[2017] HCATrans 074

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Brisbane No B65 of 2016

B e t w e e n -

COAST AND COUNTRY ASSOCIATION OF QUEENSLAND INC

Applicant

and

PAUL ANTHONY SMITH

First Respondent

HANCOCK COAL PTY LTD

Second Respondent

MINISTER FOR ENVIRONMENT AND HERITAGE PROTECTION

Third Respondent

Application for special leave to appeal

KIEFEL CJ
KEANE J

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON FRIDAY, 7 APRIL 2017, AT 10.18 AM

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MR P.J. HANKS, QC: Your Honours, I appear with **MR C.J. McGRATH** and **MR E.M. NEKVAPIL** for the applicant. (instructed by Environmental Defender's Office (Qld) Inc.)

5 **MR D.G. CLOTHIER, QC**: Your Honours, I appear with **MR S.J. WEBSTER** for the second respondent. (instructed by Ashurst Australia)

MR J.M. HORTON, QC: Your Honours, I appear with
10 **MR G.P. SAMMON** for the Minister. (instructed by Crown Law (Qld))

KIEFEL CJ: Yes, Mr Hanks.

MR HANKS: Your Honours will have read the judgments below. Could
15 I start by pointing out that there are some important factual findings made by the Land Court. Those factual findings were that what I will describe as the total emissions consequent upon the activity of this mine would amount to 0.16 per cent of global greenhouse gas emissions, which were "real and of concern". I am quoting directly from the Land Court's reasons, and
20 your Honours will find that on page 95 of the application book.

Your Honours will also find that the Land Court directly endorsed the expert evidence given on behalf of the objectors, and your Honours will see that endorsement on page 104 of the application book. The Land Court
25 took the view – and this can be seen on pages 97 and 98 of the application book – that it was beyond the Land Court's jurisdiction to consider, if one could use either shorthand term, scope 3 emissions or downstream emissions - that is, emissions caused by the transport and the burning of the coal mined at the Alpha Mine – was beyond the court's jurisdiction to
30 consider.

KIEFEL CJ: Well, probably more correctly stated, on the view that they took it was not a question that the statute threw up.

35 **MR HANKS:** The statute did not direct their attention. With respect, your Honour, I think it was put in negative terms. This Court, as a statutory jurisdiction, the statute defines what it is we are to look at, and that does not include what I have most recently described as the downstream effects.

40 **KIEFEL CJ:** Mr Hanks, what relief would the applicant seek on an appeal? What orders would it seek from this Court, given that their proceedings are directed to the recommendations made by the Land Court but not to the Minister's decision?

45 **MR HANKS:** Quite so, your Honour. As a preface to my answer to that question, the recommendation from the Land Court, which can take one of

three forms - as your Honours know, a recommendation that the approval be refused, that it be granted on conditions, or that it be granted – is, under the statute an essential step to the Minister's decision. If that step has not taken place, as we contend it has not on the simple point that if it is infected by jurisdictional error it has not happened, it is….. So if that is the case then the Minister is not in a position to proceed to make a decision as to whether or not to grant the environmental authority and the relief that - - -

KIEFEL CJ: But the recommendation is only one of a myriad of factors that the Minister takes into account.

MR HANKS: That may be so, your Honour, but it is an essential one, and if it has not occurred then - - -

KIEFEL CJ: You say it is a jurisdictional fact - - -

MR HANKS: It is. The existence of such a recommendation is the jurisdictional fact to the making of the decision by the Minister. It is not an irrelevant passing phenomenon, your Honour.

KIEFEL CJ: But you still have not told me what order you were seeking.

MR HANKS: We want the matter to be remitted to the Land Court so that it can do its job.

KIEFEL CJ: What happens to the Minister's decision? It is not vitiated.

MR HANKS: I think your Honour has reminded me that it may be necessary for us to seek a declaration that the Minister's decision as it stands is of no legal effect.

KIEFEL CJ: But you would have joined the Minister into the proceedings for that purpose, and at this late juncture.

MR HANKS: I am sorry, your Honour, the Minister is the second respondent.

KIEFEL CJ: I am sorry. Yes, of course. Yes.

MR HANKS: We have at least managed to - - -

KIEFEL CJ: You did manage to get the right parties there but not the orders.

MR HANKS: Yes. If your Honour looks at the application book, page 206, at the top of the page, I would remind your Honours that this is

the continuation of the proposed grounds of appeal. At the top of the page, paragraph 2, those are the orders that we will seek.

