LAND COURT OF QUEENSLAND

CITATION:	*Cement Australia (Exploration) Pty Ltd & Anor v East End Mine Action Group Inc & Anor (No 3)* [2021] QLC 15
PARTIES:	**Cement Australia (Exploration) Pty Ltd** ACN 009 800 355 (applicant) **Cement Australia (Queensland) Pty Ltd** ACN 009 658 520 (applicant) v **East End Mine Action Group Inc** (active objector) **Jim Elliott, Maurice James Elliott, Frank Lenz, Anne Patricia Kelly, Robert Geaney, Ross Rideout, Paula Rideout, Theresa May Derrington, Tom Chapman, Lynne Chapman, Philip Mann, Claire Mann, Brent Lashford, Gladstone Regional Council** (non-active objectors) and **Chief Executive, Department of Environment and Science** (statutory party)
FILE NO/s:	MRA241-18 EPA242-18
DIVISION:	General Division
PROCEEDING:	Application to reopen the hearing
DELIVERED ON:	29 March 2021
DELIVERED AT:	Brisbane
HEARD ON:	23 March 2021
HEARD AT:	Brisbane

MEMBER: JR McNamara

ORDER/S: **The application is dismissed.**

CATCHWORDS: PROCEDURE – where the matter had concluded and judgment was pending – where there was an application by the active objector to reopen proceedings to hear fresh evidence – where an application to reopen to hear fresh evidence is valid where the Court considers it essential in order to impart fairness and equity — where the Court considered the criteria governing the exercise of the discretionary power to reopen to admit fresh evidence – where the Court considered whether admission of further evidence was so material that the interests of justice require its admission – where the Court considered whether further evidence was likely to affect the result of the case if it were admitted – where the Court considered whether the further evidence could not by reasonable diligence have been discovered earlier – where the Court considered whether no prejudice would ensue by reason of the late admission of the further evidence – where the Court held that none of the evidence which the active objector sought to admit by way of reopening satisfied the established criteria – where the Court dismissed the application

Environmental Protection Act 1994 s 207, s 210
Land Court Act 2000 s 7, s 7A(1)(b)

Citigold Corporation Limited v Chief Executive, Department of Environment & Heritage Protection (No. 3) [2016] QLC 21, cited
EB v CT (No 2) [2008] QSC 306, cited
New Acland Coal Pty Ltd v Ashman & Ors (No. 3) [2017] QLC 1, cited
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd (No 1) (2019) 2 QR 271; [2019] QCA 184, cited
Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors [2007] QCA 338, cited

APPEARANCES: D Kelly QC, with J O'Connor (instructed by Carter Newell) for the applicant
A Lucke (advocate) for the active objector
K McAuliffe-Lake (instructed by Litigation Unit, Department of Environment and Science) for the statutory party

Overview

[1] The hearing of objections in relation to the grant of Mining Lease (ML) ML80156 and draft amended environmental authority EPML00658113 (the ML and amended EA) occurred in Gladstone in July 2020. Submissions closed in October 2020 and a decision is pending.

[2] This application was framed by the active objector as an application to reopen the hearing to hear fresh evidence concerning the technical validation of the mine dewatering impacts contained in the Pacific Environment Model, by officer/s of the statutory party or associated agencies and relied upon by the delegated officer who issued the draft environmental authority pursuant to ss 207 and 210 of the 2013 version of the *Environmental Protection Act 1994*.

[3] For convenience, although it is the active party who is the applicant on the General Application, the applicant will be referred to as 'EEMAG' for the purposes of these reasons, and the applicant for the ML and the amended EA will be referred to as 'Cement Australia'.

The general application

[4] The form 12 General Application signed by Mr Lucke, advocate for EEMAG, dated 15 February 2021 was filed in the Land Court Registry. The facts, circumstances or other relevant matters on which the application is based are contained in Attachment A of Mr Lucke's form 12 General Application.

