SUPREME COURT OF QUEENSLAND

CITATION:	*Coast and Country Association of Queensland Inc v Smith & Anor; Coast and Country Association of Queensland Inc v Minister for Environment and Heritage Protection & Ors* [2015] QSC 260
PARTIES:	**In SC 4249 of 2014** **COAST AND COUNTRY ASSOCIATION OF QUEENSLAND INC** (applicant) **v** **PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND** (first respondent) **HANCOCK COAL PTY LTD** (second respondent) **In SC 9505 of 2014** **COAST AND COUNTRY ASSOCIATION OF QUEENSLAND INC** (applicant) **v** **MINISTER FOR ENVIRONMENT AND HERITAGE PROTECTION** (first respondent) **MINISTER FOR NATURAL RESOURCES AND MINES** (second respondent) **HANCOCK COAL PTY LTD** (third respondent)
FILE NO/S:	SC No 4249 of 2014 SC No 9505 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application for a statutory order of review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 September 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 and 23 April 2015
JUDGE:	Douglas J

ORDER:

1. **The applications in SC No 4249 of 2014 and SC 9505 of 2014 are dismissed.**
2. **The applicant pay the second respondent's costs of the application in matter number 4249/14.**
3. **The applicant pay the second and third respondent's costs of the application in matter number 9505/14.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant brought an application for a statutory order of review of recommendations made by the Land Court under s 269 of the *Mineral Resources Act* 1989 (Qld) and s 222 of the *Environmental Protection Act* 1994 (Qld) – where the recommendations related to an application for a mining lease and an application for an environmental authority – where in both cases, the primary recommendations were that the applications be rejected, with alternative recommendations that the applications be granted subject to conditions deferring the resolution of certain matters to a separate approvals process under the *Water Act* 2000 (Qld) – whether it was open to the Land Court to make alternative recommendations – whether the Land Court needed to be satisfied that the grant of a mining lease and the environmental authority met all statutory requirements, including that the proposed mining activity would produce a net benefit taking all the relevant criteria into account – whether the alternative recommendations made by the learned member of the Land Court lacked finality because they depended on the further process of approval under the *Water Act* 2000 (Qld) and amounted to the deferring of the consideration of central issues

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant brought an application for a statutory order of review of recommendations made by the Land Court under s 269 of the *Mineral Resources Act* 1989 (Qld) and s 222 of the *Environmental Protection Act* 1994 (Qld) – where the recommendations related to an application for a mining lease and an application for an environmental authority – where in both cases, the primary recommendations were that the applications be rejected, with alternative recommendations that the applications be granted subject to conditions deferring the resolution of certain matters to a separate approvals process under the *Water Act* 2000 (Qld) – whether the Land Court erred in law by failing to take into account

"scope 3 emissions" associated with the proposed mine and their effect on the environment

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – where the applicant brought an application for a statutory order of review of recommendations made by the Land Court under s 269 of the *Mineral Resources Act* 1989 (Qld) and s 222 of the *Environmental Protection Act* 1994 (Qld) – where the recommendations related to an application for a mining lease and an application for an environmental authority – where in both cases, the primary recommendations were that the applications be rejected, with alternative recommendations that the applications be granted subject to conditions deferring the resolution of certain matters to a separate approvals process under the *Water Act* 2000 (Qld) – whether the Land Court erred in law by having regard to the fact that the development of the proposed mine would not increase global greenhouse gas emissions, on the basis that coal would be sourced from elsewhere and burnt irrespective of whether the proposed mine was developed

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant brought an application for a statutory order of review of a decision by the Minister for Environment and Heritage Protection to grant an environmental authority under s 225(1) of the *Environmental Protection Act* 1994 (Qld) consistent with a recommendation made by the Land Court – where the applicant brought an application for a statutory order of review of a decision or conduct by the Minister for Natural Resources and Mines associated with an assurance given by that Minister to the Minister for Environment and Heritage Protection that a condition would be attached to the grant of a mining lease under the *Mineral Resources Act* 1989 (Qld) consistent with a recommendation made by the Land Court – whether the decisions and/or conduct were invalid and should be set aside by the Court because they lacked finality and/or were made pursuant to recommendations of the Land Court challenged as themselves invalid

Acts Interpretation Act 1954 (Qld), ss 32C, 32CA(2)
Environmental Protection Act 1994 (Qld), ss 222, 223, 224, 225
Judicial Review Act 1991 (Qld), ss 20(2), 23, 24
Mineral Resources Act 1989 (Qld), ss 235(3), 269, 271A(1)(c),
Mining Regulations 1971 (Qld), reg 39(2)
Water Act 2000 (Qld), ss 206(5), 211

