the relevant statutory provisions and summarised the objections. The proposed mine would contravene s 269(4)(j)-(l) *Mineral Resources Act* and the ecologically sustainable development principles (part of the standard criteria) under s 223(c) *Environmental Protection Act* unless conditions were imposed to "avoid,

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4 See s 91 *Land Court Act 2000* and s 87 *Land and Resources Tribunal Act 1999*; as amended by the *Land Court and Other Legislation Amendment Act 2007* (Qld).

5 (1992) 80 LGERA 230, 237-238.

6 (1986) 162 CLR 24, 40, Gibbs CJ and Dawson J agreeing.

7 *Re Xstrata Coal Qld Pty Ltd & Ors* [2007] QLRT 33, [2].

8 Above [3]-[4].

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]

[21] QCC particularised its objections to require Xstrata to avoid, reduce or offset 100 per cent of the greenhouse gas ("GHG") emissions. Its application at the start of the hearing to amend that 100 per cent figure to 10 per cent was refused because Xstrata had prepared its case on the basis of the 100 per cent figure and would be prejudiced by the proposed late amendment. QCC led evidence at the hearing but did not finally submit that any particular condition should be imposed on the applications.[10] The only other objector, MCG, did not attend the hearing and relied solely on its objection by which it sought unparticularised conditions to avoid, reduce or offset GHG emissions.[11]

[22] QCC's case was that the GHG emissions due to human activities, principally energy use, contribute to global warming and climate change to the detrimental impact on Australia and the rest of the world's economy, society and environment.[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 sought to compare the proposed mine's "mine life emissions" with global annual emissions which he said were 0.24 per cent of current annual global release of greenhouse gases. But when the proposed mine's likely annual output of CO_2 emissions (5.6Mt) was compared with global annual output of CO_2 emissions (34000Mt), the correct figure was not 0.24 per cent but 0.016 per cent. Professor Lowe finally accepted in cross-examination that the proposed mine's annual contribution to annual global GHG emissions would be "very small". Mr Stanford, an expert witness for Xstrata, said that such a very small figure would make no difference to the rate of global warming. The Tribunal accepted Mr Stanford's assessment.[13]

[23] Mr John Norling also gave evidence about the economic effects of climate change. Like Professor Lowe, he placed great emphasis both on the *Stern Review* 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 on assessments by the Intergovernmental Panel on Climate Change ("IPCC"). Mr Norling grossly exaggerated references in the *Stern Review* to sea level rises.[14]

[24] On the other hand, Xstrata and the EPA argued that QCC had not demonstrated that the mine would have any discernible separate effect on global warming or climate change. They did not dispute that there was scientific evidence that GHG emissions (including from human induced causes) contribute to global warming and climate change but made no concession as to the extent of that contribution or its consequences. In a footnote the Tribunal referred to the following exchange recorded in the transcript of the hearing on 27 November 2006 as evidencing that the Tribunal then alerted QCC "to the need to prove these factors":

> "PRESIDENT: You'll have to prove that greenhouse gases are bad, though, won't you?

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9 Above, [7]-[8]
10 Above [9].
11 Above, [10].
12 Above, [12]
13 Above, [12].
14 Above, [13].

> COUNSEL FOR QCC: That may not be in dispute. … I understand that Xstrata doesn't dispute greenhouse is a major problem and has a range of programmes in place to attempt to address them, so it may not be in dispute that greenhouse is a big problem and that the mining, transport and use of this coal will result in a large amount of greenhouse gas emissions. Actually proving what impact that is, though – obviously it's a global problem … but under the Tribunal's legislation, the *Mineral Resources Act* and the *Environmental Protection Act,* are much broader and the *Mineral Resources Act* in sub-s. (4) of s 269 refers to obviously any adverse impact on the environment, any prejudice to the public right or interest, but then I believe it's sub-para. (j) that refers to any good reason, so …
> PRESIDENT: But that's what I mean. Thank you for drawing my attention to those provisions, but aren't you going to have to show that greenhouse gases contribute to global warming because you say it in ground 4?
> COUNSEL FOR QCC: Well, yes. And if that is in dispute, then it's a matter upon which expert evidence will be called, President. So if we need to have that factual dispute, then we certainly are willing to join issue on that, but it may not be and that's one of the reasons for having the without prejudice conference very promptly: to decide, really, where are the parties coming from, what are we actually in dispute about, and try and narrow down what experts are required and then address those issues as promptly as feasible."[15]

[25] The Tribunal next noted that the *Stern Review* had been severely criticised on both scientific and economic grounds and discussed the two documents the subject of the letter to the parties of 5 February:[16]

> "[16] … 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:
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> - biased, selective and unbalanced;
> - scientifically flawed;
> - a vehicle for speculative alarmism; and
> - not a basis for informed and responsible policies.
>
> 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 ~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).
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> [17] Finally, the Fourth Assessment Report of the Intergovernmental Panel on Climate Change's *Summary for Policymakers* was released on 2 February 2007. It relevantly concluded that is very likely that human-induced GHGs are causing global warming, and that most of

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15 Appeal Book 10-11.
16 See [8] of these Reasons.

