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## How the Law Constructs the Environment: The Wandoan Coal Case

The Wandoan coal case (*Xstrata v Friends of the Earth* [2012] QLC 013) handed down last week shows how far our property law and environmental and resource management systems need to evolve to deal effectively with contemporary and future environmental issues.

It is acknowledged that climate change is a global problem (and indeed the parties in the Wandoan coal case did not dispute the science of climate change). It is not the first global environmental issue - acid rain and the pollution of the world's great rivers are examples of other, earlier inter-jurisdictional environmental issues. Unfortunately, the evolution of environmental law in Australia, as elsewhere, exists still in a political era of sovereignty and control over a nation's own territory or in the Australian context, that of a State. The territory does not represent anything outside the context of law. This construction of 'the environment' limits the law's ability to deal with incremental and cumulative impacts of activity within a territory, on an otherwise interconnected world.

This territorial approach to the environment is compounded by the compartmentalisation of land into differential resources each with their own regulatory regime - for example, minerals, water and vegetation. (I have written on this before.) This further reduces the way we think about environmental impact of human activity into a variety of policy approaches, regulatory and licensing frameworks and ultimately different procedural jurisdictions. Therefore while the environmental impact of one project may have various effects on the environment, the law may treat each aspect of the activity under a different regime. This is an unrealistic way to understand and deal with the environment.

The law's construction of 'the environment' in terms of a series of independent resources within a boundary determined by law is illustrated by the decision in the Wandoan coal case.

### The Case

The Wandoan coal case is the hearing of objections to an application by Xstrata and others for a number of mining lease areas as part of a large coal mining project in Wandoan in Queensland. The mining lease areas the subject of the application are situated on rural land that is used for farming purposes and which is presently occupied by a number of landowners, including many of the objectors. The coal mining activities are anticipated to last for some 35 years, representing both a significant investment by Xstrata and its partners, but also a significant income stream. The project is recognised as being economically significant for Queensland and Australia.

Xstrata had prepared extensive environmental impact statements as required by law. The Co-ordinator General of Queensland had imposed conditions on the proposed mining project, as required under the relevant legislation, and conditions attached to the mining approvals accorded with the Co-ordinator General's Report, also as required. The objections relate to a number of aspects of the mining operation, and were brought under the *Mineral Resources Act 1989* (Qld) ('MRA').

### Impact of Mining Activities on Local People and Communities

The predominant impact of the mining activities that was considered by the Court was on the homes and businesses of the people who lived and worked on or adjacent to the mining lease areas, and on their cattle's habitat. In addition to physical amenity, the Court referred to distress of both the people involved and their cattle as a result of the proposed activities.

### ABOUT ME



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I lecture in land law and I write and think about the nature of property and its

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The first basis of the objections considered was the area to be included within the mining lease itself - the amount of land that would be under the control of the miner and either mined or used to support mining activity. In addition, objections addressed the effects of the mining activity: dust, noise, vibration, fallout, soil contamination, salination of soil and water, lower water quality, reduced water supply security and loss of access to land.

The Court accepted expert scientific evidence on these issues, but not any evidence based on the landowners' own experiences of living on and farming the land. None of the objections was found sufficient to warrant stopping the mining activity.

Importantly, the Court found that concerns about water were justified based on the scientific evidence. However it could not make recommendations on this because these objections were brought under the MRA. Water on the other hand was licensed under the *Water Act 2000* (Qld) - so this was outside the jurisdiction of the court in this matter. [607] This highlights how the abstracted way in which the law deals with land and the environment leaves gaps in effective environmental management.

#### Global (and Therefore Local) Impact

In addition to objections by people who lived near the mining activities, Friends of the Earth (FoE) objected based on the indirect impact of the mining activities. FoE argued that the activities would be 'scope 3 emissions'. [509] Emission scopes are the international reporting benchmark for greenhouse gases, and scope 3 emissions are those emitted 'downstream' as a consequence of the activity. [490] In other words, it refers to activities such as others burning the coal produced at the mine and sold overseas. While the residents' objections were justiciable but not successful, the Court found that this objection was not justiciable at all - it was outside the jurisdiction of the Court. The MRA allowed objections only in relation to environment *in Queensland* and these scope 3 emissions would occur *outside* Queensland.

#### The Court's Methodology

The Court was forensic in addressing each objection and the evidence surrounding it. It privileged scientific evidence, then had to weigh up the evidence to make a decision as to whether to stop the mining activities, to impose further conditions, or to dismiss the objections.

The Court made clear that its evidential calculations were based on what I might describe as a 'cost benefit' or a utilitarian analysis. On this basis, whatever the objectors' evidence as to amenity might have been, the greater good (public interest, economic benefit) would have prevailed. Likewise, even if there were demonstrated impacts on climate change, this was not necessarily to be elevated above the overall public benefit. The greater good involved the economic benefits that would flow from the mining activity, and this justified finding in favour of the mining activity. [581]

The decision and the methodology used to reach it is predetermined by the scope and aims of the MRA. The way the law is framed privileges mining. The Act is designed to support (sustainable) mining, not to support a sustainable environment. The result is therefore predetermined for any mining activity that engages in the process of ascertaining the scientific evidence required to meet the scientific benchmarks for human habitation. It will succeed regardless of the costs along the way. The costs of climate change precipitated by the outputs of the mining activity, for example, are not able to be factored into this equation because they are devalued.

I suppose that this is an inevitable consequence of the power of law. A postmodern view would identify that the law exercises power in its rule-making sense as well as its methodology, in its privileging of certain discourses.

The question that I think needs asking though, is the extent to which the discourse of the environment as ecology is allowed to permeate the 'truth' that is constructed by the law. The discourse of environment - in both a scientific and a lay sense - is one of connection, of complexity. Ecology cannot be segregated. Yet the systems, fields of knowledge and methodology of the law all construct the environment in a disembodied way. This results in a series of scientific observations and results, privileged as evidence or truth, that make sense within their own domain, but which deny the apparent policy objective of environmental protection in a much more comprehensive sense.

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