

# The Queensland Nickel Management Appeal: *A Case Study of the Appeals Process*

Dredging  
Discovery  
Statistical rigour  
Prudent and feasible alternatives  
Statistics  
Toxicity  
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Queensland Nickel  
Section 30(2)  
Fisheries  
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Withdrawal  
Amenity  
TPA legislation  
Null result  
Townsville Port options  
In and cross-examination  
Evidence  
Visual aesthetics  
Noise and dust  
Island Nickel



Great Barrier Reef Marine Park Authority

# **The Queensland Nickel Management Appeal: *A Case Study of the Appeals Process***

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## EXECUTIVE SUMMARY

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In March 1989 Dallhold Nickel Management, later to be known as Queensland Nickel Management (QNM), applied to the Great Barrier Reef Marine Park Authority (GBRMPA or the Authority) for a permit to offload nickel ore in the Marine Park. The proposal was considered by the Authority and it was decided in June 1990 that a permit should not be issued. A reconsideration of the proposal was requested by the Applicant and the decision was reaffirmed by the three member Authority. As a result of this reconsideration, the proponent appealed to the Administrative Appeals Tribunal (AAT or the Tribunal) for the decision to be reviewed.

Considerable Authority resources, both financial and staff, were necessary to prepare and present the case in support of the initial decision. The preparations (not including those necessary to arrive at the initial decision) commenced in October 1990 and the case was not concluded until August 1992 when the Tribunal decided that, as a result of QNM withdrawing from the Appeal, the proceeding was terminated. The withdrawal by QNM occurred seven weeks after all the evidence had been heard and was, it was stated, 'in response to recent commercial developments'.

The Townsville Port Authority, the Saunders Beach Action Group, the North Queensland Conservation Council, the Queensland Commercial Fishermen's Organisation and the State of Queensland were all joined to the Appeal. QNM attempted to meet in detail, by means of expert evidence, virtually every criticism that had been made of its proposal and a considerable amount of evidence was presented to the Tribunal that was not available to GBRMPA either at the time of its initial decision or its reconsideration of that decision.

The Appeal evidence was presented during 92 sitting days over an elapsed period of 283 days. Evidence was heard from 78 witnesses and 421 exhibits were tendered. Documentation totalled over 20,000 pages. The total cost of the exercise is not known but is likely, in this author's view, to have exceeded 10 million dollars, largely at public expense. GBRMPA's costs were in excess of 1.1 million dollars despite the fact that the considerable and comprehensive effort provided by the Australian Government Solicitor's Office was provided at no cost to the Authority.

Given the fact that GBRMPA and like bodies are, and will continue to be, and should be, subject to administrative review, it is imperative that all steps be taken to minimise the costs, in both time and money, associated with such review processes. It is, however, difficult to see many ways to circumvent the extended process of which this hearing is an example. Having said that, this author believes that there are avenues available for streamlining the process within the current system.

There was a clear directive from the Deputy President of the Tribunal that all materials to be considered were to be produced prior to the commencement of the hearing, however new material was produced and witnesses allowed to provide supplementary reports as the hearing progressed. Many of these reports addressed issues and criticisms made of

the original reports. While recognising that the Tribunal must make itself aware of the facts of a particular case I would argue that it is not in the public interest that the original decision maker be deprived of the information that is necessary for it to make an informed decision. It is certainly in the interest of no-one if the original decision maker is perceived to have made an incorrect decision due to a paucity of information.

It is also recommended that legal argument, as far as is possible, take place at the commencement of the case so that the parameters of the case can be better identified. In this case early rulings by the Tribunal on the stances taken by the various parties regarding interpretation of the various parts of relevant Acts would, I suggest, have significantly curtailed proceedings, notwithstanding the fact that the proceedings would have still been extremely detailed.

*The Administrative Appeals Tribunal Act 1975 states:*

*'If an enactment so provides, the Tribunal may give an advisory opinion on a matter or question referred to it in accordance with the enactment and, for the purpose of giving such an opinion, the Tribunal may hold such hearings and inform itself in such manner as it thinks appropriate.'*

It is recommended that GBRMPA seek to have incorporated within the GBRMPA Act and Regulations an enactment that allows an opinion to be sought from the Tribunal.

It is also recommended that, given the unacceptability (at least to the majority of the parties concerned) of the 'null' result of this case, that future reviews of the AAT address the issue of controlled withdrawal.

Finally, it is recommended that any review of the AAT powers and procedures consider the appropriateness of the AAT itself commissioning reviews by independent consultants and using the results to decide matters.

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## INTRODUCTION

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On 1 July 1991 the longest running hearing by the Administrative Appeals Tribunal (AAT) began. It involved an Appeal against the Great Barrier Reef Marine Park Authority (GBRMPA) by Dallhold Nickel Management Pty Ltd over the refusal by GBRMPA to issue a permit for the Applicant to carry out a nickel ore unloading operation in the Great Barrier Reef Marine Park. It ran for ninety-two sitting days over an elapsed period of two hundred and eighty-three days and involved seventy eight-witnesses, some of whom were called

several times, and considerable legal representation. The documentation associated with the case ran to over twenty thousand pages, of which more than seven thousand eight hundred were transcript, and included four hundred and twenty-one exhibits. The total cost of the exercise will never be accurately known but is likely to have exceeded ten million dollars, much of which was from the public purse. This paper attempts to summarise the events that led up to the hearing, the hearing itself and the results of it. Some commentary is made on the applicability and efficacy of the AAT being involved in cases such as this.

## BACKGROUND

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GBRMPA is charged with managing the world's largest marine park, the Great Barrier Reef Marine Park. The Park is used for a multiplicity of purposes including commercial and recreational fishing, tourism in many forms, and shipping. The goal of the Authority is:

*'To provide for the protection, wise use, understanding and enjoyment of the Great Barrier Reef in perpetuity through the care and development of the Great Barrier Reef Marine Park'* (GBRMPA 1986, Decision Number 90/9, made at the Great Barrier Reef Marine Park Authority Meeting 90, 15 October 1986).

The Great Barrier Reef Marine Park is part of the area that is inscribed on the World Heritage List and has been placed on the Register of the National Estate. The marine portion of the Great Barrier Reef World Heritage Area has been identified by the Marine Environment Protection Committee of the International Maritime Organisation as being the world's first Particularly Sensitive Sea Area. One of the recommendations from the International Seminar on the Protection of Sensitive Sea Areas (Declaration on the Protection of Sensitive Sea Areas, Malmo, Sweden, 25-28 September 1990) was to prohibit the transfer of cargo from vessel to vessel in or near Particularly Sensitive Sea Areas.

The main methods GBRMPA uses to manage impacts in the Park are by the zoning processes and the issue of permits for activities that are not 'as of right' within a given zone. The management of the area is subject to the *Great Barrier Reef Marine Park Act 1975* and the Regulations appertaining to the Act.

A zoning plan is developed over a number of years and involves extensive public participation to assess the acceptability of the proposed plan to those who will be most affected by it. Zoning categories range from Preservation Zones, where virtually no activities can take place, through various levels of protection to General Use 'A' Zones where minimal controls are put in place.

Permits are deemed necessary for a great number of activities that take place in the Park and applications are assessed by Queensland Department of Heritage and/or GBRMPA staff, and, for major projects, by relevant experts from outside GBRMPA if this is considered necessary.

Major categories of permits include those for tourism, manipulative research and all activities that have the potential to pollute the Park such as sewage outfalls, dredging and dumping. Applications that have the potential for major impacts may be designated under the *Environmental Protection Act (Impacts of Proposals) ACT 1974* (EP(IP) Act). Major activities that do not require permits are navigation and operation of vessels and most fishing.

Queensland Nickel Management Pty Ltd is the managerial arm of a group of companies that operate the Queensland Nickel Joint Venture (QNJV), (QNM will be used as the acronym for the Applicant throughout this paper even though, formerly, and at the time of the application the company name was Dallhold Nickel Management). The arrangement of companies that comprised QNJV is shown at figure 1.

