SUPREME COURT OF QUEENSLAND

CITATION:	*New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88
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:	2 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20, 21, 22 and 23 March 2018
JUDGE:	Bowskill J
ORDER:	**For the reasons published today, the Court finds the following grounds in the amended application for review have been established, with the consequence that it will be appropriate to order that the decision made by the Land Court on 31 May 2017 be set aside, and the matter referred back to the Land Court for further consideration:** 1. **Ground 10, in relation to groundwater.** 2. **Ground 7, in relation to intergenerational equity, consequent upon the conclusion in relation to ground 10.** 3. **Ground 1(aii) (by reference to particulars (i), (iiA) and (ii)), in relation to noise.**

The parties are directed to make submissions in relation to the appropriate orders and directions to be made under s 30 of the *Judicial Review Act* 1991, having regard to the reasons published today, and in relation to the "statement of agreed course of action following decision of 14 February 2018" and in relation to costs.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – BIAS – APPREHENSION OF BIAS – where a hearing took place on 2 February 2017, within the course of the proceeding, as a result of concerns raised by the first respondent with the applicant, in relation to media reports interpreted by the first respondent as conveying the imputation that delays in finalising the proceeding were attributable to the first respondent taking leave, which in turn was the potential cause of job losses in the community – whether a fair-minded lay observer might reasonably apprehend that the first respondent felt personally disrespected and offended by the media reports and by his Honour's perception of the applicant's actions in contributing to the media reports, and as a result, had a negative view of the applicant's corporate conduct, which might have affected the first respondent's ability to assess the issue of the media reports, and the applicant's actions in relation to them, objectively – whether there is a logical connection between that matter, and the possibility of a departure from impartial decision-making, having regard to the reasons given by the first respondent for his decision to recommend refusal of the mining lease applications and application to amend the environmental authority – whether the applicant waived the right to any objection, on the basis of the circumstances and conduct of the 2 February 2017 hearing, by failing to take action immediately – whether there was anything in the first respondent's reasons which effectively revived the matters which might be apprehended from the 2 February 2017 hearing, such that it might reasonably be apprehended from the reasons that the first respondent might not have brought an impartial mind to the resolution of the questions he was required to decide

ENERGY AND RESOURCES – MINERALS – COURTS OR TRIBUNALS EXERCISING JURISDICTION IN MINING MATTERS – QUEENSLAND – APPEAL OR REVIEW – scope of the Land Court of Queensland's jurisdiction and function in a hearing of a mining lease application, and objections, under ss 265, 268 and 269 of the *Mineral Resources Act* 1989 (Qld) and of objections to an application for, or to amend, an environmental authority,

under ss 185, 190 and 191 of the *Environmental Protection Act* 1994 (Qld)

ENERGY AND RESOURCES – WATER – WATER MANAGEMENT – SUBTERRANEAN WATER – consideration of legislative amendments to the *Mineral Resources Act* 1989, *Environmental Protection Act* 1994 and *Water Act* 2000, which commenced on 6 December 2016, in relation to the ability of the holder of a mining lease to take or interfere with underground water – where, following the amendments, the applicant would not be entitled to take or interfere with underground water in the area of the proposed mining lease, if the taking or interference happens during the course of, or results from, the carrying out of an authorised activity for the mining lease, until it has obtained an associated water licence to take or interfere with such water under the *Water Act* – where the legislative intention is that potential impacts of such activity are to be assessed and managed under the *Water Act* – whether the first respondent erred in law in proceeding on the basis that, despite the separate assessment and management regime established under the *Water Act* provisions, the Land Court of Queensland had jurisdiction to fully consider the potential impact of proposed mining activities on the availability of underground water (groundwater) supplies to surrounding landowners, on a hearing under ss 268 and 269 of the *Mineral Resources Act* 1989 and ss 185, 190 and 191 of the *Environmental Protection Act* 1994

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – whether the first respondent failed to accord procedural fairness, by failing to deal with a substantial argument advanced by the applicant, in relation to the issue of groundwater, by reference to the operation and effect of the overall legal framework which would apply to the expanded mine, including the associated water licence provisions of the *Water Act* and the suite of conditions which would otherwise apply – whether the first respondent failed to adequately articulate his reasons for rejecting the argument

ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – ENVIRONMENTAL PROTECTION LEGISLATION – where the first respondent found that there was a real possibility the quantity of groundwater supplies available to surrounding landholders could be affected by the proposed mining operations for generations to come, and therefore was satisfied there was a real possibility that at least one of the principles of intergenerational equity would be breached – whether the first respondent erred in treating the principle of intergenerational equity as a stand-alone

requirement that was capable of being breached, with such a breach being sufficient to warrant a recommendation for refusal of the mining lease applications and application to amend the environmental authority – whether the discretionary power conferred on the Land Court, under s 269 of the *Mineral Resources Act* 1989 and s 190 of the *Environmental Protection Act* 1994 to make a recommendation to the relevant decision-maker, involves a balancing exercise

ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – ENVIRONMENTAL PROTECTION LEGISLATION – where the first respondent found that noise limits ought to be included in any environmental authority, in relation to the proposed mining activities, which were more stringent (lower) than the noise limits imposed by the Coordinator-General under the *State Development and Public Works Organisation Act* 1971 – whether the first respondent erred in his approach to the interpretation and application of s 51 of the *Environmental Protection Regulation* 2008 and the *Environmental Protection (Noise) Policy* 2008 – whether the first respondent erred in finding that it was open to him to consider whether different noise limits to those contained in the Coordinator-General's conditions should be preferred – whether, if it was open, the more stringent noise condition preferred by the first respondent was inconsistent with the Coordinator-General's less stringent condition – whether the first respondent erred by concluding that, in circumstances where he preferred a condition which was inconsistent with the Coordinator-General's condition, he was compelled to, and had no other option but to, recommend refusal of the applications – whether the first respondent failed to exercise the discretionary power conferred on him by s 190 of the *Environmental Protection Act* 1994

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – whether it was within the jurisdiction of the Land Court of Queensland to consider the prior conduct of the Department of Environment and Heritage Protection, as the administering authority under the *Environmental Protection Act* 1994, in relation to its administration of the applicant's existing environmental authority, and to consider the past performance of the applicant in relation to compliance with its existing environmental authority, in determining the relative merits of the applications

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – consideration of the obligation and standard of reasons

required to be given for a decision of the Land Court of Queensland to make a recommendation under s 269 of the *Mineral Resources Act* 1989 and s 191 of the *Environmental Protection Act* 1994

Environment Protection and Biodiversity Conservation Act 1999 (Cth)
Environmental Protection Act 1994 (Qld)
Environmental Protection (Underground Water Management) and Other Legislation Amendment Act 2016 (Qld)
Judicial Review Act 1991 (Qld)
Land Court Act 2000 (Qld)
Mineral Resources Act 1989 (Qld)
State Development and Public Works Organisation Act 1971 (Qld)
Water Act 2000 (Qld)
Water Reform and Other Legislation Amendment Act 2014 (Qld)
Environmental Protection Regulation 2008 (Qld)
Environmental Protection (Noise) Policy 2008 (Qld)

Associated Minerals Consolidated Ltd v Wyong Shire Council [1974] 2 NSWLR 681
Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430
BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors [2015] QSC 107
Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd (2013) 194 LGERA 347
Camden v McKenzie [2008] 1 Qd R 39
CDD15 v Minister for Immigration and Border Protection (2017) 250 FCR 587
Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads (2014) 201 LGERA 395
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194
Coast and Country Association of Queensland Inc v Smith & Anor [2015] QSC 260
Coast and Country Association of Queensland Inc v Smith & Ors [2016] QCA 242
Coffs Harbour Environment Centre Inc v Minister for Planning (1994) 84 LGERA 324
Commissioner of Police v Kennedy [2007] NSWCA 328
Commissioner of Police v Stehbens [2013] QCA 81

