

The Xstrata case: Pyrrhic victory or harbinger?

Chris McGrath

Climate change is the Achilles heel of the Australian resources boom that both coal companies and Australian governments are fully aware of but prefer not to acknowledge or address. The *Xstrata* case brought this to the fore.¹

The *Xstrata* case can be seen as part of a growing trend for climate change litigation.² However, unlike most previous climate change litigation in Australia,³ this case allowed expert evidence to be called regarding the threat of climate change, the likely greenhouse gas emissions from the mine, and the means by which these emissions can be mitigated. The only previous Australian case to allow such issues to be agitated was the Greenpeace challenge to the Redbank power station in 1994.⁴

In the *Xstrata* case, the Queensland Court of Appeal overturned a decision of the Queensland Land and Resources Tribunal which had refused to recommend conditions be imposed on the expansion of a coal mine to address its greenhouse gas emissions. The case before the tribunal arose after two conservation groups lodged objections to the mine in late 2006 on the basis of greenhouse gas emissions. The main proponent, Xstrata Coal, is the world's largest thermal coal exporter. The main objector was the Queensland Conservation Council.

While no party to the proceedings questioned the fact that anthropogenic greenhouse emissions are contributing to climate change and pose a severe threat to the environment, the tribunal's decision doubted this fact and refused to recommend measures to mitigate these impacts. President Koppenol, the presiding member in the tribunal, used the tribunal's inquisitorial-style function to base his reasoning upon material that no party relied upon, which doubted the existence of anthropogenic climate change.

The Court of Appeal found the tribunal's approach was a breach of natural justice and set aside the decision. In response to the court's

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Notes

- ¹ *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33 (Koppenol P) and *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338 (McMurdo P, Holmes JA, Mackenzie J). Background information on this case is available at <www.envlaw.com.au/newlands.html>. The law and facts are considered as at 18 October 2007.
- ² See Joseph Smith, and David Shearman, *Climate Change Litigation*, Presidian Legal Publications, Adelaide, 2006; and Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming', *Environmental and Planning Law Journal*, vol 24, 2007, p 90.
- ³ Notably, *ACF v Minister for Planning* [2004] VCAT 2029; *WPSQ Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736; *Gray v Minister for Planning* [2006] NSWLEC 720; *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480..
- ⁴ *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd* (1994) 86 LGERA 143 (NSWLEC) (Pearlman CJ).
- ⁵ For general information on the tribunal, including past decisions, see <www.lrt.qld.gov.au/>.
- ⁶ By the *Land Court and Other Legislation Amendment Act 2007* (Qld), which commenced generally on 21 September 2007.
- ⁷ Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development*, AGPS, Canberra, 1992, <www.environment.gov.au/psg/igu/nsesd/index.html>.
- ⁸ Ian Lowe, 'A brief summary of the science of global warming and climate change', report prepared for the Xstrata Case, 15 January 2007), pp 4-6, <www.envlaw.com.au/newlands.html>.
- ⁹ Ove Hoegh-Guldberg, 'Likely Ecological Impacts of Global Warming and Climate Change on the Great Barrier Reef by 2050 and Beyond', report prepared for the Xstrata Case, 19 January 2007, paragraphs 10-12, <www.envlaw.com.au/newlands.html>.
- ¹⁰ Stephen Williams, 'Likely Ecological Impacts of Global Warming and Climate Change on the Wet Tropics World Heritage Area', report prepared for the Xstrata case, 24 January 2007, paragraph 17, <www.envlaw.com.au/newlands.html>.
- ¹¹ Hugh Saddler, 'Greenhouse Gas Emissions Associated with the Proposed Newlands Wollombi No 2 Project', report prepared for the Xstrata case, 12 January 2007, p 6; Fred Turatti, 'Expert Witness Report to the Land and Resources Tribunal', unpublished report prepared for the Xstrata case, 15 January 2007, p 2-1; Hugh Saddler, and Fred Turatti, 'Joint experts report', unpublished report prepared for the Xstrata Case, 18 January 2007, p 1. *The Greenhouse Gas Protocol* is available at <www.ghgprotocol.org>.
- ¹² Dean Ellwood, 'Statement', unpublished statement prepared for the EPA for the Xstrata case, revised 30 January 2007, p 6, para [7].
- ¹³ See generally, Australian Greenhouse Office, *AGO Factors and Methods Workbook 2006*, AGO, Canberra, 2006, <www.greenhouse.gov.au/workbook/index.html>; and *The Greenhouse Gas Protocol*, n 11.
- ¹⁴ Lowe, above n 8, p 9, para [8].
- ¹⁵ Saddler, above n 11, pp 15-16; Lowe, above n 7, p 10.
- ¹⁶ Turatti, above n 11 pp 6-1 to 6-7.
- ¹⁷ Ben Keogh, 'Greenhouse Gas Emissions Offset Opportunities: Newlands Coal Mine Wollombi No 2 Surface Area Project', report prepared for the Xstrata case, 15 January 2007, p 6, <www.envlaw.com.au/newlands.html>.
- ¹⁸ Jonathon Norling, 'Economic Analysis of Greenhouse Gas Emissions from the Proposed Extension of the Newlands Coal Mine, Wollombi No. 2 Surface Area',

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- report prepared for the Xstrata Case, January 2007, p 21, <www.envlaw.com.au/newlands.html>.
- 19 Jonathon Stanford, 'Affidavit', unpublished affidavit prepared for the *Xstrata* case, 12 January 2007, p 14.
 - 20 Colin Whyte, 'Affidavit', unpublished affidavit prepared for the *Xstrata* case, 12 January 2007, pp 20-21.
 - 21 Norling, above n 18, p 19.
 - 22 For example, see *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554; and *Maroochy Shire Council v Wise* [1999] 2 Qd R 566, 569-571.
 - 23 *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd* (1994) 86 LGERA 143, 155-157.
 - 24 Nicholas Stern, *The Economics of Climate Change: The Stern Review*, Cambridge, Cambridge University Press, , 2006.
 - 25 The decision is available on line. See <www.lrt.qld.gov.au/LRT/PDF/Xstrata_a33.pdf>.
 - 26 Cf *Gray v The Minister for Planning* [2006] NSWLEC 720, where causation was not in issue.
 - 27 Professor Lowe said that he did not know of any process which would allow anyone to quantify the impact on global warming of any particular reduction in CO₂ emissions—although if the United States and China completely ceased emissions, that would be significant and lead to a *more slowly changing climate*: see Ts 01.02.07 pp 129, 133.
 - 28 *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338 at [41].
 - 29 Joint Ministerial Statement, 12 October 2007, <<http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=54462>>.
 - 30 For example, *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 at 113.