SUPREME COURT OF QUEENSLAND

CITATION:	*New Acland Coal Pty Ltd v Smith & Ors (No 2)* [2018] QSC 119
PARTIES:	**NEW ACLAND COAL PTY LTD ACN 081 022 380** (Applicant) **v** **PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND** (First Respondent) and **OAKEY COAL ACTION ALLIANCE INC** (Second Respondent) and **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (Third Respondent)
FILE NO:	BS No 6002 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application for a statutory order of review
ORIGINATING COURT:	Land Court of Queensland
DELIVERED ON:	28 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	23 and 28 May 2018
JUDGE:	Bowskill J
ORDER:	**THE ORDER OF THE COURT IS THAT:**

1. Leave is granted to the Applicant to file and serve the Further Amended Application for a Statutory Order of Review and Application for Review in the form provided to the Court on 19 March 2018 and made Exhibit 5.

2. The decisions made by the Land Court on 31 May 2017 (Recommendation Decisions) recommending:

(a) rejection of applications for ML50232 and ML700002; and

(b) refusal of the application for amendment of environmental authority EPML00335713,

are set aside with effect from 31 May 2017.

3. The decision made by the delegate of the Third Respondent on 14 February 2018 to refuse the application for an amendment of environmental authority EPML00335713 is set aside with effect from 14 February 2018.

4. The matters to which the Land Court's Recommendation Decisions relate are referred back to the Land Court, to be further considered, by a different member of the Land Court, in accordance with the following orders.

5. For the purposes only of the further consideration in accordance with paragraph 4 and making of new recommendation decisions, the parties before the Land Court are bound by, and the Land Court is directed to proceed on the basis of, the findings and conclusions reached by the First Respondent, and set out in the Reasons of the First Respondent delivered on 31 May 2017, in relation to all issues before the Land Court at the original hearing, apart from those relating to the key issues of groundwater, intergenerational equity (as it relates to groundwater) and noise.

6. For the purposes only of the further consideration in accordance with paragraph 4 and making of new recommendation decisions, in so far as the findings and conclusions reached by the First Respondent in relation to the key issues of groundwater and intergenerational equity (as it relates to groundwater) are concerned, the Land Court is directed to exclude these issues from the further consideration, on the basis that it is not within the Land Court's jurisdiction, in this proceeding, to address the potential impacts of taking or interfering with groundwater in the area of the proposed mining lease.

7. For the purposes only of the further consideration in accordance with paragraph 4 and making of new recommendation decisions, in so far as the findings and conclusions reached by the First Respondent in

relation to the key issue of noise are concerned:

(a) The parties before the Land Court are bound by the factual findings made by the First Respondent in relation to noise.

(b) The Land Court is directed to further consider the key issue of noise, in accordance with this court's decision, delivered on 2 May 2018, and according to law, on the basis that the undisturbed factual findings as to noise stand, but on the basis of such further consideration of the evidence before the First Respondent, and any submissions, as the Land Court considers appropriate.

8. Subject to orders 5, 6 and 7, the further consideration of the matters, and making of new recommendation decisions in relation to applications for ML50232 and ML700002, and the application for amendment of environmental authority EPML00335713, is to be in accordance with any directions made by the Land Court.

9. Each party bear its own costs of the proceedings.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – GENERALLY – where the recommendation decisions of the Land Court under s 269 of the *Mineral Resources Act* 1989 and s 191 of the *Environmental Protection Act* 1994 are set aside and the matters to which the decisions relate are to be referred back to the Land Court of Queensland for further consideration – where there was criticism of the conduct of part of the hearing by the Land Court member, although not such as to find the ground of apprehended bias established, and also criticism of parts of the reasons given for the recommendation decisions by the Land Court member – where there was also subsequent conduct on the part of the Land Court member which might reasonably lead a fair-minded lay observer to apprehend that he might not bring an impartial or objective mind to further consideration of the matters – whether it is appropriate, in the interests of justice, to direct under s 30(1)(b) of the *Judicial Review Act* 1991 that the matters be further considered by a different member of the Land Court

ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – OTHER ORDERS – consideration of the

power of the Court to make directions and orders under s 30(1)(b) and s 30(1)(d) of the *Judicial Review Act* 1991, to narrow the scope of the Land Court's further consideration of the matters the subject of the recommendation decisions to avoid unnecessary re-litigation or re-examination of issues – whether it is appropriate to exercise the power to make such orders in the circumstances of this case

ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – COSTS – where the applicant was successful in obtaining an order that the Land Court's recommendation decisions be set aside, but was not successful on a number of its grounds of review, and was successful on a ground which assumed a different emphasis on the review proceeding to that which it had during the original Land Court proceeding – whether costs should follow the event, or the parties ought to bear their own costs

Judicial Review Act 1991 (Qld) s 30(1)
Uniform Civil Procedure Rules 1999 (Qld) r 681(1)

