

LAND COURT OF QUEENSLAND

CITATION: *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLC 0128

PARTIES: **Queensland Conservation Council Inc**
(applicant)

v

Xstrata Coal Queensland Pty Ltd, Itochu Coal Resources Australia Pty Ltd, ICRA NCA Pty Ltd and Sumisho Coal Australia Pty Ltd
(first respondents)

Environmental Protection Agency
(statutory party/second respondent)

FILE NOS: AML207/06
ENO208/06

DIVISION: Land Court of Queensland – general division

PROCEEDING: Hearing of an application

DELIVERED ON: 14 December 2007

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr JJ Trickett, President

ORDER: **The application is dismissed.**

CATCHWORDS: Mining – coal mining lease – additional surface area application – environmental authority application – objections – greenhouse gas emissions – global warming – climate change – appeal by Queensland Conservation Council to Court of Appeal – orders of Land and Resources Tribunal set aside – matter remitted to the Land Court for determination according to law – application by Queensland Conservation Council Inc that objections be stayed – effect of *Mining and Other Legislation Amendment Act 2007* – whether objections to granting of mining lease remain – section 275 *Mineral Resources Act 1989* – section 283 *Environmental Protection Act 1994*

APPEARANCES: Mr C McGrath of Counsel (instructed by Environmental Defenders Office), for the applicants
Mr A Pappalardo, Solicitor of Allens Arthur Robinson, for the first respondents
Mr I Pepper, Legal Officer, for the second respondent

- [1] This is an application for a stay of proceedings of objections lodged by the Queensland Conservation Council Inc (QCC) against the granting of an additional surface area under the *Mineral Resources Act 1989 (MRA)* and an amendment to an environmental authority under the *Environmental Protection Act 1994 (EPAAct)*.

Background

- [2] The first respondents, Xstrata Coal Pty Ltd and others (Xstrata), applied under s.275 of the *MRA* for a grant of an additional surface area to an existing mining lease, part of the Newlands Coal Project in Central Queensland. Xstrata intended to develop a new open cut coal mining operation (the Wollombi pit) to replace current production on the lease. Xstrata also applied for an amendment to the environmental authority associated with the original lease under s.238 of the *EPAAct*.
- [3] The QCC and the Mackay Conservation Group objected to the grant of the additional surface area and to the amendment to the environmental authority without the imposition of conditions. The objections of both organisations 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 mining, transport and use of the coal in the mine.
- [4] Under the legislation in force at the time, the applications were heard by the Land and Resources Tribunal.¹ The Tribunal considered the applications and the objections thereto and on 15 February 2007 delivered its decision,² making 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. The Tribunal also recommended to the Minister for the Environment that the related environmental authority application be granted without any of the conditions sought by the objectors.

¹ *Land and Resources Tribunal Act 1999*.

- [5] The QCC appealed to the Court of Appeal against the orders of the Land and Resources Tribunal. On 12 October 2007, the Court of Appeal allowed the appeal and set aside the orders of the Land and Resources Tribunal.³
- [6] However, in the period between the decision of the Land and Resources Tribunal and the decision of the Court of Appeal, the *Land Court and Other Legislation Amendment Act 2007*⁴ essentially transferred the jurisdiction of the Land and Resources Tribunal to the Land Court. The Court of Appeal therefore remitted the matter to the Land Court for determination according to law. The Court of Appeal also gave leave to the QCC to amend the particulars of the conditions it sought to have imposed on the respondents' applications in accordance with the applicant's application filed in the Land and Resources Tribunal on 24 January 2007.
- [7] Following the Land and Resources Tribunal's recommendations, the Minister for the Environment granted the amended environmental authority on 8 March 2007 and on the recommendation of the Minister for Mines and Energy, the Governor in Council granted the additional surface area on 29 March 2007. Those grants were made without the additional conditions sought by the objectors.
- [8] On 25 October 2007, the *Mining and Other Legislation Amendment Act 2007* (the *Amendment Act*) commenced. That Act validated the grant of surface area under the *MRA* and validated the amended environmental authority under the *EPAct*. The *Amendment Act* inserted the following section into the *MRA*:

“s.418AA Validation of inclusion of additional surface area

No. 2 in mining lease 4761

- (1) This section applies to mining lease 4761.
- (2) The application made under section 275 to include additional surface area No. 2 in the mining lease is taken to have been validly granted on 29 March 2007.
- (3) Additional surface area No. 2 is taken to have been included in the mining lease on 29 March 2007.
- (4) To remove any doubt, it is declared that nothing in this section affects an agreement, or determination by the tribunal, made under this Act before the commencement of this section about compensation payable by the holder of the mining lease for additional surface area No. 2 being included in the mining lease.
- (5) To remove any doubt, it is declared that this section does not limit or otherwise affect the operation of section 416 in relation to the application or the mining lease.
- (6) In this section—

² [2007] QLRT 33.

³ [2007] QCA 338.

⁴ Commenced 21 September 2007.

additional surface area No. 2 means the area identified as surface area 3 in mine plan 37891 recorded under this Act in the register kept by the mining registrar.”

[9] The *Amendment Act* also amended the *EPA Act 1994* by inserting s.579A which reads as follows:

“579A Validation of amendment of environmental authority MIM800098402

- (1) This section applies to the amendment application made on 6 April 2005 for environmental authority (mining lease) number MIM800098402.
- (2) The Minister’s decision made on 8 March 2007 to grant the application is taken to have been validly made under chapter 5.
- (3) The environmental authority as amended under the decision is taken to have been issued under chapter 5 on 22 March 2007.”