Cypressvale Pty Ltd v Retail Shop Lease Tribunal [1996] 2 Qd R 462
Dranichnikov v Minister for Immigration and Multicultural Affairs & Indigenous Affairs (2003) 73 ALD 321
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219
Dunn v Burtenshaw (2010) 31 QLCR 156
DWN042 v Republic of Nauru (2017) 350 ALR 582
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
Ferdinands v Commissioner for Public Employment (2006) 225 CLR 130
Fox v Percy (2003) 214 CLR 118
Gray v The Minister for Planning & Ors (2006) 152 LGERA 258
Hancock Coal Pty Ltd v Kelly and Department of Environment and Heritage Protection (No 4) (2014) 35 QLCR 56
Hannay v Brisbane City Council (1997) 94 LGERA 212
Hastings Co-operative Ltd v Port Macquarie Hastings Council (2009) 171 LGERA 152
Isbester v Knox City Council (2015) 255 CLR 135
Johnson v Johnson (2000) 201 CLR 488
Keating v Morris & Ors; Leck v Morris & Ors [2005] QSC 243
Kelly v R (2004) 218 CLR 216
Majik Markets Pty Ltd v Brake & Service Centre Drummoyne Pty Ltd (1991) 28 NSWLR 443
Makucha v Albert Shire Council [1993] 1 Qd R 493
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427
Mifsud v Campbell (1991) 21 NSWLR 725
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507
Momcilovic v R (2011) 245 CLR 1
Netstar Pty Ltd v Caloundra City Council (2003) 127 LGERA 228
New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4) [2017] QLC 24
North Sydney Council v Ligon 302 Pty Ltd (1995) 87 LGERA 435
Rathborne v Abel (1964) 38 ALJR 293
Re Credit Tribunal; Ex parte General Motors Acceptance Corporation (1977) 137 CLR 545
Ross v R (1979) 141 CLR 432
R v Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group (1969) 122 CLR 546
R v Lusink; Ex parte Shaw (1980) 32 ALR 47

R v Watson; Ex parte Armstrong (1976) 136 CLR 248
Segal v Waverley Council (2005) 64 NSWLR 177
Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473
South Australia v Tanner (1989) 166 CLR 161
SZGIZ v Minister for Immigration & Citizenship (2013) 212 FCR 235
Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256
Thomson Australian Holdings Pty Ltd v The Trade Practices Commission (1981) 148 CLR 150
Vakauta v Kelly (1989) 167 CLR 568
Viskauskas v Niland (1982) 153 CLR 280
Walker v Noosa Shire Council [1983] 2 Qd R 86
Wainohu v New South Wales (2011) 243 CLR 181
Webb v The Queen (1994) 181 CLR 41
Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480
Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-Op Ltd & Ors and Department of Environment and Resource Management (2012) 33 QLCR 79
York v General Medical Assessment Tribunal [2003] 2 Qd R 104

COUNSEL:	DR Gore QC, DG Clothier QC and BD Job QC for the Applicant SC Holt QC and Dr CJ McGrath for the Second Respondent 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

Contents

Introduction

[1] The applicant, New Acland Coal Pty Ltd (**NAC**), is the owner and operator of the New Acland mine, an established open cut coal mine close to the town of Acland, near Oakey. NAC has been operating the mine since the grant of mining lease ML 50170 in September 2001 (stage 1). The mine was expanded in 2006, with the grant of ML 50216 (stage 2). NAC proposes a further expansion of the mine (stage 3). For that purpose NAC applied under the *Mineral Resources Act* 1989 (Qld) (**MRA**) for two mining leases (ML 50232, relating to the mining area, and ML 700002, to facilitate the construction of a rail spur) and under the *Environmental Protection Act* 1994 (Qld) (**EPA**) to amend its existing environmental authority to cover the expanded activities.

[2] As contemplated by the MRA and the EPA, objections were lodged in relation to both the mining lease applications and the environmental authority amendment application, including by the second respondent, Oakey Coal Action Alliance Inc (**OCAA**). The applications, and objections, were referred to the Land Court of Queensland for hearing. The third respondent, the chief executive of the Department of Environment and Heritage Protection, was a necessary party to those proceedings, as the administering authority under the EPA.

[3] The applications and objections were the subject of a lengthy hearing before the first respondent, a member of the Land Court, over almost 100 hearing days between March 2016 and April 2017.[1] For reasons given on 31 May 2017, the first respondent recommended:

(a) under s 269 of the MRA, that the application for ML 50232 be rejected and, consequent upon that, the application for ML 700002 also be rejected; and

(b) under s 191 of the EPA, that the application for amendment of the environmental authority also be refused.[2]

[4] The hearing raised a number of complex issues for consideration and determination by the Land Court, including in relation to air quality and dust, noise, lighting, visual amenity, traffic, transport and roads, general and agricultural economics, climate change, biodiversity of flora and fauna, physical and mental health, land values, livestock and rehabilitation, land use and soils, intergenerational equity, community and the social environment, heritage values and cultural heritage, groundwater and surface water. From an economic perspective, the Land Court found that the expanded mine is likely to provide a significant economic benefit to the local region, the state and the nation. In respect of most of the other issues, the Land Court found either that there was no impact, or any potential impacts could be appropriately managed. There were, however, three issues which lead the Land Court to recommend refusal of the applications:

1. **Noise** – the Land Court member concluded that as a result of his findings as to what the recommended noise limits should be for evening and night time, he was

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1 The first respondent was excused from participating in this proceeding from an early stage.

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

compelled to recommend that the applications for the mining leases and the amended environmental authority be refused.[3]

2. **Groundwater** – the Land Court member found that it was necessary for him to fully consider groundwater issues at the hearing, and concluded that the potential impact of the stage 3 mining activity on the availability of groundwater supplies to surrounding land holders had not been properly addressed, in terms of the evidence, particularly the predictive numerical groundwater modelling relied upon by NAC at the hearing, and as a consequence recommended that stage 3 not be approved due to groundwater concerns.[4]

3. **Principles of intergenerational equity** – the Land Court member found that these principles were breached in at least one respect, with the potential for groundwater impacts to adversely affect landholders in the vicinity of the mine for hundreds of years to come, with this breach being sufficient to warrant rejection of the mining lease applications and the application to amend the environmental authority.[5]

[5] NAC applies for a statutory order of review in relation to the decision made on 31 May 2017, and conduct of the first respondent for the purpose of making the decision, pursuant to ss 20 and 21 of the *Judicial Review Act* 1991 (Qld) (**JR Act**).[6]

[6] There is no dispute that the decision of the first respondent is a decision to which the JR Act applies. Judicial review is the only available avenue for review of a decision of this kind, as it has been characterised as an exercise of the Land Court's administrative, rather than judicial function. The making of a recommendation under s 269 of the MRA has been described as "an administrative step consequent upon a statutorily prescribed inquiry conducted by the learned Land Court member", and not a decision in relation to a proceeding in the Land Court, from which an appeal lies to the Land Appeal Court.[7] The same reasoning logically applies to the making of a recommendation under s 190 of the EPA.

[7] NAC relies upon a number of grounds in support of its application, which can be conveniently grouped together under the following headings:

(a) Apprehended bias – ground 13;

(b) Groundwater – grounds 10 and 15;

(c) Intergenerational equity – grounds 7 and 9;

(d) Noise – grounds 1, 4 and 6;

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3 Reasons at [3] and [782]-[787] and [1799], [1803], [1805]-[1806], [1808] and [1838].
4 Reasons at [16] and [1679]-[1680] and [1799], [1803]-[1804], [1808] and [1839].
5 Reasons at [14] and [1337]-[1344] and [1799], [1804], [1808] and [1839].
6 Amended Application for a Statutory Order of Review, filed on 28 November 2017. Relief was additionally sought under s 43 of the JR Act, s 10 of the *Civil Proceedings Act* 2011 and s 58 of the *Constitution of Queensland* 2001 and this court's inherent jurisdiction. However, the application proceeded by reference to the relief sought under ss 20 and 21 of the JR Act, and it is unnecessary to address the alternative bases for relief sought.
7 *Dunn v Burtenshaw* (2010) 31 QLCR 156 at [47]; see also *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107 at [34]-[36] per Philip McMurdo J; cf s 64 of the *Land Court Act* 2000.

(e) Inquiring into the conduct of the third respondent (the DEHP) and the current environmental authority – grounds 2 and 3;

(f) Procedural fairness – ground 12;

(g) Legal reasonableness and rationality – ground 14; and

(h) Sufficiency of reasons – ground 15.

[8] The focus of the oral submissions at the hearing was on the grounds referred to in (a) to (d), followed by (e).

[9] I propose first to address the statutory context of the hearing before the Land Court under the MRA and the EPA, and the Land Court's jurisdiction and function in that regard; then to address an issue raised on this application in terms of the obligation and standard of reasons required to be given by the Land Court member; before turning to deal with the grounds of review.

Statutory context – Land Court's jurisdiction and function

[10] The relevant statutory context in which the hearing before the Land Court under the MRA and the EPA took place includes the *State Development and Public Works Organisation Act* 1971 (Qld), the MRA, the EPA, the *Water Act* 2000 (Qld) and the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

State Development and Public Works Organisation Act 1971

[11] The *State Development Act* establishes the role of the Coordinator-General for the State (s 4), whose function, in a broad sense, is to do what they consider necessary and desirable to secure the proper planning, preparation, execution, coordination, control and enforcement of a program of works, planned developments, and environmental coordination for the State (s 10(2)). Environmental coordination is dealt with under part 4 of the Act. Among other things, the Coordinator-General has responsibility to coordinate departments of the government and local bodies throughout the State in activities directed towards ensuring that proper account is taken of the environmental effects of any development (s 25).

