COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA NUMBER: CA2235/07
NUMBER: AML207/06 and ENO208/06

Appellant: **QUEENSLAND CONSERVATION COUNCIL INC**

AND

First Respondent: **XSTRATA COAL QUEENSLAND PTY LTD & ORS**

AND

Second Respondent: **ENVIRONMENTAL PROTECTION AGENCY**

First Respondent's Outline of Argument

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Introduction

1. The present appeal arises out of a decision by the Land and Resources Tribunal to recommend the grant of additional surface rights under a mining lease and the corresponding grant of an environmental authority.

2. Section 67(1) of the *Land and Resources Tribunal Act 1999 (LRT Act)* provides that:

> *"A party to a proceeding before the Tribunal may appeal against a decision to the Tribunal, but only on a question of law."*

3. There is no specific appeal provision contained in the *Mineral Resources Act 1989* in respect of a decision made by the Tribunal pursuant to s.269 of the *Mineral Resources Act (MRA).*

4. The Appellant's Outline of Argument fails to identify the questions of law which this Honourable Court is asked to determine. Further, the Notice of

Appeal and Outline of Argument raise a number of grounds which are not questions of law but which challenge findings of fact. To that extent the appeal is incompetent.

Summary

5. Grounds 1 and 2 of the Notice of Appeal are based on the false premise that the Tribunal found that emissions of anthropogenic gases does not contribute to global warming and that the appellant was not accorded procedural fairness in relation to evidence going to that fact. That finding was not made. Nor was there any failure to accord procedural fairness or natural justice. Further, on this point, the appellant's argument proceeds as if the respondents' failure to dispute a fact forecloses the Tribunal's examination of the fact even though on ground 3 of the appeal the appellant contends that the Tribunal is bound to enquire more widely than the issues joined by it on the objection.

6. Ground 3 of the Notice of Appeal is based on the false premise that the Tribunal held that refusal to amend the particular was based on s 268 of the MRA. The refusal was based on the fact that the particulars previously given did not fairly raise a case that an offsetting condition other than a condition that all emissions be offset should be imposed as a matter of recommendation. The proposed amendment would have raised a completely different case as to the viability or advisability of such a condition. There is no question of law on which an appeal can be brought on that point.

7. Ground 4 of the Notice of Appeal is based on the false premise that under s269 of the MRA and s 220 of the *Environmental Protection Act 1994* (EPA) the Tribunal is bound to give an objector a hearing or opportunity to make submissions which are outside the scope of the determination of the objection, simply because it would be within the power of the Tribunal to consider a matter beyond the scope of the objection if the Tribunal chose to do so. That mistakes the role of an objector under the MRA and under the EPA.

8. Ground 5 of the Notice of Appeal proceeds on the false premise that the Tribunal limited its consideration to a condition based upon a 100% offset

and that the Tribunal placed a constraint on its role in considering the evidence.

9. Grounds 6 and 7 of the Notice of Appeal proceed on the false premise that the finding that there was no evidence as to any impact that the proposed additional surface area would have on global warming meant that the requirement under s 269 of the MRA or s 223 of the EPA were not addressed. On the contrary, that finding was based on unchallenged and uncontradicted evidence and was relevant to the recommendation to be made. There was no error in making the finding or the recommendation which gives rise to an appeal on a question of law on this point.

Question of Law

10. The Full Federal Court has recently considered the question of the nature of an appeal under s 44(1) of the *Administrative Appeals Tribunal Act* which provided for an appeal on a question of law. In *Comcare v Etheridge*[1] Branson J with whom Spender J and Nicholson J agreed, stated that an appeal "on a question of law" is narrower than an appeal that involves a question of law. In this respect the Court indicated that where an appeal lies "on a question of law" the subject matter of the appeal is limited to the question or questions of law.

11. In *TNT Skypak Interntational (Aust) Pty Ltd v FCT*[2] Gummow J observed that: *"The existence of a question of law is now not merely a qualifying condition but also the subject matter of the appeal itself..."*. In a similar vein, Ryan J in *Australian Telecommunications Corporation v Lambroglou*[3] commented that in the context of an appeal on a question of law it would be inappropriate for the rules to require "grounds" because they would relate to findings of fact.