[5] In summary, the matters identified in Attachment A include that:

- It was only while questioning the delegated officer of the statutory party at the hearing that EEMAG became aware that a validation exercise of the Pacific Environment model had been conducted by departmental technical officers and relied upon by the statutory party prior to issuing the draft EA;
- Written requests following the hearing (but before the close of submissions) to obtain access to the report concerning the validation exercise had been denied;
- Right to Information (RTI) requests were made of the Department of Environment and Science (DES) and the Department of Natural Resources,

Mines and Energy (DNRME), and on 15 January 2021, '158 pages of RTI from DNRME was released to EEMAG' including a 7 page 'Review of Pacific Environment Model' dated 11 January 2018 by DNRME hydrology experts Mr Bleakley and Mr Larsen;

- The DNRME Review does not challenge or disagree with the Pacific Environmental Model's findings of mine dewatering impacts into Bracewell, however 'it does contain evidence of serious shortcomings and deficiencies that reflect on the integrity of the model's performance'; and
- It is then stated that: 'if justice and public interest is to prevail, it is important for the sake of transparency and accountability of Departmental decisions, and consideration of just how and why DES has withheld key reports apparently used in their decision making'.

[6] The orders and other relief sought in Attachment B include:

- Order/s 'to have the Land Court reopen to hear fresh evidence recently acquired under RTI and other sources';
- Order/s that DES documentation 'be made available and thoroughly examined, and the probity of the decision(s) established, or the Pacific Environment Model's findings include mine impacts into Bracewell, be fully expressed …'; and
- The remaining content of Attachment B suggest what EEMAG would propose if the hearing was reopened including: subpoena 'a witness' and documentation in place of Dr James, and seek answers to the 'administrative process DES relied upon'.

[7] The grounds on which the orders or other relief are sought is found in Attachment C:

- That DES excluded essential information from objectors;
- That the findings in the Pacific Environment Model of permeability at depth is not consistent 'with the policy setting of DES or Cement Australia' and is a departure from the models findings;

- That technical staff who undertook the validation exercise referred to in evidence, other than the DNRME Review, have not been identified; and
- Those technical staff should have be available at the hearing.

General principles

[8] A general application to reopen to hear fresh evidence is valid where the Court considers it essential in order to impart fairness and equity when considering the matter. The granting of leave to reopen is a discretionary matter for the Court.[1]

[9] In this matter EEMAG rely on the reopening of *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)*[2] hearing as comparable to the circumstances in this matter. EEMAG also rely on s 7 of the *Land Court Act 2000*, which requires that the Court is to be guided by equity and good conscience and the substantial merits of the case without regard to legal technicalities and as such, leave to reopen is a discretionary matter for the Court.

[10] The basis of EEMAGs application is that the hearing needs to be reopened to hear 'crucial new evidence' that was 'unknown and unavailable to EEMAG at the time of the July 2020 hearing, and was not provided by DES at the hearing'.

[11] EEMAG says that the interests of 'justice and public interest' arise in rehearing the matter to include the fresh evidence.

Legal principles

[12] In *New Acland (No. 3)*, the application to reopen was brought by New Acland to introduce new evidence (in the form of 2016 IESC[3] Final Advice[4]); or, leave to reopen to tender the document. The objectors opposed the application to reopen. Member Smith referred to *Citigold Corporation Limited v Chief Executive, Department of Environment & Heritage Protection (No. 3)*,[5] where he had noted the guiding principle is whether or not the interests of justice are better served by

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1 *Land Court Act 2000* s 7A(1)(b).
2 [2017] QLC 1 (*New Acland (No. 3)*).
3 Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development.
4 The report was finalised after the hearing but before judgment.
5 [2016] QLC 21 (*Citigold*); In *Citigold* leave was granted to admit an affidavit in the context of considering a newly gazetted guideline.

allowing or rejecting the application for leave to reopen, and, as noted in the Cement Australia written submissions, he relevantly stated:

> "The considerations relevant to determining whether to permit the reopening of a case where the hearing has concluded but judgment is pending, cited with approval by Appelgarth J [sic] in *EB v CT (No. 2)*, are dealt with in the case of *Reid v Brett* as follows: 'The criteria governing the exercise of the discretionary power to re-open a case to admit further evidence where the hearing has concluded but judgment has not been delivered have been said to be as follows: (a) the further evidence is so material that the interests of justice require its admission; (b) the further evidence, if accepted, would most probably affect the result of the case; (c) the further evidence could not by reasonable diligence have been discovered earlier; and (d) no prejudice would ensue to the other party by reason of the late admission of the further evidence.'"[6] (citations omitted)

[13] In *New Acland (No. 3)*, the applicant argued that the material would probably affect the outcome of the case, it could not reasonably have been discovered earlier, and it would result in no prejudice by reason of further admissions. They claimed that the Court's reliance on the superseded material would lead the court into error.