Armstrong v Boulton [1990] VR 215
Brackenreg v Comcare Australia (1995) 56 FCR 335
Comcare v Broadhurst (2011) 192 FCR 497
Comcare v Wuth (No 2) [2018] FCAFC 60
Hytch v O'Connell (No 2) [2018] QSC 99
Minister for Immigration and Multicultural Affairs v Wang (2003) 215 CLR 518
Murdoch v Lake [2014] QCA 269
New Acland Coal Pty Ltd v Smith & Ors [2018] QSC 88
Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal (1990) 26 FCR 39
Oshlack v Richmond River Council (1998) 193 CLR 72
Park Oh Ho v The Minister of State for Immigration and Ethnic Affairs (1989) 167 CLR 637
Ruddock v Vadarlis (No 2) (2001) 115 FCR 229
Sunland Group Ltd v Townsville City Council [2012] QCA 30
Vaitaiki v Minister for Immigration and Ethnic Affairs (1998) 150 ALR 608
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2009) 168 LGERA 1

COUNSEL: DR Gore QC and DG Clothier QC for the Applicant
Dr CJ McGrath for the Second Respondent (submissions prepared by SC Holt QC and Dr CJ McGrath)
KA Barlow QC and A Keyes for the Third Respondent

SOLICITORS: Clayton Utz for the Applicant
Environmental Defenders Office for the Second Respondent
Crown Law for the Third Respondent

[1] On 2 May 2018 I published my reasons[1] for allowing the application by NAC for a statutory order of review of the decision of the Land Court of Queensland made on 31 May 2017.[2]

[2] I did not make any orders on that occasion. I indicated that, having found ground 10 (in relation to groundwater), ground 7 (in relation to intergenerational equity) and ground 1(aii) (in relation to noise) of the application were established, I considered it appropriate:

(a) to set aside the decision of the Land Court made on 31 May 2017 recommending that the mining lease applications be rejected, and that the application to amend the environmental authority also be refused; and

(b) that an order be made referring the matter to which the decision relates back to the Land Court for further consideration, in accordance with my reasons and according to law, with appropriate directions (s 30(1)(b) of the *Judicial Review Act* 1991) to limit the scope of further consideration only to such aspects of the matter as is necessary, having regard to my reasons (at [378]-[379]).

[3] As foreshadowed in my decision, the parties subsequently filed submissions in relation to the orders and directions to be made, including in relation to whether the matter ought to be referred to a different member of the Land Court, and in relation to costs.

[4] A hearing in relation to those matters took place on 23 May 2017. As a result of some preliminary views articulated by me during the oral submissions of Mr Gore QC, on behalf of NAC, as to the issue of a different Land Court member, and the scope of directions for the further consideration of the matter by the Land Court (which was considerably narrower than proposed by the parties), each of the parties, by their representatives, expressed agreement with the approach I had in broad terms outlined. Accordingly, the need for further argument was significantly reduced.

[5] I indicated to the parties that I would prepare written reasons for the orders and directions I regard as appropriate in this matter, and circulate to them a draft of the proposed orders for their comments, with an opportunity for further submissions to be made if necessary. The draft orders, and a draft of these reasons to assist in considering the orders, were circulated to the parties on 24 May 2018. The orders made today reflect changes to the proposed orders agreed between the parties, or as a result of clarification sought by the parties, as explained below.

Orders 1 and 3 - setting aside the decision of the third respondent made on 14 February 2018

[6] It is appropriate that I briefly record the basis for orders 1 and 3.

[7] As noted in my decision at [63], on 14 February 2018, a final decision was made by a delegate of the third respondent to refuse the application to amend the environmental

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1 *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 (the **decision**). Abbreviations used in these reasons, have the same meaning as in the decision.

2 *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24.

authority, substantially relying upon the findings of the Land Court in relation to noise limits, intergenerational equity and groundwater.

[8] Prior to the hearing of the substantive application before me, the parties agreed upon a course of action, in the event the application for review was successful, in order to deal with the consequential decision of the third respondent. That course of action included a proposal to permit the applicant to file a further amended application for a statutory order of review, to include within the scope of this proceeding, review of the third respondent's decision made on 14 February 2018 (exhibit 5).

[9] Consistent with that agreed course of action (set out in exhibit 4), each of the active parties have consented to leave being granted to NAC to file that further amended application (order 1) and to an order that the third respondent's decision be set aside (order 3). Such an order is appropriate, in the circumstances.

Order 2 – setting aside the Land Court's decision

[10] Consistent with the indication I gave in [378] of my decision, by order 2 the decisions made by the Land Court on 31 May 2017, recommending rejection of the applications for ML50232 and ML700002, and refusal of the application for amendment of the environmental authority EPML00335713, are set aside with effect from 31 May 2017.

Order 4 – referral of the matter to a different member of the Land Court for further consideration

[11] Section 30(1) of the JR Act provides as follows:

> "On an application for a statutory order of review in relation to a decision, the court may make all or any of the following orders –
>
> (a) an order quashing or setting aside the decision, or a part of the decision, with effect from –
>
> (i) the day of the making of the order; …
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions (including the setting of time limits for the further consideration, and for preparatory steps in the further consideration) as the court determines;
>
> (c) an order declaring the rights of the parties in relation to any matter to which the decision relates;
>
> (d) an order directing any of the parties to do, or to refrain from doing, anything that the court considers necessary to do justice between the parties."