[12] One of the ways in which this may occur is by the Coordinator-General declaring a project to be a "coordinated project" (previously called a "significant project")[8] for which an environmental impact statement (or EIS) is required (s 26(1)(a)).

[13] The stage 3 expansion of the New Acland coal mine was declared a significant project in 2007.[9]

[14] As a consequence, the assessment process provided for under part 4, division 3 of the *State Development Act* applied, which includes the preparation of a draft EIS for the project (s 32), public notification of the draft EIS (s 33), the opportunity to make submissions in relation to that (s 34) and the preparation of a report by the Coordinator-General (s 34D). In this case, there was a draft EIS prepared, then a new EIS prepared

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8 See amendments made by the *Economic Development Act* 2012, Act No. 43 of 2012.

9 See the Reasons at [20] and [56].

following revision of the stage 3 expansion proposal, and then an amended EIS, following public consultation.[10]

[15] In December 2014 the Coordinator-General issued an evaluation report on the EIS under s 34D. He concluded that "there are significant local, regional and state benefits to be derived from the development, and that any adverse environmental impacts can be acceptably avoided, minimised, mitigated or offset through the implementation of the measures and commitments outlined in the EIS documentation". The Coordinator-General approved the stage 3 project, subject to the conditions and recommendations made in the Coordinator-General's report and NAC obtaining all subsequent statutory approvals.[11]

[16] As further discussed from [327] below, the *State Development Act* contains provisions dealing with the relationship between the approval under this Act, and requirements under other Acts. For example, in relation to the MRA, a Coordinator-General's evaluation report may state conditions for the proposed mining lease (s 45(1)). Where the mining lease is granted, and the Coordinator-General's conditions are included in it, if there is any inconsistency between those conditions, and another condition of the mining lease, the Coordinator-General's conditions prevail to the extent of any inconsistency (s 46). In this case, the Coordinator-General did not state any conditions for the mining lease.

[17] In relation to the EPA, the Coordinator-General's evaluation report may state conditions for an environmental authority (s 47C(1)). That occurred in this case. The Coordinator-General's stated conditions for the proposed environmental authority are set out in appendix 2 to the evaluation report.[12] Where the administering authority decides to approve the application under the EPA, and the application relates to a coordinated project, the administering authority must impose on the environmental authority (or draft environmental authority) the Coordinator-General's conditions. Any other condition imposed on the authority cannot be inconsistent with such a condition (s 205 of the EPA). Similarly, s 190(2) of the EPA provides that where the Land Court decides to recommend the application be approved, but on conditions different to those set out in the draft environmental authority, any such conditions must include the Coordinator-General's conditions, and cannot be inconsistent with the Coordinator-General conditions. This provision is discussed in more detail from [308] below, in relation to noise.

[18] The Coordinator-General's report may also recommend conditions for approvals required under other legislation (s 52). In this case, appendix 3 to the Coordinator-General's evaluation report contained recommendations for conditions to be included in approvals under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth), the *Transport Infrastructure Act* 1994 (Qld) and the *Water Act* 2000 (Qld).[13]

[19] Under s 54B of the Act, the Coordinator-General's report may also impose other conditions for undertaking the project. Such conditions prevail over the conditions of any other approval applying to the project (s 54E). Under this section, the

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[10] See the Reasons at [56]-[64].

[11] See the Reasons at [65]. See also the Coordinator-General's evaluation report (exhibit 16 in the Land Court proceedings), exhibit 1, tab 45.

[12] Exhibit 1, tab 45, pp 170-204.

[13] Exhibit 1, tab 45, pp 205-212. See the Reasons at [65].

Coordinator-General imposed the conditions set out in appendix 1 to the evaluation report.[14]

[20] Judicial review is not generally available in respect of a decision, action or conduct of the Coordinator-General under part 4 of the Act, which includes the provisions just referred to in relation to the imposition or recommendation of conditions (s 27AD).

[21] Provision is made in ss 35B to 35K of the *State Development Act* for the proponent of a coordinated project to apply for changes to be made to the conditions imposed or stated by the Coordinator-General. Sections 35M and 35N also contemplate the Coordinator-General considering a change to the project on his or her own initiative.

Mineral Resources Act 1989

[22] Section 234 of the MRA confers a discretionary power on the Minister to grant a mining lease. The purposes for which a mining lease may be granted are, under s 234(1):

> (a) to mine[15] the mineral or minerals specified in the lease and for all purposes necessary to effectually carry on that mining;
>
> (b) such purposes, other than mining, as are specified in the mining lease and that are associated with, arising from or promoting the activity of mining.

[23] The general entitlements of the holder of a mining lease are set out in s 235 (discussed further from [198] below).

[24] An application for a mining lease must comply with the requirements set out in s 245. Where that has been done, under s 252 the chief executive issues a mining lease notice. Under s 252A the applicant for the mining lease is required to give that notice, a copy of the application, and various other documents to affected persons, which includes the owners of land necessary for access, and adjoining land. Section 260 provides for an entity, or an owner of land, to lodge an objection to the grant of the mining lease.

[25] Where the application for a mining lease also relates to an application for, or to vary an existing, environmental authority, and there are objections to both applications, the chief executive must refer the mining lease application and the objections to the Land Court "for hearing" (s 265(2)).

[26] In relation to that hearing, s 268 relevantly provides:

> "(1) On the date fixed for the hearing of the application for the grant of the mining lease and objections thereto, the Land Court shall hear the application and objections thereto and all other matters that pursuant to this part are to be heard, considered or determined by the Land Court in respect of that application at the one hearing of the Land Court.

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[14] Exhibit 1, tab 45, pp 157-169.

[15] The meaning of "mine" is set out in s 6A. It means to carry on an operation with a view to, or for the purpose of, winning mineral from a place where it occurs; or extracting mineral from its natural state; or disposing of mineral in connection with, or waste substances resulting from, the winning or extraction.

> (2) At a hearing pursuant to subsection (1) the Land Court shall take such evidence, shall hear such persons and inform itself in such manner as it considers appropriate in order to determine the relative merits of the application, objections and other matters and shall not be bound by any rule or practice as to evidence.
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> (3) The Land Court shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application."

[27] Although not bound by the rules of evidence, the Land Court "must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts".[16] Nevertheless, a hearing under s 268 of the MRA is in many ways conducted in the same manner as any other court hearing, including on the basis of evidence taken on oath, affirmation or affidavit, which must be recorded.[17]

[28] Following the hearing, the Land Court is required to make a recommendation to the Minister, that the application be granted or rejected, in whole or in part (s 269(2)(a)). A recommendation may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers appropriate (s 269(3)). The Land Court's powers in this regard have been construed to enable the Court to make alternative recommendations (for example, a recommendation for refusal, with an alternative recommendation for a grant subject to conditions).[18]

[29] Section s 269(4) provides as follows:

> "The Land Court, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, **shall take into account and consider** whether:
>
> (a) the provisions of this Act have been complied with; and
>
> (b) the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate; and
>
> (c) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and

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[16] Section 7 of the *Land Court Act* 2000.

[17] Section 11 of the *Land Court Act* 2000.

[18] *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [15]-[17] and [26]-[29] per Douglas J. This decision was following judicial review of the first respondent's decision in *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No 4)* (2014) 35 QLCR 56, in which his Honour recommended either that MLA 70426 be rejected or that MLA 70426 "be granted, subject to the condition that approval be subject to Hancock first obtaining licences to take, use and interfere with water under s 206(1)(a) and (b) of the Water Act such that all concerns pursuant to the precautionary principle are resolved" (and took the same approach in relation to the environmental authority). See [410]-[414] of *Hancock*.

(d) the land and the surface area of the land in respect of which the mining lease is sought is of an appropriate size and shape in relation to –

(i) the matters mentioned in paragraphs (b) and (c); and

(ii) the type and location of the activities proposed to be carried out under the lease and their likely impact on the surface of the land; and

(e) the term sought is appropriate; and

(f) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and

(g) the **past performance of the applicant has been satisfactory**; and

(h) any disadvantage may result to the rights of –

(i) holders of existing exploration permits or mineral development licences; or

(ii) existing applicants for exploration permits or mineral development licences; and

(i) the **operations** to be carried on under the authority of the proposed mining lease **will conform with sound land use management**; and

(j) there will be **any adverse environmental impact caused by those operations** and, if so, the extent thereof; and

(k) the **public right and interest** will be prejudiced; and

(l) **any good reason has been shown for a refusal** to grant the mining lease; and

(m) taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use."[19]

[30] Section 269(4) provides the framework within which the Land Court's decision on the hearing of a mining lease application and objections takes place, in terms of identifying the scope of the relevant considerations. The Land Court's function, and jurisdiction, is otherwise determined by s 268, namely to determine the relative merits of the mining lease application, and objections, and other matters (relevantly, the application to amend the environmental authority) and make a recommendation to the Minister.[20]

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[19] Emphasis added.