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, cited
Armstrong v Brown [2004] 2 Qd R 345; [2004] QCA 80, cited
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, cited
Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure (2013) 194 LGERA 347; [2013] NSWLEC 48, cited
Dunn v Burtenshaw (2010) 31 QLCR 156; [2010] QLAC 5, approved
Ferdinands v Commissioner for Public Employment (2006) 225 CLR 130; [2006] HCA 5, cited
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, cited
Hancock Coal Pty Ltd v Kelly (No 4) [2014] QLC 12, affirmed
McBain v Clifton Shire Council [1996] 2 Qd R 493, distinguished
Minister for the Environment and Heritage v Queensland Conservation Council Inc (2004) 139 FCR 24; [2004] FCAFC 190, cited
Minister for Immigration and Ethnic Affairs v Baker (1997) 153 ALR 463, cited
Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd (2007) 155 LGERA 322; [2007] QCA 338, cited
R v Wallis; ex parte Employers' Association of Wool Selling Brokers (1949) 78 CLR 529; [1949] HCA 30, distinguished
Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473, distinguished
Unity APA Ltd v Humes Ltd (No 2) [1987] VR 474, cited
Victoria v Leck [2010] VSCA 76, cited
Walker v Noosa Shire Council [1983] 2 Qd R 86, followed
Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc (2014) 307 ALR 262; [2014] NSWCA 105, cited
Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage (2006) 232 ALR 510; [2006] FCA 736, cited
Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd (2012) 33 QLCR 79; [2012] QLC 13, cited

COUNSEL: S Keim SC and Dr C McGrath for the applicant in both matters
Submitting appearance for the first respondent in matter no 4249 of 2014

DG Clothier QC and SJ Webster for the second respondent in matter number 4249 of 2014 and the third respondent in matter no 9505 of 2014
MD Hinson QC and JM Horton QC for the first and second respondents in matter number 9505 of 2014

SOLICITORS: Environmental Defenders Office (Qld) Inc for the applicant in both matters
Submitting appearance for the first respondent in matter no 4249 of 2014
Ashurst Australia for the second respondent in matter number 4249 of 2014 and the third respondent in matter number 9505 of 2014
GR Cooper, Crown Solicitor for the first and second respondents in matter number 9505 of 2014

[1] These are two applications for statutory orders of review under the *Judicial Review Act* 1991 (Qld) ("JRA"). The first, No 4249 of 2014, is of a decision of the Land Court to recommend the refusal both of an application by Hancock Coal Pty Ltd ("Hancock Coal") for a mining lease under the *Mineral Resources Act* 1989 (Qld) ("MRA") and of an application by it for an environmental authority under the *Environmental Protection Act* 1994 (Qld) ("EPA") for the Alpha Coal Mine. The learned member of the Land Court recommended, alternatively to their refusal, that the applications before him be granted, subject to conditions deferring the resolution of certain matters to a separate approvals process under the *Water Act* 2000 (Qld) ("the *Water Act*").

[2] His decisions were in the form of recommendations to the Minister for Natural Resources and Mines ("the MRA Minister") under s 269 of the MRA and to the Minister for Environment and Heritage Protection ("the EPA Minister") under s 222 of the EPA. Such decisions have been treated as administrative rather than judicial by the Land Appeals Court;[1] hence these applications for judicial review in this court.

[3] After the recommendations were made by the Land Court, the first respondent in the later application, No 9505 of 2014, the EPA Minister, decided not to refuse but to grant an environmental authority under s 225(1) of the EPA for the Alpha Coal Mine proposed by Hancock Coal subject to certain conditions. Hancock Coal was the second respondent in matter number 4249 of 2014 and the third respondent in matter number 9505 of 2014.

[4] That decision is challenged in matter number 9505 of 2014 as is a decision or conduct of the MRA Minister by which he assured the EPA Minister that a condition would be attached to the grant of a mining lease for the mine under the MRA requiring further assessment of the groundwater impacts of the proposed mine under the water licence regime in the *Water Act*.

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1 See *Dunn v Burtenshaw* (2010) 31 QLCR 156, 165 at [47].

[5] The Land Court recommendations were attacked by the applicant primarily in four ways. First, it submitted that it was not open to the learned member to make such alternative recommendations. Secondly, it submitted that his Honour's reasoning about the environmental harm likely to be caused by the mine, which he should have taken into account, was flawed because he should have assessed whether approval of the mine created a net benefit for the local economy. The applicant's third submission was that the Land Court decision lacked finality because the alternative recommendations in effect deferred the consideration of central issues including whether the mine should go ahead. Its fourth submission was that his Honour erred in his conclusions about whether the adverse impact of greenhouse gas emissions contributing to climate change from the burning of coal from the mine[2] was a relevant consideration and that, in any event, if it was a relevant consideration, he erred in his further conclusion that the mine would have "no impact" on such emissions because, if the mine did not proceed, "the coal will simply be sourced from somewhere else".[3]

[6] The subsequent decisions or conduct of the EPA Minister and the MRA Minister were attacked as invalid on the basis that they lacked finality and/or were made pursuant to recommendations of the Land Court challenged in matter number 4249 of 2014 that were themselves invalid.

The Land Court decision

[7] The original application for judicial review of the Land Court decision related to an application by Hancock Coal for an open cut thermal coal mine in the Galilee Basin for the Alpha Coal Mine to which the applicant in these proceedings, Coast and Country Association of Queensland Inc ("CCAQ"), objected. There was no issue that the Land Court's recommendations were within the extended definition of "decision" for the purposes of the JRA. Hancock Coal argued, however, that CCAQ did not relate its submissions closely to the grounds of review contained in s 20(2) of the JRA as amplified in s 23 and s 24 of that Act.