[12] The power to give directions under s 30(1)(b) includes, in a proper case, a power to direct that, on the matter being referred back to the Land Court for further consideration, the Land Court should be differently constituted.[3]

[13] The proper exercise of the power to make such a direction is not limited to circumstances where a decision is set aside for reasons of apparent bias, but extends to cases in which it is otherwise considered desirable, or in the interests of justice, for the further consideration to be by a different decision-maker.[4]

[14] There is a useful summary of general principles as to the exercise of the power to remit to a different decision-maker in the reasons of Young JA (with whom Beazley JA agreed) in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2009) 168 LGERA 1 at [119]-[121]:

> "[119] The Court certainly has power to remit a matter to a different judge. My researches have not discovered any overriding principle as to when it does so, but there are guidelines in the authorities. The key question is whether there will be a perception of a fair trial if the case is remitted to the judicial officer who previously heard it.
>
> [120] As Kirby J said in *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 556, a direction to remit to a fresh person:
>
> > … is not uncommon in the exercise of appellate or judicial review jurisdiction where a conclusion is reached that a rehearing by the same decision-maker would be *unlawful* (where the decision is set aside for reasons of actual or apparent bias) or otherwise *undesirable* (in the interests of justice).
>
> [121] The guidelines include the following:
>
> (1) Ordinarily, the Court of Appeal will not interfere with the assignment of the matter by the trial court …
>
> (2) The power to direct a remittal to a fresh person is to be exercised sparingly: *Seltsam Pty Ltd v Ghaleb* (2004) 3 DDCR 1 at [12].
>
> (3) [Note, however, the Full Federal Court in *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 took the contrary view, see per Davies and Foster JJ at 42 and that view has prevailed in subsequent cases in the Federal Court;

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[3] See, by analogy (in relation to s 481(1) of the *Migration Act* 1958 (Cth)) *Minister for Immigration and Multicultural Affairs v Wang* (2013) 215 CLR 518 at [4] per Gleeson CJ, at [62] per Gummow and Hayne JJ, and at [108], [113], [123] and [131] per Kirby J; cf at [22], [40]-[42] per McHugh J (that such a power could be exercised under the equivalent of sub-s 30(1)(d), not (b)).

[4] *MIMA v Wang* at [123] per Kirby J; see also *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 42-43 per Davies and Foster JJ*; Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 at 615 per Burchett J, at 623 per Whitlam J and at 631 per Branson J, agreeing with the orders proposed by Burchett J*; Comcare v Broadhurst* (2011) 192 FCR 497 at [90]-[94] per Tracey and Flick JJ.

see eg *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 26 AAR 227 at 232-233.][5]

(4) It must also be borne in mind just what is the extent of the power of the appellate court to order remitter …

(5) It may well be a ground for remitting a matter to a differently constituted court or tribunal where there have already been strong findings about the credibility of a party …

(6) If there has been stringent criticism of the judge or tribunal member in the appeal court, the appearance of justice might recommend that the matter be remitted to a fresh mind: *Brackenreg v Comcare Australia* (1995) 56 FCR 335 at 352 per Sheppard J.

(7) If there is a reasonable likelihood that a judicial officer or tribunal member will be perceived to have pre-judged an issue to be remitted to him or her, the matter should be remitted to a fresh mind: *Baulkham Hills Shire Council v Basemount Pty Ltd* (2003) 126 LGERA 339 at 345 per Tobias JA with whom Handley and Ipp JJA agreed.

(8) If the appeal hearing throws up a reasonable suggestion of bias in the original decision maker, remittal to a different person will be ordered: *Castle Constructions Pty Ltd v North Sydney Council* [(2007) 155 LGERA 52] per Tobias JA at 73. …"[6]

[15] In the case cited by Young JA at point (6), *Brackenreg v Comcare Australia* (1995) 56 FCR 335, Sheppard J said, at 352:

> "I think it would be quite wrong to send a matter back to a tribunal such as the Tribunal here after a lengthy criticism of the way in which its decision has been arrived at and ask it to give additional reasons for its conclusions. I am not suggesting for a moment that the Tribunal did not or would not act in good faith. But, in the administration of justice, appearances are as important as actualities. It would be very difficult to persuade a reasonable person observing what had happened that justice had necessarily been done if it turned out that the decision remained as it is. In my opinion, the matter should be remitted to the Tribunal for rehearing before a different member."[7]

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5 See also *Glen Cameron Nominees Pty Ltd v Transport Workers' Union of Australia (No 2)* [2017] FCA 1515 at [36], where Perram J suggested that the Full Court in *Comcare v Broadhurst* (2011) 192 FCR 497 had "heavily qualified" the comments of Davies and Foster JJ in *Northern NSW FM* at 42, referring to [90] in the reasons of Tracey and Flick JJ. I do not read *Comcare v Broadhurst* at [90] in that manner, although as the discussion at [89]-[94] of that case explains, the power ought not be approached on the basis of any inclination as to how it should "usually" be exercised, with each case depending on its own facts and circumstances (see also Downes J at [31]).