Twenty-eight per cent of the joint venture is owned by the State of Queensland operating as Nickel Resources North Queensland Pty Ltd. The refinery has extracted nickel and cobalt from ore mined at Greenvale in north Queensland since 1974 but as reserves dwindled at this source the joint venture started to explore ways of extending the life of the refinery by importing ore from New Caledonia and Indonesia. The refinery employs about eight hundred people and generates substantial export earnings. The refinery is located some twenty kilometres north of Townsville on land adjacent to Halifax Bay (see figure 2). Most of Halifax Bay is in the Marine Park and all of it in the World Heritage Area. The zoning category of the area for which the unloading operation was proposed is General Use 'A'.



## Queensland Nickel Joint Venture

**Dallhold Investments Pty Ltd (in liquidation)**

owns 100% of  
**Dallhold Nickel Management Pty Ltd**  
*(receivers and managers appointed)*

and 100% of  
**Preble Pty Ltd**  
*(receivers and managers appointed)*

owns 100% of  
**Greenvale Queensland Nickel Inc**

and 100% of  
**MEQ Nickel Pty Ltd**  
*(receivers and managers appointed)*

owns 100% of  
**Yabulu Nickel Company Pty Ltd** owns 15% of —  
and 100% of  
**Australian Nickel Holdings Pty Ltd** owns 4.5% of —  
and 52.5% of

↓  
**Ore Purchase and Shipping Pty Ltd**  
**Queensland Nickel Pty Ltd**  
**Queensland Nickel Sales Pty Ltd**

**Queensland Government**  
owns 100% of  
**Queensland Treasury Corporation**  
owns 100% of  
**Nickel Resources North Queensland Pty Ltd** owns 28% of —

*Figure 1*

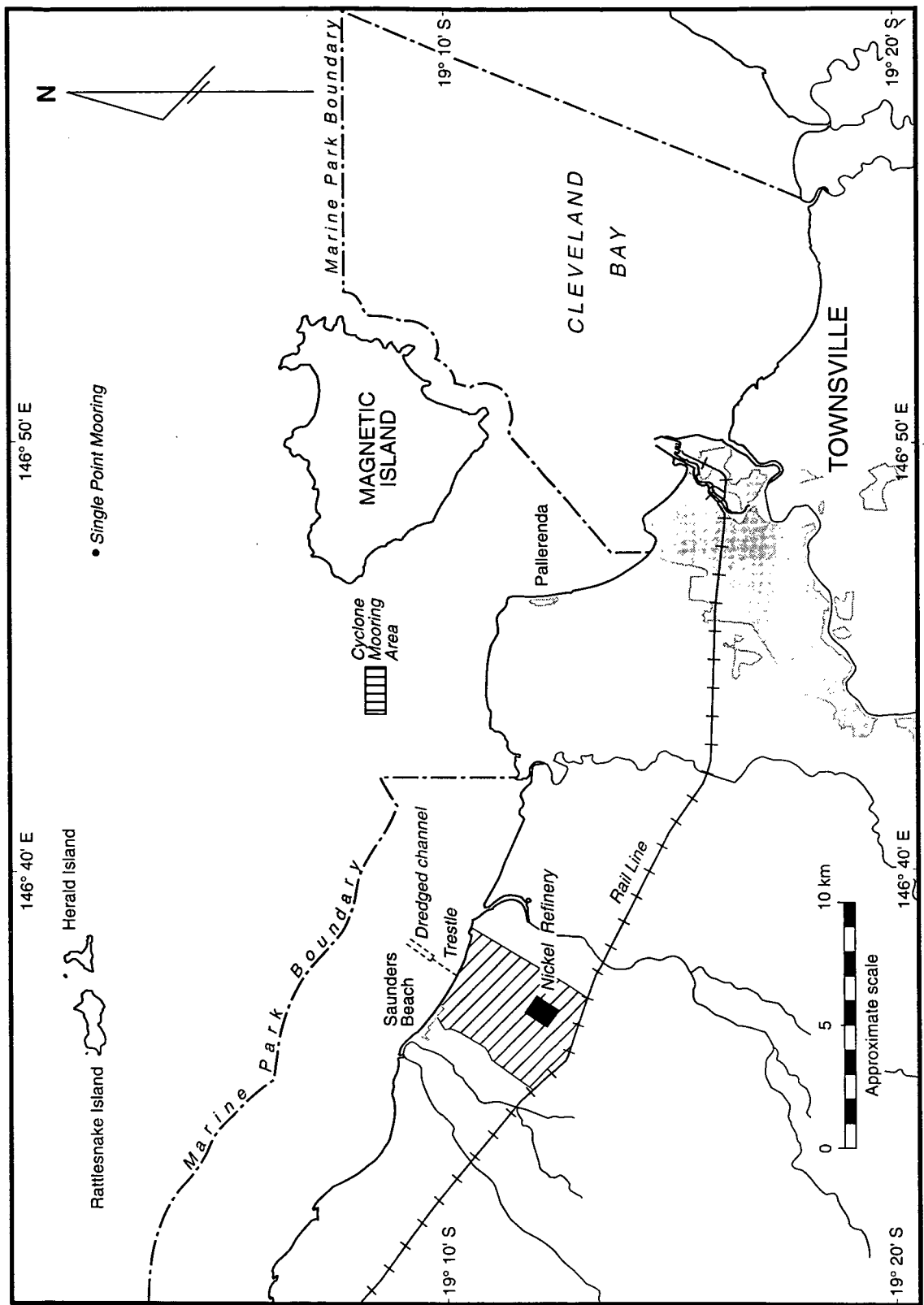


Figure 2: Map of the area (all positions are approximate).

## THE APPLICATION AND ASSESSMENT

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On 31 March 1989 QNM applied to GBRMPA to offload nickel ore in the Marine Park from bulk carriers moored in Halifax Bay. The proposal was to use large, three thousand tonne capacity, barges to carry the ore to a purpose built, thirteen hundred and fifty metre long trestle and bucket wheel unloader (see figure 2). This was to be connected to the refinery by a conveyor belt. There would be a dredged channel leading up to the trestle to allow the barges access in the shallow water. The project would involve the importation of up to four million tonnes of ore per year and the project life was to be for at least twenty years and perhaps as long as fifty years. The proposal also included the activity of bunkering the ore carriers in Halifax Bay and the installation of cyclone moorings for the barges. In support of the application QNM had commissioned an Impact Assessment Study (IAS) (Tribunal (T) Document 162, page T682). After consideration of the IAS by GBRMPA and the Commonwealth Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) the proposal was designated under the EP(IP) Act on 6 April 1989 and the impact assessment process was therefore put in train. As a result of comments made regarding the IAS, QNM arranged for a Supplement to the IAS (SIAS) (T162, page T856) to be prepared and this was released, along with the IAS, for public comment on 14 September 1989. A statutory period of twenty-eight days was allowed for review.

QNM and GBRMPA were not the only interested parties in the outcome of the assessment. Residents who lived at Saunders Beach (see figure 2) closely examined the proposal and, through the Saunders Beach Action Group (SBAG), made it clear that they would oppose the development. The Townsville Port Authority (TPA) also had interests in the outcome of the process since it would affect its future development strategies if the nickel ore was to be brought through the Port. The outcome of the Appeal would also have significant financial implications for it in terms of investment requirements, sources of funds for Port development and income from capturing the nickel ore trade. The State of Queensland, having a large share in the QNJV, as well as being responsible for harbours and the environment, had interests which covered all aspects of the proposal. Some of these were clearly conflicting.