Power to make alternative recommendations

[8] The submissions by CCAQ that the Land Court lacked the power to make alternative recommendations of refusal and conditional approval were based partly on the form of the relevant statutory provisions. It also argued that the Land Court applied the wrong test in making its alternative recommendations because those recommendations had to be based upon a positive satisfaction that the mining activity would produce a "net benefit" to Queensland and that the Land Court acted beyond power in making alternative recommendations because they were impermissibly conditioned by a future approvals process under the *Water Act*, which offended the principle of finality and deferred consideration of central issues.[4]

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2 Referred to as "scope 3 emissions" in the case.

3 *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [229]-[232] and [248].

4 See ground 2 of the application in No 4249 of 2014; CCAQ's submissions in No 4249 of 2014 at [48]-[50].

[9] Section 269(1) of the MRA is the statutory provision pursuant to which the Land Court is required to make recommendations in respect of an application for the grant of a mining lease. There is a similar power to make recommendations under s 222 of the EPA.

[10] The relevant provisions are as follows:

MRA

"269 Land Court's recommendation on hearing

(1) Upon the hearing by the Land Court under this part of all matters in respect of an application for the grant of a mining lease, the Land Court shall forward to the Minister –

(a) any objections lodged in relation thereto; and

(b) the evidence adduced at the hearing; and

(c) any exhibits; and

(d) the Land Court's recommendation.

(2) For subsection (1)(d), the Land Court's recommendation must consist of—

(a) a recommendation to the Minister that the application be granted or rejected in whole or in part; and

(b) if the application relates to land that is the surface of a reserve and the owner of the reserve has not consented to the grant of a mining lease over the surface area, the following—

(i) a recommendation to the Minister as to whether the Governor in Council should consent to the grant over the surface area;

(ii) any conditions to which the mining lease should be subject.

(3) A recommendation may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers appropriate, …

(4) 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—

…

(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

..."

EPA

"222 Nature of objections decision

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

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

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

(c) the application be refused."

[11] The Land Court's function under those provisions is to make recommendations to the relevant decision makers following an objections hearing. Under the MRA any recommendation to the Minister to refuse the grant of a lease is to be accompanied by the provision of reasons pursuant to s 269(5). Those recommendations are required to be considered by, but do not bind, the decision makers in making the decision to either approve or refuse the application for a mining lease or an environmental approval.[5] Hancock Coal also drew attention, in particular, to the power of the Minister under the MRA, before making a decision, to direct the Land Court to hold a further hearing into the application generally or in relation to particular matters pursuant to s 271A(1)(c) of the MRA. It also seems clear that the regimes under each Act should be read so as to achieve a harmonious operation for both.[6]

[12] Mr Keim SC for CCAQ focussed on the use of the word "or" in s 269(2)(a) of the MRA and s 222(1)(a) and s 222(1)(b) of the EPA and the use of the word "must" in each section to argue that the word "or" should be understood in its disjunctive sense so that the types of recommendations that could be made were limited to the options provided for in those sections and did not include the option of making alternative recommendations to either refuse or approve a proposed mine.

[13] Hancock Coal's submission to the contrary relied on the provision in s 32C of the *Acts Interpretation Act* 1954 (Qld) providing that words in the singular include the plural and the meaning of "must" referred to in s 32CA(2) of that Act when used in relation to a power as indicating that the power is required to be exercised. Mr Clothier QC's argument in respect of the use of the word "or" was that it should not be understood disjunctively but distributively as identifying the range of categories of recommendations that could be made.[7]

[14] He submitted that the Land Court must make recommendations after a hearing and the range of recommendations must be drawn from those set out in s 269 of the MRA and s 222 of the EPA but that the Land Court is free to decide the type or types of

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5 See MRA s 271(a) and EPA s 225(3)(a) and s 225(4).

6 See *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 146 at [49].

7 Cf *Victoria v Leck* [2010] VSCA 76; *Unity APA Ltd v Humes Ltd (No 2)* [1987] VR 474, 481 and *Minister for Immigration and Ethnic Affairs v Baker* (1997) 153 ALR 463, 469-470.

recommendations to make which should logically extend to making recommendations on an alternative basis. In this context, he drew attention to the fact that the result of the process was the making of recommendations and the provision of information and a considered view to the ultimate decision makers for their further consideration. Because the recommendations had no final or determinative effect, he submitted that this Court should be hesitant to find invalidity in the form of expression of the Land Court's recommendations.

[15] There seems to me to be some strength in those submissions. They are also supported to some extent by the power in s 269(2)(a) of the MRA to recommend the application be granted or rejected "in whole or in part" and subject to appropriate conditions in s 269(3). The form of s 222 of the EPA covers, even on a disjunctive reading of the word "or", either a recommendation for the refusal of the application or for its grant on stated conditions: see s 222(1)(b) and s 222(1)(c). It does not seem to me that the range of possibilities provided by that section should necessarily be limited to one only of the alternatives mentioned.