6 The 9th guideline (specific to the Land and Environment Court) and some references, omitted.

7 See also, to similar effect, *Sunland Group Ltd v Townsville City Council* [2012] QCA 30 at [57] per Muir JA, holding that any rehearing following the successful appeal should be before a different judge of the Planning

[16] In seeking an order that the matter be referred back to a different member of the Land Court, NAC relies on this court's conclusions in relation to the 2 February 2017 hearing, the conclusions reached in the decision about parts of the Reasons given by the first respondent, as well as subsequent conduct of the first respondent, at a costs hearing on 19 October 2017.

[17] As to the latter, on 19 October 2017 the parties appeared before the first respondent, for the purposes of dealing with costs arising in relation to the proceedings in the Land Court. From the transcript of proceedings on that day,[8] the first respondent indicated at the start of the hearing that "there's something I need to say at the start of this". What his Honour then went on to address was his concerns about subparagraph 14(ix) of NAC's application for judicial review.

[18] Ground 14 concerned an allegation of legal unreasonableness and, as originally filed, included a number of particulars. One of the particulars, set out in paragraph 14(ix), was that "the [first] Respondent put documents to at least one lay witness of the Applicant (Mr Denney) that he indicated he had 'randomly' selected from the etrial website including documents that required expert knowledge and asked the witness to interpret the documents".

[19] It is relevant to note that text in quotation marks also appeared in subparagraphs 14(ii) (by reference to a specific finding in the Reasons), 14(viii) (by reference to the first respondent's use of the phrase "lived experiences" of objectors) and 14(xii) (referring to the first respondent's description of the "literal truck load of evidence"). There are other phrases in quotation marks elsewhere in the application also.

[20] By the time of the hearing before me, none of the original particularised subparagraphs to ground 14 were relied upon, and the legal unreasonableness ground was pressed by reference to grounds 1 to 13 and 15 of the application.

[21] On 19 October 2017 the first respondent articulated his concern about subparagraph 14(ix) in the following way:

> "It's the use of the word 'randomly' in inverted commas, and, in my understanding the use of inverted commas around a word such as 'randomly', in the manner in which it's done, falls squarely within the definition of scare quote, which is an opponent saying something in such a way as to put that statement into ridicule or disregard. I won't go to the exact meaning of the word, but, in effect, it's saying he says it was done randomly, but it wasn't really done randomly. In applying normal English usage to the use of those words, it is, at the very least, an indirect attack on my truthfulness in a statement that I've made as to my coming across the document referred to in a random matter [sic, manner].
>
> I will go no further than [indistinct] to say what occurred in the way I came across the document, except to say I strenuously deny any allegation that my finding of the document was in any way other than random. Now, I have, of course, read and given instructions on the balance of NAC's application.

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and Environment Court in order to avoid a real risk of allegations of apprehended bias with the attendant possibility of a further appeal and delays.

[8] Exhibit MGZ-9 to Mr Geritz's affidavit, filed 23 November 2017.

> I think I'm a big boy. I've certainly been around every level of jurisdiction in Australia, including a substantive practice in the High Court in my earlier career, and have drafted many documents myself and served many documents myself which are of the same nature as the great bulk of the application for statutory review. I see that as par for the course and part of the litigious process we go through and have not the slightest concern in the world about anything that is said.
>
> That's just part of our legal process, which those of us experienced in the law completely understand, but that doesn't apply to the use of the word 'randomly' by way of a scare quote, and that I have seen – perhaps I am overly sensitive when I cut everything away, but seeing that as at least an indirect attack on my honesty is a completely different thing to everything else that is put, which is a question of getting things wrong or not understanding things or going off the track. That's fine. Not a concern in the world.
>
> I haven't been able to find precedents where a judge's honesty has been questioned in proceedings, but my concern is this. I could use some Australian colloquialisms to say how it made me feel when I read that, but to say that I was deeply hurt, offended and extremely unhappy would be putting it too lightly.
>
> I believe, in a judicial sense, that I could probably – but I can't put it any higher than that – put that to one side for the fair disposition of the matters currently before me, but I cannot say how I would respond subconsciously, and, of course, though the test is not how I feel or what I feel. It's how the independent observer would believe, if there was at least the apprehension of a bias in relation to this point.
>
> I am, though, deeply troubled that there may, with respect to this particular usage of this one word by NAC – the creation of circumstances which means that I can no longer deal with this matter."

[22] As a consequence of those comments, NAC submitted the costs applications should be adjourned, and the other parties present agreed.

[23] Although an affidavit was filed, to which this transcript was annexed, prior to the hearing before me commencing, this matter was not relied upon in any way at the hearing.

[24] As was the case at the 2 February 2017 hearing, at the 19 October 2017 hearing the first respondent again articulated his personal feelings of hurt and offence taken, on the basis of an imputation drawn by his Honour from the paragraph in the judicial review application. It is unnecessary to engage in any detailed analysis of this issue. I accept that the first respondent's comments in this regard are such as might reasonably lead a fair-minded lay observer to apprehend that he might not bring an impartial, or objective, mind to any further consideration of this matter.