The impact assessment was carried out by GBRMPA in conjunction with a Joint Working Group that included the State Departments of the Premier, Economic and Trade Development, Primary Industries, Transport, Environment and Heritage as well as DASETT. Many experts in relevant fields were asked to peruse the IAS and SIAS and provide written reports regarding the proposal. These reports and a Review of the IAS and Supplement (RIASS), prepared by the Joint Working Group, were made available to the proponent to assist it in developing the project to a satisfactory level. A further document was prepared by the proponent, the Response to the RIASS (RRIASS) (T394, page T3337), for consideration by the working group. At this stage QNM had dropped the bunkering aspects of the proposal, had decided that a single point mooring would address a number of reviewers' concerns regarding anchoring, and had proposed a sophisticated barge and pusher arrangement which would allow the pusher to be 'locked'

to the barge when required. This would, in effect, turn the barge and pusher into a single vessel during operations. They had also dropped the plan to use interim grab unloaders on some of the ore carriers and all vessels were to be equipped with specially designed unloading gear to minimise spillage. This proposal was also subjected to expert review and considered by the same relevant authorities. The Joint Working Group presented a final report on 4 May 1990 in which it was recommended that the project not proceed for the following reasons:

*'On the basis of the material provided for assessment it is not possible to estimate with any certainty the likely rate of spillage of nickel ore into the waters of Halifax Bay;*

*'On the basis of the material provided for assessment it is not possible to describe with any certainty the likely biological impacts of nickel ore spilt into the waters of Halifax Bay;*

*'Given the uncertainties identified in the foregoing two paragraphs it does not appear to be possible to devise any predictive model or monitoring system that would indicate when thresholds of unacceptable rates of spillage or unacceptable biological impacts are being approached;*

*'Given the impossibility of conceiving an appropriate management response if long-term toxic effects on marine organisms become evident;*

*'Given the levels of investment and the overriding requirement for an assured supply of ore to the Yabulu Refinery it is necessary that any import arrangements that are approved now can be implemented in the expectation that they will be able to remain in place essentially unaltered for the life of the Refinery. In the light of the uncertainties surrounding the spillage of ore and its consequences, such assurances could not be given; and*

*'There would appear to be a feasible alternative at only marginally differing long-term costs available through the Port of Townsville' (T372, page T3100).*

On 1 June 1990 the Minister for DASETT provided advice and recommendations to GBRMPA pursuant to the EP(IP) Act that noted that:

*'...the central issue of the impact of spilled ore remains in doubt and there is the potential for significant impacts to occur. This matter should be given serious consideration by the Great Barrier Reef Marine Park Authority (GBRMPA) in deciding on the issue of a permit for the proposal.' T398, page T3592)*

She went on to recommend that:

*'Should the Marine Park Authority decide to issue a permit for the proposal, the following conditions are recommended to minimise environmental impact:*

*a monitoring program to gauge the environmental impact of ore spillage be developed and implemented by the proponent in cooperation with the Authority; and*

*a management strategy to minimise ore spillage be developed and implemented by the proponent in cooperation with the Authority. The management strategy should provide for changes to be made to operational procedures in response to impacts identified by the monitoring program' (ibid.).*

A draft monitoring program was provided by QNM to GBRMPA on 22 June 1990 (T411). This was also reviewed by experts in appropriate fields and the comments forwarded to QNM.

On 28 June 1990 GBRMPA decided to refuse permission for the project to proceed relying largely on the provisions of section 13AC(4) of the Regulations. This section of the Regulations, generally speaking, sets out the criteria that GBRMPA must consider when assessing an application for an activity in the Marine Park. The reasons for the decision were published on 1 August 1990 in the Commonwealth Special Gazette No. S219 (T345, page T3938) and can be summarised as follows:

considerations of the application were limited to the effects of the proposed development within the Marine Park on the Marine Park, the effects of the development on adjacent areas whether inside or outside the Marine Park, the effects of the proposed activities outside the Marine Park to the extent that they may involve use or entry into the Marine Park and the use or management of an area which might affect or relate to the Marine Park;

it was not possible to develop workable permit conditions to devise a reliable method to measure ore spillage or ensure reporting of ore spillage, determine long-term biological effects of spillage, devise a suitable management response in the event of unacceptable environmental impact and maintain constant independent supervision of an operation that would be carried out twenty-four hours per day on an estimated two hundred days per year;

it was not known what the actual level of spillage was likely to be (estimates by QNM having never been justified) nor was it known what level of spillage would cause unacceptable biological impacts to occur;

it would be difficult to require operations to cease even if an agreed level of spillage could be measured;

the monitoring program proposed by QNM included various parameters to be measured but did not indicate how the spillage was to be measured, did not provide information on management responses that would occur if standards were not met and did not give any indication as to methods of predicting the biological impacts of spilled ore:

it was not known what remedial action could be taken if, after a number of years, it was shown that spillage was having an adverse environmental impact;



that future options for the use of the park and adjacent areas would be seriously restricted particularly in relation to fishing activities;

that the proposal would change the area of Saunders Beach (an area adjacent to the Marine Park) from one of 'urban retreat' and high aesthetic value to that of an industrial site;

that there were other impacts such as noise, dredging, construction and removal of structures and oil spills considered but it was thought that these could be controlled through suitable permit conditions; and

it was considered that the Minister's recommendations could not be met and the orderly and proper management of the Park could not be ensured.

On 20 August 1990 the solicitors for the Applicant exercised their statutory right to ask GBRMPA for a reconsideration of the application. Since any Appeal by QNM would be on the basis of the reconsidered decision it was imperative that all aspects of the application and reviews of it were taken into account once more. After reconsideration by the three-member Authority the decision was reaffirmed on the basis of the rationale behind the original decision but also taking into account the responsibility of GBRMPA to be cognisant of sections of the *Australian Heritage Commission Act 1975* (AHC Act), particularly section 30(2) and section 30(4). It also noted that the Great Barrier Reef Region included all of the Marine Park, that the Region had been inscribed on the World Heritage List and the Australian Register of the National Estate, and that the Commonwealth was a signatory to the Convention for the Protection of the World Cultural and Natural Heritage.

Section 30(2) of the AHC Act requires that GBRMPA shall not take any action that adversely affects a place on the Register of the National Estate unless it is satisfied that there is no feasible and prudent alternative to the taking of that action and that all measures that can reasonably be taken to minimise the adverse effect will be taken.

Section 30(4) of the AHC Act defines what the taking of an action means in the context of section 30(2) (see below for details of submissions regarding the AHC Act).

The Convention for the Protection of the World Cultural and Natural Heritage establishes an obligation for the Commonwealth to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation, where necessary, of listed areas.

The Applicant was advised of the outcome of the reconsideration on 18 September 1990 and its solicitors, on 11 October 1990, asked for the Authority's findings on material questions of fact pursuant to section 28(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). All of GBRMPA's decisions regarding permits can be appealed under the provisions of the AAT Act and GBRMPA's legislation and an Appeal was formally lodged with the AAT on 15 October 1990. GBRMPA responded to the section 28 request on 8 November 1990.

## THE ADMINISTRATIVE APPEALS TRIBUNAL

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The AAT was established to provide inexpensive, informal, non-adversarial and speedy resolution of issues arising from decisions made by Commonwealth departments and agencies.

Where an enactment so provides, it has the responsibility to review any administrative decision taken by the Commonwealth Government if a person affected by that decision decides to appeal. It is *'empowered to affirm, modify or reverse the decision appealed from, to substitute a fresh decision of its own or to send the matter back to the original decision-maker for reconsideration in the light in (sic) any directions or recommendations made by the Tribunal'* (Hansard 1975, House of Representatives, 6 March 1975, page 1186, Administrative Appeals Tribunal Bill 1975, Second Reading). It does not have the responsibility to review policy or regulatory standards but can only exercise discretion and decision making powers within the context of the relevant Acts governing the bureaucracy. It cannot refer any matter to another jurisdiction such as a Court or the Ombudsman but can refer questions of law to the Federal Court.

*'The Tribunal is not bound by the rules of evidence, but is empowered to inform itself in any way in which it sees fit'* (ibid.).

It can use any material that parties put before it and material of its own and need not only consider the material that the administrative body had before it at the time the initial decision was made.

The AAT is required to provide reasons for all its decisions and cannot award costs other than in very limited circumstances, neither of which were relevant in this case.