[14] Member Smith accepted that the 2016 advice satisfied the Reid criteria; that the advice could not be considered without reopening the hearing for want of procedural fairness, minimisation of prejudice, and equitable treatment of the parties; and where the effects were to be material, the parties were entitled to engage with the new evidence which might only occur by reopening the matter.

[15] As noted in Cement Australia's written and oral submissions in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd (No 1)*,[7] the Court of Appeal considered, amongst other things, the application to reopen and the decision of Member Smith in *New Acland (No. 3)*. Sofronoff P (with whom Philippides JA and Burns J agreed) observed:

> "[28] In a civil trial in the Supreme Court, the exercise of the discretion whether to allow a reopening would not have been very difficult. It would have required the applicant to explain its failure to lead the evidence at the appropriate time and why the evidence was said to be significant enough to warrant a disruption to the ordinary processes. In the Land Court, the position was not so straight forward because the result of the exercise by the Court of its jurisdiction would not be a binding decision; it would be two recommendations. Those recommendations would be made to the Minister responsible for the administration of the *Mineral Resources Act* 1989 and to the administering authority under the *Environmental Protection Act* 1994, respectively. The Minister would have to consider the reasons and recommendations of the Member, as well as other materials,

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6 *Citigold* at [11].
7 [2019] QCA 184.

> before coming to a decision. If the Minister thought that there was evidence that was relevant, but which had not been considered by the Member in formulating his recommendation, such as Acland's proposed new evidence, the Minister might refer the whole of the matter back to the Land Court for its consideration of the further evidence. A balance has to be struck between the delay occasioned by the reopening of the case and the delay that might have been occasioned anyway if a reopening were refused but the Minister later decided that the Land Court should consider the later information.
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> [29] The Member was acutely aware of this dimension to the issue."

The EEMAG application

[16] EEMAG seek leave to introduce evidence and to reopen the hearing.

[17] Cement Australia and the statutory party oppose the application on the basis that the Reid criteria are not satisfied.

The scope of the application following submissions

[18] EEMAGs position regarding the scope of the Application was discussed during a review of the matter on 24 February 2021 and further clarified by submissions on 10 March 2021. The EEMAG submissions were accompanied by an affidavit of Groundwater Modelling Engineer, Mr Jerome Arunakumaren. Both the statutory party and Cement Australia filed submissions and affidavits of the respective lawyers with the carriage of these matters.

[19] The statutory party (in submissions) distilled the scope of the application following the EEMAG submissions to three issues. Those issues (as follows) were discussed at the commencement of the hearing and provided the agenda for the hearing:

1. To introduce correspondence primarily arising through RTI requests for the purposes of transparency and accountability of departmental decisions and consideration of how and why DES withheld reports apparently used in their decision making (**Correspondence**);

2. To introduce a document referred to as a DNRME Review of the Pacific Environment 2018 model obtained under RTI, and to engage a Groundwater Modelling Engineer to provide evidence in that regard (**The DNRME Review**); and

3. To introduce 2019-2020 Water Monitoring Data obtained after the hearing had concluded for the purpose of examining whether the draft EA trigger levels have been exceeded; and to assess whether the data might lead to certain conclusions regarding aquifer recharge (**Water Monitoring Data**).

Correspondence

[20] At the July 2020 hearing Ms Tansley, Manager (Assessment) Minerals at DES, gave evidence. Ms Tansley is the delegated officer who decided to issue the draft EA. Her evidence detailed the processes leading to that decision.

[21] In cross examination by Mr Lucke regarding technical detail in the groundwater impact modelling report (the 11 January 2018 Pacific Environment Groundwater Modelling draft Report), Ms Tansley said:

> "So we had a look at the model and I do say again that I'm not a technical expert, but if I can just walk you through the process. The modelling is validated by technical staff that we have at the Department who do have the technical expertise and I rely on the advice provided by them. So as far as the model goes, in terms of looking at potential impacts of the expansion of the mine, that was considered and we included levels and triggers for ground water quantity and quality in the draft environmental authority."[8]

[22] There followed an exchange:

> "Is there any reason why the assessment provided by the experts on the validity of this model – is there any reason why that can't be made publicly available?
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> MS McAULIFFE-LAKE: Your Honour, I'm not sure what assessment he's referring to.
>
> MR LUCKE: Well, I mean, let me explain. I regard this as an unproven, untested model. It's the Darcian flow model, just like all the previous models. And, yet, the model itself is fundamental to the application and the decisions that were made based on it will affect the lives of those stakeholders.
>
> McNAMARA M: So, sorry, you're asking about would a document be publicly available; which document are you talking about?
>
> MR LUCKE: Well, Ms Tansley suggested that the model was taken back into the departments for analysis and for verification as to suitability."[9]