[25] Taking that matter, together with the conclusions I reached in relation to aspects of the apprehended bias ground (even though it was not found to be established) and other parts of my decision in which the first respondent's Reasons were subject of criticism,

in all the circumstances I am satisfied it is appropriate, in the interests of justice, to exercise the power to make a direction that the matter be referred back to a different member of the Land Court for further consideration. Adopting Sheppard J's words, in the administration of justice, appearances are as important as actualities. In my view, a further hearing before the first respondent would not have the requisite appearance of fairness.

[26] Although the second respondent, OCAA, had initially opposed an order in these terms, it did not ultimately press its objection. OCAA's concern had been for the scope of any further hearing before the Land Court, if the matter were referred back to a different member. However, I am satisfied for the reasons that I will now come to, that it is within the proper exercise of the power conferred by s 30(1)(b) and (d) of the JR Act, for me to make directions which substantially narrow the scope of the further consideration of this matter, even if that is by a different Land Court member.

Power to make directions as to the scope of the further consideration of the matter by the Land Court

[27] I indicated in my decision that I considered it appropriate, on the matter being referred back to the Land Court, that directions be made to limit the scope of further consideration only to such aspects of the matter as is necessary, having regard to my reasons (at [379]).

[28] The High Court has held that the legislative purpose of a power in terms of s 30(1)(c) and s 30(1)(d) of the JR Act is:

> "… to allow **flexibility in the framing of orders** so that the issues properly raised in the review proceedings can be disposed of in a way which will achieve what is 'necessary to do justice between the parties' … and which will **avoid unnecessary re-litigation between the parties of those issues**. The scope of the powers to make orders which the sub-section confers should not, in the context of that legislative purpose, be constricted by undue technicality."[9]

[29] The orders initially proposed by each of NAC and OCAA (there being some disagreement as between them) gave far broader scope to re-litigation of issues, including issues not the subject of the review proceeding, than I consider is appropriate, or in the interests of the administration of justice. It was apparent from the written submissions of the parties that this was because of a view as to the effect of the High Court's decision in *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518.

[30] For the following reasons, in my view, *Wang* does not support, or require, such an approach in this case.

[31] The factual context of *Wang* arises under the *Migration Act* 1958. Mr Wang's application for a protection visa was rejected. That decision was affirmed by the Refugee Review Tribunal. He sought judicial review of that decision by the Federal Court. His application was dismissed at first instance, but then allowed on appeal to the

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[9] *Park Oh Ho v The Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 644 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ. Emphasis added.

Full Court. The Full Court remitted the matter to the Tribunal, reserving to the parties liberty to apply in relation to the constitution of the Tribunal, observing that if the remitted matter were heard by a differently constituted Tribunal, it might deprive Mr Wang of findings that were favourable to the outcome of his application. When it appeared the Tribunal would list the remitted matter for hearing by a different member, Mr Wang exercised the liberty to apply to the Full Court, which then ordered that the Tribunal be constituted by the same member who had previously considered his application. The Minister appealed from that decision to the High Court. The High Court[10] held that, whilst the Full Court had power to make an order remitting the matter to the Tribunal constituted in a particular way, the Court had erred in the exercise of its discretion, because its order was made on the assumption that fairness required Mr Wang to have the benefit of favourable findings made during the original review hearing, and on the further assumption that if the Tribunal were constituted by the same member, Mr Wang would receive the benefit of those findings, both of which were incorrect. Absent any other directions by the court (which were not made), the Tribunal was required to carry out its task afresh and make whatever findings of fact were appropriate at the time of its decision.

[32] The first point to be made about *Wang* is that it concerns a very different legislative context. Although the making of a recommendation decision under s 269 of the MRA and/or s 190 of the EPA is regarded as an administrative step consequent upon a statutorily prescribed inquiry conducted by the Land Court,[11] the procedure involved in a hearing before the Land Court for that purpose bears more relation to adversarial litigation than it does to the kind of administrative process involved under the *Migration Act*. Even in the absence of pleadings, issues of fact and law are joined as between the parties to the proceeding. In this regard, the observation of Gummow and Hayne JJ in *Wang* at [71] is apt:

> "In adversarial litigation, findings of fact that are made will reflect the joinder of issue between the parties. The **issues of fact and law joined between the parties will be defined** by interlocutory processes **or by the course of the hearing**. They are, therefore, issues which the parties have identified."[12]

Their Honours went on to say, in [71], that "A review by the Tribunal is a very different kind of process. It is not adversarial; there are no opposing parties; there are no issues joined. The person who has sought the review seeks a particular administrative decision – in this case the grant of a protection visa – and puts to the Tribunal whatever material or submission that person considers will assist that claim. The findings of fact that the Tribunal makes are those that it, rather than the claimant, let alone adversarial parties, considers to be necessary for it to make its decision. Those findings, therefore, cannot be treated as a determination of some question identified in any way that is distinct from the particular process of reasoning which the Tribunal adopts in reaching its decision."[13]

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[10] Gleeson CJ, McHugh J, Gummow and Hayne JJ (for varying reasons, as to the source of the power to make the order, but for similar reasons, as to the error in exercise of the power), Kirby J dissenting (finding no error in the exercise of the power).