## PREPARATIONS FOR THE CASE

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The first task that GBRMPA had to undertake was to prepare a Statement for the Tribunal as required under section 37 of the AAT Act. This was substantially the same as the section 28 Statement provided to QNM and summarised GBRMPA's rationale for its decision.

Of considerably more concern was the need, within twenty-eight days, to consolidate *'every other document or part of a document that is in your possession or under your control and is considered by you to be relevant to the review of the decision by the Tribunal'* (letter of 16 October 1990 to GBRMPA from the Deputy Registrar of the AAT). These documents are required by the AAT Act to be compiled for the benefit of the Tribunal and the Applicant in the conduct of the Appeal. The eventual Tribunal (T) documents numbered four thousand two hundred and sixty-four pages and it was a requirement that GBRMPA provide the AAT with six copies. This was only the start of logistical problems associated with immense amounts of copying of documentation that was required by all parties, the AAT and expert witnesses.

Over the next few months Deputy President Breen of the AAT called a number of directions hearings to determine the arrangements for the actual hearing of the Appeal. He was keen that interested parties should be informed of the hearing so that all issues could be heard at the one time and the Applicant and the Respondent were directed to provide lists of potentially interested parties. These parties were written to and those that were interested in being joined to the Appeal were required to demonstrate that they had a genuine interest. As a result of this, the TPA, SBAG, the North Queensland Conservation Council (NQCC) and the Queensland Commercial Fishermen's Organisation (QCFO) were joined although the original list of interested parties was much greater and included some who were identified by QNM. In the event, all of this group of joined parties were sympathetic to the stance taken by the Respondent. There were limits, however, imposed by the AAT, to the extent that the joined parties would be involved and limits to their rights of cross examination. The TPA could only consider the issue of prudent and feasible alternatives (i.e., the Port options). SBAG and NQCC were limited to consideration of the environmental and social issues, including environmental comparisons between the options, and were joined on the condition that they engage the same legal representative. QCFO could only consider commercial fisheries matters.

Prior to the joinder of the other parties there had been some discussion between the Applicant and the Respondent with a view to narrowing the issues to those that the Applicant considered 'primary'; spillage, materials handling, toxic effects and monitoring. The Applicant suggested that certain issues could be abandoned in the context of the cases to be put before the Tribunal. The Respondent took the view that it could not abrogate its statutory responsibilities to put before the Tribunal all the issues that it had considered in making its decision, that the Tribunal would effectively stand in the Authority's place and should consider all relevant issues, and that the joining of the parties would necessitate that GBRMPA be consistent in its response to the issues that had been raised by the application.

A number of deadlines were set during the directions hearings and these included the following; exchange of lists of facts and contentions (1 March 1991) and rejoinder to those lists by all parties (28 March 1991), a list of disputed issues to be provided by the Applicant (8 March 1991), provision of proofs of evidence from non expert witnesses and reports from expert witnesses (20 May 1991) and for the response to the reports and proofs in reply and lists of witnesses required for cross examination (17 June 1991). The hearing was set down to commence on 1 July 1991 and estimates were that it would take six weeks to complete.

GBRMPA asked the Applicant for a list of further and better particulars on 30 December 1990 and this was provided in conjunction with the list of disputed issues, some three weeks late, on 26 March 1991. Because the list was provided late the deadline for response to it was extended from 4 April to 26 April. It was maintained by GBRMPA that the further and better particulars requested were still lacking in detail and a further informal request was made on 9 April 1991. A formal request through a directions hearing was made on 19 April. A list that was satisfactory to the Respondent was never forthcoming.

On 5 March 1991 the State of Queensland applied for joinder to the proceedings as a neutral party neither supporting nor opposing the application by QNM. The basis for its application lay in a need to protect State employees' reputations if they were impugned during the course of the case. This, it was thought, was possible due to their input to the Joint Working Group. On 28 March the State was joined as a party but only on the basis that it could be there to protect State employees. It was directed to produce proofs of evidence for all State witnesses by 26 April. A Direction was given that GBRMPA and TPA must make available to the Applicant a list of State witnesses that it would call so that QNM could decide which, if any, it would like to call. The deadline for this was set at 3 May so that QNM could meet the previously set 20 May date for witness identification. Joined parties were directed to provide statements of facts and contentions on or before 26 April.

None of the parties managed to meet the May 20 deadline for exchange of reports and this was extended until 27 May, however, even with the extension, there were still a number of outstanding reports. By the time the reports were exchanged GBRMPA had identified some twenty witnesses, not including those that were State employees.

GBRMPA received fifteen reports from QNM, eleven from TPA and one from SBAG on 28 May. These reports amounted to a considerable body of material addressing virtually all the issues including amenity, land values, toxicology, materials handling, economics, fisheries and biological aspects of Halifax Bay. Documents ranged in size from those of a few pages to extensive reports of several hundred pages. Most of the witnesses that GBRMPA planned to call needed to receive a large proportion of the material to put the whole case in perspective and allow them to prepare expert reports in reply. It was also necessary that they receive each others reports so that they were aware of the development of GBRMPA's case. GBRMPA copied some fifteen thousand pages of material to be sent out for review and consideration at this stage and, given that the set date for rejoinder to these reports was 17 June, it was clear that there was going to be great difficulty in meeting that deadline. Indeed, some of the rejoinders were not available until after the case commenced, although most were.

While preparations were continuing there were ongoing negotiations between the State of Queensland and GBRMPA regarding access to the State witnesses that GBRMPA would wish to call. Since the arrangement to interview, or 'proof', the witnesses was subject to these negotiations, and resolution was unlikely in the time available, GBRMPA stated its intention of calling all State witnesses to comply with the request of the Tribunal to identify which were to be called.

As the date of commencement approached there were continuing rumours regarding the negotiations that were taking place between the TPA, QNM and the State regarding a settlement that would bring the ore through the Port of Townsville and on 25 June the State released a proposal for an upgrade of the Port which would involve developing a new outer berth and the deepening of the access channel. The details were not, at this time, released and QNM had, apparently, not been party to discussions.

## Discovery

Discovery is a process by which the parties are able to examine documents that they consider relevant to the case and that are in the possession of one of the other parties. Discovery can be on a formal or an informal basis, involving a direction from the Tribunal if on a formal basis. The process can range from asking for very specific documents to, what can only be described as, large 'fishing expeditions'.

In April QNM sought informal discovery of documents held by GBRMPA regarding developments on Magnetic Island, particularly the monitoring program for the Magnetic Keys marina development, as well as papers relating to ore spillage in the Port of Townsville, dredging and dumping, seagrasses and fringing reef areas. This was the first of many applications by all parties for discovery, some of which were made formally to the Tribunal and some of which, as in this case, were agreed to without the need to involve the Tribunal.

The discovery process continued throughout the case with both the State and GBRMPA making formal applications for discovery of material from QNM regarding the economic viability of the various options. This was granted by the Tribunal with the proviso that it would exclude material that reflected the financial capability of QNM to pay for the development that they were proposing. This was, and is, an important point in that it is clear that the Tribunal did not consider it appropriate for the body responsible for deciding on a permission to have access to information as to whether the proponent could reasonably be expected to complete it.

The discovery did, however, reveal aspects of the economics of the operation that could be used in cross examination of witnesses who had been responsible for the preparation of the economic reports and some QNM employees who had worked on the proposals. There was also some unexpected, but fortuitous, information which came to light that related to difficulties in materials handling.

QNM also made several applications for discovery of material from the State of Queensland. The State was not prepared to release all the files that QNM desired relating to the comparison of the importation options and the deliberations of the Joint Working Group, stating that it would not be in the public interest for the material to be made available. After much argument, including an extra day of interlocutory hearings between the August and November sittings the Tribunal directed that discovery be allowed. This decision was successfully appealed by the State in the Federal Court in January 1992.

The discovery process was never actually completed with some outstanding requests still current when the case closed.