12. Both of the above decisions were referred to with approval by Branson and Stone JJ in *Birdseye v ASIC*[4]. In *Birdseye*, Branson and Stone JJ left open the question whether a denial of natural justice was a question of law so as to

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1 (2006) 227 ALR 75 at [13]; See also *MBF Health Funds Inc v Minister for Health and Ageing* (2006) 149 FCR 291 at 293.

2 (1988) 82 ALR 175 at 178.

3 (1990) 12 AAR 515 at 524.

4 (2003)76 ALD 321 at 324; [2003] FCA 232 at [11]-[14].

found an appeal under s 44 of the AAT Act but referred to another decision of the Full Federal Court which had so held[5]. The High Court has held that a breach of natural justice is a jurisdictional error[6] but that is not precisely the same question as whether an appeal on that question is on a question of law. It appears to have been assumed although not formally decided by the Queensland Court of Appeal in *Armstrong v Brown*[7] that the question of whether there was a breach of natural justice was an error of law.

13. The particular content of the requirement to accord procedural fairness or natural justice in any given case is not purely a question of law. In *SZBEL v. Minister for Immigration and Multicultural and Indigenous Affairs & Anor*[8] the High Court stated at [26]:

> *"It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that a particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case.*

14. Whether a successful appeal on a question of law brings about the result that the decision should be set aside and the matter referred back to the Tribunal will depend on whether the error in question was material to the Tribunal's decision and affected the decision reached.[9] In this regard, the approach does not differ significantly from that referred to by the Queensland Court of Appeal in *HA Bachrach Pty Ltd & Ors v Caboolture Shire Council*[10].

Conduct of Proceedings

15. As stated above, a competent appeal from the Tribunal's decision is limited to one on a question of law. The appeal is not in the nature of a rehearing.

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5 *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 per Gray ACJ and North J, Gyles J dissenting.

6 *Minister for Immigration v. Bhardwaj* (2002) 209 CLR 597 at 611-612, although it wasn't one of the recognised categories referred to by the High Court in *Craig v South Australia* (1995) 184 CLR 163 at 179.

7 (2004) 2 Qd R 345.

8 (2006) 231 ALR 592 at 598.

9 *Hyundai Automotive Distributors Australia Pty Ltd v Chief Justice Officers, Australian Custom Service* (1998) 51 ALD 45; (1998) 81 FCR 590.

10 (1992) 80 LGERA 230 at 237 – 238. Although the *Local Government (Planning and Environment) Act 1990* provided in that case to an appeal "on the ground of error or mistake in law on the part of the court or that the court had no jurisdiction to make the determination or exceeded its jurisdiction in making the determination".

The Appellant's outline of argument ignores the distinction and delves deeply into a detailed reconsideration of the factual matrix of evidence before the Tribunal. The Respondent does not therefore propose to traverse paragraphs 5- 32 of the Applicant's Outline and thereby compound the error in relation to any of the grounds of appeal except on matters which could arguably constitute a question of law[11].

The Tribunal's decision

16. The presiding member decided that:

(a) having considered the evidence and the factors in s269(4) and s223 he recommended that the proposed additional surface area be granted in whole and the related environmental authority (mining lease) application be granted on the basis of the draft environmental authority for the application. In both cases he recommended that the grant be made without any of the conditions sought by the objectors[12];

(b) he was not satisfied that the greenhouse gas emissions (GHG emissions) from the proposed mine would have any effect on global warming or climate change, if eliminated[13];

(c) on the basis of all the evidence he was not satisfied that[14] ;

(i) the proposed additional surface area mining operations would:

1. cause any adverse environmental impact which could not be managed by the draft environmental authority;

2. prejudice the public right and interest;

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11 Paragraph 17 of the Appellant's outline is not an accurate summary of the evidence but the fact that greenhouse gas emissions contribute to global warming and climate change was not disputed. As to paragraph 19 Mr Stanford and Dr Turatti did not give evidence disputing that the GHG emissions from the mine "contributed" to global warming, but the Appellant did not lead any evidence that they would have any discernible effect either.

12 Reasons at [7] and [16].

13 Reasons at [21].

14 Reasons at [22].

(ii) any good reason had been shown to refuse the subject applications; or

(iii) Ecologically Sustainable Development Principles (ESD principles) operated to require the applications to be conditioned as advocated by the objectors[15].

(d) any condition as to the avoiding, reduction or offsetting of GHG emissions would:-

(i) not have any discernible impact on global warming or climate change;

(ii) have the real potential to drive wealth and jobs overseas and to cause serious adverse economic and social impacts upon the State of Queensland.