> 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.
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> [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.
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> [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.
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> [20] This Tribunal is empowered by statute to 'inform itself of anything in the way it considers appropriate'. 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:
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> '… the tribunal would not be entitled to ignore material of which it had notice which demonstrated that earlier material was incorrect, incomplete or misleading'."[17] (footnotes omitted)

[26] The Tribunal then considered QCC's submission that environmentally sustainable development ("ESD") principles include mitigating serious environmental degradation caused by global warming. The Tribunal rejected that submission

[17] *Re Xstrata Coal Qld Pty Ltd & Ors* [2007] QLRT 33, [16]-[20].

because it was based on an assumption concerning the cause and effect of global warming. The Tribunal was:

> "…not satisfied that that assumption (relevantly, a demonstrated causal link between this mine's GHG emissions and any discernible harm – let alone any 'serious environmental degradation' – caused by global warming and climate change) has been shown by QCC to be valid. 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."[18] (footnotes omitted)

[27] The Tribunal concluded:

> "[22] Having regard to all of the evidence before me, I am not satisfied that:
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> - 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.
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> [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." (footnotes omitted)

[28] After briefly referring to the factors required to be taken into account under s 269(4) *Mineral Resources Act* and s 223 *Environmental Protection Act*, the Tribunal recommended to the Minister that the additional surface area application and the related environmental authority application be granted without any of the conditions sought by the objectors.[19]

The relevant statutory provisions

[29] The statutory matrix in which the Tribunal was operating at the hearing is relevant to QCC's contentions in this appeal.

[30] The Tribunal was established by the *Land and Resources Tribunal Act*.[20] The Tribunal in exercising its jurisdiction under the Act was not subject to the direction of the Minister.[21] This matter was heard before the Tribunal constituted by the

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18 See [21] of these reasons.

19 *Re Xstrata Coal Qld Pty Ltd & Ors* [2007] QLRT 33, [24].

20 This Act has been very substantially amended since the hearing of this matter by the *Land Court and Other Legislation Amendment Act 2007* (Qld), operational 21 September 2007.

21 *Land and Resources Tribunal Act,* s 5.

President, who was appointed by the Governor-in-Council until retirement or resignation.[22] The President has the salary and allowances payable to a Supreme Court judge.[23] Part 4 of the Act deals with the organisation and operation of the Tribunal and div 2 (ss 46 to 50) deals with "Proceedings". A party to a proceeding before the Tribunal may appear in person or be represented by a lawyer or someone else.[24] Hearings are open to the public unless the Tribunal orders otherwise in the interests of justice or to allow culturally sensitive issues to be appropriately dealt with.[25] Of direct relevance is s 49:

> "**49 Conduct of proceeding**
>
> (1) When conducting a proceeding, the tribunal must—
>
> (a) observe natural justice; and
>
> (b) act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it.
>
> (2) For the proceeding, the tribunal—
>
> (a) is not bound by the rules of evidence; and
>
> (b) may inform itself of anything in the way it considers appropriate; and
>
> (c) may decide the procedures to be followed for the proceeding.
>
> (3) However, the tribunal must comply with this division and the rules.
>
> (4) Directions about the way a proceeding is to be conducted may be given at any time—
>
> …"

[31] The Tribunal is a court of record.[26] Its decisions or orders must be in writing, fully state the facts found, the decision and the reasons for the decision on each relevant question of law raised at the Tribunal hearing and, if the Tribunal hearing is open to the public, must be published.[27] Proceedings which could have been brought before the Tribunal pending in either the Supreme or District Court may be transferred to the Tribunal.[28] Witnesses notified to attend at a Tribunal hearing commit an offence if they fail to attend; a warrant may be issued and executed to bring the person before the Tribunal.[29] Witnesses at the Tribunal must not without reasonable excuse refuse to be sworn or to make an affirmation.[30] A member of the Tribunal, a person representing a party before it and a person attending or appearing at it as a witness have the same protection and immunity, respectively, as a judge of the Supreme Court, a lawyer appearing for a party in a proceeding in the Supreme Court or a witness in a proceeding in the Supreme Court.[31] A person must not obstruct or improperly influence the conduct of a Tribunal hearing or contravene an

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22 Above, s 7.