## THE HEARING

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The hearing commenced on 1 July 1991 before a Tribunal consisting of Justice Gray (President), Mr Breen (Deputy President) and Associate Professor E. K. Christie (Member Assisting). The Applicant and Respondent were each represented by Queens Counsel and Junior Counsel; TPA was represented by a solicitor; the State of Queensland was represented by Junior Counsel; SBAG and NQCC were represented by Junior Counsel and the QCFO elected to represent itself. All parties had teams of instructing solicitors and/or support staff assisting with the case. The estimate for the time necessary to hear the case had now increased from six to a possible eight to twelve weeks. In fact the Tribunal sat for various periods between 1 July and 8 April 1992 for a total of ninety-two sitting days or twenty weeks. This total does not include various directions hearings, the Appeal to the Federal Court by the State of Queensland or the day of hearing when the Tribunal was reconvened on 23 June 1992.

Very early in the hearing on 4 July, the State sought to have its terms of joinder altered in response to points raised by QNM's Senior Counsel in his opening address. He tendered the details of an offer from the State to QNM regarding the Port option and the State regarded it to be now necessary to be able to defend itself against criticism regarding the economics of the Port option. The resultant Application to the Tribunal to cross examine relevant witnesses on economic matters was granted. As it turned out the offer from the State was to develop the outer berth option but it only expected QNM to pay for the least cost option as identified in the Port development study commissioned by TPA (exhibit G24). This meant that QNM would have to pay seventy-five million dollars to the Port development. It was an offer that QNM rejected although it was apparent that negotiations were continuing. Indeed, on 18 July 1991 the State applied to the Tribunal for an indefinite adjournment of the hearing *'so as to enable negotiations to be conducted in an atmosphere without litigious background in which full and free exchange can take place'* (Transcript, page 1065). It was contended that the adversarial nature of the proceedings was hampering the likelihood of a successful outcome to the process that was taking place behind the scenes. It was perhaps prescient that the State Counsel maintained at the time *'it would be most unfortunate if this hearing were to proceed for another seven weeks only to have the application withdrawn upon settlement being reached ..... upon the eleventh hour after considerable expenditure of public money'* (written submissions made by Counsel for the State in support of the Application, page 3). Clearly, the point of the matter was that GBRMPA was withholding that which the Applicant wanted, a permit, and was not involved in the negotiations at all, so the hearing could not be adjourned on that basis. As stated by the President of the Tribunal:

*'The application has the qualified support of the Great Barrier Reef Marine Park Authority, which is one of the principal parties. It has the full support of the other parties joined. It is opposed by the Applicant.'*

*'The State of Queensland.....does not have the power to grant or withhold what the applicant seeks, namely, a permit from the Great Barrier Reef Marine Park Authority to proceed with its proposed'*

*development in Halifax Bay. Any decision to adjourn the proceedings would amount to an instruction to the Applicant to forego its Halifax Bay proposal and to negotiate about the Port of Townsville proposals. That would not be a proper exercise of the power given by.....the Administrative Appeals Tribunal Act....'* (Transcript, page 1085).

At the conclusion of the QNM and TPA cases, before the other parties' cases, and before presenting other than preliminary evidence of its own, GBRMPA invited the Tribunal to make a decision to uphold GBRMPA's decision on the evidence that had been adduced to that date. This invitation was presented on the basis that there was a demonstrable prudent and feasible alternative to the project (one of the available Port options) and that unacceptable adverse impacts to the Marine Park would occur. The Tribunal declined to make such a decision prior to considering all the evidence since it would be necessary for for all the evidence to be heard to determine at least one aspect of the applicant's case (i.e. to demonstrate that there would be no adverse effect).

The case finished on 8 April 1992 with the Tribunal reserving its decision and it was expected that it would take some months before an outcome would be known.

On 27 May solicitors for QNM filed a Notice of Withdrawal with the AAT indicating that a decision was no longer required. The rationale given for this was that *'In response to recent commercial developments our client has elected to withdraw its application for review....'* (AAT 1992, Decision re Application for Review Q90/474, page 4). GBRMPA asserted and argued the position that there was no power in the AAT Act for the Applicant to unilaterally withdraw from the Appeal and requested, at a further directions hearing, the opportunity to argue that point before the Tribunal. The Tribunal was reconvened on 23 June 1992 to hear submissions from all parties. QCFO, NQCC and SBAG were in support of GBRMPA's position that a decision should be made on the merits of the case while TPA and the State of Queensland took the view that the withdrawal was both quite appropriate and legally efficacious.

GBRMPA, QCFO, SBAG and NQCC argued that they would suffer prejudice, in terms of costs incurred, if the Tribunal did not proceed to a decision. It was further argued that there was a possibility of a further application and, most importantly, that it was desirable for the parties, especially for GBRMPA, to know the opinion of the Tribunal on the matters that had been raised during the case from the point of view of future management of the Marine Park.

GBRMPA's primary position was that there was no right to unilateral withdrawal but, if the Tribunal found that there was such a right, then it was only a qualified or conditional right. GBRMPA sought to have conditions imposed that would compensate the parties for the expenses incurred during the case (essentially restoring the status quo as of 1 July 1991) and that an order be given that there would be no further application for the project.

The Tribunal concluded, on the basis of its perception of decided cases on the point, that there was a right to withdraw. It decided that, even if it was wrong in this conclusion, it

would give leave to withdraw. Further, it found that it had no power to award compensation and no power to order that no further application be made.

The Tribunal made the following comments on the issue of precedent:

*'We understand the desire of the parties to know the views of the tribunal on the various issues that arose in the present case. Even though those views would not have the same authority as would the opinion of the court on a question of construction of relevant legislation, we accept that a decision of the tribunal would be a valuable guide, particularly to GBRMPA in its operation of the planning scheme in the marine park. If the application has been withdrawn validly, however, we are unable to accede to the proposition that we should proceed to give a decision. It is clear on the authorities that the withdrawal of an application puts an end to it; that which was sought can no longer be granted or refused'* (ibid., page 13).

It went on to summarise the outcome of its decision:

*'In the past, it has been the practice of the tribunal, upon an applicant withdrawing, to direct that the matter be removed from the hearing list. We should follow this practice but would desire to add some words in our decision to make it abundantly clear that the proceeding is to be treated as having been disposed of finally. The decision of GBRMPA made on 14th September 1990 remains completely unaffected'* (ibid., page 15).

## THE EVIDENCE

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As stated by the Tribunal in its final decision;

*'The evidence was detailed and complex. QNM undertook the task of attempting to meet in detail, by means of expert evidence, every single criticism made or implied of its proposal, in an endeavour to establish that the carrying out of its proposal would have no effect environmentally'* (ibid., page 3).

It is not intended to go through the evidence in detail but to draw attention to some of the issues that were argued and the positions that the various parties took. The issues of the case evolved as it proceeded as a result of external factors over which the Tribunal and the Respondent had no control.

## The Environment

There was little debate about the actual characteristics of the area in question although some about the importance that could be attributed to it. The Tribunal heard expert testimony that the reefs in Halifax Bay were extremely diverse, that there were important seagrass beds that were of an extent that was perhaps debatable, that it had populations of turtle and dugong and that there were communities of many small animals that inhabited the soft bottom of the Bay. It was also informed that the Bay was a significant nursery area for fish targeted by both commercial and recreational fishermen. A fishery for prawns and pelagic and reef fish was also important to the area.

## Spillage of Ore

One of the major concerns of the joined parties was the likelihood of spillage of nickel ore at all the transfer points but particularly those transfers that took place over the sea. Factors that would affect spillage levels included the machinery used for materials handling, wave and wind conditions, relative vessel motions between the ore carrier and the barge, and human error. There were also the issues related to failure of machinery to meet design specifications and catastrophic failure. QNM's experts sought to address all these issues.

QNM provided specifications of proposed equipment that would be fitted to the vessels. These included enclosed conveyors that would feed material through an expandable, concertina like spout into the barges that would be moored alongside. There were to be designated 'dirty' areas on the vessel deck that were enclosed by dykes one hundred millimetres high as well as washdown facilities to a holding tank that would accommodate the input of water from periods of heavy rain. This dirty water would be discharged in the open ocean during transit to source ports. There were operational controls that would be devised to turn off machinery when no barge was present and the spout would be swung back inboard between barges. It was proposed that the operator of the loading conveyor would have a dead man's switch to ensure that it could not be left running unless the operator was satisfied that it should be running. The barges were not to be filled to the maximum so as to minimise spillage while in transit to the unloader.