(e) that absent universally applied policies for GHG reduction, requiring this mine to limit or reduce its GHG emissions would be arbitrary and unfair[16].

Ground 1: Denial of Natural Justice

17. The precise question for consideration by the Court has not been identified by the Appellant but it appears to be whether the Tribunal in failing to give the Appellant notice of the use it might make of two articles provided to the parties for comment after the hearing was a breach of natural justice. In the Respondent's submission this is not purely a question of law for the reasons set out above and therefore not an appeal on a question of law.

18. Natural justice requires that a statutory power must be exercised fairly. What is the content of a duty to act fairly depends on the circumstances of a case.[17] In *Commissioner for Australian Capital Territory Revenue v. Alphaone Pty Ltd* (1994) 49 FCR 576 at 590 – 1 the Full Federal Court stated:[18]

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15 Reasons at [22].
16 Reasons at [23].
17 *Kioa v. West* (1985) 159 CLR 550 at 585 per Mason J.
18 Approved in *SZBEL v. Minister for Immigration and Indigenous Affairs* (supra) at [32].

> *"It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material".*

19. The Appellant's outline of argument suggests that the Stern Review was in evidence[19]. The Stern review was not in evidence before the Tribunal. The Stern Review was adverted to by the witnesses but was not a matter that was in evidence. The Stern review was sought to be drawn upon by Mr Norling, the expert for the Appellant, who purported to give evidence of the economic impact climate change would have in Queensland using the Stern review. His evidence was challenged as to expertise, and credibility and was found to have contained grossly exaggerated references.[20]

20. By s 268(2) of the *MRA* the Tribunal is not bound by the rules of evidence and it is entitled to inform itself in such a manner as it considers appropriate, in order to determine the relative merits of the application and any objections.[21] It is not complained that the Tribunal referred to the articles but the use that has been made of them by the presiding member is challenged. It is also suggested that the presiding member used the articles to cast doubt on the existence of anthropogenic climate change.

21. Aside from the question of whether the alleged denial of natural justice is a question of law, there was no breach of natural justice in the present case for the following reasons:

    (a) the articles were provided to the parties and the parties were invited to comment upon them which all parties did;

    (b) it was quite obvious that the *"Stern Review: A Dual Critique"* challenged the scientific and economic predictions of the Stern report as being exaggerated, so the parties were put on notice by the content of the article itself what use could have been made of that article and thereafter allowed to make (and did make) submissions;

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19 Para 21 and 36 Appellant's outline.

20 Reasons at [13].

21 See also *Armstrong v. Brown* (2004) 2 Qd R 345 at 348 per McMurdo J, with whom McPherson JA agreed.

(c) the *"Stern Review: A Dual Critique"* although commented upon by the presiding member in his decision was not material to his decision[22];

(d) it is not correct to say that the Tribunal questioned the entire basis of the science of climate change or cast doubt on the existence of anthropogenic climate change. To the extent that the Tribunal thought the extent of climate change and global warming was brought into question by the articles he provided the opportunity to the parties to comment;

(e) a critical issue for the Tribunal's consideration was whether the GHG emissions from the proposed mine would have any discernable separate effect on global warming and climate change as opposed to the extent that global warming will contribute to climate change generally[23]; and

(f) some five days after the Appellant provided a first submission in response to the Tribunal's invitation to comment on the articles and without leave of the Tribunal or reference to the other parties, the Appellant provided a second responsive submission but it did not apply to reopen the evidence or make further submissions to the Tribunal in either of its submissions.[24]

22. In the present case, the presiding member provided the parties with the opportunity to deal with material which may have affected his decision[25] even though the articles ultimately assumed little significance.

23. As was said by Brennan J. in *Kioa v. West* (1985) 159 CLR at 628 – 629:

> *"The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision- making is not to be clogged by enquires into allegations to which the repository of the power would not give*

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22 At [15] – [20].

23 Reasons at [21].

24 Reasons at [19].

25 The Tribunal acted consistently with what Mason J. regarded a decision maker in *Kioa v. West* as obliged to do in relation to the additional source of information which had not been dealt with by the Applicant and upon which an adverse finding could have been made, namely allowed the parties to comment.

credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made. Administrative decisions are not necessarily to be held invalid because the procedures of adverse litigation are not to be fully observed . . ."