[11] See the decision at [6].

[12] Emphasis added.

[13] See also at [18] per Gleeson CJ, at [37] per McHugh J and also at [77] per Gummow and Hayne JJ.

[33] The second point is that *Wang* is not authority for the proposition that, whenever a matter is returned, following judicial review, to the original decision-maker for further consideration, the original decision-maker is necessarily required to consider the whole of the matter afresh. Each of the judgments in *Wang* makes reference to the possibility, in an appropriate case, of remittal on a narrower basis, albeit that was not the question for determination in that case. For example:

Gleeson CJ said, at [17]:

> "It is tempting, but dangerous, to seek analogies in the field of adversarial litigation. An appeal court, pursuant to statutory power, may order a re-trial limited to particular issues. But where the issues on a re-trial are at large, it would come as a surprise to see a court of appeal order a re-trial before a particular judge for the reason that the judge is thought to be more, or less, likely than others to resolve the issues in a particular fashion. The Full Court, having set aside the Tribunal's decision, appears to have contemplated that the further hearing would in some way be limited, but it made no order to that effect; it attempted to achieve the same practical result by indirect means. Whether it could have achieved the intended result by making different orders, or giving different directions, is not a matter that arises for decision."[14]

McHugh J (who had a different view from the other members of the court, as to whether the power to direct, under the equivalent of s 30(1)(b), enabled the Full Court to make an order as to the constitution of the Tribunal), nevertheless said at [36]:

> "… In a particular case, **the power to direct may extend to directing *the Tribunal* to treat certain facts as established. But even then, it may need to be qualified by an 'unless' clause.** And in determining whether the Tribunal can or should be given a direction, the Federal Court must take into account that the Tribunal is not a court; nor does it exercise judicial power. Care must be taken not to confuse the role of the Tribunal with that of a court which must necessarily **find or rely on facts that are relevant to defined issues between the parties, issues that concern facts that have occurred in the past**."[15]

And at [38]:

> "… it may be open [in an appropriate case] to the Federal Court to direct the Tribunal only to decide the point in respect of which the Court has found legal error…"

And at [45]:

> "Although the Full Court appears to have made the order that it did to ensure that Mr Wang got the benefit of the previous factual findings, it did not direct the Tribunal, in rehearing the application, to apply or accept the findings that it had made in the original hearing. It seems to have assumed

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[14] See also at [39] per McHugh J.

[15] Bold emphasis added. Italics in the original.

> that, because the matter would go back to the same person, Mr Wang would receive the same favourable findings on certain issues…"

Gummow and Hayne JJ said, at [62], of the power in the equivalent of s 30(1)(b), to refer the matter for further consideration "subject to such directions as the Court thinks fit":

> "The **amplitude of that power should not be unnecessarily confined**.[16] It is a power that includes directing that the matter be heard by the Tribunal constituted differently from its constitution for a decision that was set aside…"[17]

Further, at [66]-[68], they said:

> "[66] … all three members of the Court appear to have based the decision to direct that the Tribunal be constituted by the member whose decision had been set aside on the conclusion that it was desirable, perhaps even necessary, to preserve some findings that had been made at the first, failed, review by the Tribunal. Not only was the conclusion wrong, the Court's order did not give effect to it.
>
> [67] The Court's direction that the Tribunal be constituted in a particular way said nothing about how the Tribunal, so constituted, should regard findings made in the course of the first review. **The Court's orders**, taken as a whole, provided for the Tribunal to **begin again** its statutory task of reviewing the decision to refuse the respondent a protection visa. …
>
> [68] Whether any findings from the first review would be preserved would entirely depend upon the view formed by the Tribunal in conducting the second review. On that second review the respondent, as applicant for a visa, could be expected to appear to give evidence and present arguments (s 425), and, **so far as the Court's orders were concerned**, it was a review to be conducted in the ordinary way. At best, then, any preservation of findings was speculative and depended upon an assumption that the member constituting the Tribunal would be unlikely to depart from views formed earlier despite considering any further evidence or argument…"[18]

Kirby J (who dissented as to the result, finding that the Full Court did not err in the exercise of its discretion, having agreed with the majority as to the power) began his reasons at [80] by reference to the passage I have set out above from the High Court's unanimous decision in *Park Oh Ho* (see also at [112]). His Honour also said, at [114] that (the equivalent of s 30(1)):

> "… is designed to confer specified powers on the Federal Court. That Court is a superior court created under the Constitution. It has been repeatedly held that legislative conferral of such powers on a court is

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[16] Citing, among others, *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.
[17] Emphasis added.
[18] Emphasis added.

> not to be narrowly construed. This is so because the receptacle of the power can be trusted to exercise it only where such exercise is warranted. A superior court must normally be afforded a large field of discretionary power with which to respond to the myriad circumstances coming before it. It would be contrary to legal authority and principle to read the scope of the power conferred by s 481(1)(b) narrowly."