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KIEFEL CJ: Are they the orders that you sought below?

MR HANKS: I am looking at, and I take your Honours here to page 185, if your Honour has in mind before the Court of Appeal. I believe,
100 your Honour, we only sought an order quashing, in effect, the decision of the Land Court in remitting the matter to the Land Court.

KIEFEL CJ: Quite. So we do not have any discussion about what should happen with the Minister's decision by the Court of Appeal.

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MR HANKS: No, we do not, your Honour, but that is not surprising. The Court of Appeal found another way out of the maze. They found a door that opened before any such discussion was necessary. They said - - -

110 **KIEFEL CJ:** In any event, it is your argument, as I understand it, that if the decision is wrong then the Minister could not have proceeded to make the - - -

MR HANKS: If there has been no recommendation of the kind
115 contemplated by the Act then the next step must be delay until there is such a recommendation. In practical terms what we are seeking is that the matter goes back to the Land Court, that the Land Court considers what it said it would not consider and makes some findings of fact and then weighs those findings of fact against the other relevant matters.

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It might be, of course, that the Land Court would still conclude that a positive recommendation should be made, or it might conclude that certain conditions would necessarily be attached to the grant of the environmental authority conditions relating to, for example, options.

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KIEFEL CJ: Which provision of the Act do you say makes this a condition precedent – that is, a recommendation on the basis on which you argue?

130 **MR HANKS:** If your Honours go to page 221 of the application book. I will just take your Honours very quickly through the provisions - 219, that is the section I am referring to on page 221, requires a referral to the Land Court if there is an objection. That starts the proceeding in the Land Court. If we turn the page then a decision is contemplated by the Land Court – 222
135 is the section number, subsection (1). It must be a recommendation to the Minister within one of those three alternatives.

KIEFEL CJ: But what is the provision dealing with the Minister's power?

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MR HANKS: The Minister's decision is dealt with in section 225, which is set out on, confusingly, page 223:

> The EPA Minister must make 1 of the following decisions -

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Now, there is no explicit provision, your Honour, which says only if there has been a recommendation may the Minister make a decision. Indeed we would not cavil with a proposition that the Minister's decision, the Minister's choice between those three alternatives will not be constrained by the recommendation, but in our submission there must be a recommendation of one sort or the other.

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That, we say, is necessarily implicit in the structure of the legislation. Consequential chronology. We have a proposal that comes from, in this case, the second respondent. We have an objection, let us say, by our client, the current applicant for a hearing and recommendation made by the Land Court answering a particular description. Then we have a decision by the Minister.

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160 **KIEFEL CJ:** Accepting that the legislative structure is as you say it is, the fact is that there has been a recommendation.

MR HANKS: No, your Honour, with respect. Could I play the *Bhardwaj* card? If our argument is accepted the recommendation by the Land Court is vitiated by jurisdictional error and it is therefore no recommendation at all in law. It might in fact - - -

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KEANE J: That proposition is the proposition that was not the subject of argument and reasons in the Court of Appeal.

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MR HANKS: No, it was not, your Honour, but could I advance this response, if I might? The Court of Appeal did not engage with that contingency because the Court of Appeal decided that the recommendation from the Land Court was good, that it was not vitiated by jurisdictional error. There is, if I might say so with all respect to the Court of Appeal, some confusion within its reasoning as to why that was so.

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One member of the Court of Appeal – that is, the President – said that the Land Court was mistaken in not engaging with what we call the scope 3 emissions from this project. The other members of the Court of Appeal did not engage with that question. They found that what they described as the finding of fact made by the Land Court that stopping this mine would not prevent growth in global greenhouse gas emissions, they

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found that that was a sufficient reason to excuse the Land Court from having failed to consider the question which we said to the Court of Appeal it should have considered.

But that, if I might say so, leaves the guidance that might be derived from the Court of Appeal's reasons in a somewhat confused state - one judge, one member of the Court of Appeal saying it is a relevant matter that must be considered, the other two members saying nothing about it, and then all three members saying it is a sufficient excuse for the court, that is, the Land Court, not to engage with that question if the court makes a finding of fact – the Land Court makes a finding of fact that there will inevitably be a continued growth in greenhouse gas emissions whether or not the mine goes ahead.

KIEFEL CJ: Your case for jurisdictional error would have to direct attention to section 223, I assume.

MR HANKS: Just a moment, your Honour, sorry.

KIEFEL CJ: It would be a failure to consider something that it was required to consider.

MR HANKS: That is right, your Honour.