[20] Cf [131] and [1774] of the Reasons. At [1774] the first respondent said "I am not required by the MRA to specifically consider each element [in] s 269(4) in the current circumstances". That was said to be because s 269(4) only applies where the Land Court is making a recommendation that the application for a mining lease be granted, not when the recommendation is that it be refused (at [1772]). As this was not a point raised by the parties on the application before me, I will proceed on the basis that what his Honour intended to convey was that, *in articulating his reasons* for recommending refusal he did not strictly regard it as

[31] It was common ground that the reference to "those operations" in s 269(4)(j) is a reference to "the operations to be carried on under the authority of the proposed mining lease" referred to in s 269(4)(i).

[32] In terms of the Land Court's jurisdiction under the MRA, the Court of Appeal has confirmed that s 269(4)(i) and (j) allow consideration only of operations to be carried on under the authority of the proposed mining lease.[21]

[33] Relevantly, the operations to be carried on under the authority of the proposed mining lease refers to the physical activities associated with winning and extracting coal from the place where it occurs or its natural state.[22]

[34] The requirement under s 269(4)(k), to consider whether the public right and interest will be prejudiced (by the grant of the mining lease) contemplates broader considerations.[23] However, sub-s (k) and, for that matter, sub-s (l) (which requires consideration of whether "any good reason" has been shown for a refusal to grant the mining lease) are to be construed harmoniously, not inconsistently, with sub-s (i) and (j),[24] such that they could not be relied upon to expand the Land Court's jurisdiction, in a hearing under ss 268 and 269, to include consideration of, for example, adverse environmental impacts caused by operations or activities for which some other source is the authority other than the proposed mining lease.

[35] Subject to the overriding obligation to exercise the power reasonably,[25] the weight to be given to the various considerations is a matter for the Land Court on the hearing.[26]

[36] Where the Land Court recommends to the Minister that an application for the grant of a mining lease be rejected, the Land Court is required to give the Minister the Land Court's reasons for that recommendation (s 269(5)).

[37] Ultimately, it is the Minister who has the power to grant a mining lease (s 234). Under s 271 when the Minister considers the mining lease application, the Minister must consider any Land Court recommendation for the application and the matters mentioned in s 269(4).

[38] The Minister may decide to grant the mining lease, for the whole or part of the land proposed, or reject the application, or refer the matter back to the Land Court to conduct a further hearing (s 271A).

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necessary to address the matters in s 269(4) – and not that those were not matters he needed to consider. The latter would in my view be an error.

[21] *Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242 at [31]-[33] per Fraser JA, at [51] per Morrison JA, agreeing, and at [1] per McMurdo P, agreeing on this point.

[22] *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-Op Ltd & Ors and Department of Environment and Resource Management* (2012) 33 QLCR 79 at [528]-[530], affirmed in *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 at [27] and [31].

[23] For example, as in *Coast and Country Association of Queensland Inc v Smith,* the scope 3 emissions which could result from the transportation and burning of coal from the mine by others: see [2015] QSC 260 at [41]; [2016] QCA 242 at [42].

[24] See, for example, *Ross v R* (1979) 141 CLR 432 at 440.

[25] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

[26] *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 at [46] per Fraser JA, referring to *Rathborne v Abel* (1964) 38 ALJR 293 at 295 and 301 and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41. See also *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 482 per Gibbs J.

Environmental Protection Act 1994

[39] The object of the EPA is "to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological process on which life depends (***ecologically sustainable development***)" (s 3).

[40] Section 4 sets out in more detail how that object is to be achieved, by reference to an "integrated management program that is consistent with ecologically sustainable development". Central to that program is the concept of "environmental values", both in terms of deciding what are the environmental values to be protected (s 4(4)(b)) and in terms of integrating those environmental values into land use planning and management of natural resources, and ensuring all reasonable and practicable measures are taken to protect environmental values from all sources of environmental harm (s 4(6)(a) and (b)).

[41] As defined in s 8, the "environment" includes:

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
>
> (d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).

[42] As defined in s 9 an "environmental value" is:

> (a) a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
>
> (b) another quality of the environment identified and declared to be an environmental value under an environmental protection policy or regulation.

[43] One of the means of "ensuring all reasonable and practicable measures are taken to protect environmental values from all sources of environmental harm" (s 4(6)(b)) is to require an environmental authority before an environmentally relevant activity may be carried out.

[44] Chapter 5 of the EPA deals with environmental authorities and environmentally relevant activities.

[45] The activity of mining, under a mining lease granted under the MRA, is an "environmentally relevant activity" that is regulated under the EPA,[27] by the requirement to hold an environmental authority. It is an offence to carry out an environmentally relevant activity without holding an environmental authority for the activity (s 426).

[46] As defined in s 110, a "mining activity" is:

> (a) an activity that is an authorised activity for a mining tenement under the MRA; or
>
> (b) another activity that is authorised under an approval under the MRA that grants rights over land.

[47] The term "authorised activity" is not defined in the EPA. But it is defined in schedule 2 to the MRA to mean, for a mining tenement, "an activity that its holder is, under this Act or the tenement, entitled to carry out in relation to the tenement".

[48] It is necessary to pay particular attention to these provisions, as they define the "activity" for which an environmental authority is required – that is, an activity which the holder of, relevantly, a mining lease is, under the MRA or the mining lease, entitled to carry out in relation to the lease.

[49] The EPA contemplates there being only one environmental authority for a project involving environmentally relevant activities. So if the holder of a mining lease, has already applied for and been granted an environmental authority in relation to mining activity, and wishes to expand their activities, the EPA contemplates an amendment to the existing authority, rather than the grant of a new one.[28]

[50] That is what occurred in this case, with NAC making an application, under s 224, to amend its existing environmental authority. The requirements for such an application are set out in s 226. The administering authority (the third respondent) decided that the proposed amendment was a major amendment (s 228), with the consequence that chapter 5, parts 3 to 5 applied to the amendment, as if it were a site-specific application (s 232). This process includes public notification of the application (s 152) and the opportunity for submissions to be made about the application (ss 160 and 161). Following this, the administering authority makes a decision about the application (ss 171, 172, 176), and must give notice of its decision to the applicant and any submitters (s 181).

[51] Under s 176(2), for a variation or site-specific application, in deciding the application the administering authority must –

> (a) comply with any relevant regulatory requirement;[29] and

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[27] See ss 18 (a "resource activity" is an environmentally relevant activity), 107 (a "resource activity" is, inter alia, an activity that involves a "mining activity") and 110 (defining "mining activity") of the EPA.

[28] See ss 118, 119 and 224 of the EPA.

[29] See paragraph (a) of the definition of "regulatory requirement" in schedule 4 to the EPA; see also chapter 4, part 2 of the *Environmental Protection Regulation* 2008 (regulatory requirements for all environmental management decisions).

(b) subject to paragraph (a), have regard to each of the following –

(i) the application;

(ii) any standard conditions for the relevant activity or authority;

(iii) any response given for an information request;

(iv) the standard criteria.[30]

[52] Chapter 5, part 5, division 3 contains provisions dealing with the decision stage of "an application for a mining activity relating to a mining lease" (s 180; see also s 184). If the decision is to approve the application, including where that is on the basis of conditions that are different to the standard conditions, the notice must be accompanied by a draft environmental authority. The notice must also state that a submitter may, by written notice, request that their submission be taken to be an objection to the application; and that the applicant may, by written notice, request that the administering authority refer the application to the Land Court (ss 181(2), 182 and 183).

[53] In this case, the decision of the administering authority was to recommend that the amendment to the environmental authority be approved, and a draft environmental authority was prepared.[31]

[54] If a submitter gives an objection notice or if the applicant requests referral of the application to the Land Court, the administering authority must refer the application to the Land Court for an "objections decision", unless that has already been done under s 265 of the MRA (s 185(1)). The Land Court is required to make an order or direction that the (EPA) objections decision hearing happen at the same time as the (MRA) hearing for the mining lease application and objections to it (s 188(2)). That is what occurred in this case.

[55] As in the case of the MRA, the objections decision is a recommendation to the administering authority that the application be approved, either on the basis of the draft environmental authority or on stated conditions that are different to those proposed in the draft environmental authority, or that the application be refused (s 190(1)(a)). If the mining lease is part of a coordinated project, and the recommendation is for approval, any stated conditions must include the Coordinator-General's conditions and cannot be inconsistent with those conditions (s 190(2)).

[56] Section 191 provides that:

> "In making the objections decision for the application, the Land Court **must consider** the following –
>
> (a) the application;
>
> (b) any response given for an information request;

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[30] See the definition of "standard criteria" in schedule 4 to the EPA (discussed further below).