Further, Kirby J, again by reference to the passage from *Park Oh Ho* (which was expressly directed to the power under the equivalent of s 30(1)(c) and (d)) said, at [116]:

> "… the **desirability of avoiding unnecessary re-examination** of the issues for decision is an equally relevant consideration in fashioning an order under s 481(1)(b). The whole spirit of s 481(1) is one that embraces flexibility and the adjustment of the orders in a way that is appropriate to the circumstances of the particular case, **specifically the correction of the identified error in the decision-making process**. Such an approach is compatible with the closing words of par (d), by which the Federal Court is empowered to make an order of the specified kind that it 'considers necessary to do justice between the parties'."[19]

[34] I proceed on the basis that s 30(1)(b) and (d) confer broad power on this court to make directions and orders. The power allows flexibility in the framing of orders and directions, so that the issues raised in the review proceedings can be disposed of in a way which will achieve what is necessary in order to do justice between the parties and which will avoid unnecessary re-litigation, or re-examination of issues.

[35] The original hearing before the Land Court was substantial and lengthy, extending over almost 100 days. It involved many complex issues which were substantively heard and determined by the Land Court, reflected in the findings and conclusions articulated in the detailed Reasons delivered on 31 May 2017.[20] As noted at [4] of the decision, in respect of most of the issues, the first respondent found either that there was no impact, or any potential impacts could be appropriately managed. There were three issues which lead the first respondent to recommend refusal of the mining lease applications and application to amend the environmental authority: noise, groundwater and, relatedly, intergenerational equity. Those issues were the focus of the grounds of review at the hearing before me (in addition to the apprehended bias ground).

[36] No party to the Land Court proceeding sought to review the first respondent's decision in relation to any of the other issues. The conclusions I reached in relation to the grounds of review relating to noise, groundwater and, relatedly, intergenerational equity, are discrete, and do not affect, or infect, the findings in relation to the other issues dealt with by the first respondent. The position would be different had I found the apprehended bias ground was established, as such a finding would infect the whole of the Land Court's decision. In those circumstances, I do not consider that it is in the interests of justice, including the interests of the parties and the administration of justice more broadly, for the matter the subject of the Land Court's decision, to be referred

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[19] Emphasis added.

[20] See the decision at [3]-[4] and [95].

back to the Land Court in a manner which would leave open the re-litigation of any of the issues which were untouched by the judicial review proceeding.

[37] The parties have already expended a considerable amount of money and time, as well as personal resources, on this matter. There is still the separate procedure under the *Water Act* to be undertaken, which may in itself result in a further, separate hearing before the Land Court. Given the particular scope of the errors in the decision-making process which have been identified, I can see no reason why orders and directions which quite specifically define and delimit the scope of the further consideration to be undertaken by the Land Court should not be made. It would be entirely inimical to the interests of justice to permit the parties to avoid the binding effect of the findings and conclusions already reached by the Land Court, after a full hearing, which are not tainted in any way by the outcome of this judicial review proceeding.

[38] Accordingly, in my view, the appropriate orders to be made (in addition to orders 1 to 3 discussed above) are to the effect that:

4. The matter to which the Land Court's decision, made on 31 May 2017, relates is referred back to the Land Court, to be further considered, by a different member of the Land Court, in accordance with the following orders.

5. The parties are bound by, and the new Land Court member is to proceed on the basis of, the findings and conclusions reached by the first respondent, and set out in the Reasons delivered on 31 May 2017, in relation to all issues before the Land Court at the original hearing, apart from those relating to the key issues of groundwater, intergenerational equity (as it relates to groundwater) and noise.

6. In so far as the findings and conclusions reached by the first respondent in relation to the key issues of groundwater and intergenerational equity (as it relates to groundwater) are concerned, the new Land Court member is directed to exclude these issues from the further consideration, on the basis that it is not within the Land Court's jurisdiction, in this proceeding, to address the potential impacts of taking or interfering with groundwater in the area of the proposed mining lease.

7. In so far as the findings and conclusions reached by the first respondent in relation to the key issue of noise are concerned:

   (a) The parties are bound by the factual findings made by the first respondent in relation to noise limits.

   (b) The new Land Court member is directed to further consider the key issue of noise, in accordance with this court's decision and according to law, on the basis that the undisturbed factual findings as to noise limits stand, but on the basis of such further consideration of the evidence before the first respondent, and any submissions, as the new Land Court member considers appropriate.

8. Subject to orders 2, 3 and 4, the further consideration of the matter, and making of a recommendation decision under s 269 of the MRA and s 190 EPA, is to be in accordance with any directions made by the new Land Court member.

[39] As earlier indicated, on 24 May 2018 the parties were provided with a draft order in these terms for comment. The orders made today, and recorded in this judgment, reflect the following changes:

1. Amendments to clarify that the binding effect of the first respondent's findings and conclusions is limited to the further consideration in accordance with order 4, and making of new recommendation decisions. Relevantly, the third respondent, as the ultimate decision-maker in relation to the application to amend the environmental authority under the *Environmental Protection Act* 1994, is not bound by those findings and conclusions when making its final decision under s 194 of that Act.

2. Amendments to clarify that all of the parties to the Land Court proceeding are bound by the findings and conclusions, not merely the parties to the review proceeding in this court.

