Are "net benefit" and scope 3 emissions relevant in Land Court objections hearings?

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Summary

The *Mineral Resources Act* and *Environmental Protection Act* should be amended to make it clear that objections cannot be lodged on the grounds of scope 3 emissions or the "net benefit" test.

The Queensland Supreme Court has confirmed, among other things, that proponents for mining lease applications are not required to show their mine will create a "net benefit" to the community, and may not need to consider the potential impact of Scope 3 greenhouse gas emissions from their mine.

The case of *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 involved the hearing of two applications for judicial review of:

- the decision of the Land Court to recommend, in the first instance, the refusal of both of Hancock Coal Pty Ltd applications for a mining lease (**ML**) under the Mineral Resources Act 1989 (Qld) (**MRA**), and for an environmental authority (**EA**) under the Environmental Protection Act 1994 (Qld) (**EP Act**) for the Alpha Coal Mine, and in the alternative, 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); and
- the decision of the EP Act Minister not to refuse but to grant an EA under, as it was then, section 225(1) of the EP Act for the Alpha Coal Mine, subject to certain conditions, and the decision or conduct of the MRA Minister by which he assured the EP Act Minister that a condition would be attached to the grant of a ML for the mine under the MRA requiring further assessment of groundwater impacts under the Water Act.

Judicial review of Land Court recommendation

The Land Court recommendations were challenged by Coast and Country Association of Queensland Inc (**CCAQ**) on four grounds:

- it was not open to Member Smith to make alternative recommendations;
- Member Smith should have assessed whether approval of the mine created a net benefit for the local economy;
- the Land Court decision lacked finality; and
- Member Smith erred in his conclusions regarding the adverse impacts of greenhouse gas (**GHG**) emissions (scope 3 emissions) firstly on the basis that it was a relevant consideration and not considered, or in the alternative to the extent it was considered, Member Smith erred in concluding that the mine would have "no impact" on such emissions, because "the coal would simply be sourced from somewhere else".

In dismissing CCAQ's application, the Supreme Court made the following comments in relation to CCAQ's grounds of appeal.

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Power to make alternative recommendations

CCAQ argued that the use of the word "or" in sections 269(2)(a) of the MRA (ie. a recommendation that the application for the ML be granted **or** rejected) and, as it was then, section 222(1)(a) and (b) of the EP Act (ie. the application for the EA be granted on basis of draft EA **or** granted on stated conditions different to the draft EA **or** the application be refused) meant the Land Court did not have the option of making alternative recommendations to either refuse or approve a proposed ML or EA.

In dismissing this ground, the Supreme Court agreed with the submissions of Hancock, being that the Land Court must make a recommendation after a hearing, and the range of recommendations must be drawn from those set out in section 269 of the MRA and, as it was then, section 222 of the EP Act, but the type or types of recommendations to be made is up to the Land Court to decide, which Justice Douglas stated should logically extend to the making of recommendations on alternative bases.

It was held that as the purpose of these provisions is for the Land Court to make recommendations, it was impractical to construe the provisions to limit the range of recommendations that the Land Court may make so strictly, and ultimately the alternative recommendations made by Member Smith were recommendations that could be made under the MRA and EP Act.

Net benefit test

In submitting the Land Court needed to be satisfied the mine would create a net benefit for the local community, CCAQ relied upon several cases[2], [1] in conjunction with the statutory requirements, to support its position.

Essentially, CCAQ had argued in the Land Court that environmental and social impacts should be attributed some numerical cost with such cost to be deducted from any economic benefits associated with the project.

Hancock distinguished its position from each of the cases for various reasons, including that:

- some were decided under a different regime;
- the requirement was for the Land Court to be satisfied the circumstances warrant a recommendation having regard to the purposes for which the Crown should give a right to mine its minerals;
- the requirement was not that there be a "net benefit" but rather that the Land Court is to consider all matters set out in the MRA and EP Act irrespective of whether an objection relates only to limited criteria; and
- the cases did not establish a requirement for a "net benefit" test.