The bucketwheel unloader was to have a tray put in place underneath it when a barge was not present and the conveyor to the refinery was to be enclosed.

Spillage estimates by consultants to QNM varied considerably, from some fifteen tonnes to three hundred tonnes per annum and it was of great concern to GBRMPA that, although a risk assessment had been carried out and evidence led by a number of experts, it could not be reliably estimated or even measured with any level of accuracy. Even the high figure of three hundred tonnes represented only 0.0075 of one per cent of annual transshipment amounts. The main concern was that chronic long-term spillage over the life of the project could lead to irreversible damage that could not be attended to once it became evident. It was also a matter for concern that the only reactive option that GBRMPA could envisage was that the operation would have to be stopped if any criteria that were agreed to were exceeded. QNM's position was that spillage problems, if any were found to exist, could be addressed by changing either the machinery involved or the operational standards.

A further potential difficulty that became apparent was the managerial remoteness of the Applicant from those actually to be carrying out the transshipment. While QNM were the general managers of the Joint Venture the group responsible for purchase and transshipment of foreign ore were Ore Purchase and Shipping Pty Ltd (OPS) which made all arrangements for administration and negotiation of contracts for the shipment of ore. The arrangements at the time were that OPS held a contract of affreightment with a

Canadian shipping company, FEDNAV, which arranged for vessels to be made available for transport of ore. It transpired that FEDNAV did not own the vessels but procured them from a number of sources depending upon circumstances at the time. To further increase GBRMPA's concerns with regard to the volatility of importation arrangements it was learned that OPS were in the process of litigation with FEDNAV and were trying to break the contract on the basis of a 'war clause' in the light of the events that had taken place over the invasion of Kuwait (exhibit F27). It appeared, to GBRMPA at least, that maintaining operational controls over the vessels in Halifax Bay was going to be a task of some magnitude despite protestations by the Applicant that all the necessary controls could be arranged as part of future contracts.

## Toxicology

The Applicant commissioned studies to examine the toxic effects of the ore on a number of organisms. These studies were intended to demonstrate the lack of toxicity of the ore in concentrations considerably higher than predicted by the combination of estimated spillage rates and oceanographic and dispersion modelling. However, some witnesses for the Applicant agreed that if the spillage levels were not as predicted then they would have to reassess their opinions as to the environmental impacts of the proposal. As a result of suggested flaws in the dispersion modelling and in the toxicological work entirely new studies were commissioned to address these issues and a number of witnesses had to be recalled.

Much of the debate regarding the studies related to statistical analyses and the power of the studies to truly detect change.

GBRMPA's position was that the toxicological work, even if spillage predictions were substantially correct, had not demonstrated that the ore build up would be benign given the length of time for which the project was proposed. It further maintained that the chronic spillage would not allow a reactive monitoring program to be developed that could address a problem if it were found to occur.

## Amenity

The issues of noise, dust and visual aesthetics were debated at length, with QNM maintaining that noise and dust could be satisfactorily controlled and that the trestle would not be visually disturbing.

SBAG was extremely concerned about these aspects of the proposal since some of its members had residencies only a few kilometres from the proposed trestle and unloader. Evidence was given to the effect that fishing vessels had caused noise to be apparent in homes and that the three thousand tonne barges, as proposed, would cause further noise problems.



The unloader was to be about thirty metres high and would operate on a twenty-four hour basis while a ship was being unloaded and GBRMPA shared the concerns of SBAG. Some truly extraordinary claims were made by certain witnesses with regard to visual aspects, claiming that the light on the structures would be comparable to that of a clear starlit night and that the curvature of the earth would somehow ameliorate the visual impact.

On the other hand, QNM raised amenity issues in the context of the Port options and the impacts that would be caused by unloading and railing through Townsville.

## **Land Values**

The concern was expressed by SBAG that the property values at Saunders Beach would be adversely affected by the proposed development and evidence was adduced by QNM that they would not. Indeed, they put forward scenarios that showed that land values would actually increase.

## **Fisheries**

Attempts were made to quantify, in dollar terms, the cost of alienation of fisherfolk from parts of Halifax Bay. There was considerable disagreement as to the level of impact that the structures and the barge operation would have on fishing operations. QCFO maintained that the impact would be great because the fishing vessels would have to avoid the entire area or run the risk of collision with the barges. They further maintained that they would not be able to trawl across the dredged channel or up close to the trestle. Interestingly, they also maintained that the fishing log records used by QNM to arrive at a cost to the fishery were not accurate.

Other evidence was put forward that the trestle structure and its associated lighting would cause unnatural aggregations of fish that, by a process of predation on larval stages of the animals, could alter the fish community structure.

## **Economic factors**

The options for importation of ore were the Halifax Bay facility, as proposed by QNM, or the Port of Townsville. Within the Port there were a number of options that had been considered by the consultants to the TPA. These were the development of a new outer berth (the Outer Option) or the use of an inner Port berth, Berth Four, (Berth Four Option). Each of these options had a number of sub-options in which the development would take place in a different manner.

It took considerable time to explore the economic aspects with both TPA and GBRMPA seeking to demonstrate that a facility at the Port would be of benefit to all parties to the Appeal and not at a greater cost to QNM than the Halifax Bay proposal. QNM's position was that even if it was conceded that the capital costs were similar then the operational costs were substantially greater and this could make the refinery not economically viable.

In August 1991 the TPA unexpectedly announced that the only Port option that it would pursue with regard to the prudent and feasible alternative was the development of the new outer berth facility and dropped Berth Four from its case. GBRMPA maintained that, despite this unexpected turn of events, the Tribunal was required by the legislation to be satisfied that there was no prudent and feasible alternative before a permit could be issued. GBRMPA's position was that it had not been demonstrated that Berth Four was not prudent and feasible and was, therefore, still a 'live' issue.

Much debate occurred around the relative costs that would be incurred depending upon the ship sizes. Three sizes were considered; Handymax (about fifty thousand tonnes), Panamax (sixty-five to seventy-five thousand tonnes) and Cape Class (greater than ninety thousand tonnes). There were clear advantages in shipping costs in having larger vessels and the size of the vessel would determine the amount of dredging that would be necessary in the channel to the Townsville Port. However, there were draught limitations at some of the source ports in New Caledonia so that there was a need to retain at least one Handymax vessel. Draught limitations through the Torres Strait also meant that some vessels would not be fully loaded unless they took the long route from Indonesia around the top of New Guinea. The majority of the evidence, with one notable exception, was that Cape Class vessels would only be economical once a single source of ore had been found and developed. QNM had already attempted to secure a single source without success but with a substantial investment (about seventeen million dollars) in feasibility studies.

In December, during cross examination, Mr Henessey (Managing Director of QNM), disagreed with a number of the significant premises used in the reports that had been prepared as part of the QNM examination of the options and in the impact assessment process. He disagreed with the operating costs that had been used, believing them to be too low in certain areas such as the comparison between Waterside Workers Federation and Australian Workers Union labour. He stated that QNM's consultants had not used the most desirable or acceptable approach in considering the Port options. He did not agree with other witnesses regarding the use of larger, greater than ninety thousand tonne, vessels and maintained that they would be used even if a single source of ore was not found. He maintained further that the consultants had used similar sized vessels in their financial comparison of the options even though this did not represent what was likely to actually happen. He further disagreed with the RRIASS regarding the scenarios under which vessels of various sizes would be used insisting that ninety thousand tonne vessels could be used without development of a single source Port. This would add a substantial amount to the dredging required for the Port options although it was maintained by Mr Henessey and others that there was no plan to bring ninety thousand tonne vessels to the Port since it would be financially more sensible to use smaller vessels requiring less or no dredging.