23 Above, s 10(1); repealed by s 4, *Land Court and Other Legislation Amendment Act 2007* (Qld), operational 21 September 2007.

24 *Land and Resources Tribunal Act*, s 47.

25 Above, s 48.

26 Above, s 54.

27 Above, s 55.

28 Above, s 56.

29 Above, s 57.

30 Above, s 58.

31 Above, s 59.

order of it limiting the extent to which a Tribunal hearing is open to the public.[32] The Tribunal has power to deal with a person for contempt.[33] In exercising its jurisdiction the Tribunal has all the powers of the Supreme Court.[34]

[32] Under s 265 and s 268(1) *Mineral Resources Act*, Xstrata's application for the grant of the additional surface area of the mining lease, together with any objections to it, was to be heard by the Tribunal. At the hearing:

> "…the Tribunal shall take such evidence, shall hear such persons and inform itself in such manner as it considers appropriate in order to determine the relative merits of the application, objections (if any) and other matters and shall not be bound by any rule or practice as to evidence."[35]

The Tribunal may direct an inspection or view,[36] adjourn a hearing,[37] order compensation[38] or award costs against an applicant[39] or an objector.[40] The Minister may require the Tribunal to advise why a hearing has not been finalised.[41]

[33] Under s 269 *Mineral Resources Act*, after the hearing the Tribunal must forward to the Minister the objections, the evidence, exhibits and the Tribunal's recommendation[42] that the application should be granted or rejected in whole or in part.[43] A recommendation may include that the mining lease be granted subject to such conditions as the Tribunal considers appropriate.[44] Matters which the Tribunal must take into account when making a recommendation are listed in s 269(4) and relevantly include whether:

> "(a) the provisions of this Act have been complied with; and
> …
> (e) the term sought is appropriate; 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; …"

Where the Tribunal recommends to the Minister that an application for the grant of a mining lease be rejected in whole or in part, the Tribunal is required to furnish reasons.[45]

[34] Xstrata's application for an amendment to the environmental authority associated with its application relating to the mining lease was required by

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32 Above, s 60.
33 Above, s 62-64
34 Above, s 65.
35 *Mineral Resources Act*, s 268(2).
36 Above, s 268(3).
37 Above, s 268(5).
38 Above, s 268(6).
39 Above, s 268(8).
40 Above, s 268(9).
41 Above, s 268(7).
42 Above, s 269(1).
43 Above, s 269(2)(a).
44 Above, s 269(3).
45 Above, s 269(5).

s 219 *Environmental Protection Act* to be referred to the Tribunal because of the objections.[46] The Tribunal was able to make appropriate orders or directions for the objections decision hearing.[47] Those orders had to be determined as close as practicably possible to the hearing of an associated application under the *Mineral Resources Act* for a relevant mining tenement.[48] The objections decision for the application must be a recommendation to the Minister that the application be granted on the basis of the draft environmental authority for the application or that it be granted on stated conditions that are different to the conditions in the draft or that it be refused.[49] In making the objections decision, the Tribunal had to consider the matters set out in s 223(a)-(g) *Environmental Protection Act*.

The alleged errors of law

1. Denial of natural justice?

(a) What was in issue between the parties as to global warming?

[35] The Tribunals' reasons[50] raise whether the fact, that human-induced (anthropogenic) greenhouse gases are a cause of climate change and global warming, was in dispute between the parties at the hearing. The Tribunal's footnoted reference to the transcript of the directions hearing[51] and the Tribunal's observations made in para [14] and following of its reasons[52] suggest that the Tribunal made its decision on the applications and objections rejecting the fact that anthropogenic greenhouse gas emissions have contributed to climate change.

[36] The competing expert evidence presented by Xstrata on the one hand and QCC on the other at the hearing did not put in issue that global warming and climate change were real and were caused by emissions of greenhouse gases linked to human activity, especially the burning of fossil fuels.