KIEFEL CJ: The Land Court.

MR HANKS: Could I come back to – my learned junior has just pointed out a provision of the Act that is critical, your Honour - 225(3), which does not appear in the application book. We have 225(1); 225(3) "The Minister must, before making these decisions" - the decisions contemplated by subsection (1) – "consider the objections decision". The objections decision is the decision of the Land Court.

KIEFEL CJ: Yes.

MR HANKS: Required by section 222. It would seem to us, your Honours, that there can only be one answer to the question with which, as Justice Keane reminded me, the Court of Appeal did not engage, that question being whether a valid objections decision by the Land Court is a necessary precondition.

KIEFEL CJ: There is no suggestion that the Minister failed to consider the objections decision.

MR HANKS: I will come back to the point, your Honour.

KIEFEL CJ: You say it is no objections decision at all?

MR HANKS: There is nothing for the Minister to consider.

KIEFEL CJ: What is the breach of section 223 that you rely on?

MR HANKS: In that case, your Honour, could I refer the Court to the reasons of the President of the Court of Appeal, page 191 of the application book through to 193, where her Honour considers what we would describe as the mandatory provisions in section 223, but within a somewhat broader context. Section 223, one might say, identifies the relevant considerations in the strict *Peko-Wallsend* sense; that is, matters that the Land Court must take into account. In fact, your Honours can see that very language "must consider the following" matters appears in section 223.

Relevantly, the standard criteria are then prescribed in the schedule – and her Honour the President goes through those standard criteria in paragraphs 8, 9 and 10 of her Honour's reasons for judgment.

KIEFEL CJ: Her Honour considers as a matter of construction - she would prefer a construction which did not limit them to the activity itself but concludes that the findings of fact by the Land Court stand in the way of that going anywhere in any event.

MR HANKS: That is right, and I need to deal with those findings of fact very shortly. My response to your Honour's question is that there are mandatory considerations which bring into play matters in the schedule to the Act and, through the schedule, other documents which are identified in the schedule. Those matters would include the matters that are set out, for example, in paragraph 9 of the President's reasons.

There are also within the Act provisions that create offences: the offence of causing serious environmental harm or material environmental harm. Your Honours will see those on pages 223 and 224 in the application book. I am referring, of course, to sections 437 and 438. Your Honours will see that it is an element in each of those offences that the person unlawfully causes serious or material environmental harm. That adverb is elaborated at 493A, on page 224. I take your Honours immediately to subsection (2):

> A relevant act is unlawful unless it is authorised to be done under –
>
> . . .
>
> (d) an environmental authority -

So the process in which the Land Court is engaged in making an objections decision as a preliminary step to a minister deciding whether to grant an environmental authority will necessarily, if there is a positive decision at the end of the process, immunise the person holding the authority from liability for causing environmental harm. I need just to remind your Honours that "environmental harm" is defined in very wide terms, on page 218 of the application book, section 14.

KEANE J: In a context where section 3, on page 217, states the object of the Act as being:

> to protect Queensland's environment while allowing for development -

So that would suggest that it is not concerned with environmental harm elsewhere.

MR HANKS: Quite so, your Honour. The findings of fact that were made here were that there would be harm to Queensland's environment because, adding to greenhouse gas emissions would elevate global temperatures, and the elevation of global temperatures would cause damage to Queensland's environment. The simple example that was offered by the experts in their evidence which, as we understand it, was accepted by the Land Court was the Barrier Reef and coral bleaching and the risk of severe weather events affecting the Queensland coast. All those matters were accepted. We do not think that the argument that was put to the Land Court and the argument that we wish to - - -

KEANE J: But was it not also found that they would happen in any event?

MR HANKS: That is right, your Honour. Now, that is the point I need to deal with. In our submission that finding dealt with an irrelevant fact. It was irrelevant because a question for the Land Court was what will be the consequence of this activity, not what will be the consequence if this activity does not take place. That, in our submission, is a fundamental misunderstanding by the Land Court of the way the question is posed in the legislation. Thank you, your Honours.

KIEFEL CJ: Yes, thank you. Yes, Mr Clothier.

MR CLOTHIER: Thank you, your Honour. Your Honours, in our submission, the decision of the Court of Appeal involved an orthodox interpretation of the word "consider" in section 223 of the Act in the context of two things which are particular to this case. The first was the Land Court's consideration of a particular objection that, as Justice Fraser noted

in his reasons, the proceeding before the Land Court was a proceeding upon that objection, and I will come to the objection in a moment. The second particular thing to this case was the Court of Appeal's consideration of a
325 very narrow ground of appeal, to which I will also come.