It should be noted that the position for the single point mooring did not allow vessels of this size due to draught limitations and that many of the studies proceeded from the fact that the mooring would be in a set position. Studies included in this category included dispersion modelling, costing aspects, timing of shuttle movements and shuttle routes.

Mr Henessey disagreed with other evidence regarding unloading rates at Berth Four in that he believed that higher rates could be achieved than had been previously put forward. He also stated that *'at the present time it would be difficult to justify building in Halifax Bay, impossible to justify the Townsville Outer Harbour'* and went on to say *'right now it would not be prudent to be building either of them'* (Transcript, page 4676). He expected that that would change in the future.

This led on to further debate regarding the likely time frame of development and returned to the question of the need to upgrade the rail link between the Port and the refinery. This had been the subject of considerable cross examination of previous witnesses. There was evidence to the effect that the Queensland Rail would require an investment by QNM of twenty-two million dollars if the line was to handle greater than two million tonnes of ore per annum and that there would be a need to transport three million, two hundred thousand tonnes. It was suggested that the investment would be wasted if Halifax Bay went ahead since the rail link would no longer be necessary. QNM witnesses, Mr Henessey amongst them, maintained that some unspecified arrangement could be made that would avoid the investment even though the date of completion for Halifax Bay was at least four years away. Mr Henessey's evidence was that there was no longer any predictable time frame for development. Indeed, he agreed that at the time there was no funding in place for the project and that although he believed that it would occur he could not say when. This raised the issue of the Tribunal deciding on something that may be a future use and the attendant restrictions that that would place for other users. It should be noted that the Great Barrier Reef Marine Park Regulations require that an application specify the time period for which a permission is sought.

The President of the Tribunal asked Counsel for QNM to address the issue as to whether the Tribunal *'should proceed in the light of the apparent lack of willingness of the Applicant to undertake anything if it did get a permit'* (Transcript, page 4784). The response that was forthcoming, on the last day of the November/December sittings was that *'the applicant is firmly committed to the Halifax Bay proposal and that it will implement an approval immediately, economic conditions permitting'* (Transcript page 4821). The Tribunal at this stage drew attention to the possibility of a time period for project commencement being attached to any permit that may be allowed.

Early in the sittings that commenced in February 1992 TPA informed the Tribunal that Berth Four was no longer available for either interim or long-term use by QNM since it had been allotted to Queensland Cement. It also amended its statement of issues to include another berth, Berth Three, as a prudent and feasible alternative.

## THE ONUS AND STANDARD OF PROOF

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The question of which party or parties bore the onus of proof of the multitude of issues in contention in the case was never resolved during the proceedings although it was alluded to at various times. GBRMPA maintained that the onus *'is on the Applicant to establish grounds justifying the grant of permission by the Marine Park Authority generally, and the onus particularly in relation to section 30 subsection (2) is on the applicant to establish that there is no*

*feasible and prudent alternative'* (Transcript, page 7383). There was some comment from the Tribunal that there may be a split onus situation in that (addressing the respondent's counsel) *'if you first have to be satisfied that there will be an adverse effect, then do you carry that onus, and if the Tribunal is of the view that there will be an adverse effect, does the Applicant then carry the onus of excluding any feasible and prudent alternative'* (Transcript, page 7389). This view was not accepted by GBRMPA which maintained that the Applicant must *'establish that its activities....will not cause any adverse effects.....and also satisfy the regulatory authority that there is no feasible and prudent alternative'* (Transcript, page 7389). The Applicant did not argue that the onus of proof was other than with the Applicant and *'accept(ed) that where an Applicant seeks a grant of permission the authorities would suggest that the Applicant should carry the onus of proof..., with the standard of proof being on the balance of probabilities'* (Transcript, page 7440). Indeed the presentation of the case, during which the Applicant tried to demonstrate that there would be no adverse effect, implicitly suggests that the Applicant accepted that the onus lay with them.

Although it was the view of the Applicant that the standard of proof would be on the balance of probabilities and the Respondent generally agreed with that view, it was put to the Tribunal that the balance of probabilities should *'take into account the gravity of the decision, the precautionary approach, the area involved, the uncertainty about predictive modelling, the different estimates, the evidence, and determine the appropriate degree of probability which is proportionate to the subject matter'* (Transcript, page 7391). The issue of the applicability of scientific standards was raised in this context on a number of occasions and the difference between a civil standard of probabilities (greater than fifty per cent) was clearly differentiated from the standards that are generally used in science (confidence levels of ninety-five per cent or greater). As with the onus of proof issue, the standard of proof was not resolved during the case.

## THE AUSTRALIAN HERITAGE COMMISSION ACT

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The question of the interpretation and application of the AHC Act to the matters in issue in these proceedings was the subject of extensive, esoteric and vigorous debate not only between the parties but between the parties and the Tribunal. Virtually all component parts (words and phrases) of section 30(2) and section 30(4) were dissected and argued, in the context of such case law as has addressed these (and similar) sections, in an endeavour to legally define and delineate GBRMPA's obligations pursuant to the Act in the performance of its own statutory function.

The positions adopted respectively by GBRMPA and QNM were as follows:

### GBRMPA Submissions

That GBRMPA considered itself bound to consider whether any options available at the Port of Townsville were feasible and prudent alternatives to the Halifax Bay proposal such that it could not grant the requested permission to QNM.

GBRMPA considered itself so bound because of the provisions of sections 30(2) and 30(4) of the AHC Act reproduced below:

## Section 30(2)

*'Without prejudice to the application of sub-section (1) in relation to action to be taken by an authority of Australia, an authority of Australia shall not take any action that adversely affects, as part of the national estate, a place that is in the Register unless the authority is satisfied that there is no feasible and prudent alternative, consistent with any relevant laws, to the taking of that action and that all measures that can reasonably be taken to minimise the adverse effect will be taken.'*

## Section 30(4)

*'For the purpose of this section, the making of a decision or recommendation (including a recommendation in relation to direct financial assistance granted, or proposed to be granted, or proposed to be granted to a State), the approval of a program, the issue of a licence or the granting of a permission shall be deemed to be the taking of action, and in the case of a recommendation, if the adoption of the recommendation would adversely affect a place, the making of the recommendation shall be deemed to affect the place adversely.'*

In what amounted to a joint submission by GBRMPA and the State of Queensland, the following pencil sketch of the operation of section 30 was put to the Tribunal:

Firstly, section 30(2) creates a general prohibition on the Commonwealth authorities from doing anything that would harm the National Estate.

Secondly, section 30(2) creates an exception to the general prohibition permitting the Commonwealth authority to take action that may result in harm to the National Estate only if all the requirements of two separate limbs are met. The first limb requires that no alternative exists at present to the proposed action which would harm the National Estate. That alternative must be qualified in three ways, i.e. it must be feasible, prudent and consistent with any relevant laws. The second limb requires that something will be done in the future by requiring that all measures that can reasonably be taken to minimise the adverse effect will be taken.

Throughout the hearing GBRMPA maintained the position that it was for the applicant for permission to demonstrate that there *was not* a prudent and feasible alternative rather than for GBRMPA to satisfy itself that there *was* an alternative.