3. An amendment to order 7, to clarify that the parties are bound by the factual findings made by the first respondent in relation to noise (not simply the factual findings in relation to the noise *limits* preferred by the first respondent). However, to be clear, the intention of orders 5 and 7 is that the Land Court, upon its further consideration and making of new recommendation decisions, is not bound by the first respondent's conclusions in relation to the issue of noise (including as to the form and substance of any conditions to be included in any amended environmental authority). That will be a matter for the Land Court to address, upon its further consideration of the matter, as directed by order 7(b), in accordance with this court's decision and according to law, on the basis that the undisturbed factual findings as to noise stand, but on the basis of such further consideration of the evidence before the first respondent, and any submissions, as the new Land Court member considers appropriate.

[40] Another matter raised by OCAA, but not resulting in any amendment to the orders, was whether order 5 could be misinterpreted in such a way that the Land Court, upon its further consideration, may not consider the groundwater quality conditions in schedule D of the draft environmental authority. Order 5 does not have the effect of preventing the Land Court from considering, as it is required to do, the draft environmental authority, including the conditions in schedule D (s 191(d) of the EPA). Order 5 must be read in conjunction with this court's decision. The key issue of groundwater, which I have found was not within the jurisdiction of the Land Court to consider, concerned the potential impact of the activity of taking or interfering with underground water in the course of or as a result of carrying out authorised activities under the proposed mining lease (decision at [225]-[227]). The potential impact of authorised activities under the proposed mining lease on the *quality* of groundwater in the area of the mining lease (cf [236] of the decision) was not a substantive issue litigated in the original Land Court proceedings. OCAA has made it clear it does not intend to raise that as a substantive issue on the further hearing by the Land Court, but was only concerned to ensure the Land Court would not be prevented, by the orders made today, from considering the conditions of the draft environmental authority. It would not.

Costs

[41] NAC seeks an order that the second respondent, OCAA, pay its costs of the judicial review application. NAC does not seek an order for costs against the third respondent.

Appropriately, since the first respondent did not participate in this proceeding, consistent with the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, no order is sought against the first respondent either.[21]

[42] NAC relies upon r 681(1) of the *Uniform Civil Procedure Rules* 1999, which provides that costs of a proceeding are in the discretion of the court, but follow the event, unless the court orders otherwise.[22] NAC submits that as it succeeded in obtaining orders that the first respondent's recommendation decisions be set aside, its costs should follow that event, and be paid by OCAA.

[43] OCAA opposes any order for costs, and submits the appropriate order is that each party bear its own costs of the proceedings in this court.

[44] In my view that is the appropriate order to be made, having regard to the following:

1. As McHugh J explained in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67], the rationale for the principle that costs usually follow the event:

> "… is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation."

2. Here, the litigation had to be brought by NAC, in order for it to correct what it contended, and has been found, was a decision made otherwise than in accordance with law. The fact that OCAA opposed the application, and took on the role of the primary contradictor (the third respondent taking a much narrower role) may have added to the costs of the proceeding, but did not cause NAC to incur the expense it did. It must also be acknowledged that having a contradictor is of assistance to the court in determining matters such as this.[23]

3. In exercising the discretion to award costs, the court may have regard to the issues in respect of which each of the parties has been successful and apportion costs accordingly.[24] Although NAC has been successful, in obtaining orders setting aside the Land Court's recommendation decisions, it raised many grounds and was not successful on all of them. The ground of apprehended bias, on which NAC did not succeed, occupied a considerable part of the hearing, both in terms of the written and oral submissions. Although NAC emphasises my finding that it

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[21] See also *Our Town FM Pty Ltd v Australian Broadcasting Tribunal & Anor (No 3)* (1987) 77 ALR 609 at 612, that it would only be in an unusual case that the court would consider an award of costs against the decision-maker.

[22] Although s 49 of the JR Act makes provision for an application by, inter alia, the applicant for review, for another party to the review application to pay its costs, such an application may only be made prospectively, not when the substantive decision has been handed down and costs of the proceeding have already been incurred. In such a case, as here, the rules of court apply: *Attorney-General (Qld) v Barnes* [2014] QCA 152 at [44]-[45].

[23] See *Hytch v O'Connell (No 2)* [2018] QSC 99 at [4].

[24] See *Murdoch v Lake* [2014] QCA 269 at [24] per Morrison JA (Boddice J agreeing); see also *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [11] per Black CJ and French J.

was an argument which was open and reasonably made, and the positive finding at step 1 of the *Ebner* test, in my view that involves too fine a division of "(sub)issues". The ground was not established. The groundwater issues also occupied a considerable part of the hearing. NAC succeeded on this ground, on a basis which I found was not clearly articulated (by any of the parties) before the first respondent. Whilst it may not be the case that NAC succeeded on a ground not raised at all before the first respondent, the arguments certainly "assumed a different emphasis" in this court.[25] Of the remaining grounds, NAC enjoyed a measure of success on the noise ground, but less on the others.

[45] In those circumstances, it seems to me appropriate to order that each party bear its own costs of the proceedings.

[25] Cf *Armstrong v Boulton* [1990] VR 215 at 223 and *Comcare v Wuth (No 2)* [2018] FCAFC 60 at [17].