[31] See the administering authority's Environmental Authority Assessment Report (exhibit 12 before the Land Court), exhibit 1, tab 43; and the draft environmental authority (exhibit 9 before the Land Court), exhibit 1, tab 42.

(c) any standard conditions for the relevant activity or authority;

(d) any draft environmental authority for the application;

(e) any objection notice for the application;

(f) any relevant regulatory requirement;

(g) the standard criteria;

(h) the status of any application under the Mineral Resources Act for each relevant mining tenure."[32]

[57] These matters do not limit the criteria or matters the Land Court may consider in making the decision (s 316).

[58] The "standard criteria" referred to in s 191(g) is defined in schedule 4 to the EPA, and includes:

"(a) the following principles of environmental policy as set out in the Intergovernmental Agreement on the Environment[33] –

(i) the precautionary principle;

(ii) intergenerational equity;

(iii) conservation of biological diversity and ecological integrity; and

(b) any Commonwealth or State government plans, standards, agreements or requirements about environmental protection or ecologically sustainable development; and

…

(e) the character, resilience and values of the receiving environment; and

(f) all submissions made by the applicant and submitters; and

…

(i) the public interest; and

…

(k) any relevant integrated environmental management system or proposed integrated environmental management system; and

(l) any other matter prescribed under a regulation."

[59] In relation to (a), as articulated in section 3 of the Intergovernmental Agreement on the Environment those principles of environmental policy are to inform policy making and program implementation. They are described in section 3.5 as follows:

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[32] Emphasis added.

[33] A copy of which appears in the schedule to the *National Environment Protection Council (Queensland) Act* 1994.

> **"3.5.1 Precautionary principle**
>
> Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
>
> In the application of the precautionary principle, public and private decisions should be guided by:
>
> (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
>
> (ii) an assessment of the risk-weighted consequences of various options.
>
> **3.5.2 Intergenerational equity**
>
> The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.
>
> **3.5.3 Conservation of biological diversity and ecological integrity**
>
> Conservation of biological diversity and ecological integrity should be a fundamental consideration."

[60] The administering authority makes the final decision on the application for, or to amend, an environmental authority. In addition to the objections decision from the Land Court, the EPA makes provision for the MRA Minister and the *State Development Act* Minister to provide the administering authority with advice about any matters they consider may help in making a decision about the application (s 193). In making the final decision, the administering authority must have regard to the objections decision of the Land Court, any advice provided under s 193 and the draft environmental authority (s 194(4)(a)).

[61] In contrast to the MRA Minister's decision under s 271 of the MRA, the administering authority is not required to revisit the criteria in s 191. But that is explained by the fact that, under the EPA, the administering authority is obliged to make a decision on the application *before* it is referred to the Land Court for an objections decision (and in that context, will already have addressed the criteria in s 176).

[62] Reflecting s 190(2), s 205 provides that if the application relates to a coordinated project, and the decision is to approve the application, the conditions of the environmental authority must include the Coordinator-General's conditions (s 205(2)) and "any other condition imposed on the authority cannot be inconsistent with a Coordinator-General's condition" (s 205(3)).

[63] In this case, on 14 February 2018, a final decision was made by a delegate of the third respondent to refuse the application to amend the environmental authority, substantially relying upon the findings of the Land Court in relation to noise limits, intergenerational equity and groundwater.[34]

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[34] See the Statement of Agreed Course of Action following decision of 14 February 2018 (exhibit 4).

[64] As in the case of s 269(4) of the MRA, ss 190 and 191 of the EPA provide the framework within which the Land Court's decision on an objections hearing takes place, in terms of identifying the scope of the relevant considerations and the Land Court's function.

[65] Importantly, what is referred to the Land Court is "the application", being the application (for an environmental authority) for a mining activity relating to a mining lease (see ss 180 and 184). The objections hearing is not an open-ended inquiry about matters concerning the environment or environmental values. 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 (see s 268(2) MRA) 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 or the mining lease, if it is granted.

[66] I return to this issue from [196] below, but it is appropriate in this context to make the following further points about the scope of the jurisdiction and function of the Land Court, which arise from the groundwater issue.

[67] I accept that the terms "environment" and "environmental values" are broad, and may well encompass the *quantity* of groundwater available for use by surrounding landowners, as a natural resource, and a characteristic of a place or area that contributes to biological diversity and integrity, and as a physical characteristic of the environment that is conducive to ecological health.[35] However, in my view, that does not assist in identifying the scope of the jurisdiction conferred on the Land Court, for the purposes of an objections decision. That is governed by ss 190 and 191, having regard to the nature of "the application" which those provisions are dealing with, which is an application (for an environmental authority) for a mining activity relating to a mining lease (ss 180 and 184). The function of the Land Court under the EPA is limited to considering the matters identified in s 191 in so far as they relate to those activities – that is, activities which the applicant would be entitled to carry out under the MRA or the proposed mining lease.

[68] This was the approach taken by President MacDonald in ***Xstrata*** *Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-Op Ltd & Ors and Department of Environment and Resource Management* (2012) 33 QLCR 79 at [588]-[597], which in my respectful view, subject to one possible qualification, is correct, as a matter of construction of the relevant provisions.

[69] The possible qualification arises from a matter addressed by McMurdo P, by way of obiter, in *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242. Her Honour expressed the view that, in contrast to s 269(4)(i) and (j) of the MRA, having regard to the object of the EPA, and the broad meaning of the terms "environment", "environmental value" and "environmental harm", s 223(c) [now s 191(g)] should not be given a narrow construction, "so as to limit it to a consideration of the standard criteria directly relevant to an activity authorised under the *Mineral*

[35] See the third respondent's written submissions at [38] and [39], and oral submissions at T 4-61 to 4-62 (OCAA made submissions to similar effect); cf NAC's argument to the contrary, in [66] of NAC's submissions (filed 17 October 2017) and at T 1-63 and 1-68 to 1-79.

Resources Act to take place on land to which the relevant mining tenement relates"[36] (at [12]).

[70] The particular matter that her Honour said should be considered, as part of the "standard criteria" (having regard to the inclusion, as part of the standard criteria, of the principles of ecologically sustainable development as set out in the National Strategy for Ecologically Sustainable Development[37]) was the scope 3 emissions, which were not emissions caused by the physical operations which would be undertaken under the proposed mining lease; but rather emissions that may be caused by the transportation and burning of coal by others.

[71] In the same case, Fraser JA, at [39]-[42], referred to President MacDonald's conclusion in *Xstrata*, and to the fact that the first respondent in *Hancock* (the decision under review in *Coast and Country*) had adopted President MacDonald's conclusions. His Honour also noted that Douglas J at first instance affirmed the Land Court member's adoption of that analysis from *Xstrata*. Fraser JA did not, on my reading, express a concluded view on the point; observing (as McMurdo P did as well) that it would not affect the result of the appeal even if a broader construction of s 223(c) [now s 191(g)] were adopted. Morrison JA expressed general agreement with Fraser JA.

[72] In my respectful view, the jurisdiction which is conferred on the Land Court under ss 190 and 191 of the EPA has a particular focus – namely, the hearing of an application for (or to amend) an environmental authority, to permit mining activities lawfully to be carried out. The absence of express words such as "relevant to the application" in s 191(g) [s 223(c)][38] does not, in my view, mean that the consideration of "the standard criteria" is at large. Having regard to s 191 as a whole, in the context of subdivision 3 (commencing at s 184), it is implicit that consideration of the standard criteria, like the other matters referred to in s 191, is in relation to the subject matter of the decision to be made – which is an "objections decision" in relation to an application for an environmental authority to carry out particular activities.

[73] However, just as, under s 269(4)(k) of the MRA, broader considerations may be appropriate in considering whether the public right and interest will be prejudiced (by the grant of the mining lease), the same may be said of some of the "standard criteria" – which also includes, for example, "the public interest".

[74] It is not necessary, in order for me to determine the issues in this application, to form a conclusive view about the question of construction raised by McMurdo P in *Coast & Country*. Her Honour's obiter comments leave that question open for consideration in an appropriate case. However, those comments do not answer the problem posed in this case – which is whether it was within the jurisdiction of the Land Court, in making the objections decision, to fully consider an activity which would not be authorised under the mining lease, but depended upon a separate statutory assessment and approval process under the *Water Act*. For the reasons developed from [196] below, in my view it was not. In any event, in so far as the Land Court member in this case considered it was part of his Honour's function, and jurisdiction, to do so, that was not

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[36] My underlining.

[37] Which, in the context of the *Coast and Country* decision, appears from the passage quoted at [8] to have been in the form it was prior to the amendment effected by the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act* 2012 (Act No. 16 of 2012), s 61.

[38] Cf the textual analysis of McMurdo P in *Coast and Country* at [12].

on the basis of a broad interpretation being given to the "standard criteria" under s 191(g).