[16] Mr Keim SC for CCAQ also submitted that this was an appropriate occasion to apply the maxims *expressum facit cessare tacitum* and *expressio unius est exclusio alterius*, recognising that they should be applied with caution.[8] In supporting that approach, he relied on a statement by Dixon J in *R v Wallis; ex parte Employers' Association of Wool Selling Brokers*[9] that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely that the same matter is not to be done according to some other course. As Mr Clothier submitted, however, that decision was directed to the question that arises where a statute confers a narrow power and a broad power where the broad power is to be read subject to the narrow power. It does not determine the appropriate construction of these statutes.

[17] Bearing in mind that the purpose of these provisions is for the Land Court to make recommendations, it seems to me to be impractical to construe them to limit so strictly the range of recommendations that it may make. A recommendation for refusal with an alternative recommendation for a grant subject to conditions is one that, in my view, can be made pursuant to each statute.

"Net benefit" test

[18] The applicant's second primary submission in respect of the Land Court decision was that it needed to be satisfied that the grant of a mining lease and of an environmental authority met all statutory requirements, including that the proposed mining activity would produce a net benefit taking all the relevant criteria into account. The approach was sought to be justified, not so much by the statutory language, but from case law which it was submitted combined with the statutory requirements to establish a need for the Land Court to be affirmatively satisfied that the possible economic benefits of allowing a private company

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[8] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 575. In translation, "When there is express mention of certain things, then anything not mentioned is excluded." And "The express mention of one person or thing is the exclusion of another".

[9] (1949) 78 CLR 529, 550.

to exploit public resources justified a decision in favour of the cost of allowing that exploitation in spite of the environmental harm that may be caused by it.

[19] Mr Keim relied, in particular, on decisions in *Sinclair v Mining Warden at Maryborough*,[10] *Armstrong v Brown*,[11] *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd*[12] and *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure*,[13] on appeal, *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc*[14] in the New South Wales Land and Environment Court and its Court of Appeal.

[20] Hancock Coal's submissions sought to distinguish those decisions on a number of bases. *Sinclair v Mining Warden at Maryborough* was said to have been decided under a different statutory regime which did not prescribe factors for consideration in a way the MRA and EPA now do. In particular, reg 39(2) of the *Mining Regulations* 1971 (Qld) then imposed a mandatory requirement to recommend rejection where the warden was of the opinion that the public interest or right would be prejudicially affected by the grant of an application for a mining lease.[15] The submission that that case must be approached with care as a source of a test applicable to the MRA in its current form was justified. The discussion in *Armstrong v Brown*[16] illustrates how the reasoning in *Sinclair v Mining Warden at Maryborough* can remain relevant.

[21] It was submitted, and again it seems to me to be accurately, that *Armstrong v Brown* underlined that the Land Court must, in considering the factors under s 269(4) of the MRA, be satisfied that the circumstances warrant a recommendation having regard to the purposes for which the Crown should give a right to mine its minerals.[17] In this context, Mr Clothier drew attention to the discussion of the issues by the learned member of the Land Court to this effect:[18]

> "The materials show that the project is for the extraction of a very valuable resource in accordance with the environmental processes and Coordinator-General conditions.
>
> My concerns relate to groundwater issues, make-good agreements, and baseline monitoring, all relevant not to the actual area of the MLA, but to the surrounding district.
>
> I am satisfied that the proposed mining operation is an appropriate land use of the application land.
>
> …
>
> I am of the opinion that … the groundwater evidence and modelling may well be sufficient, following full Water Act processes … with the result that

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10 (1975) 132 CLR 473.
11 [2004] 2 Qd R 345.
12 (2007) 155 LGERA 322, 339-340 at [53].
13 (2013) 194 LGERA 347.
14 (2014) 307 ALR 262.
15 See the discussion by Barwick CJ at (1975) 132 CLR 473, 479-480, Gibbs J at 482 and Stephen J at 485-486
16 [2004] 2 Qd R 345, 348 at [15].
17 *Armstrong v Brown* [2004] 2 Qd R 345, 348 at [15].
18 *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [401]-[403], [410].

> all my concerns that arise under the precautionary principle are satisfactorily answered for the purposes of my recommendations in this matter"

[22] Nor, he submitted, did *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* stand for the proposition that there was some superadded test of "net benefit". Rather, he submitted, it identified the requirement for the Land Court to consider all the matters set out in both statutes irrespective of whether an objection relates to only limited criteria.[19] He submitted that the Land Court did so in the present case and there was no ground of review suggesting otherwise.

[23] The New South Wales decisions in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure*[20] and, on appeal, *Warkwork Mining Ltd v Bulga Milbrodale Progress Association Inc*[21] concerned, he submitted, a different process and statutory context, involving a merits review of a Minister's decision to approve the extension of a mine where the court was exercising all the functions and discretions of the Minister. That case itself did not articulate a test of "net benefit".

[24] In the absence of any statutory requirement that a net benefit be shown to justify the recommendation by the Land Court in a case like this, it does not seem to me that I should readily add such a concept to the statutory considerations already required, for example, by s 269(4) of the MRA. That sub-section sets out many issues for the Land Court to take into account and consider, including prejudice to the public interest and adverse environmental impacts. The lengthy reasons of the learned member show that he addressed such concerns. It does not seem to me that I should set aside his decision on the basis of this submission.