Those things, separately and in combination, in our submission, make the decision of the Court of Appeal correct, raise no point of principle and raise no point of general importance, and particularly having regard to
330 other factors, including the challenge that is sought to be made to the Minister's decision which was not the subject of consideration below, it is our submission that this is not an appropriate vehicle for the consideration of those points.

335 The focus really of the application seems to be on the Land Court's finding following an earlier decision in *Xstrata* to the effect that scope 3 emissions were outside its jurisdiction for the purposes of the *Environmental Protection Act*. The focus of the appeal was on something very different.

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Can I ask your Honours to take up the book, page 104, paragraph [232] of the Land Court's reasons. The Land Court made a finding that if it was wrong about its primary conclusion then certain things would follow in its view. The things that would follow would be that in the
345 context of the facts of this case the amount of greenhouse gas emissions and, therefore, the extent of climate change and its effects would be no different whether the project proceeded or not and, indeed, on an earlier finding, it might be that if this project proceeded there might be slightly less greenhouse gas emissions and slightly less environmental harm in that
350 event.

At paragraph [35] of his reasons Justice Fraser noted that that consideration was in the context of the objections decision which the court was required to make, being a decision on the objection, which appears
355 commencing at page 389 of the book. If your Honours go to page 396, in paragraph (c) at the top of that page the relevant objection was indeed that:

> The Project will increase the likelihood, severity and longevity of the environmental harms that will result from climate change -

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It was not the subject of the objection that merely emitting greenhouse gases is itself an impact of the project but the impact of the project was said to be the increase in the likelihood of the consequences of climate change. That was the context of the Land Court's consideration and the Court of
365 Appeal's considerations, but by the time the matter came to the Court of Appeal the issues were much narrower, as Justice Fraser identified, than those that were before the primary judge.

370 If your Honours go to the Court of Appeal's reasons, Justice Fraser noted that particular proposition at paragraph [16] and he identified the particular ground of appeal relevant here, at paragraph [22]. Your Honours see on page 195 of the record book, in paragraph 1 the ground of appeal that was relevant to the *Environmental Protection Act*. That ground was focused upon the Land Court's alternative finding that, if it were to take
375 into account scope 3 emissions, it would make no difference to its decision because on the evidence climate change and its effects would be no different whether or not the project proceeded.

380 It was in that context that his Honour, in paragraph [18] noted those particular findings. This is at page 194 of the record book, and then at page 202 of the book, paragraph [45] – if I could ask your Honours to read it.

KIEFEL CJ: Yes, the point being no merits review.

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MR CLOTHIER: The merits were reviewed and an alternative finding was made based upon the merits by reference to the objection which was that the project will increase the likelihood of things and the finding was the project will not increase the likelihood of things. So, the case in the Court
390 of Appeal depended upon the consideration of the ground which was focused upon the actual consideration of the matter by the Land Court and that was held not to be affected by legal error because in the context of this particular rejection, it was commonsense in assessing whether the likelihood of a particular harm would be increased by this project to ask
395 yourself will it be the same if the project does not proceed.

So, in our respectful submission, the case – that is why in a sense the majority of the Court of Appeal did not decide the question of jurisdiction because that was not the focus of the ground of appeal. The focus of the
400 ground of appeal was on the Land Court's alternative finding of fact and the suggested irrelevance of that. The Court of Appeal disposed of the case on that particular basis. So, on that basis, in our submission, the case does not involve any point of principle or point of general importance.

405 Your Honours, it is said in the reply submissions that these questions are of general importance for a number of reasons. The first is said to be because the Land Court has subsequently, in effect, followed the holding in *Xstrata* that scope 3 emissions are outside its jurisdiction and that is, with respect, not correct.

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Can I hand up a copy of the decision to which reference is made in the applicant's submissions on *Adani Mining* or some extracts from that anyway. Your Honours, the relevant paragraphs in that decision appear at

paragraphs [450] to [457]. This is, in fact, the decision of the then President of the Land Court who decided the *Xstrata Case* and if I can direct your Honour's attention to paragraph [455] and ask your Honours to read that.

So, in fact, it is not correct to say that there is an error that has been perpetuated in the Land Court by its exclusion of consideration of scope 3 emissions and that this Court has to correct that error because, in fact, the Land Court subsequently is considering scope 3 emissions and that is an approach which is consistent with the view of Justice McMurdo below.