[37] QCC's expert witnesses, Professor Lowe (Emeritus Professor of Science, Technology and Society at Griffith University), Professor Hoegh-Guldberg (Professor of Marine Studies at the University of Queensland), Dr Hugh Saddler (environmental scientist and consultant), Mr Norling (an economic consultant) and Mr Keogh (a carbon trader and broker) all gave opinions referring to or accepting that global warming and climate change were both real and caused by anthropogenic emissions of greenhouse gases. Mr Norling, Mr Keogh and Professor Lowe were cross-examined. Whilst their interpretation of the *Stern Review* was tested, it was not suggested to them that anthropogenic greenhouse gas emissions were not a major cause of global warming and climate change and nor were the *Stern Review's* scientific and macro-economic findings challenged.

[38] Xstrata's expert witnesses, environmental scientist Dr Turatti and economist Mr Stanford, also unequivocally accepted in their evidence that anthropogenic greenhouse gas emissions contributed to global warming and that emissions from the mine would also contribute to it. Dr Turatti emphasised that Xstrata invests

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46 *Environmental Protection* Act, s 219(1); now jurisdiction of the Land Court, as amended by *Land Court and Other Legislation Amendment Act 2007.*

47 Above, s 220(1); now jurisdiction of the Land Court, as amended by *Land Court and Other Legislation Amendment Act 2007.*

48 Above, s 220(2).

49 Above, s 222; now jurisdiction of the Land Court, as amended by *Land Court and Other Legislation Amendment Act 2007.*

50 See *Xstrata Coal Queensland Pty Ltd & ors* [2007] QLRT 33, [14]-[24].

51 Set out in these Reasons at [24].

52 Set out in these Reasons at [25]-[27].

significant amounts in clean coal research, carbon capture and storage research and the utilisation of methane from coal mines. These projects have the potential to reduce the greenhouse gas intensity of coal production and use.

[39] Similarly, Mr Stanford's report accepted that there was strong scientific evidence to suggest that climate warming was at least in part the result of anthropogenic causes, namely the emission of greenhouse gases (particularly carbon dioxide) and that the overwhelming majority of climate scientists suggest that this has created an "enhanced greenhouse effect". He accepted the *Stern Review* as "the major report on the economics of climate change". In cross-examination he agreed with its conclusions on the economics of climate change, its emphasis on the global nature of the problem and the need for a global solution whilst emphasising the negative economic costs of business-as-usual policies and that urgent action should be taken at an early stage. He regarded, however, the conditions QCC sought to impose on Xstrata's applications as ineffective in a globalised economy where investment projects like Xstrata's can move jurisdictions. He argued that the only way to effectively address climate change was for all nations to agree to concerted action. Coal remains Australia's largest commodity export and is of particular importance to the Queensland economy. He opined:

> "However, the coal industry faces an uncertain future over the longer term because of the fact that, when burnt, coal produces relatively high levels of greenhouse gases. As the world responds to climate change, the coal industry is likely to be relatively disadvantaged. In response, the industry and government are investing considerable sums of money into research into cleaner coal and more greenhouse-friendly processes. In this context, proposals to selectively increase the industry's costs in a manner that does not generate offsetting community benefits would not be in the national interest."

[40] The joint expert reports of Drs Turrati and Saddler and of Professor Lowe and Mr Stanford clearly show that it was common ground between Xstrata and QCC that there was a persuasive body of scientific evidence that global warming and climate change was caused by anthropogenic greenhouse gas emissions. In the words of Mr Stanford (Xstrata's expert witness in economic and public policy issues relevant to government strategies to address climate change):

> "There is now strong evidence to suggest that the world is growing warmer, the climate is changing and that this is related, at least in part, to anthropogenic causes. The emission of greenhouse gases, particularly carbon dioxide (CO_2) has increased significantly since the beginning of the industrial revolution and, as the overwhelming majority of climate scientists suggest, this has created an 'enhanced greenhouse effect'. There is broad agreement that the way to address the problem is to reduce net emissions of greenhouse gases so as to stabilise and later reduce carbon concentrations in the atmosphere."[53]

[41] The fact that climate change is occurring and that anthropogenic greenhouse gas emissions have contributed to it, was undoubtedly common ground between the parties at the hearing. The submissions from Xstrata, the EPA and QCC responding to the Tribunal's letter of 5 February[54] also all support that conclusion. What was in

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53 Appeal record book, 291.

54 Set out in these Reasons at [9]-[12].

issue was the extent to which the proposed mine would contribute to global warming and whether, in the applicable factual and statutory matrix, the Tribunal should impose conditions on the recommended granting of Xstrata's applications in response to the mine's potential contribution to global warming.

(b) Did the Tribunal breach natural justice?