Finality

[25] CCAQ's third primary argument was that the alternative recommendations made by the learned member of the Land Court lacked finality because they depended on the further process of approval under the *Water Act* and amounted to the deferring of the consideration of central issues including whether the mine should go ahead.

[26] A significant issue at the hearing concerned the impacts of the proposed mine on groundwater resources and the adequacy of the assessment of those impacts. In this case, Hancock Coal will also require a licence under the *Water Act* and the effect of s 235(3) of the MRA is to require Hancock Coal not to divert or appropriate water without such an authority.

[27] The processes under the *Water Act* themselves involve an objections procedure which can lead to a hearing before the Land Court in which impacts are assessed and considered. As was submitted by Hancock Coal and, again, it seems to me to be accurately, the Land Court's alternative recommendations were made with a view to suggesting a course which the relevant decision makers might take if they did not accept the primary recommendations against the applications. In other words, if the relevant Ministers

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[19] (2007) 155 LGERA 322, 339-340 at [53].
[20] (2013) 194 LGERA 347.
[21] (2014) 307 ALR 262.

decided to grant the applications, the condition was designed to ensure that the evidence about groundwater impacts was satisfactorily addressed before mining could proceed.

[28] CCAQ's arguments on this question of finality related particularly to the decision in *McBain v Clifton Shire Council*[22] where an impermissible condition was imposed on the approval of a piggery in circumstances where the approval purported to postpone decisions which could fundamentally alter the development of the piggery from the time of conditional approval until unspecified future dates. It was in that context that the Court of Appeal decided that the decision offended the finality principle and was therefore impermissible.

[29] Here, where the decision of the Land Court is merely a recommendation linked to further necessary statutory approvals under the *Water Act*, should the mine proceed, it does not have the effect of involving the decision maker in deferring matters for later decision by itself. It merely recognises that, if the Ministers decide that the lease and environmental approval should be granted, then the issues of concern relating to the use and supply of water will need to be addressed by the future statutory process under the *Water Act*. These recommendations were not, to my mind, decisions which required finality in their expression. The statutes recognise that the recommendations need not be followed by the ministers. If that eventuality occurs, as happened here, the MRA recognises the need for the further statutory process of an approval under the *Water Act*. That is not a lack of finality in the learned member's recommendation but a recognition of reality.

Scope 3 greenhouse gas emissions

[30] The fourth submission relating to the Land Court decision involved the learned member's consideration of "scope 3 emissions". These are emissions from the transportation and burning of coal from the proposed mine by others. CCAQ's case was that scope 3 emissions will contribute to global greenhouse gas emissions and therefore to climate change and the environmental effects of climate change, and that these were matters the Land Court was bound to consider and weighed against positive recommendations.

[31] In that context, CCAQ contended that the Land Court erred in law by holding that it was outside its jurisdiction to consider any environmental harm and adverse environmental impacts of scope 3 emissions contributing to climate change and in holding that, in any event, to the extent that the matter was a relevant consideration, the proposed mine would have no impact on global greenhouse gas emissions, climate change and the effects of climate change because, if it did not proceed, the coal would simply be sourced from elsewhere and the amount of global greenhouse gas emissions would not be any different.

[32] Hancock Coal argued that the Land Court concluded that it was entitled to and should consider scope 3 emissions, not under s 269(4)(j) of the MRA, namely adverse environmental impact caused by the operations, but under the public interest consideration raised by s 269(4)(k), following an earlier decision of the President of the Land Court in *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-*

[22] [1996] 2 Qd R 493.

Op Ltd.[23] It also argued that the reasons of the Land Court were within its jurisdiction and correct in concluding that the mine would have no impact on such emissions.

[33] Greenhouse gas emissions for present purposes fall into three categories described by Dr Taylor, an expert called by Hancock Coal, in his report in the following terms, which were accepted by the Land Court:

> "Scope 1 and scope 2 GHG [greenhouse gas] emissions are respectively defined under the National Greenhouse and Energy Reporting Regulations 2008 (the Regulations) as follows:
>
> > 'Scope 1 emission of greenhouse gas, in relation to a facility, means the release of greenhouse gas into the atmosphere as a direct result of an activity or series of activities (including ancillary activities) that constitute the facility'
> >
> > Scope 2 emission of greenhouse gas, in relation to a facility, means the release of greenhouse gas into the atmosphere as a direct result of one or more activities that generate electricity, heating, cooling or steam that is consumed by the facility but that do not form part of the facility'
>
> Scope 1 emissions include the combustion of fuel in an organisation's owned or controlled mobile plant or vehicles. Scope 2 emissions are indirect and generally occur at the facility that generated the electricity, heating, cooling or steam used by the facility.
>
> Scope 3, or 'other indirect' emissions are not discussed in the Regulations, but are defined elsewhere. For example, the Greenhouse Gas Protocol (World Business Council for Sustainable Development and World Resources Institute, 2004) states:
>
> > 'Scope 3 is an optional reporting category that allows for the treatment of all other indirect emissions. Scope 3 emissions are a consequence of the activities of the company, but occur from sources not owned or controlled by the company. Some examples of scope 3 activities are extraction and production of purchased materials; transportation of purchased fuels; and use of sold products and services.'"[24]

[34] Greenhouse gas emissions were a relevant issue for the Land Court to consider in respect of the environmental approval under the EPA because s 223(c) of that Act requires it to consider the "standard criteria" set out in Schedule 4 of that Act. Those standard criteria include, among other things, the principles of ecologically sustainable development as set out in the "National Strategy for Ecologically Sustainable Development"; the character, resilience and values of the receiving environment; all submissions made by the applicant and submitters; and the public interest.