Water Act 2000

[75] The interrelationship between the *Water Act,* the MRA and the EPA is central to the resolution of the grounds of review relating to groundwater. The relevant provisions have been addressed in detail at paragraphs [198]-[200], [209]-[214] and [225] below.

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

[76] The objects of the *Environment Protection and Biodiversity Conservation Act* 1999 (**EPBC Act**) include to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance (s 3(1)(a)). One of the ways in which this is done is to prohibit certain action, without an approval first being obtained under the Act. Relevantly for present purposes, taking action that involves a large coal mining development, that has or will have, or is likely to have, a significant impact on a water resource, is prohibited without an approval (ss 24D(1), 67 and 67A).

[77] Provision is made under this Act for a bilateral agreement between the Commonwealth and a State that may deal with various things, including minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State, or vice versa (ss 45 and 48). There is such a bilateral agreement in place between the Commonwealth and the State of Queensland.[39] The stage 3 project was assessed by the Coordinator-General under the bilateral agreement, by reference to matters of national environmental significance,[40] with the Coordinator-General's evaluation report then being provided to the Commonwealth Minister for the Environment in accordance with s 36(2) of the *State Development and Public Works Organisation Regulation* 2010 and the bilateral agreement.[41]

[78] Section 505C establishes the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (**IESC**). Its members must possess scientific qualifications or expertise (in the areas of geology, hydrology, hydrogeology and ecology) that the Commonwealth Minister considers relevant to the performance of the Committee's functions. The functions of the Committee include "to provide scientific advice to the Environment Minister in relation to … large coal mining developments that are likely to have a significant impact on water resources…" (s 505D(1)).

[79] Like the State EPA, the EPBC Act also makes provision for an approval process for certain actions (ss 133 and 134). In some circumstances, the Minister is required to obtain the advice of the IESC before deciding whether or not to grant an approval (s 131AB). If approval is granted, the conditions of the approval must be complied with; it is an offence not to do so (ss 142, 142A and 142B).

[80] In this case, following advice received in December 2016 from the IESC, the Federal Minister gave EPBC Act approval for the revised stage 3.[42]

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39 See [89] of NAC's written submissions.
40 Exhibit 1, tab 45, p 63 and following.
41 Exhibit 1, tab 45, p viii.
42 Reasons at [1635] and [1746].

Obligation and standard of reasons required to be given

[81] Inadequacy of reasons is relied upon in respect of a number of the grounds of review. It is also a matter that is relevant to consideration of the apprehended bias ground.

[82] Although it has been held, and recently affirmed, that there is no free-standing common law duty to give reasons for an administrative decision,[43] the requirement to give reasons is acknowledged as an incident of the judicial function and process.[44]

[83] As explained by French CJ and Kiefel J (as her Honour then was) in *Wainohu v New South Wales* (2011) 243 CLR 181 the rationale for the duty upon judges to give reasons for their decisions (both final decisions and important interlocutory rulings) is not limited to the availability of rights of appeal; a wider rationale can be derived from the nature of the judicial function. Their Honours referred at [56] to the following summary of the objectives underlying the duty:[45]

> "First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Secondly, the general acceptability of judicial decisions is promoted by the obligation to explain them. Thirdly, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions."

[84] Their Honours also confirmed that the content of the duty will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision. Observing that the duty is an incident of the judicial function, whether or not the court making the relevant decision is subject to appeal, French CJ and Kiefel J said, at [58]:

> "The provision of reasons for decision is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion."

[85] In *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, which was cited in *Wainohu* (at [55]) McPherson and Davies JJA said, at 483:

> "The extent of the duty to give reasons is affected by the function that is served by the giving of reasons. The requirement is considered an incident

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[43] *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [43], referring to *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

[44] *Wainohu v New South Wales* (2011) 243 CLR 181 at [54]-[58] per French CJ and Kiefel J.

[45] From an extra-curial statement by Gleeson CJ, referred to by Heydon J in *AK v Western Australia* (2008) 232 CLR 438 at [89].

> of the judicial process, the hallmark of which is, as McHugh JA stressed in *Soulemezis* (1987) 10 NSWLR 247, 278-279, 'the quality of rationality', which is what serves to distinguish a judicial decision from an arbitrary decision. The giving of reasons is thus an aspect of judicial accountability, which was identified by his Honour in *Soulemezis* as the second of three purposes served by the judicial duty of giving of reasons. The first, his Honour said, is that 'it enables the parties to see the extent to which their arguments have been understood and accepted, as well as the basis of the judge's decision'. The third is that judicial reasoning provides a precedent for the decision of future cases…"

[86] Each of the purposes identified by McHugh J in *Soulemezis,* and referred to in *Cypressvale,* have equal force in relation to a decision of the Land Court under ss 268 and 269 of the MRA and ss 190 and 191 of the EPA.

[87] There is no question that the Land Court is under an obligation to give reasons for its recommendation in the present context. It is statutorily obliged to do so under s 269(5) of the MRA, when recommending the application for a mining lease be refused. There is no express obligation in the case of a recommendation that the application be accepted, and none in either case under the EPA. But in my view, for the reasons articulated in *Wainohu,* even in the absence of a statutory requirement, the Land Court is obliged to give reasons for its decision, as an incident of the judicial process. The only reason why there is any scope for debate in the present case about the standard of the obligation to give reasons is because of the characterisation of the decision to make a recommendation under s 269 of the MRA and s 191 of the EPA as administrative, rather than judicial. However, in my view, that characterisation does not alter the fact that the decision is one made by a judicial officer, a member of a court, as part of a judicial process.

[88] This was the conclusion reached by the Court of Appeal of New South Wales in *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435,[46] in relation to a decision of a judge of the Land and Environment Court of NSW which was, in effect, an administrative decision. In that case, Kirby ACJ (with whom Sheller and Clarke JJA agreed on this point) at 442 expressed:

> "reservations in extending the current immunity against the obligation to give reasoned decisions, enjoyed by pure administrators, to a judicial officer of a superior court. Cf *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 666. Whilst it is true that the judge is substituted for the consent authority and is making, in effect, an administrative decision, it is a decision inescapably made by a judge. As an incident of the judicial office, the judge is expected by the community to give reasons which sufficiently demonstrate the lawfulness of what he or she has done. *Housing Commission of New South Wales v Tatmar Pastoral Co Ltd* [1983] 3 NSWLR 378 (CA) at 385 …; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (CA) at 270. Whilst it is true that the duty of the judge will vary according to the way a case has been conducted and the

[46] Referred to by Meagher JA in *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443-444, which in turn was referred to by Muir JA in *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [63].

> reasoning followed, where a point is vital and where its resolution is crucial to the contest between the parties, it will ordinarily be expected that the judge will expose his or her reasons for the decision on the issue: see *Soulemezis* (at 270)."

[89] In this case, one of the things the court was required to take into consideration was a particular development control plan. A complaint on appeal was that the judge had failed to do that because, on the face of his Honour's reasons, there was no reference to it.

[90] A unanimous Court of Appeal held that an error of law had been shown in that regard. The reasons for this conclusion included the following (per Kirby ACJ at 442-443, Sheller and Clarke JA agreeing on this point):

1. The only way a court, on appeal, and the parties, can discern whether a consideration crucial to the case was taken into account is by looking to the reasons of the judge. Whilst those reasons should not be examined in an "overly critical or pernickety" way, the facility of appeal is provided by Parliament to ensure that a manifestly lawful decision is made. It is an incident of judicial duty to give reasons which extend to expressing findings upon issues which are critical to the point(s) in contention in a case. In my view, the same observation applies in relation to the facility of judicial review.

2. Although the decision was, in effect, an administrative decision, it was made by a judge, and as an incident of judicial office, the judge is expected by the community to give reasons which sufficiently demonstrate the lawfulness of what he or she has done. The consideration of the development control plan was crucial to the conduct of the case and the contest between the parties. This imposed upon the judge the obligation to at least refer to it, and to indicate his reasons, notwithstanding the application of the development control plan, for coming to the view that consent for the development should be given.

3. From a practical perspective, the trial lasted four days, a great deal of money had been expended by both sides, and many citizens' interests were involved. In these circumstances, a failure of the judge to indicate, in clear terms, that he had taken into consideration a crucial factor leaves the resolution of the dispute in an unsatisfactory state.[47]

[91] OCAA placed particular reliance upon the High Court's decision in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, a decision concerned with the standard of reasons required to be given by a Medical Panel for its opinion on a medical question referred to it. The only basis for an obligation to give reasons was statutory, and as a consequence the standard was a matter of statutory construction. Two considerations were regarded as of particular significance: first, the nature and function performed by the Medical Panel in forming and giving an opinion on the medical question referred to

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[47] Although the effect of the unanimous decision as to the failure to take into consideration a critical matter was that the matter had to be remitted to the Land and Environment Court, there was a separate aspect of the proceeding (a question of construction of a provision of the planning legislation dealing with whether consent of an owner of adjoining land was required) which was the subject of appeal to the High Court (*North Sydney Council v Ligon 302 Pty Ltd* (1996) 185 CLR 470), prior to the remittal. There was no appeal from the conclusion in relation to reasons.

it; and second, the objective, within the scheme of the relevant Act, of requiring the Medical Panel to give written reasons for that opinion (at [43]-[47]).