The rest of the Court of Appeal did not address the issue because it did not have to and the issue remains to be decided if it has to be decided finally by the Court of Appeal if and when it is properly raised in an appeal before that Court. There is no fear that the Land Court is going off on an erroneous view on the applicant's case because it is not and if it does, the Queensland Court of Appeal remains free to correct any error in that respect.

Your Honours, the second and third aspects of the importance is said to be that there may be an issue of the interpretation of the EPA by reference to treaty obligations, a point that was never raised before the primary judge or the Court of Appeal. The third aspect of importance is said to be that somehow this decision might impact upon decisions under the federal Act which, in our respectful submission, cannot be the case.

Justice Fraser noted in his reasons at paragraph [30] at page 198 that in the *Nathan Dam Case* the Full Federal Court said that the interpretation of the Commonwealth Act is not to be affected by decisions involving State legislation. There is no concern that this decision is going to somehow affect the federal Act and, indeed, since the Full Federal Court's decision, a particular definition of "impact" has been inserted into the Federal Act. The Federal Court will no doubt interpret the federal Act according to its terms without regard to this particular case.

So that, for those reasons, in our respectful submission, the Court of Appeal properly dealt with the ground that was before it on the basis upon which that ground was advanced before it. The Land Court is not perpetuating an error of the kind that it is said it is perpetuating and should it go into error, the Court of Appeal can correct that in the future.

The case turned upon a finding which was responsive to the particular harm alleged here, an increase in the likelihood of particular damage and the finding was to the effect that there would be no such increase by virtue of the project.

460 Your Honours, can we say finally in relation to the point the Chief Justice raised about the relief that is sought, in fact, in the proceeding before the primary judge, the primary relief that was sought was the setting aside of only the alternative part of the Land Court's recommendations.

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Your Honours might recall, the Land Court recommended that the application for an environmental…..be rejected primarily or in the alternative that it be approved subject to conditions. The application for review, which your Honours will see commencing at page 154 but the
470 relevant part is at page 159, the application for review sought primarily an order setting aside only parts of the decision, that is, the alternative recommendations. It sought in the alternative the setting aside of the whole of the decision. But if leave is granted here, it seems that the applicant wishes to invite the Court to set aside the whole of the decision and it
475 wishes to consequently say that that is something that undermines the validity of the Minister's decision.

Now, that is, as your Honours have observed, not a point that the Court of Appeal discussed and it is not a point that automatically
480 follows from a conclusion that the Land Court fell into error because it would involve a consideration of the meaning and consequences of the Minister's power under section 225 and, in our submission, it would also involve a consideration of the inherent nature of the Land Court itself being a court of record constituted under the *Land Court Act* and
485 potentially, at least, provisions of the *Judicial Review Act*, in this State which have equivalence elsewhere to the effect that a review application does not automatically deprive a decision of effect and it may be acted upon.

490 So there is very much a separate statutory interpretation issue that would arise in relation to the Minister's decision. It was not the subject of a decision below. In fact in its notice of appeal below the applicant invited the court to remit the matter to the Trial Division to consider that point later but now the applicant invites this Court to decide.

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The absence of any consideration by the Court of Appeal of that particular separate issue in light of the relief that is sought also makes this, in our submission, an inappropriate vehicle for special leave. Those are my submissions. Thank you, your Honour.

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KIEFEL CJ: Thank you. Yes, Mr Horton.

MR HORTON: Your Honours, our submissions are directed only to the question of the relief sought or the argument levelled against the Minister's

505 decision that it is to be collaterally or derivatively challenged because of the alleged invalidity of the Land Court recommendations.

We just have two submissions to make. The first is that the nature of this court below is one of a court of record and therefore on the authority of
510 *Craig v South Australia* we enjoy a presumption that any errors that are committed are not ones that go to jurisdiction, including we say here an error which is said to be failure to take into account a relevant consideration. That is the first hurdle that the applicants have to mount.

515 The second is that there has to be a legal dependency, if you like, of the Minister's decision upon the Land Court recommendation and we say that does not follow either from *Bhardwaj* or otherwise and that is the recommendation is not cast in terms of the legislation as being a legal prerequisite or, indeed, a jurisdictional fact and the special purpose of a
520 recommendation we say must be taken into account – that is, it is more in the nature of an excursus or exposition, if you like, of the objections directed to, yes, the statutory purpose in section 223, but not one that leaves the Minister's decision vulnerable to challenge if there were imperfections in it.
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In both of those points we say when does the applicant's collateral challenge to the Minister's decision, one which would, in our respectful submission, fail and therefore for the entire application to lack any practical utility were it to be granted special leave. Those are our submissions,
530 your Honour.