The Application

[10] As the matter had been remitted to the Land Court for hearing and determination according to law, it was listed at a callover in the Land Court on 7 December 2007, where the QCC brought the present application. Mr McGrath argued that the amending legislation had the effect of validating the applications and the grants of the mining lease and the amended environmental authority, but says nothing about the objections by the QCC. However, he concedes that from the Explanatory Notes to the *Amendment Act*, it is clear that the intention is that there would not be a rehearing. The QCC accepts that the legislative intention is that the objections in relation to the greenhouse gas emissions issues not be reheard.

[11] Mr McGrath referred to the Second Reading Speech by the Minister for Mines and Energy. The Minister stated that it should be stressed that the circumstances of this case are highly unusual and the Government’s response should not be interpreted as a precedent for other legislative intervention. Mr McGrath argues that on the face of the legislation the objectors have a right to be heard on their objections about which the amending legislation is silent. However, he concedes that it was intended that there be no rehearing, which would ultimately be a futility as the issues to be argued about relate to conditions to the mining lease and environmental authority, which have been granted.

[12] However, he submits that the QCC maintains the validity of its objections and does not withdraw them. The procedures under both Acts entitle it to a right to be heard on those objections which the amending legislation has not clearly overridden. He

contends that the Court could direct the proceedings to continue, or dismiss the proceedings, or stay the proceedings. However, while the proceedings could continue, he concedes that would be of little utility because of the amending legislation.

[13] On the other hand, he argues that dismissal is not appropriate because the Land and Resources Tribunal's determination of the objections had been set aside. The objections have not been heard and determined. Dismissal would imply that the merits of the objections had been rejected. Therefore, he submits, the most appropriate order would be to stay the proceedings. In that way, the proceedings would not be dismissed, but would be stayed, because the objections are unresolved.

[14] On behalf of Xstrata, Mr Pappalardo argued that the *Amendment Act* validating the grant of the surface area under the *MRA* and the amended environmental authority under the *EPA Act*, has now put beyond question the validity of those grants. It has also had the following effects:

- There are no longer any applications on foot for the Land Court to make a recommendation in respect of; and
- There is no longer any jurisdiction for the Land Court to conduct a rehearing.

[15] He submits that there is no longer any subject matter before the Court which can be the subject of a determination. A stay is only appropriate where a matter can be re-enlivened at a later time. That cannot happen in the present case. Therefore, the appropriate order is for dismissal.

[16] Mr Pepper for the Environmental Protection Agency submitted that the agency as a statutory party, supported the QCC's application for a stay. While the Agency did not necessarily agree with the QCC's submission about the intent of the legislation, neither did it necessarily agree with the submission by Xstrata that a rehearing could not proceed.

[17] In Mr Pepper's submission, too much is being read into the explanatory notes in relation to the legislation. On its face, the amending legislation itself does not prevent a rehearing or deny this Court jurisdiction to rehear the objections. However, the QCC does not wish to proceed with its objections and the Agency supports a permanent stay.

Conclusion

- [18] Following the recommendations by the Land and Resources Tribunal on 15 February 2007, the amended 33 page environmental authority was granted by the Minister for the Environment on 8 March 2007. However, the amended environmental authority, being a precondition to the grant of a mining lease, did not take effect until the grant of the additional surface area to the mining lease by the Governor in Council on 29 March 2007.
- [19] Later in the year, the Court of Appeal delivered its decision on 12 October 2007, setting aside the orders of the Land and Resources Tribunal and remitting the matter to the Land Court for determination according to law. That would have allowed the QCC to amend its particulars of the conditions it sought to have imposed on Xstrata's applications and have its objections reconsidered by the Land Court.
- [20] However, the Legislature intervened and the *Amending Act* commenced on 25 October 2007, validating the grant of the surface area and the amended environmental authority.
- [21] After considering the various arguments, I have come to the conclusion that the validating legislation restored the situation that existed prior to the decision of the Court of Appeal. At that time, the two relevant Ministers, apparently satisfied that the provisions of the Acts had been complied with and the objections dealt with, the Minister for the Environment granted the amended environmental authority on 8 March 2007 and the Minister for Mines recommended to the Governor in Council the grant of an additional surface area to a mining lease be granted. The Governor in Council granted the additional surface area on 29 March 2007.
- [22] Where does that leave the objections? In my view, the objections are no longer relevant. The applications for the additional surface area and for the amended environmental authority were granted and those grants were validated by the *Amendment Act*. The opportunity for the QCC to have its objections reconsidered was effectively removed by the *Amendment Act*.
- [23] The QCC argues, and the Environmental Protection Agency agrees, that there is nothing on the face of the *Amendment Act* that removes the right to have those objections dealt with according to law by the Land Court. However, the QCC accepts that the Explanatory Notes and the Minister's Second Reading Speech indicate there should be no rehearing of the objections.

- [24] In my view, there is no need to have recourse to such extrinsic material. The wording of the *Amendment Act* is clear and unambiguous. The amended environmental authority is deemed to have been validly granted and the application to include the additional surface area in the mining lease is also deemed to have been validly granted.
- [25] In other words, both grants have been validated by legislation, notwithstanding the decision of the Court of Appeal. Therefore, the objections by the QCC can no longer exist. Such objections have been overtaken by statutory intervention and there is no longer anything for the Land Court to hear and determine. The objections cannot exist in a vacuum. Therefore, the application by the QCC must be dismissed.
- [26] However, I should make it clear that they are dismissed because of the effect of the *Amendment Act*, not because the merits of the objections have been dealt with. They simply no longer exist.

Order

The application is dismissed.

**JJ TRICKETT
PRESIDENT OF THE LAND COURT**