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[23] (2012) 33 QLCR 79.

[24] *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [204].

[35] The principles for ecologically sustainable development are set out in the National Strategy for Ecologically Sustainable Development as follows:

> "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 them.
>
> 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]."[25]

[36] Greenhouse gas issues are also relevant in respect of the mining lease application under the MRA. In relation to that Act, the learned member concluded that scope 3 emissions did not fall to be considered under s 269(4)(j) of that Act for reasons I shall mention shortly. That subsection deals with "any adverse environmental impact caused by those operations" referring back to s 269(4)(i) which refers to "the operations to be carried on under the authority of the proposed mining lease". The learned member decided that scope 1 and scope 2 emissions were relevant to those operations but that the issue of scope 3 emissions fell to be considered under s 269(4)(k) of the MRA which requires the

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[25] Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development*, AGPS, Canberra, p. 8.

Land Court to take into account and consider whether "the public right and interest will be prejudiced".

[37] The learned member treated the scope 3 emissions from the burning of thermal coal as ones which would occur overseas in Asia, most probably in India or China. His views about the materiality of the different categories of emissions as a proportion of global emissions were that the scope 1 and 2 emissions associated with the proposed mine, as a 0.002% proportion of global emissions were "infinitesimal".[26] He identified the scope 3 emissions as a percentage of 0.16% as a proportion of global greenhouse gas emissions and concluded, contrary to Hancock Coal's submissions, that they were not "negligible" but both real and of concern.[27]

[38] The learned member, in deciding that the "operations" referred to in s 269(4)(i) and s 269(4)(j) did not, on a proper reading of the legislation, extend to the transportation of the coal to ports and to the burning of the coal in power stations overseas applied the reasons of MacDonald P in *Xstrata Coal Queensland Pty Ltd v Friends of the Earth - Brisbane Co-Op Ltd*.[28] There the President of the Land Court took the view that the transportation and use of the coal fell outside the scope of the "operations" referred to in s 269(4)(j). In doing so, she distinguished a decision of the Full Court of the Federal Court in the "Nathan Dam" case[29] because of differences in the definitions of the words "action" and "operations" in the two situations, the word "operations" being limited to the activities of mining and extracting coal.[30] In other words she concluded that the phrase, "all adverse impacts", referred to in the Nathan Dam decision as including 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", was not equivalent to "the operations to be carried on under the authority of the proposed mining lease" under s 269(4)(i).

[39] That approach to the interpretation of the legislation seems to me to be correct and to have justified the relevant conclusions of the learned member in this case.[31] In that context, it is clear that the learned member also 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.[32]

[40] It is also in that context that he concluded that he should not take the scope 3 emissions 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.[33]

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[26] *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [208].
[27] *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [209].
[28] (2012) 33 QLCR 79.
[29] *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.
[30] *Xstrata Coal Queensland Pty Ltd v Friends of the Earth - Brisbane Co-Op Ltd* (2012) 33 QLCR 79, 162-163 at [528]-[530], 166 at [547]-[548].
[31] *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [210]-[220].
[32] *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [218] and [232].
[33] *Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 at [221]-[232].

[41] The factual finding, that, whether or not the proposed mine proceeds, there will be no effect on global demand for coal and therefore no effect on the amount of greenhouse gases emitted globally, was one that was available on the evidence and which was within the learned member's jurisdiction to make. It was in the context of the public interest issues raised by s 269(4)(k) of the MRA that the learned member reached this conclusion about the effect of scope 3 emissions. Those findings do not seem to me to be susceptible of challenge in an application of this nature as they are distinctly of a type that fell within the Land Court's jurisdiction.

[42] CCAQ's criticism of the conclusion was that the Land Court member misdirected himself "in that the objections decision required the court to assess the likely environmental harm of the mine the subject of the application and not the likely impacts that might be caused by other notional activities".[34]

[43] The argument against that for Hancock Coal was that the member was addressing himself to the environmental harm caused by global greenhouse gas emissions as a whole in respect of scope 3 emissions. His finding that such global emissions would remain at the same level regardless of the proposed mine's development led to the conclusion that it was permissible to give the scope 3 emissions associated with the mine no weight in considering the effect of the mine on the environment, relying on the decision in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage*.[35] Hancock Coal argued, therefore, that the application for review in respect of the climate change issue should be dismissed because the Land Court properly considered the scope 3 emissions as part of the public interest but gave them no weight by reason of findings of fact which could not be impeached.