[23] This led to correspondence from Mr Lucke after the hearing had concluded requesting the timely provision of departmental officers' conclusions regarding their examination and review of the 2018 Pacific Environment Model. The request of Mr Lucke was followed up by inter and intra agency correspondence which produced a document identified as the 31 January 2018 'Review of groundwater modelling

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8 T 5-36, lines 46 to 5-37, line 6.
9 T 5-37, lines 8 to 23.

report' (referred to in these reasons as the DNRME Review). The DNRME Review was provided to EEMAG pursuant to an RTI request.

[24] The material EEMAG would seek to introduce should the proceedings be reopened would, according to their application and submissions, appear to be the correspondence referred to in [23] above.

Has it been established that the evidence was so material that the interests of justice required its admission?

[25] EEMAG says that it is important for the sake of transparency and accountability of DES decisions for them to explain how and why they (DES) withheld key reports apparently used in their decision making. There appears to be only one document which might qualify as a 'report'. That is the DNRME Review which is discussed later in these reasons. EEMAG do not explain clearly why correspondence between DES and EEMAG, or between DES and DNRME, after the hearing is so material that the interests of justice require its admission.

[26] The statutory party says that all correspondence referred to was created after the hearing had concluded. They strenuously deny that any material has been withheld and the imputation of dishonesty. They say that EEMAG had sought, after the hearing, 'further material' which was in fact provided through RTI. They say the correspondence is of no probative value and is not material to a matter to be determined by the Court in these proceedings.

Would the further evidence if accepted most probably affect the result of the proceeding?

[27] The statutory party says that the correspondence does not speak to any matter within the scope of the hearing and in that regard could not affect the outcome of the proceeding.

Could the further evidence by reasonable diligence not have been discovered earlier?

[28] The statutory party says that the (EEMAG/DES) correspondence did not exist at the time of the hearing and in that regard could not have been discovered earlier.

Will no prejudice ensue to the other party by reason of the late admissions of the further evidence?

[29] The statutory party says that prejudice would be suffered in the importance of finality of litigation, cost and delay, and having to bear the prejudicial burden of disproving an allegation of dishonesty.

The DNRME Review

[30] The document (as opposed to the correspondence) EEMAG seek to introduce is the 'Review of groundwater modelling report 31 January 2018' obtained under RTI.

[31] In written submissions DES describe the document as follows:

> "The DNRME Review is an internal document between state government departments evidencing a step in the process taken to arrive, ultimately, at the conditions set in the Draft EA. It is not a determination or decision. It preceded the drafting of the Draft EA (and the Assessment Report), so while it queries points of the Pacific Environment Model, it provides little useful information regarding the conditions ultimately included in the Draft EA that is not already provided by the draft EA and the Assessment Report."[10]

Has it been established that the evidence was so material that the interests of justice required its admission?

[32] EEMAG says that while the DNRME Review does not challenge or disagree with the Pacific Environment Model's finding on mine dewatering impacts into Bracewell: 'it does contain evidence of serious shortcomings and deficiencies that reflect on the integrity of the model's performance'.

[33] EEMAG has not explained why that evidence is so material that the interests of justice require its admission.

[34] In the hearing of the application to reopen and as noted already, the evidence of Ms Tansley concerning the 'validation of the Pacific Environment Model' was explored. Counsel for the statutory party say that in evidence Ms Tansley was describing a process, whereas Mr Lucke seemingly understood Ms Tansley to be referring to a specific assessment document or report. The transcript would appear to bear this out. The relevant passage is as follows:

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10 Statutory party written submissions at [33].

> "So we had a look at the model and I do say again that I'm not a technical expert, but if I can just walk you through the process. The modelling is validated by technical staff that we have at the Department who do have the technical expertise and I rely on the advice provided by them. So as far as the model goes, in terms of looking at potential impacts of the expansion of the mine, that was considered and we included levels and triggers for ground water quantity and quality in the draft environmental authority.
>
> Is there any reason why the assessment provided by the experts on the validity of this model – is there any reason why that can't be made publicly available?
>
> MS McAULIFFE-LAKE: Your Honour, I'm not sure what assessment he's referring to."[11]

[35] It appears from the transcript that what Ms Tansley refers to as a 'process' was recharacterised by Mr Lucke as an 'assessment provide by the experts', which assumed the existence of something in the nature of a compiled validation report.

