

Case update: Alpha coal judicial review



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On 4 September 2015, the Supreme Court delivered judgment in respect of two judicial review applications brought by EDO Queensland client, conservation group Coast and Country Association of Queensland (CCAQ): one against the decision of the Queensland Land Court and another against the decisions of the Ministers responsible for granting the Mining Lease (ML) and Environmental Authority (EA).¹

Background

Hancock Coal Pty Ltd (**Hancock**) proposed the Alpha Coal Project in 2008, seeking approval for a 30 million tonne per annum thermal coal mine, 360km south-west of Mackay in the Galilee Basin. The mine is expected to draw down groundwater levels by up to 10 metres within a 5km radius of the mine.

In February 2013, CCAQ objected to the grant of the ML and EA for the project in the Queensland Land Court, due to the impacts of the project on groundwater, climate change and economics. Early on, the Court rejected the attempt to file and read an affidavit in support of the assertion by Hancock that the proceedings were instituted to delay or obstruct.² The Court stated that:

“I believe that all parties, when they come before the Court at first instance, unless they already have a finding against them in another place (such as: that they are a vexatious litigant) should be seen as coming before the Court with clean hands. That is the presumption until proven otherwise, or until conduct suggests otherwise.”³

In April 2014, after hearing the full evidence in the matter, the Land Court found that “Given the unsatisfactory nature of the evidence relating to groundwater, good reason has been shown for a refusal to grant the mining lease”.⁴ The Land Court ultimately recommended that the EA and ML be refused or subject to additional conditions in respect of groundwater.⁵ Acknowledging that the Land Court may not have had the power to make recommendations in the alternate, the Court made it clear that if it were to make a singular recommendation it would be for the refusal of the applications for the EA and ML.⁶

On the basis of the success in relation to ground water one of the landholder objectors sought and were awarded costs against Hancock.⁷

In relation to climate change the Land Court decision took significant steps forward in the recognition of climate change, finding that the emissions from the burning of the coal were legally relevant as part of the requirements to consider the public interest.⁸ The Land Court also found that the quantity of emissions from the project, representing 0.16% of global emissions, were ‘real and of concern’ and ‘cannot be dismissed as

¹ *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 (14/4249) Douglas J 04/09/2015

² *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9

³ *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9 at [3].

⁴ *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC at [399].

⁵ *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC

⁶ *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC at [426].

⁷ *Hancock Coal Pty Ltd v Cassoni (No. 5)* [2014] QLC 33

⁸ *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC at [218].

negligible’.⁹ However after finding the emissions from the burning of coal overseas to be legally relevant the Court came to the factual finding on the evidence that global emissions ‘will not fall if Alpha does not proceed as the coal will simply be sourced from somewhere else’.¹⁰

In August 2014, following the Land Court decision and recommendations, the Minister for the Environment decided to grant the EA, in part relying on the Minister for Mines to impose some of the conditions recommended by the Land Court.

CCAQ challenged some aspects of the Land Court’s decision, including whether the Land Court:

- can make alternative recommendations for both refusal and approval;
- was required to consider whether the project would result in a net benefit;
- recommendation was not sufficiently final as it required further assessment under the Water Act; and
- properly considered emissions from the burning of coal.

The CCAQ subsequently challenged the decision of the Environment Minister to grant the EA, relying on the Land Court recommendation, and the decision and/or conduct Mines Ministers provided some assurances regarding proposed conditions on the ML, upon which the Environment Minister relied.

Decision

The Supreme Court dismissed the applications for Judicial Review, finding that:

- the Land Court is entitled under the relevant statutes to recommend refusal with an alternate recommendation for approval with conditions;
- the Court would not read into the legislation a requirement that the project demonstrate a net benefit;
- the recommendations of the Land Courts are not final decisions and do not require finality; and
- the Land Court considered the emissions from the burning of coal as part of the consideration of the public interest but gave no weight to those emissions due to the factual finding that the emissions of the product coal would be substituted by another project elsewhere if this mine did not proceed.

The last point is a significant finding which clarifies for the first time in the Supreme Court that emissions from the burning of coal are relevant in the assessment of coal mines in Queensland – an issue that had been hotly debated until now. It is now clear that each coal mine may be required to argue on the facts whether the mine will in fact increase global emissions.

Some commentators have suggested that the law should be amended to prevent objections in relation to the emissions from the burning of coal to ensure the argument is not run again however it would be misguided to change the law in response to factual findings in one or two cases. Few of our criminal laws would be left standing if they were repealed on each finding of ‘not guilty’.

The Decision of the Supreme Court has been appealed to the Queensland Court of Appeal in respect of the findings in relation to climate change. The hearing is expected early next year.

⁹ Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4) [2014] QLC at [208].

¹⁰ Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4) [2014] QLC at [229]