[44] CCAQ argued, however, that the public interest considerations required a discretionary balancing exercise of the widest import so far as the subject matter and the scope and purpose of the statute may enable.[36] In that context, CCAQ argued for a broad meaning to be given to any causative relationship between such conduct and the environmental harm that may be caused, relying on the "precautionary principle", which was taken into account significantly by the learned member of the Land Court. It submitted that the assessment of the adverse impacts of the mine should not be artificially separated from activities that give the mine commercial meaning and with which it is inextricably involved and which should include, therefore, the transport and burning of the coal.[37]

[45] Hancock Coal's submission that the factual finding of the Land Court that the scope 3 emissions associated with the mining of coal at the proposed mine would not, as a matter of fact, increase global emissions, so that the mine's development would not, whether directly or indirectly, aggregate the greenhouse gas problem seem to me to establish that the learned member's conclusion was one that was logically available and within his fact finding powers on the basis that, if global emissions are not increased, then there is no impact that constitutes or causes environmental harm.[38] Hancock Coal argued that the

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[34] See the applicant's outline of argument in No 4249 of 2014 filed 11 July 2014 at [60].
[35] (2006) 232 ALR 510, 524 at [72].
[36] Applicant's outline of argument in No 4249 of 2014 filed 11 July 2014 at [87].
[37] Applicant's outline of argument in No 4249 of 2014 filed 11 July 2014 at [109].
[38] Written submissions for the second respondent in No 4249 of 2014 filed 1 September 2014 at [72].

conclusions were similar whether under the EPA or the MRA and determined by the factual finding made within jurisdiction by the Land Court.

[46] The argument that the Land Court arrived at its conclusion by taking into account an irrelevant consideration, namely, the notional environmental harm that might be caused by another coal mine somewhere else in the world does not persuade me. It does not seem to me to be necessarily irrelevant or impermissible as an approach to fact finding by the member. Although the objective of the EPA is environmental protection in the context of ecologically sustainable development, it does not require the learned member to ignore what is likely to happen elsewhere in the world, even if this particular mine does not go ahead. These were essentially matters for the Land Court and do not reveal legal error in the approach to its factual finding.

Conclusion on the challenge to the Land Court recommendations

[47] I accept Hancock Coal's submissions, therefore, with the result that the application in matter 4249 of 2014 should be dismissed.

The Ministers' decisions and/or conduct

[48] After the decision of the Land Court was delivered, the MRA Minister provided advice to the EPA Minister dated 29 August 2014 under s 224 of the EPA that the MRA Minister would impose "a special condition upon the grant of Mining Lease 70426; requiring Hancock Coal Pty Ltd (Hancock) to make arrangements to obtain water licences to satisfy the Land Court's recommendation in relation to this matter". On or about the same date, 29 August 2014, the EPA Minister granted the environmental authority. The MRA Minister has not yet granted, however, a mining lease for the mine under the MRA.

[49] The EPA Minister's reasons for the decision given on 23 September 2014 stated, amongst other things, that:

> "6. The Minister responsible for the *Mineral Resources Act 1989* has assured the EPA Minister that the Minister will impose a condition upon the grant of Mining Lease 70426, requiring the applicant [Third Respondent] to apply for water licences under the *Water Act 2000*, that will give effect to the intent of the Land Court recommendation at page 2, paragraph 2(a) and (c) of the objections decision.
>
> 7. The EA [environmental authority] will be conditioned to take effect only upon the grant of ML 70426.
>
> …
>
> 11. Having regard to the above considerations, the EPA Minister has decided that the draft EA will be granted, with the following conditions (additional to those in the draft EA):
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> a. The EA will be conditioned to take effect only upon the grant of MLA 70426. MLA 70426, if granted, will require the applicant to apply for water licences under the *Water Act 2000*, which will give effect to the intent of the Land Court recommendation to both

> Ministers. Accordingly, an identical or substantially similar condition to that proposed in the ML 70426 will not be imposed on the EA."

[50] Section 224 of the EPA empowers the MRA Minister to advise the EPA Minister about any matter the MRA Minister considers may help the EPA Minister to make a decision on an application for an environmental authority pursuant to s 225 of that Act. As I have pointed out previously, s 235(3) of the MRA requires Hancock Coal not to divert or appropriate water without a licence under the *Water Act*.

[51] The applicant's argument, in this context, was that the EPA Minister has made an administrative decision reviewable under the JRA. It also argued that a reviewable decision had been made by the MRA Minister in giving the advice permitted by s 224(2) of the EPA. The decision and that conduct were criticised as invalid if the Land Court recommendations were to be set aside by me and also as lacking in finality.

[52] I have found that the Land Court recommendations were not invalid. The main issue to consider in this context, therefore, is whether the conduct of each Minister lacked finality.

Was the MRA Minister's advice a reviewable decision?

[53] Before I discuss that issue, however, I should mention that the submissions for the MRA Minister included the argument that his advice or assurance given to the EPA Minister did not amount to a decision under an enactment because there had been no final or operative decision determinative of an issue falling for consideration nor a conclusion reached along the way in the course of reasoning to an ultimate decision such as the grant or refusal of a mining lease.[39]

[54] CCAQ's contention was that the MRA Minister can be said to have made at least an intermediate decision to impose a condition on the grant of any mining lease requiring Hancock Coal to apply for a water licence under the *Water Act.* It also argued that the MRA minister made a decision on or about 29 August 2014 to advise the EPA Minister that he would impose such a condition on the grant of any mining lease.