KIEFEL CJ: Thank you, Mr Horton. Any reply, Mr Hanks?

MR HANKS: There are two matters I wish to deal with, your Honours.
535 Your Honours were asked to look at some passages from the *Adani* case, which my friend handed up. Could I ask your Honours to look at paragraph [456] in *Adani*. Your Honours can see embedded there the proposition:

540 > that there will be no increase in Scope 3 emissions if the mine is not approved because other coal will be obtained from elsewhere.

Your Honours will be familiar with that point because it is made by the Land Court in our case. It is identified by the Court of Appeal as an
545 important reason why the appeal was dismissed. Can I take your Honours to what was said by Justice Fraser in the Court of Appeal and that is on page 202 in the application book. Paragraph [45] is probably the neatest illustration of what we say is a fundamental confusion on the part of the Land Court and reinforced by the Court of Appeal.
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Your Honours can see the references to "scope 3 emissions in connection with the mine" at the beginning of the paragraph, and if we follow through the paragraph we find the conclusion at about the eighth line in the sentence beginning "Rather, the member" - that is the Land Court:

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> took into account his finding that the power stations would burn the same amount of coal and produce at least the same amount of scope 3 emissions whether or not the mine proceeded -

560 Now that, in our submission, illustrates a fundamental confusion. Scope 3 emissions can only be the emissions downstream from the particular activity. That is the way in which the term is used throughout the evidence that was given, the way it is used throughout the findings of fact made by the Land Court.

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Scope 3 emissions do not exist in the abstract. They are emissions that are attributable to but are caused by the particular activity. Here the particular activity is mining of coal at Alpha Mine and to talk of scope 3 emissions in the general sense is, in our submission, and we say this with

570 the greatest of respect, fundamentally confused.

KEANE J: Why are they not perfectly appropriate as being directed towards the ground of objection at page 396, paragraph (c)? Why are they not perfectly understandable as observations directed to the issue that your

575 side raised?

MR HANKS: Just pardon me, your Honour, while I find the page. They are a complete diversion. They are a refusal to engage with that objection, your Honour, because the way in which the objection in a sense is turned

580 aside is to say that there will be emissions from other activities, but that is not the question. The question is whether there would be emissions from this activity.

KEANE J: No, the question is not whether there will be emissions; the

585 question is whether the project will increase them.

MR HANKS: Yes.

KEANE J: That is what his Honour's observations are directed to at

590 paragraph [45], that being the ground of objection that your side raised at page 396 in paragraph (c).

MR HANKS: One must, your Honour – and I trust I am not trying your Honour's patience – but one must focus on this activity and the

595 consequences of this activity and this activity, according to the evidence and indeed we think the facts would contribute in a particular percentage -

that is then turned into a fraction, as your Honours will recall from the reasons for judgment, particularly the percentage of the increase in global greenhouse gas emissions.

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Now, it may be the fact that other mines might step into the breach, the vacuum, if this mine did not go ahead, but nevertheless there would be an increase in emissions from this activity. That is the simple point. In our submission, the way in which both the Land Court and his Honour Justice Fraser and then, by adoption, the other members of the Court of Appeal dealt with that point has demonstrated a refusal to engage with the way in which the case must be decided. 605

KEANE J: Is it not rather that they have just simply determined the case on the basis of the findings of fact that have been made? 610

MR HANKS: Perhaps I can respond to your Honour's question despite the red light. The findings of fact are findings on an illegally irrelevant matter. That is our point, your Honour. Now, you can make a finding of fact that it might rain tomorrow but it is not legally relevant to the question that needs to be decided. Similarly, the answer to that question is not legally relevant to the question whether this activity will result in potential damage to the environment. If your Honours please. 615

620 **KIEFEL CJ:** We do not consider that this matter is a suitable vehicle to resolve the issues which the applicant seeks to agitate. Special leave is refused. Do you seek costs?

MR CLOTHIER: We seek costs, your Honour.

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MR HORTON: My client does not seek costs, your Honours.

KIEFEL CJ: Mr Hanks, do you have any response to the application for costs by the second respondent?

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MR HANKS: We do not, your Honours.

KIEFEL CJ: The applicant will pay the second respondent's costs. The Court will adjourn to reconstitute.

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AT 11.01 AM THE MATTER WAS CONCLUDED