24. The Appellant's real complaint is not that it did not have a fair opportunity to comment on a matter upon which potentially adverse findings may be made but rather that the Tribunal did not make its preliminary views in relation to the articles known to the parties. The Courts have generally held that a decision maker is not obliged to make or to seek comment on his or her preliminary views before making a final decision in order to accord natural justice[26]. There is nothing in the present case which calls for a different finding in this case.

25. The decision relied upon by the Appellant, *York v. The General Medical Assessment Tribunal & Anor*[27] is distinguishable. In that case, the Tribunal rejected the only expert medical opinions given in evidence before it on a critical issue and in doing so failed to inform Mr York of the Tribunal's disagreement with the evidence[28]. Unlike the present case, Mr York was not put on notice that the Tribunal may make findings on the basis of opinions based on their own expertise.[29]

26. In the present case, the matter to which the Tribunal suggested it may have regard, namely the content of the articles, was clearly notified to the parties and they were provided with an opportunity to respond.[30]

27. Nothing further was required to be done by the Tribunal to accord procedural fairness or natural justice.

Grounds 2-4: Role of Particulars

28. The alleged error of the Tribunal was a "misunderstanding of what constitutes an objection" and "the function of particulars"[31].

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26 *York v The General Medical Assessment Tribunal & Anor* (supra) at [26]; *F Hoffman-La Roche and Co AG v Secretary for Trade and Industry* (1975) AC 295 at 369; *Greyhound Racing NSW v Cessnock & District Agricultural Association* [2006] NSWCA 333 at [82] and [86]; *SZBEL v. Minister for Immigration and Indigenous Affairs* (supra) at [29] – [32] and [48].

27 (2003) 2 Qd R 104 at 115,[32]

28 At [30].

29 At [29].

30 *Kioa v West* (supra) at 587; *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-1.

29. The Appellant sought to amend the particulars of its grounds. The Tribunal rejected the application for amendment stating[32]:

> *"In my view, this application to amend the further and better particulars substantially changes the case that the Applicant has to meet. The application was made at a very late stage and the Applicant is not in a position to meet the objection in its proposed amended state and will be prejudiced in the event that leave were granted for the objections.*
>
> *Having regard to the submissions made, I am satisfied that this is not an appropriate case for leave to be granted."*

30. Notwithstanding that ruling, the Appellant sought to provide submissions advocating the very conditions which were the subject of the amendment which had been refused by the Tribunal[33].

31. Section 268(3) of the *MRA* provides that:

> *"The Tribunal 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."*

32. In *ACI Operations Pty Ltd v. Quandamooka Lands Council Aboriginal Corporation*[34], the Court of Appeal found that the Tribunal had erred in inviting an objector to make submissions as to whether the provisions of the Act had been complied with or whether any good reason could be shown for a refusal to grant a mining lease notwithstanding that that question was not the subject of a ground of objection duly lodged.[35]

33. The Court of Appeal considered that s. 268(3) qualified the power of the Tribunal to inform itself through the objection hearing process itself pursuant to s. 268(2) of the MRA.[36] As was said by Mullins J. in *ACI Operations Pty Ltd*[37]:

> *"The making of submissions by an objector in relation to an issue equates to the entertaining of an objection on that issue by the Tribunal."*

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31 Paragraph 42 of the Appellant's outline
32 T 24/1-20.
33 T144/1-30.
34 (2002) 1 Qd R 347.
35 See [para. 6] per Davies JA.
36 See at [6] per Davies JA, [14] per McKenzie J. and [60]-[61] per Mullins J.
37 At [60].

34. Clearly, while the Tribunal was not limited in the present case to consider only conditions proposed by the Appellant, it was not open for the Appellant to advocate particular conditions which had been the subject of an unsuccessful application for amendment of the particulars of the grounds of objections.

35. There is no appeal from the decision to refuse leave to amend the particulars. Accordingly, the objection as particularised that the application for additional surface area should be refused unless granted on condition that the respondent offset 100% of the greenhouse gas emissions was the question that the Tribunal was bound to decide in determining the objection, but the contention of the appellant that the application should have been refused except on condition that the respondent offset 10% of emissions was not.