[92] *Wingfoot* is of little assistance here, given the fundamentally different nature of the function of the Medical Panel (to form an opinion on a medical question) and the Panel itself, as compared with the decision made by the Land Court in the present context. However, the conclusion I have reached, about the obligation and standard of reasons to be expected of a Land Court member, is also supported by applying those two considerations to this case.

[93] First, in terms of the nature and function performed by the Land Court. The Land Court is a specialised judicial tribunal, a public court of record (s 4 of the *Land Court Act*). The Land Court has, for exercising jurisdiction conferred on it, all the powers of the Supreme Court (s 7A). In the exercise of its jurisdiction, the Land Court is not bound by the rules of evidence, may inform itself in the way it considers appropriate, and must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts (s 7). This provision does not diminish the obligation to give reasons for its decisions, or somehow lower the standard – it is a general provision, applying to the exercise of all aspects of the Court's jurisdiction, whether characterised as judicial or administrative decisions.

[94] Hearings before the Land Court are conducted in essentially the same way as any other court hearing, save for the fact that the court is not bound by the rules of evidence. Evidence is taken formally and recorded (s 11). The Court has the power to subpoena a person to give evidence or produce documents (s 8) and to punish for contempt (s 9). Parties are entitled to be legally represented (s 24). The Court has power to make an order for costs (s 34).

[95] The hearing before the Land Court in this matter was substantial, extending over almost 100 hearing days. It involved, in addition to the applicant and the statutory party, 12 objectors (both organisations, such as OCAA, and individuals) who actively participated (and another 27 who did not).[48] A number of the parties were legally represented, including by senior and junior counsel; whilst others represented themselves. The hearing involved multiple, complex issues, in respect of which both lay and expert evidence was led;[49] and required consideration of a large body of evidence as well as extensive, detailed and complex submissions on matters of fact, including as informed by technical expertise, and law. In terms of the practical considerations referred to by Kirby ACJ in *North Sydney Council v Ligon 302 Pty Ltd* (a trial of four days, involving expenditure of a "great deal of money" and involving "many citizens' interests"), it might be observed that in the case of this Land Court proceeding those considerations are far more compelling.

[96] As to the second matter, the objective, within the scheme of the relevant legislation, of requiring reasons to be given, there are three important aspects to this:

(a) first, the reasons are required in order to inform the Minister under the MRA and the administering authority under the EPA, as the ultimate

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[48] Reasons at [83].

[49] Reasons at [103] (the Court heard from 38 lay witnesses and 28 expert witnesses).

decision makers, of the basis for the recommendations to refuse the applications;

(b) second, the reasons are required to inform the parties as to the basis for the decision, and also to facilitate review rights of the parties, by disclosing what was taken into account and in what manner; and

(c) third, the reasons are required to inform the broader public, both because of the subject-matter of the decision, concerning a public resource, but also because it facilitates the understanding and application of the law. It is clear that decisions of the Land Court in relation to matters such as the present do have precedential value.

[97] Although the decision is a recommendation, in so far as both the MRA Minister and the administering authority under the EPA are concerned, the decision plainly has the capacity to affect, in a practical sense, the rights and interests of the parties concerned. In my view, it is appropriate that the standard of reasons required to be given by a Land Court member, for a decision to make a recommendation under s 269 of the MRA and s 191 of the EPA, is the same as that which the members, as judicial officers, would be required to give for other decisions they may be required to make. The distinction between "administrative" and "judicial" decisions, in this context is, in my respectful view, an artificial one, if it is relied upon to contend that something less than that would be appropriate. The commercial and personal interests of parties who are involved in proceedings such as this are considerable, not to mention the public interest, given the subject-matter.

[98] In my view, the principles which were summarised in *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [58]-[65], and the decision of the Land Appeal Court in *Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads* (2014) 201 LGERA 395 at [47]-[50], apply equally to the obligation of a Land Court member to give reasons for the making of a recommendation under s 269 of the MRA and s 191 of the EPA. Relevantly, and without including the many cases cited as authority, in *Cidneo* at [49] Peter Lyons J summarised the position in the following way:

> "Since issues which depend on questions of fact are determined on the basis of evidence, a judicial officer must consider all evidence relevant to an issue, though it will not be necessary to refer to all the evidence in the reasons for judgment; but a failure to deal with evidence potentially critical to an important issue in the case tends to deny the fact and the appearance of justice having been done, and indicates that the evidence was excluded from consideration. The duty to state reasons requires a judicial officer to record the steps taken to arrive at the result, including the examination of relevant material; so that a failure to refer to material evidence can properly be taken as showing that the judicial officer has erroneously overlooked or discarded it. Where the reasons for judgment do not refer to evidence which is important or critical to the proper determination of an issue, an appellate court may infer that the judicial officer overlooked the evidence or failed to give consideration to it. Where one set of evidence is accepted over a conflicting set of significant evidence, the reasons should refer to the existence of both sets of evidence, and make it apparent how the judicial officer came to prefer one over the other. Where the evidence is expert

> evidence, which amounts to a coherent reasoned opinion, then its rejection should be explained by coherent reasoned rebuttal, or discounted for another good reason. The reasons for judgment should make apparent the process of reasoning by which the judicial officer has reached his or her conclusions. Overall, the reasons are to demonstrate that the judicial officer has grappled with the case as presented by each party."

[99] It follows that, where it is not otherwise apparent from the exposed reasons that evidence, or relevant material or arguments, in relation to *a critical issue* has been considered, generalised statements by the judicial officer to the effect that "I have taken into account all the evidence and submissions"[50] will not suffice.[51]

[100] Finally, OCAA also submitted that the Land Court member's reasons should be interpreted according to the well-known principles for interpreting decisions of administrative decision-makers, as set out in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. I agree with and adopt Kirby ACJ's observation in the *Ligon 302 Pty Ltd* case, that it is appropriate not to examine the Reasons in an "overly critical or pernickety way". But beyond that, I do not regard *Wu Shan Liang* as particularly applicable to consideration of the reasons of a judicial officer, a member of a specialist court, such as the Land Court.[52]

[101] Whilst this issue was the subject of argument before me, in the context of some of the grounds of review relied upon by NAC, I do not apprehend that the Land Court member regarded himself as under any lesser standard in terms of the obligation to give reasons. The preparation by his Honour of a decision of almost 460 pages in length strongly suggests he did not. It must also be acknowledged that his Honour had an unenviable task, given the voluminous amount of material and submissions, and the range and complexity of issues he had to deal with.[53]

[102] I turn now to the first of the grounds of review.

Apprehended bias

[103] Ground 13 of the amended application contends that in making the decision, the first respondent breached the rules of natural justice, in that the decision was made in circumstances where there was apprehended bias.

Relevant principles

[104] It is a fundamental principle of the procedural fairness of the system of decision-making, which applies to courts as well as to other tribunals, that the decision-maker be independent and impartial.

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[50] See for example Reasons at [37], [38] and [113].

[51] See, by analogy, *Camden v McKenzie* [2008] 1 Qd R 39 at [36] per Keane JA (and also at [30] and [31] as to the general principles). See also *Commissioner of Police v Stehbens* [2013] QCA 81 at [36] per Margaret Wilson J (Gotterson JA and Douglas J agreeing): "[m]erely referring to 'the state of the evidence' before the [Magistrate], without any analysis of that evidence, did not satisfy his Honour's obligation to give reasons…".

[52] See also, in this regard, *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 at 484-485.

[53] See for example Reasons at [202]-[205] and [1655].

[105] That principle is infringed in cases of actual bias, but also in cases of apprehension of bias. Bias, whether actual or apprehended, connotes the absence of impartiality.[54] Whatever its cause (be it interest in the outcome, affection or enmity, or prejudgment), "the result that is asserted or feared is a deviation from the true course of decision-making".[55]

[106] In this case, NAC expressly disavows any reliance upon an allegation of actual bias. It contends that, in the circumstances outlined below, a fair-minded observer *might* reasonably apprehend that the first respondent *might* not have brought an impartial or unprejudiced mind to bear to his task.[56]

[107] The basis of the principle of apprehended bias, and its application, were enunciated by the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ at [6]-[8] as follows:

> "[6] Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified **if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide**. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
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> [7] The apprehension of bias principle may be thought to find its justification in the **importance of the basic principle, that the tribunal be independent and impartial**. So important is the principle that **even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined**. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, **if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome**. No attempt need be made to inquire into the actual thought processes of the judge or juror.