In agreeing with Hancock, Justice Douglas did not find that a net benefit test was a statutory requirement under either the MRA or EP Act, and he was not prepared to add such a concept to the statutory considerations already imposed.

Although not mentioned in the Supreme Court decision, a practical difficulty with the argument run by CCAQ is that there is very little agreement amongst experts in this area as to how these environmental and social impacts should be costed.

Lacking finality

In quickly dismissing this ground of review, Justice Douglas stated that the decision of Member Smith to recommend grant subject to further statutory approvals under the Water Act does not have the effect of involving the decision maker in deferring matters for later decision by itself. Rather it recognises that if the ML and EA are decided to be granted, the issues relating to the use and supply of water will need to be

[2] Those cases included *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473; *Armstrong v Brown* [2004] 2 Qd R 345; *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* (2007) 155 LGERA 322, 339-340 at [53]; and *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LEGRA 347 on appeal, *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 307 ALR 262.

addressed by the future statutory process under the Water Act before the mine can proceed. He stated that this is not a lack of finality in the recommendation, but a recognition of reality.

Scope 3 emissions

GHG emissions commonly fall into three categories. Scope 1 and Scope 2 GHG emissions relate respectively to the release of GHG emissions as a direct result of an activity of a facility, and the release of GHG emissions as a result of activities that generate electricity, heating, cooling or steam that is consumed by that facility, but do not form part of the facility itself.

Scope 3 emissions are the "indirect" emissions, or emissions released as a consequence of the activities of a company, but from sources not owned or controlled by the company. For instance, extraction and production of purchased materials, transportation of purchased fuels and use of sold products and services (including the burning of coal).[3]

The Supreme Court agreed that GHG emissions are a relevant issue for both the EA and the ML. Under the EP Act, GHG emissions are a relevant issue through the requirement to consider the "standard criteria" under, as it was then, section 223(c), including the principles of ecologically sustainable development, the character, resilience and values of the receiving environment, submissions made by the applicant and submitters and the public interest.

Under the MRA, it was held that scope 1 and 2 emissions fall to be considered under ss269(4)(i) and (j) which both refer to the operations to be carried on under the authority of the proposed ML, but scope 3 emissions fall to be considered under s269(4)(k), being the requirement for the Land Court to consider the potential impact to the public right and interest.

The Court ruled this view is supported by the decision of Xstrata Coal Queensland Pty Ltd v Friends of the Earth - Brisbane Co-Op Ltd (2012) 33 QLCR 79 where President MacDonald took the view that the transportation and use of coal did not fall within the "operations" carried out under the ML referred to in section 269(4)(j) (and necessarily, section 269(4)(i)).

In concluding that the scope 3 emissions from the Alpha Coal Mine should not be taken into account as impacting the public right and interest, Member Smith's reasoning was that the facts showed there would not be any reduction of GHG emissions if the Alpha Coal Mine was refused, and in fact, depending on the replacement coal sourced, such replacement coal could increase the level of emissions.

This position was supported by Justice Douglas, who held that "although the objective of the [EP Act] 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".

Ministers' decisions and conduct

In dismissing this second application, Justice Douglas considered the main issue to be whether the conduct of either Minister lacked finality. He stated that the aspect left undecided was something which neither Minister had power to grant, namely a water licence. The EP Act Minister had decided the application for the EA and the MRA Minister had decided that if it were to grant the ML, it would be conditioned to require a water licence to be obtained. As such, the conduct or decisions of both Ministers would satisfy the finality principle.

Where to from here?

Given that the same arguments relating to scope 3 emissions have now been run in a number of Land Court matters and now the Supreme Court with the same result, it would seem appropriate for amendments to be made to the MRA and EP Act to make it clear that objections cannot be lodged on this ground.

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

Similarly, to avoid repetition of argument and associated significant time delays, the same position could be taken on the "net benefit" test.

This would also support the desire of industry as recently supported by Government to ensure that Land Court processes can be completed within a more appropriate timeframe and that significant time and costs are not incurred by experts arguing the same position as has been already argued and decided by the Courts particularly given that these issues are essentially matters of government policy.