36. The refusal of the Tribunal to entertain a ground of objection based on the 10% offsetting condition was consistent with and required by the decision on the application to amend because that would have been outside the scope of the issues joined by the objection as particularised. The function of the particulars is to narrow the factual dispute. They thereby limit the evidence which is relevant to determine the factual issues. Particulars ordered under the rules of the Land and Resources Tribunal of a ground of objection required under s.268 (3) of the MRA or s.223 of the EPA are no different.

37. The grounds of the Appellant's objections provided that the mining leases should not be granted without conditions. The particulars in question were of the conditions that the Appellant contended should be imposed. The particulars are inseparable from the grounds of objection and had to be provided for the Respondent to know what the nature of the objections were that it had to meet and to prepare its evidence on that basis.[38] It was on the basis of the particulars of Appellant's grounds that the Respondent had prepared its case in response[39].

38. The very function of particulars is to identify a party's case. In this case, the grounds of a party's objection were particularised so that the other parties were aware of the case that they had to meet[40]. A party is generally bound

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38 T 144/30-45.

39 T15/1-15, T19-T20.

40 *Bailey v FCT* (1977) 136 CLR 214 at 219;*Bass v TCN Channel Nine Pty ltd* [2006]

by those particulars. This is endorsed by, rather than being contradicted by the principal decision relied upon by the Appellant. In *Mummery v. Irvings Pty Ltd*[41] the majority[42] relevantly commented that particulars could not have operated to circumscribe the causes of action sued upon. They said:

> *"This is not the function of particulars; their function is to limit the issues of fact to be investigated and in doing this they do not modify or alter the cause of action sued upon."*

39. In that case, the High Court had to consider whether the Trial Judge had erred in directing a jury only to consider whether the appellant's injuries had resulted from the failure on the part of the respondent to discharge its duty as the occupier of the premises, so that it was not open to find that the claim could be supported by evidence of some casual act of negligence on the part of a servant of the respondent. The High Court stated[43]:

> *"In the present case there may, perhaps be some doubt upon the pleadings whether the appellant, on this branch of the case, relied solely upon the alleged breaches of the duty imposed upon the respondent as the occupier of the premises in question but, on the whole, we are forced to the conclusion that he did. Apart from the particulars appended to par. 5 the statement of claim does not allege the breach of any duty on the part of the respondent and it is only by reference to the particulars in par. 5 that a cause of action is disclosed. ... Moreover it was upon this basis that the trial was conducted throughout. Accordingly, in the absence of any amendment, the trial judge was bound to confine the deliberations of the jury on this aspect of the case to the question whether the respondent had failed in that duty."*

40. Similarly, *Dare v. Pulham*[44] does not assist the Appellant. In that case the argument was whether a jury could assess damages based on a loss of earning capacity which exceeded that claimed in the particulars. The High Court overturned the decision of the Full Court which set aside the jury's verdict on the ground that, although there was evidence to support the assessment, it was sustainable only on the footing that the jury had accepted that the Plaintiff could have earned considerably more than $200.00 net per week. That amount was more than the amount stated in the particulars and

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NSWCA 343 at [41]-[44]

41 (1956) 96 CLR 99 at 110

42 Dixon CJ, Webb J, Fullagar J and Taylor J.

43 Supra at 111

44 (1982) 148 CLR 658.

the Plaintiff was bound by the estimate in the particulars. In this regard, the High Court commented that the rule of the court in question:

> *"Does no more than extend the ambit of particulars which the Plaintiff is required to furnish. The rule does not create a duty to state a limit on the amount which a Plaintiff claims where that duty does not otherwise exist nor does the rule purport to confine the range which the jury is to quantify the Plaintiff's general damages ... In the event that evidence, admitted without objection, tends to establish a claim for damages higher than the claim made in the particulars, the Defendant is placed in no stronger position to avoid an assessment based upon that evidence than he would be if a verdict was returned on facts not alleged in particulars but admitted without object at the trial to establish the cause of action pleaded."*

41. In the present case, not only were the amended particulars objected to by the Respondent, but the Respondent objected to cross-examination trying to lead evidence of an alternative case which had been the subject of the proposed amendment that had been ruled against[45]. The Tribunal made an express ruling that once the application to amend the further and better particulars was refused, it followed that the objections were limited to a combination of the objections and the further and better particulars of the objections which were filed on 11 December 2006.[46]

42. There was no suggestion below that the Tribunal's power to recommend appropriate conditions was restricted by the objections as particularised. The question was only whether the Appellant could advocate such a case. That was not open to them.