[36] On that understanding EEMAG contend that the DNRME Review document was the 'assessment provided by (the) experts on the validity of this model' and contend that it constitutes a technical validation relied upon by the delegated officer of the statutory party leading to the issuing of the draft environmental authority. On that basis they say it should have been produced and provided to EEMAG ahead of the hearing.

[37] The statutory Party says the DNRME Review 'is an internal document… a step in the process… it is not a determination or decision…' and that EEMAG does not identify any connection between matters in the DNRME Review and any condition in the draft Environmental Authority. In that regard, the statutory party also says that the Groundwater Modelling Engineer Mr Arunakumaren who was commissioned by EEMAG, does not appear to have had regard to the draft Environmental Authority or made any comment about how it might be affected by the conclusions he has drawn.

[38] Cement Australia note that the Pacific Environment Groundwater Modelling Report was provided to the parties' respective experts who were required to give an opinion as to the appropriate mathematical model and the predicted drawdown of what the experts considered was the proper model. The DNRME Review document was not included in the bundle provided to the experts. Nevertheless, Dr Merrick identified

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11 T 5-36, lines 46 to 5-37, line 6.

shortcomings and 'volunteered some criticisms' of the Pacific Environment Model believing it to overestimate impacts on drawdown. The expert engaged by EEMAG, Dr James,[12] did not address the Pacific Environment Model. Accordingly, Cement Australia say that where extensive evidence has been given regarding the Pacific Environment Model, no further evidence is necessary. Specifically, they say that the report of Mr Arunakumaren does not contradict the opinions already expressed or raise an issue of such significance that it warrants additional expert evidence.

Would the further evidence if accepted most probably affect the result of the case?

[39] EEMAG say that findings concerning the Pacific Environment model which are referred to in the DNRME Review regarding permeability at depth, is not consistent with 'policy settings' of DES or Cement Australia. I understand this to mean that EEMAG assert the review supports a conclusion concerning the nature of the aquifer which, if accepted, would require DES to reach a different conclusion regarding groundwater issues – and consequently lead to a different conclusion regarding the recommendation to be made, and/or the conditions which might be recommended.

[40] The statutory party say that the DNRME Review document would have no bearing on the result of the case. Cement Australia say that where extensive evidence has been given regarding the Pacific Environment model no further evidence is necessary and, in that regard, would have no bearing on the result of the case.

Could the further evidence by reasonable diligence not have been discovered earlier?

[41] EEMAG argue that they attempted to obtain all information relevant to the decision making of the statutory party, but were looking in the wrong place, as the relevant material was held by another agency (DNRME) which was not disclosed to them.

[42] The statutory party and the Applicant both say that the DNRME Review document could have been discovered earlier with reasonable diligence as it is referred to in the assessment report.[13] They say the failure to investigate the document constitutes an absence of reasonable due diligence on the part of EEMAG and not obfuscation.

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12 Dr James did not appear at the hearing due to ill health.

13 Ex 1 - DES0014 p 25.

EEMAG says that they misinterpreted the currency of the assessment report as a result of an 'effective' date noted on the report which preceded the date of the Pacific Environment Report.

Will no prejudice ensue to the other party by reason of the late admissions of the further evidence?

[43] Prejudice to EEMAG in not granting the reopening or to the other parties must be factored into the decision. In that regard EEMAG argue that because they consider the Review to be critical evidence the prejudice they would suffer is great, but that there is little prejudice that befalls Cement Australia or the statutory party as this information was available to them throughout the matter.

[44] The statutory party repeats and relies on its submission regarding prejudice as outlined at [29] above. Cement Australia say they will suffer prejudice, particularly if Mr Arunakumaren is introduced as a replacement witness for Dr James (who did not appear at the hearing due to ill health) as Mr Arunakumaren has not conferred with Dr Merrick nor considered his evidence, and it would have consequential effects for evidence given at the hearing by Mr Collins (surface water) and Mr Thompson (subsoil moisture).

[45] More generally, Cement Australia say that they will suffer significant prejudice should the case be reopened, referring to the affidavit of Mr Shute outlining the costs incurred in the hearing and the further delay and costs any reopening would cause.