## QNM Submissions

QNM's Submissions in respect of the application of section 30 of the AHC Act were summarised in its Statement of Issues in the following terms:

*'Dallhold contends that s.30(2), properly construed, does not operate to make the Port Option relevant to Dallhold's application under the Great Barrier Reef Marine Park Regulations, because:*

*(a) the section envisages that an "alternative .... to the taking of that action" will constitute action that the relevant authority, may itself take, whereas the importation of nickel ore through the Port*



*of Townsville is not action which GBRMPA may take;*

*(b) the section envisages that an "alternative ... to the taking of that action" will affect the place in the Register but that the effect will not be adverse, whereas the Port of Townsville is not a place in the Register of the National Estate;*

*(c) action taken by GBRMPA in the form of a grant of permission will not itself adversely affect the Marine Park.*

*Further, assuming (contrary to Dallhold's contention) that s.30(2) does make the Port Option relevant to Dallhold's application:*

*(a) the preferable or correct conclusion is that the implementation of Dallhold's proposal will not adversely affect the Marine Park;*

*(b) alternatively, the importation of nickel ore through the Port of Townsville is not a feasible and prudent alternative to the importation of nickel ore through Halifax Bay' (Statement Of Issues of the Applicant, Dallhold Nickel Management Pty Ltd, re Administrative Appeals Tribunal Hearing Q90/474).*

## **AAT Response**

The Tribunal consistently and repeatedly acknowledged the difficulties of interpretation of the section per se and particularly the difficulties of application of the section in the context of GBRMPA's performance of its statutory functions. The meanings of such words as 'adversely', 'affects', 'significant extent', 'feasible', 'prudent', 'action', 'place', 'is satisfied' were vigorously debated but by no means settled by the end of the substantive hearing. In the absence of the Tribunal's rulings on such matters as a necessary component of a delivered judgement the various interpretations proffered by the various parties throughout the hearing are still 'alive' and even the process of legal debate could not be said to have offered any real guidance as to what may eventually be the judicial interpretation of such terms. The Tribunal itself acknowledged that even its own pronouncements upon the interpretation of the section would not carry judicial weight (because the Tribunal is not a 'judicial' body) although its pronouncements would undoubtedly provide guidance to those dealing with matters of this kind.

## **Implications for GBRMPA**

GBRMPA will have to continue to perform its statutory function subject to the obligations imposed by the AHC Act in the absence of any clear interpretation of the nature and extent of those obligations.

On a very strict interpretation of section 30(2) GBRMPA would find itself incapable of granting a permission for any but the most benign activity anywhere in the Marine Park. On a very broad interpretation of that same section GBRMPA may consider itself able and entitled to permit all but the most noxious and damaging of activities.

It must be apparent, as a matter of common sense, that the correct position lies between these two extremes but GBRMPA's present difficulty lies in identifying that position.

## DISCUSSION

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All the parties that were involved were funded, to a greater or lesser extent, from the public purse. GBRMPA spent in the vicinity of one million, one hundred thousand dollars despite having access to considerable and comprehensive free legal support from the Australian Government Solicitor's Office. The State of Queensland effort obviously was funded from the State coffers, SBAG and NQCC were granted legal aid although there was an unknown input from the respective groups, TPA is a relatively autonomous body but is in existence to service the needs of the public and QCFO was funded by its own members. Even the Applicant's massive undertaking to mount the Appeal was technically funded to the tune of twenty-eight per cent, that being the State's share in the joint venture. Costs incurred by the AAT must have been considerable and included the rent of the hearing room and office space as well as those associated with the Tribunal members themselves and their support staff. It is estimated that the total cost of the Appeal would have exceeded ten million dollars.

Clearly the expenditure of large amounts from the public purse to achieve essentially a 'null' result is highly undesirable. On the other hand, it is even less desirable that there be no public scrutiny of administrative decisions. This is particularly so for an organisation such as GBRMPA which has a high public profile and whose decisions have both the potential to affect large numbers of people as well as determine impacts on a World Heritage Area. It should be noted that it is technically possible, by amendment to the Great Barrier Reef Marine Park Regulations, for there to be no appeal to the AAT at all. There is no suggestion that this course of action be considered unless an alternative less legalistic appeals process is available. Although it was not an alternative to the AAT proceedings that occurred in the context of the Magnetic Quays development, a review such as was undertaken, post hoc, by J F Whitehouse serves as an example of another method of independent reconsideration which could be implemented (Review of the Magnetic Island Marina Development, July 1992). It is recommended that any review of the AAT powers and procedures consider the appropriateness of the AAT itself commissioning this kind of review and using the results of it to decide matters.

Given that there is a need for review of administrative decisions it is difficult to see many ways to circumvent the extended process of which this hearing is an example. If a proposal is complex then, clearly, it will take a considerable amount of time for any review body to make itself aware of all the implications of any decision it may make. The consideration of new material is important in this context.

In the early directions hearings before the Appeal commenced there was a clear directive made by the Deputy President that all materials that were to be considered by the Tribunal were to be produced before the hearing commenced, however new material was produced and witnesses allowed to provide supplementary reports as the case proceeded. These reports often addressed issues and criticisms that had been made of the original

reports during cross examination. To observers of the case a kind of Xeno's Paradox seemed to be unfolding in that there seemed a real chance that endeavours to come to a conclusion would only protract proceedings further.

As well as this, the fact that the Tribunal can consider any new material that has been prepared since the decision by the relevant body means that rather than 'reviewing' the decision the Tribunal effectively makes a new decision and does not, as it were, 'stand in the decision maker's shoes'. In this case, the great volume of new material that was placed before the Tribunal was, in many instances, precisely the detail that GBRMPA had been asking for at the time prior to making its decision. Whether that detail would have convinced GBRMPA to allow a permit will always remain a moot point but there is no doubt that provision of less than adequate detail to the original decision maker increases the likelihood of rejection of an application. The days of trust in the predictions of would-be developers have long gone in the wake of the number of unfinished or environmentally unsympathetic projects on the Queensland coast.

It is also possible that a would-be developer can misjudge the abilities or objectiveness of a decision maker or judge that there will be a better chance of a favourable decision by following the route of Appeal. If this is the case, then the strategy of appearing to abide by the system while providing less than adequate information may lead to a rejection of an application and the opportunity for the developer to pursue its aspirations through an avenue that is perceived to be more sympathetic.

In a case such as the one under discussion, it could be argued that the public interest is best served by all material being before the AAT since the decision that it makes will be the best that it could make at the time. On the other hand, it is clearly not in the public interest that the original decision maker be deprived of the information that is necessary for an informed decision nor is it in the public interest if the original decision maker is perceived to have been in error due to a paucity of information provided by the proponent. The public perception, if GBRMPA had had its decision overturned by this Appeal, or any Appeal in which it may be involved in future, will be that the organisation made an error of judgement in its initial decision. It is surely against the public interest if the professionalism, status and reliability of an organisation is called into question due to factors that are beyond its control.

The issue of new material should be addressed in any future review of the AAT and its procedures and it is recommended that the Tribunal control more stringently the tabling of new documentation.

It is also recommended that the Tribunal ensure that legal argument, as far as is possible, take place at the commencement of the case so that the parameters of the case can be better identified. In this case, GBRMPA took the view that a correct interpretation of section 30(2) of the AHC Act would mean that once an adverse effect had been demonstrated and a prudent and feasible alternative identified then the Tribunal had no alternative but to reject the Appeal. If a decision on this matter alone had been made early in the piece then it is suggested that the case could have been significantly curtailed,

notwithstanding the fact that issues presented would still have been extremely detailed. One avenue open to GBRMPA is to recommend to Government that its legislation be amended so that, pursuant to section 59 of the AAT Act, it can ask the AAT for an opinion regarding their likely interpretation of legislation that may be argued in the context of an Appeal. The Act states:

*'If an enactment so provides, the Tribunal may give an advisory opinion on a matter or question referred to it in accordance with the enactment and, for the purpose of giving such an opinion, the Tribunal may hold such hearings and inform itself in such manner as it thinks appropriate.'*

Where an Act so provides, the AAT may in turn request an opinion of other Courts in arriving at an opinion.

It is recommended that GBRMPA seek to have incorporated a suitable provision within its own legislation on the basis that seeking an opinion will allow the legal scenario to be better defined prior to an Appeal commencing. This would also allow a request to be made for an opinion from the Tribunal in circumstances such as QNM's withdrawal from proceedings. Furthermore, it would also seem that prior opinions on legislative interpretation would enhance consistency of approach by successive Tribunals.

Despite cogent legal argument regarding GBRMPA's view of the withdrawal of QNM and the consequences thereof, the Tribunal took the view that there were no rules that the Tribunal had to control withdrawal. It is recommended that, given the example of this case, any future review of the AAT should address this issue of control.

It is surely not in the public interest, indeed it is a farce that brings the AAT itself into disrepute, for a hearing to run to completion, no matter of what duration, only to terminate in a 'null' result.

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