43. The position is no different under the *Environmental Protection Act (EPA)*. Section 218 of the *EPA* does not permit a party to amend its objection outside the period permitted for the making of the objection.

44. Pursuant to s 220(1) of the *EPA* the Tribunal may make orders or directions as it considers appropriate for the hearing of the objections.

45. Particulars of the conditions which the Appellants sought to have imposed upon the Respondent were ordered to be given and were given. The application to amend those particulars was dismissed. Consistent with the Tribunal's rulings, whether under the *MRA* or the *EPA*, it was not open for

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45 T52 20-32.

46 T53 25-50.

the Appellant to make submissions about the conditions that should be imposed other than those that were particularised.

46. There is no basis for the assertion by the Appellant that the presiding member considered himself restrained by the conditions as particularised and bound to only recommend conditions exactly in accord with those originally particularised or not at all[47]. The Tribunal was bound to consider the matters in s 269(4) and s 223 and the objections made[48]. It was not bound to consider conditions outside those contained in the objections, although it was empowered to do so if it considered them appropriate[49]. That was a matter within the discretion of the Tribunal in making its decision to recommend the grant or refusal of the applications.

47. The Tribunal did not find the conditions proposed in the objections were justified, nor did it consider that conditions as to the avoiding reduction or offsetting of greenhouse gas emissions were appropriate. It was not satisfied that eliminating the proposed mine's greenhouse gas emissions completely, would have any effect on global warming or climate change. It further found that the proposed coal mine would not cause any adverse environmental impact which could not be managed by the draft environmental authority. The Tribunal further found that, apart from having no demonstrated impact on global warming or climate change, any condition for avoiding reducing or offsetting greenhouse gas emissions would have the real potential to drive wealth and jobs overseas and to cause adverse economic and social impacts upon the State of Queensland and that absent universally applied policies, to do so would be arbitrary and unfair.[50]

48. There is nothing to suggest that the Tribunal did not consider that it could impose conditions requiring reduction, avoidance or offsetting of greenhouse gas emissions. Its decision made it plain it did not think it appropriate on the evidence to do so. There is no error on a question of law in that conclusion.

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47 Reasons at [4]; T177/10-60.

48 S 268(2) MRA.

49 Similar to the position of the Minister in *Peko-Wallsend Ltd* (supra) at p.46.

50 Reasons at [23].

Ground 5: The Tribunal's statutory function

49. There is no evidence that the Tribunal failed to understand its statutory role under the *MRA* and *EPA*. The error identified by the Appellant in fact shows that the Appellant fails to understand the Tribunal's role. The key to the Appellant's complaint appears to be in paragraph 62 of its outline. Paragraph 62 asserts that if the Presiding member had correctly identified his *"duty to recommend relevant and reasonable conditions to the Minister"*, then the cost of offsets in the evidence of Mr Keogh combined with Mr Norling's evidence should have led him to conclude that offsetting the greenhouse gas emissions from the mining operation itself would not effect the economic viability of the mine. It is further asserted that on the basis of that evidence the Tribunal should have concluded that offsetting 10% of the emissions from the transport and use of the coal would also not have affected the economic viability of the mine.

50. On the Appellant's approach the Tribunal could not simply conclude that no conditions relating to GHG emissions should be recommended at all[51]. The Tribunal is not bound in all cases to consider whether it should recommend any possible conditions but has the power to do so. When an objection is properly made on the basis that a condition should be imposed it is bound to consider that matter, but beyond that, it is matter within the Tribunal's discretion to recommend or not recommend a condition. No basis has been shown whereby it can be said that the Tribunal erred in the exercise of that discretion[52]. The exercise of that discretion based on the evidence does not constitute an error giving rise to an appeal on a question of law[53].

51. In any event, it is incorrect to assert that by relying on the statements of Mr.Stanford the presiding member was only considering a condition based upon a 100% offset. First, that construction is not consistent with the language of the reasons. Secondly, Mr Stanford in cross-examination rejected the proposition that his opinion as to carbon leakage assumed that any proposed condition would make the mine not viable economically[54].

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51 Although it raised that possibility in paragraph 64.
52 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 47.
53 Cf *ASIC v DB Management Pty Ltd & Ors* (2000) 199 CLR 321 at 331.
54 T51/5-25 – T52/1-15.