[42] The application and content of the doctrine of natural justice will depend on the relevant facts and the statutory context applicable in each case: *Kioa v West*.[55] The statutory framework set out earlier in these reasons[56] under which the Tribunal was conducting the hearing is critically important in determining whether in the present circumstances there has been an error of law in failing to grant QCC natural justice: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs.*[57]

[43] Although designated a tribunal, the Land and Resources Tribunal had very considerable judicial power.[58] Whilst the rules of evidence need not apply,[59] the present hearing appears to have been conducted according to those rules. All parties were legally represented, Xstrata and QCC by both senior and junior counsel. The Tribunal gave directions as to the conduct of the hearing, including that all evidence in chief was to be in affidavit form and as to the filing of expert reports and conferences with expert witnesses. The witnesses called at the hearing gave their evidence in chief, were cross-examined and re-examined. The Tribunal was entitled to inform itself of anything it considered appropriate.[60] But s 49(1) *Land and Resources Tribunal Act* in its terms specifically required the Tribunal to observe natural justice.

[44] In its reasons, the Tribunal discussed at length[61] the two scientific papers raised in the letter of 5 February and questioned whether anthropogenic greenhouse gas emissions have been proved to contribute to climate change. As I have explained, this issue was not in dispute between the parties at the hearing. Immediately following that discussion, the Tribunal found that it was not satisfied of any demonstrated causal link between Xstrata's greenhouse gas emissions and any discernible harm – let alone any serious environmental degradation – caused by global warming and climate change.[62] In so finding, the Tribunal appears to have been significantly influenced by the Carter-Byatt critique of the *Stern Review*, a critique which was raised in neither Xstrata's nor the EPA's case and was contrary to their positions taken at the hearing.

[45] QCC's expert witnesses were neither cross-examined about the critique nor given an opportunity to respond to it with knowledge that the Tribunal intended to use it to find facts contrary to the undisputed facts at the hearing. The Tribunal did notify the parties in the letter of 5 February that it had become aware of the critique and that it considered it may be relevant to the ultimate decision. But the Tribunal did not specify or clarify the way in which it considered the critique may be relevant.

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55 (1985) 159 CLR 550, Mason J 584-585.

56 Paras [29]-[34]

57 (2006) 231 ALR 592, [26].

58 See *Land and Resources Tribunal Act*, ss 5, 7, 10, 38, 47-49, 54-60, 62-65; ss 10 & 38 repealed by the *Land Court and Other Legislation Amendment Act 2007*; under the *Mineral Resources Act* the Tribunal has power to award compensation (ss 268(6), (8) and (9)).

59 Above, s 49(1)(b) and (2).

60 *Land and Resources Tribunal Act*, s 49(2)(b) and *Mineral Resources Act*, s 268(2).

61 *Re Xstrata Coal Qld Pty Ltd & ors* [2007] QLRT 33, [15]-[20].

62 Above, [21].

The letter referred not only to the critique of the *Stern Review*, but also the IPCC summary report, a report which was well capable of supporting the view, accepted by all parties at the hearing, that anthropogenic climate change was causing significant detrimental environmental effects globally. Having regard to the way the hearing was conducted, the Tribunal's letter did not make sufficiently clear that the Tribunal considered that the critique of the *Stern Review* put in issue the fact that global warming was occurring and that it was caused by anthropogenic greenhouse gas emissions. The Tribunal's reliance on the critique to dismiss the objections was not something which should reasonably have been anticipated by QCC after receiving the letter.

[46] Merely informing the parties that the Tribunal had become aware of documents which may be relevant to its decision did not satisfy the Tribunal's obligation to afford the parties procedural fairness by giving them a real opportunity to present information or argument on a matter not already obvious but in fact regarded as important by the decision-maker: see *Yorke v General Medical Assessment*,[63] where Jerrard JA (McMurdo P and Davies JA agreeing) relied on the following observations of Gibbs CJ in *Public Service Board of New South Wales v Osmond*:[64]

> "…a person or body which is considering making a decision which will adversely affect another should generally give notice to that other of the reasons why the proposed action is intended to be taken so that the person affected will have a fair opportunity to answer the case against him."

See also Brennan J's observations in *Kioa v West*[65] and *Commissioner for ACT Revenue v Alphaone Pty Ltd*.[66] QCC's further submissions of 14 February responding to the Tribunal's letter effectively highlighted this danger to the Tribunal. Unfortunately, the Tribunal did not respond appropriately to those submissions by, for example, listing the matter for further hearing so that the Tribunal's concerns arising out of the critique could be explained to the parties to allow them to respond and to call further evidence and make further submissions if they wished.