New Evidence – water monitoring data

[46] The Annual Water Monitoring Report 2019-2020 was exhibited to the Affidavit of Mr Shute in support of Cement Australia's submissions, dated September 2020. The report is produced to satisfy the requirements of certain special conditions of the current mining leases. In the Executive Summary is says that the report has been prepared to provide the findings from groundwater monitoring undertaken and provide evidence of the adequacy of the groundwater monitoring program. It states that a review of the data has been undertaken to detect trends and changes to groundwater characteristics at the mine and surrounding areas. The stated intent of the groundwater monitoring program is to collect sufficient data to understand the

hydrologic processes at the East End Mine and its surrounds, assess impacts on groundwater users, and allow future development of predictive impact models. While the program of monitoring is undertaken quarterly, reporting is annual within 2 months of 1 August.

Has it been established that the evidence was so material that the interests of justice required its admission?

[47] EEMAG say the 2019-20 data indicates that some designated bores were approaching or already had fallen below prescribed minimum trigger levels. They note the Pacific Environment model concludes that rainfall below 200mm per quarter produces no recharge, and on the basis of the last 7 quarters only one small recharge may have occurred.

[48] Cement Australia say that the data is collected pursuant to mining lease special conditions in relation to an operating mine, and water monitoring will continue. It should not be the case that every time water monitoring data is collected pending a decision, the Court should reopen proceedings. Any further water monitoring data would need to be of such significance to warrant special consideration.

Would the further evidence if accepted most probably affect the result of the case?

[49] The statutory party says as it is not in possession of a complete dataset and note that the tables included in Appendix 5 to the EEMAG submissions are not present in the current EA – to which the data relates. In their submissions EEMAG say Appendix 5 are the East End Mine quarterly water measurement comparisons (December 2020) against D8 and D9 charts of designated bore trigger levels of the Draft EA. EEMAG says that given the June 2020 data 'and intense ongoing drought, it is foreseeable that additional bores could fall below trigger levels'. They then say that 'Availability of this data is important to ensure an early check on conditioning of the Draft EA'.

[50] The statutory party contend that there is no way to sensibly assess whether the Appendix 5 notations are accurate, credible, and to know what difference they would make to the draft EA.

[51] Cement Australia in written submissions note that the parties' respective experts were provided with agreed briefs of documents including 'a raft of historical water monitoring data'.[14] They note:

> "20.1 At Transcript 6-71, lines 19-27:
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> > MR COLLINS: I've analysed, in a lot of detail, the actual pumping records which pulls together 20 years worth of records. So I can actually draw some conclusions 20 about trends in infiltration, the effect of floods and that type of thing, which is within my expertise as a civil engineer and as a surface water hydrologist. The other thing I've done is I've reviewed, in quite a lot of detail, all the water quality testing done and reported to confirm for myself that there has been compliance with the current environmental authority on discharge. And that, coupled with my inspections and 25 the quality of water that I've seen, told me that there is compliance. They have complied and they are compliant. So that's the level of research.[15]
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> 20.2 At Transcript 6-73 lines 42 to 6-74 line 2:
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> > … this is an application for an extension to an existing mine. I have 20 years of data of that existing mine to tell me what is coming into the pit, what's happening. Over the next 25 years, a very slow and gradual extension of that mine is proposed a little at a time. You would expect the dewatering to be identical at the start of that expansion and perhaps increase slightly 45 over time to the numbers that Dr Merrick's talked about. But with 20 years of data – I dream of having jobs with 20 years of data to build on, and it's entirely aimed at telling me what's going to happen for the next 25 years with the dewatering."[16]

[52] During oral submissions Cement Australia handed up two maps, Figure 2 and Figure 28 from the Pacific Environment 2018 model.[17] On Figure 2 Cement Australia highlighted the three bores identified by EEMAG as approaching or exceeding trigger levels. Figure 28 models the predicted zone of influence for the existing pit, and the pit extension. By comparing the maps Cement Australia contends that 'the three particular bores in question are far outside the predicted zone of influence' and the location of the bores would tend to indicate that any issue of drawdown might not be caused by the (existing) mine. It was further noted that in any event, in the case of exceedances the process involved is to undertake an investigation in accordance with condition D27.

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14 Cement Australia written submissions at [20].
15 T 6-71, lines 19 to 27.
16 T 6-73, lines 41 to 6-74, line 2.
17 T1-49, lines 26 to T1-50 line 24; CEM4628.