52. The present case is not akin to that considered by the High Court in *Sinclair v Mining Warden at Maryborough*[55]. In that case the High Court found that the Mining Warden had erred in two respects. First, he erred in holding that the limited interest of the objector rendered it impossible for him to conclude that any interest of the public would be prejudicially affected by the grant of leases. Secondly, he erred because he failed to appreciate that there should be evidence that would warrant a favourable recommendation and that an applicant was not entitled to a favourable recommendation merely by observing the formalities for making the application.

53. In the present case, there was no misconception by the Tribunal of its function. The Tribunal did not place any constraint on its role in considering the evidence and clearly considered that on the evidence a favourable recommendation as to the proposed application for surface area and environmental authority was warranted, having considered the factors in s 269(4) and s 223.

54. The matters which have been raised by the Appellant are a challenge to the findings of fact of the Tribunal and are not questions of law. As set out above, the Tribunal found as a matter of fact that no offsetting condition was warranted. There is no basis for contending that the Tribunal erred upon a question of law in exercising its discretion by not recommending the imposition of such conditions.

Gounds 6-7: Discernable Environmental Impact

55. The matters identified in paragraphs 69 and 70 (and subsequently in paragraphs 71- 93) of the Appellant's outline are not matters which raise questions of law. They raise factual findings by the Tribunal and no question of law is identified. They are neither matters of construction of the particular provisions of the statute which would raise a question of law[56], nor do they raise a question whether facts fully found fall within the provision of a statutory enactment properly construed.[57]

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55 (1975) 132 CLR 473 at 479.

56 *Collector of Customs v Agfagevert Ltd* (1995) 186 CLR 389 at 396-397.

57 *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7.

56. Insofar as the complaint is framed in terms of an alleged incorrect onus, while it is true that the question of onus is not generally applicable to administrative decisions[58] that is not always the case. It is a matter which depends upon the nature of the particular inquiry and the terms of the Act[59].

57. In any event, the Tribunal did not speak in terms of onus but rather of matters of which it was satisfied or was not satisfied on the evidence. It found that the Appellant had not satisfied it that the GHG emissions from this mine would have any separable or overall effect on global warming and climate change or cause any discernible harm. Such evidence might have been expected to come from the objector before the Tribunal. This is evident from the following statutory provisions:-

(a) S 260(3) which provides for an objector to state not only the grounds of objections but also the facts and circumstances relied upon by the objector in support of those grounds;

(b) S 268(3) which provides that an objector lead evidence as to its objections;

(c) S 268(8) and (9) which provide that costs may be awarded against the objector if the objector withdraws or abandons its objection;

58. The Tribunal's decision in paragraphs 21 - 23 does not indicate that the Tribunal considered that the matters raised by the Appellant could not "enliven" s. 269(4) (j), (k) or (l) of the *MRA* or 223(c) of the *EPA* as a matter of statutory construction. Rather those paragraphs make it plain that, as a matter of fact and on the evidence, including the evidence as to GHG emissions, the Tribunal did not consider that it should impose a condition as to avoiding, reducing or offsetting GHG emissions. There is no basis for suggesting that the Tribunal refused to consider the impact of GHG emissions from the mine. It was not outside power or an error on a question of law for the Tribunal to consider that it was not satisfied as a matter of fact that the additional surface area would have any discernible effect and

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58 *McDonald v Director General of Social Security* (1984) 1 FCR 354 at 356-357.

59 *The Secretary, Department of Primary Industries v Samuel Peter Costa* [2007] VSC 88 at [21].

because of that fact to conclude that no condition should be imposed as a matter of recommendation.

Should the decision be set aside?

59. It is submitted that, in any event, the decision of the Tribunal should not be set aside on the basis that:

(a) as was found by the Tribunal, on no view of the evidence was it established, that the proposed mine would have any discernable separate effect on global warming;

(b) the Tribunal found that conditions as to avoiding, reducing or offsetting GHG emissions would have no demonstrated impact on global warming or climate change;

(c) the Tribunal found that any such condition would have the real potential to drive wealth and jobs overseas and to cause serious adverse economic and social impacts in the State of Queensland;

(d) the Tribunal found that in the absence of universally applied policies any such condition requiring this mine (and no others) to limit or reduce its GHG emissions would be arbitrary and unfair.

David Jackson QC

Sue Brown

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