[47] The Tribunal relied on the Carter-Byatt critique which contended, contrary to the facts accepted by the parties at the hearing, that there was no scientific evidence demonstrating anthropogenic greenhouse gas induced serious global warming, to ultimately conclude that it was not appropriate to impose the conditions sought by QCC on the grant of Xstrata's applications. There was nothing in the statutory and factual matrix of this case that made it unreasonable for the Tribunal to inform QCC that having read the critique it was inclined to accept and act on it, so that QCC had an opportunity to respond. In the circumstances, this amounted to a denial of natural justice to QCC.

[48] In *Armstrong v Brown*,[67] although the question was not directly considered, this Court seems to have accepted that a breach of natural justice is an error of law sufficient to allow an appeal from the Tribunal under s 67(1) *Land and Resources Tribunal Act*. The Tribunal's failure to accord QCC natural justice in the

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63 [2003] 2 Qd R 104, 115, [30].
64 (1986) 159 CLR 656, 666.
65 (1985) 159 CLR 550, 629.
66 (1994) 49 FCR 576, 591-592.
67 [2004] 2 Qd R 345.

circumstances here appears to have materially affected the Tribunal's ultimate decision. It is an appealable error of law under s 67(1) requiring this Court's intervention. The appeal must be allowed, the orders of the Tribunal set aside and the matter remitted to the Land Court for re-hearing and determination according to law.

2. Should QCC have been allowed to amend its particulars?

[49] As I am proposing there will be a re-hearing, the ground of appeal relating to the Tribunal's refusal to allow QCC to amend the particulars of its objection should also be determined so that the boundaries of any rehearing are clarified.

[50] Section 268(3) *Mineral Resources Act* provides that the Tribunal:

> "(3) … shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application."

The *Environmental Protection Act* provides for amendment to an objection only within the objection period,[68] which it seems had expired at the time of the filing of QCC's application to amend its particulars on 24 January 2007. QCC's application was not, however, to amend its objection but to amend the particulars of its objection. In any case, as senior counsel, Mr D J S Jackson QC, who appeared with Ms Brown for Xstrata, rightly conceded, the Tribunal had wide discretionary powers under s 49 *Land and Resources Tribunal Act* and was not prevented from allowing the amendment to the particulars by s 268(3) *Mineral Resources Act* or by any provision in the *Environmental Protection Act*.

[51] The function of particulars is to limit the issues of fact being investigated, not to modify or alter the issue between the parties: *Mummery v Irvings Pty Ltd*.[69] Had QCC been successful in its application to amend its particulars from requiring Xstrata to avoid, reduce or offset greenhouse gas emissions related to the proposed mine by 10 per cent rather than the particularised 100 per cent, it would not have significantly changed the case that Xstrata had to meet. The proposed amendment to the particulars involved a question of degree and amount; if anything it narrowed rather than widened, but certainly did not alter, the issue for determination between the parties. Mr Jackson contends that the proposed amendment to the particulars would have required Xstrata to call different evidence as to the changed cost of meeting the more limited conditions sought by QCC. The evidence at the hearing was that the costs of carbon offsets were calculated in terms of the cost per tonne of CO_2 produced. Xstrata's response to the proposed amendment of the particulars would seem to involve its relevant expert witnesses in relatively straight-forward mathematical recalculations and minor consequential addenda to their reports. On the material before the Tribunal and this Court, QCC should be allowed to amend its particulars in the terms sought at first instance.

3. Did the Tribunal err in interpreting its statutory role?

[52] Because the appeal is to be allowed on other grounds, Mr Keim's third contention[70] need not be fully considered by this Court. The Land Court's approach on the re-

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68 *Environmental Protection Act*, s 218(1) and s 212 which makes irrelevant, for determining the objection period, *Mineral Resources Act* s 252A.

69 (1956) 96 CLR 99, Dixon CJ, Webb, Fullagar and Taylor J, 64-110.

70 Set out a para [17] of these reasons.

hearing will turn on the evidence and information before it. It is sufficient for the purposes of the re-hearing to make the following observations.