Could the further evidence by reasonable diligence not have been discovered earlier?

[53] As noted, although the data is collected for a financial year, reporting is required within 2 months of 1 August each year. The 2019-2020 report is dated September 2020. Accordingly, it did not exist at the time of the hearing.

Will no prejudice ensue to the other party by reason of the late admissions of the further evidence?

[54] Cement Australia say that they will suffer significant prejudice should the case be reopened, referring to the affidavit of Mr Shute outlining the costs incurred in the hearing and the further delay and costs any reopening would cause.

Decision

[55] As stated by Bowskill J in *New Acland (No. 3)*[18] the objections hearing is not an open-ended inquiry. It is an inquiry in relation to the merits of the application for a mining lease and objections to that application, and objections to the application for an environmental authority for the purpose of the Land Court making a recommendation to the relevant decision-makers under the MRA and the EPA. The focus, under the EPA, as under the MRA, is upon the activities the putative holder of the mining lease will be entitled to carry out under the MRA on the mining lease, if it is granted.

[56] It is within the jurisdiction of the Court to reopen a matter to admit new evidence where it is just and equitable. In *New Acland (No. 3)*, Member Smith distilled principles from the Court of Appeal's decision in *Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors*[19] and observed that s 7 does not empower the Land Court to dispense justice other than in accordance with basic common law principles of natural justice and procedural fairness.[20]

[57] As noted, the Reid principles were affirmed by Applegarth J in *EB v CT (No 2)*[21] and remain current and guide the exercise of discretion in this application. The Reid

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18 *New Acland (No. 3)* at [65].
19 [2007] QCA 338.
20 *New Acland (No. 3)* at [48].
21 [2008] QSC 306.

principles have provided the framework to consider the submissions of the parties and to draw conclusions.

[58] The primary purpose of reopening proceedings to introduce interagency correspondence, other than the DNRME Review, appears to be for the purpose of establishing misconduct. The jurisdiction of the Land Court in proceedings such as these does not extend to an inquiry of that nature. The correspondence does not appear to have any bearing on the matters for my consideration and therefore cannot affect the result of the proceedings. I accept that the statutory party would suffer prejudice for the reasons expressed at [29] above, and Cement Australia for the reasons expressed at [45] above.

[59] I accept that the DNRME Review is not a determination or decision. It would appear that the DNRME Review was not the only step taken to arrive at the conditions set in the draft EA. The fact the DNRME Review challenges aspects of the performance of the Pacific Environment model it is considering, but does not ultimately disagree with key findings, might also dilute its significance.

[60] Evidence concerning the Pacific Environment model was before the court and the subject of evidence at the hearing.

[61] As noted by Cement Australia in submissions it was the Pacific Environment model itself which was provided to the relevant experts who participated in the hearing. Those experts, other than Dr James who did not address the model, acknowledged and described certain shortcomings and expressed criticisms of the model. While EEMAG consider the review document to be crucial evidence, it has not been established that the evidence is so material that the interests of justice require its admission.

[62] I am unable to accept that if the DNRME Review was introduced and accepted that it would affect the result of the case. I have considered the potential for prejudice to EEMAG. I have also considered the prejudice to the statutory party and Cement Australia and accept the reasons expressed at [29], [44] and [45] above.

[63] In relation to the 2019-2020 water monitoring data which is collected to detect trends and changes to groundwater characteristics at the mine and surrounding area, and to produce sufficient data to understand the hydrologic processes at the East

End mine, I accept the submissions of Cement Australia and the evidence of Dr Merrick that for the purposes of producing expert reports and providing evidence to the court there was an abundance of water monitoring data. It would appear to me that the introduction of the 2019-2020 water monitoring data is unlikely to have any bearing on the result of the proceedings, and although it was not produced and published before the hearing, there is an abundance of water monitoring data that was available to the experts in considering matters relevant to the hearing. I have considered the prejudice that might be suffered by parties if leave to reopen is or is not given. I have taken into account the submission of Cement Australia at [52] above. I accept the prejudice to the statutory party and Cement Australia and their reasons expressed at [29] and [45] above.

[64] Accordingly, it has not been established to my satisfaction that my discretion should be exercised to reopen the hearing to allow the introduction of documentary evidence or for the calling of witnesses in relation to that documentary evidence.

Order

The application is dismissed.