[55] On the other hand, counsel for each of the Ministers' submission was that the giving of the assurance was not part of any statutory decision-making process and did not affect rights or obligations. It was merely an administrative exchange between the Ministers as to how arrangements would be made for the obtaining by Hancock Coal of such other approval as it required to proceed with the project. In the absence of a decision by the MRA Minister whether the mining lease would be granted or not, there was no administrative action attributable to that minister which was susceptible to challenge. Similarly Hancock Coal's submission was that s 224 was not the source of a power in the MRA Minister to make a decision.

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[39] See *Griffith University v Tang* (2005) 221 CLR 99, 122 at [61] and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 341-343, 377.

[56] Whether the conduct of the MRA Minister in providing advice amounted to the making of a reviewable decision need not, in the view I have taken, be decided in this case. What seems to me to be more significant for present purposes is whether the conduct of either Minister is susceptible to challenge for want of "finality".

Did the Ministers' decisions and/or conduct lack finality?

[57] The argument for the applicant was that in deferring to a separate future approval process under the *Water Act*, consideration of issues central to the grant of the environmental authority and mining lease the decisions lacked finality and were void *ab initio*.

[58] As was submitted for the Ministers, however, there is no lack of finality in the Ministers' actions because neither of them were able to make the decision whether or not to grant a water licence. That decision lies with the chief executive pursuant to the *Water Act* under s 206(5) and s 211 on application made to the chief executive. Under the *Water Act* an appeal lies to the Land Court in relation to a decision of the chief executive about the grant of a water licence. Consequently neither Minister had any power to receive such an application or to consider the grant of a water licence, nor had any application been made for one by Hancock Coal, on the evidence, before the MRA Minister's advice or assurance was given to the EPA Minister.

[59] As counsel for the Ministers submitted, the finality principle is concerned with a single application and seeks to ensure that an application is disposed of fully and finally, rather than deferring a decision on an essential aspect of the application or delegating such a decision to another body. Here, what is left undecided is something which neither Minister has power to grant, namely a water licence, and something which is not the subject of the application for an environmental authority or a mining lease. The EPA Minister has finally decided the application for an environmental authority. The application for a mining lease remains to be decided by the MRA Minister but, if decided by the grant of a mining lease on condition that Hancock Coal apply for a water licence to give effect to the intent of the Land Court recommendations, the submission was that that decision would satisfy the finality principle.

[60] The argument continued to the effect that the MRA prohibits mining for a specified mineral without a mining lease for that mineral. The EPA prohibits the carrying out of a mining activity without an environmental authority while the *Water Act* prohibits taking or interfering with water without a water licence. The grant of an authority relevant to each of those matters makes lawful what would otherwise be unlawful under each of those Acts. Each of those Acts prescribes a distinct and separate process for applying for a relevant authority and a process for assessing and deciding such applications including assessment and decision criteria. Different decision-makers assess and decide such applications and each Act's process is self-contained and operates independently of another Act's process.

[61] In a case such as this where multiple approvals are required, counsel for the Ministers relied upon the decision of the Full Court in *Walker v Noosa Shire Council*[40] as follows:

[40] [1983] 2 Qd R 86, 90.

> "With increasing government controls it is commonplace for an applicant to require multiple consents from different authorities or from the same authority in different capacities. With the exceptions I have already mentioned (illegality or obvious futility) it may be said that in general it is desirable that such applications be considered on their merits one at a time, and without undue speculation on the fate of other necessary applications.
>
> The material does not enable this Court to determine the identity of the authorities whose consent would be required before the ramps could be erected. The possible contenders are the Crown, the Commissioner for Main Roads, and the Noosa Shire Council itself. It seems that at least one permit will be needed from the Council under by-law 4 of chapter VIII of the Noosa Shire Council By-Law of June 18, 1941. For this reason it seems desirable that the approval to be granted in the present cases should be subject to a condition that all consents from any person or authority whose consent or permission is required for the building of the proposed erections upon any part of the Park Road reserve be obtained before commencement of works."

[62] To my mind that approach determines the situation in this case also and highlights why there has been no lack of finality by the relevant Ministers in their conduct or decisions.

The consequences if the Land Court recommendations had been invalid

[63] There were also opposing contentions by the parties as to the consequences for the validity of the Ministers' conduct or decisions had I found that the Land Court recommendations were invalid or the subject of an error going to jurisdiction. Because of my conclusion that those recommendations were valid I do not need to enter into that debate.

Conclusion in respect of the Ministers conduct

[64] The consequence is, therefore, that the applications against the Ministers' conduct should also fail.

Conclusion and orders

[65] For the reasons expressed above, each application should be dismissed.

[66] In respect of costs, I order:

1. The applicant pay the second respondent's costs of the application in matter number 4249/14.

2. The applicant pay the second and third respondent's costs of the application in matter number 9505/14.