[53] The Tribunal's role under the *Mineral Resources Act* and the *Environmental Protection Act* was not limited to considering only the particularised conditions sought by QCC to be attached to any recommendations made to the Minister approving the applications. If not withdrawn, MCG's unparticularised objections will also have to be considered. In respect of Xstrata's application under the *Mineral Resources Act*, the Tribunal would, irrespective of QCC's objections, be required to take into account matters including the objectives of the Act,[71] and the criteria listed in s 269(4) in determining whether to recommend to the Minister that the application be granted or rejected in whole or in part and whether if granted it should be subject to an appropriate condition or conditions. Similarly, in considering Xstrata's application under the *Environmental Protection Act*, the Tribunal would, irrespective of QCC's objections, take into account matters including the objects of that Act[72] and how they are to be achieved[73] and the matters set out in s 223 of that Act. See *Sinclair v Mining Warden at Maryborough*.[74]

4. Was QCC required to demonstrate a causal link between Xstrata's greenhouse gas emissions and a discernible environmental impact?

[54] Similarly, because the appeal is to be allowed on other grounds and a re-hearing conducted, it is unnecessary to determine whether, as Mr Keim submitted, the Tribunal erred in requiring QCC to prove that greenhouse gas emissions from Xstrata's proposed mining lease would make a discernible contribution to climate change before enlivening the public interest consideration relevant to the Tribunal's decision under s 269(4)(k) *Mineral Resources Act* and s 223(c) *Environmental Protection Act*.

[55] The Tribunal at the re-hearing when determining what recommendation to make to the Minister in respect of Xstrata's applications will consider the evidence before it and take into account all relevant matters including those in s 269(4) *Mineral Resources Act* and s 223(c) *Environmental Protection Act*.

Conclusion

[56] The statutory scheme under which the Tribunal operated in this case demonstrated a clear legislative intention to have applications like Xstrata's for mining leases and to amend environmental authorities heard and determined expeditiously but according to principles of natural justice. It is regrettable that this has not resulted in the present case which must now be re-heard. QCC is, however, entitled to have its objections heard and determined according to law. The Tribunal took into account, in rejecting the conditions sought by QCC to be imposed on any recommendations granting Xstrata's applications, a critique which put in issue the fact, accepted by all at the hearing, that anthropogenic greenhouse gas emissions contributed to global warming. The Tribunal did not make clear to QCC that it intended to use the critique in this way and so did not give QCC a fair opportunity to test or refute the

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71 See *Mineral Resources Act*, s 2.

72 *Environmental Protection Act*, s 3.

73 Above, s 4.

74 (1975) 132 CLR 473, Barwick CJ at 479 (Murphy J agreeing), Gibbs J at 482, Jacobs J at 487, Stephen J at 484-485 and see also McMurdo J's observations in *Armstrong v Brown* [2004] 2 QdR 345 at [15].

critique by other information or submissions. The Tribunal's denial of natural justice to QCC in the present circumstances amounts to a significant appealable error of law which this Court must correct. Fortunately much of the information and evidence before the Tribunal was contained in affidavits so that the re-hearing should be able to proceed relatively promptly, even allowing for the preparation of any necessary ancillary expert reports.

[57] Since the hearing of this appeal, the *Land Court and Other Legislation Amendment Act 2007* (Qld) has essentially transferred the jurisdiction of the Land and Resources Tribunal to the Land Court: see s 91 *Land Court Act 2000*. QCC now asks for an order remitting this matter to the Land Court for rehearing. The respondents do not suggest that this is inappropriate in the event that the appeal is allowed.

ORDERS:

1. Appeal allowed with costs to be paid by the first respondent.

2. The orders of the Land and Resources Tribunal of 8 May 2007 are set aside.

3. The matter is remitted to the Land Court for determination according to law.

4. The appellant is given leave to amend its particulars of the conditions it seeks to have imposed on the respondents' applications in accordance with the appellant's application filed in the Land and Resources Tribunal on 24 January 2007.

[58] **HOLMES JA**: I agree with the reasons of both the President and Mackenzie J, and with the orders the President proposes.

[59] **MACKENZIE J**: The basis upon which the proceedings were conducted in the Land and Resources Tribunal is explained in McMurdo P's reasons. I agree with her analysis and her conclusions on the issues in the appeal. I wish only to add the following additional remarks.

[60] For reasons explained by McMurdo P, after the experts had given their evidence and the formal hearing had concluded, the President of the Land and Resources Tribunal undertook an analysis of a graphical representation of the global mean temperatures from 1850 to the present which is to be found as Figure SPM-3 in a document entitled Summary for Policy Makers: "Climate Change 2007: The Physical Science Basis" prepared by the Intergovernmental Panel on Climate Change ("IPPC"). For the purpose of his analysis, he expressed the IPCC's critical conclusion as being that it was very likely that human induced greenhouse gases were causing global warming and that most of the observed increases in global average temperatures since the mid-twentieth century were very likely due to the observed increase in human caused GHG concentrations. The Tribunal's reasons then make reference to two periods in which the graph certainly shows a downturn in global mean temperature (1900-1910 and 1944-1976) and two periods when the global mean temperature was trending upwards (1910-1944 and 1976-1998).

[61] There was also reference to the period 1998-2006 which the Tribunal's reasons describe as another example of a period of cooling. The year 1998, selected as the starting point for the period of cooling, was, according to the graph, significantly

warmer than any of the years preceding it and any which had followed it up to 2006. Had either of the following two years been selected as the starting point, and the result for 1998 been treated as an aberrant spike, the period to 2006 would have demonstrated an increase over that period larger than the alleged cooling relied on by the President.

[62] He then went on to point out that there was an increase of only 0.6 degrees from 1951 to 2006. Because the document said that most of the increase was due to the effect of GHGs, he assigned 75% of the increase to their effect, reaching a conclusion that the temperature increase due to GHGs was about 0.45 º C. His ultimate conclusion was as follows:

> "With all respect, a temperature increase of only about 0.45 degrees C *over 55 years* seems a surprisingly low figure upon which to base the ITCC's concerns about its inducing many serious changes in the global climate system during the 21st century."

[63] It is not the function of the present appeal to express a conclusion whether or not the methodology and analysis relied on by the President of the Tribunal is valid or not. But it is necessary to investigate whether the appellant was denied natural justice by his engaging in the analysis without informing the parties sufficiently of its purpose. It is true that after the decision had been reserved, he gave notice to the parties that he had become aware of the report in question and the critique of the Stern review, which had been referred to but not admitted in evidence in the course of the hearing. He directed that each party be given an opportunity to make any submissions concerning those two documents by the following Friday. Each of the parties took advantage of this opportunity but none specifically referred to the graph analysed in reaching the Tribunal's conclusion. Several days after the appellant's supplementary submission was delivered to the Tribunal, junior counsel for the appellant wrote a further letter complaining that the submissions of the respondents raised matters which went beyond the evidence and which had not been put to any of the expert witnesses called at the hearing. More importantly, the letter continued:

> "QCC does not know how the Tribunal proposes to make use of the two documents or the submissions of Xstrata and the EPA; however, QCC raises the requirements in subs 49(1) of the *Land and Resources Tribunal Act* 1999 that the Tribunal must observe the rules of natural justice and must act as quickly and with as little formality and technicality as is consistent with a fair and proper consideration of the issues before it."

[64] As far as the record shows, there was no response by the Tribunal to that letter. The reasons were published the following day.

[65] In my view, the failure to acquaint the parties of an issue that the Tribunal thought assumed importance, arising from the two reports provided to the parties for comment, was a critical failure to observe the requirements of natural justice. Had it been indicated that the Tribunal intended to undertake the analysis of the graphical representation in Figure SPM-3 with the particular line of inquiry in mind, the expert witnesses, or some of them, may have wished to explain aspects of it or advance alternative conclusions in support of their respective opinions. That is especially so since it was effectively conceded by Senior Counsel for the respondent that the conclusion reached by the Tribunal as a result of analysis of the graph was more sceptical of global warming than anything in the experts' reports.

[66] While it is ultimately the duty of the Tribunal to interpret scientific evidence and draw conclusions from it, this was a case where the material relied came to light only after the expert witnesses had been called. Had it been introduced in the course of evidence at the hearing, and issues had been raised about its proper interpretation, they may have wished to express a view about it. The course taken denied them that opportunity.

[67] The conclusion reached by the Tribunal on the basis of the analysis of the graph was clearly influential in its concluding that the appellant had failed to show that, even if the proposed mine's GHG emissions were eliminated completely, it would not have any effect on global warming and climate change. The explicit reference in the reasons to the appellant's submission that regard should be had to environmentally sustainable development principles suffering from the difficulty that it was "based on an *assumption* concerning the cause and effect of global warming" shows this. While that kind of issue is only one of a range of factors that have to be taken into account in performing the Tribunal's functions, it was the basis of the appellant's case and therefore a conclusion expressed as to it was inherently important in the mix.

[68] I agree that the failure to inform the parties sufficiently of the line of inquiry being pursued was a breach of the requirement to observe natural justice in the circumstances in this case. I agree with the orders proposed by McMurdo P.