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[54] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [23].

[55] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [183] per Hayne J.

[56] See *Keating v Morris & Ors; Leck v Morris & Ors* [2005] QSC 243 at [37], and the authorities there referred to.

> [8] The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires **two steps**. **First**, it requires the identification of **what** it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The **second** step is no less important. There must be an articulation of **the logical connection between the matter and the feared deviation from the course of deciding the case on its merits**. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."[57]

[108] It was not controversial that the principles in *Ebner* applied to the Land Court member and to the proceeding before him.

[109] I adopt what Moynihan SJA said in *Keating v Morris & Ors; Leck v Morris & Ors* [2005] QSC 243 at [47] to the effect that apprehended bias is a serious allegation to be made, and the considerations canvassed by the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336 are relevant. A reviewing court will not lightly conclude that a judicial officer may reasonably be suspected of bias. As the High Court said in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group* (1969) 122 CLR 546 at 553-554:[58]

> "[The] requirements of natural justice are not infringed by a mere lack of nicety but only when it is **firmly established** that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds."[59]

[110] The focus of the test upon the fair-minded lay observer confirms that it is the court's view of the public's view, not the court's own view, which is determinative.[60]

[111] As to the characteristics of the fair-minded lay observer, in *Johnson v Johnson* (2000) 201 CLR 488 at [12] and [13] Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said:

> "[12] …The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is **objective**, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be **reasonable**; and the person being observed is '**a professional judge** whose training,

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[57] Emphasis added. Footnotes omitted.

[58] Adopted in *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262.

[59] Emphasis added. See also *R v Lusink; Ex parte Shaw* (1980) 32 ALR 47 at 50 per Gibbs ACJ; *Vakauta v Kelly* (1989) 167 CLR 568 at 575 per Dawson J and at 585 per Toohey J.

[60] *Webb v The Queen* (1994) 181 CLR 41 at 52.

tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'.

[13] Whilst the fictional observer, by reference to whom the test is formulated, is **not to be assumed to have a detailed knowledge of the law**, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of **ordinary judicial practice**. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakauta v Kelly* Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of 'the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case'. Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them."[61]

[112] In relation to the latter, it was observed by Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [71] that "the question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion".

[113] The hypothetical fair-minded observer assessing possible bias is taken to be aware of the nature of the decision and the context in which it was made, as well as to have knowledge of the circumstances leading to the decision.[62]

[114] As will become apparent, a hearing which took place on 2 February 2017 is central to the apprehended bias ground. I proceed on the basis that the fair-minded lay observer would be aware of the history of the proceeding prior to that date, including the observations earlier made about the need for urgency, what occurred on 2 February 2017, and the whole of the Reasons, as well as an awareness of ordinary judicial practice, if not the law or the character or abilities of this particular decision-maker.

[115] I do not accept that the fair-minded observer could be taken to be aware of earlier decisions of this Land Court member, in relation to other applications by NAC associated with this mine (beyond what is recorded in the Reasons).[63]

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[61] Emphasis added; references omitted.

[62] *Isbester v Knox City Council* (2015) 255 CLR 135 at [23] per Kiefel, Bell, Keane and Nettle JJ.

[63] Cf [265]-[268] of OCAA's submissions. I record that OCAA did not press its submissions at [269]-[271] (that the fair-minded observer would also be aware that the Land Court member had approved many other mines in the past).

[116] In the circumstances of this case, relying as NAC does upon what might be apprehended from the Reasons, there are two further High Court decisions which are relevant.

[117] The first is *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 in which the issue was whether a decision of a judge of the Supreme Court of New South Wales should have been set aside (as it was by the Court of Appeal) because a fair-minded lay observer might reasonably have apprehended, from what had occurred in several interlocutory applications made by the appellant before the trial, that the judge might not bring an impartial and unprejudiced mind to the resolution of the issues at the trial. The interlocutory applications included ex parte applications for leave to use disclosure affidavits provided by two of the respondents in response to an earlier freezing order in the context of possible criminal investigations overseas, and an application to use documents produced in response to a subpoena, for a similar purpose. In each case, the applications were made without notice to the respondents, heard in closed court, and the subject of restrictions on publication post hearing, which remained in place for more than a year. The respondents unsuccessfully applied on two occasions for the judge to recuse himself from hearing the trial.

[118] As the plurality (Gummow A-CJ, Hayne, Crennan and Bell JJ) observed at [64], after referring to the two steps involved in the application of the apprehension of bias principle, explained in *Ebner*:

> "In the Court of Appeal, the present respondents **sought to articulate the connection** between the ex parte applications that had been dealt with by Einstein J and the alleged appearance of prejudgment **by pointing to what they said was revealed by the final judgment** that had been delivered at trial. They submitted that the reasons for judgment delivered at trial 'demonstrated a mind which had been, at least subconsciously, influenced to accept the 'case theory' presented by Mr Wilson in his affidavits during the interlocutory proceedings…"[64]

[119] After referring to the reasoning of Basten JA in the Court of Appeal, their Honours said, at [67]:

> "As pointed out earlier in these reasons, an allegation of apprehended bias requires an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judge might not bring an impartial mind to bear upon the issues that are to be decided. An allegation of apprehended bias does not direct attention to, or permit consideration of, whether the judge had *in fact* prejudged an issue. **To ask whether the reasons for judgment delivered after trial of the action somehow confirm, enhance or diminish the existence of a reasonable apprehension of bias runs at least a serious risk of inverting the proper order of inquiry (by first assuming the existence of a reasonable apprehension).** Inquiring whether there has been 'the crystallisation of that apprehension in a demonstration of actual prejudgment' impermissibly confuses the different inquiries that the two different allegations (actual bias and apprehended bias) require to be made.

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[64] Emphasis added.

> And, no less fundamentally, an inquiry of either kind moves perilously close to the fallacious argument that *because* one side lost the litigation the judge was biased, or the equally fallacious argument that making some appealable error, whether by not dealing with all of the losing side's arguments or otherwise, demonstrates prejudgment."[65]

[120] At [68] their Honours held that "the Court of Appeal was wrong to take account as it did of the reasons for judgment published by Einstein J after the trial in deciding whether in this case there was a reasonable apprehension of bias".[66] Their Honours identified the "central and determinative question for this aspect of the matter" as "might what was done in connection with [the appellant's] ex parte applications reasonably cause a fair-minded lay observer to apprehend that the judge might not bring an impartial mind to the resolution of a question for decision at the trial?".

[121] The error in the reasoning process identified by the High Court was in using the reasons for judgment to identify what it is said might lead the judge to decide the case other than on its merits (that is, the identification of the "matter" under step 1 of the *Ebner* test).

[122] The High Court held, contrary to the Court of Appeal's conclusion, that the fact that Einstein J had made several ex parte interlocutory orders did not found a reasonable apprehension of prejudgment of the issues that were to be fought at trial, observing that in none of the applications was the judge required to make, nor did he make, any determination of any issue that was to be decided at trial, nor of the credit of witnesses at the trial ([69]-[73]). Since there was no sufficient basis to conclude, from the interlocutory proceedings, that there was a reasonable apprehension of bias, the Court of Appeal's conclusion that there was such a reasonable apprehension could only be reached by impermissibly reasoning backwards, from what was decided at trial, and how it was decided, to the conclusion that it might reasonably be apprehended that the judge might have prejudged those matters (at [73]).

[123] But it is not the case that reference may not be made to the reasons for judgment, in a claim of apprehended bias made following the delivery of reasons, in reliance in part on conduct which took place before. Indeed, in an appropriate case that may be the means of demonstrating the "logical connection" between the matter (that is, step 1, what it is said might lead a judge to decide a case other than on its legal and factual merits) and the feared deviation from the course of deciding the case on its merits.

[124] This is demonstrated by the second case, *Vakauta v Kelly* (1989) 167 CLR 568. In the course of the trial of this personal injuries case the trial judge made adverse comments critical of the evidence of some of the medical witnesses, given in previous cases, for example describing three doctors as "that unholy trinity", being part of the insurer's "usual panel of doctors who think you can do a full week's work without any arms or legs" and whose "views are almost inevitably slanted in favour of the [insurer] by whom they have been retained, consciously or unconsciously". Toohey J (at 584, with whom Brennan, Deane and Gaudron JJ generally agreed, subject to the comments at 570-573) expressed the view that such comments "would excite in the minds of the

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[65] Emphasis added.

[66] See also *Vakauta v Kelly* (1989) 167 CLR 568 at 585 per Toohey J, similarly counselling against assessing bias during a hearing by reference to the judgment.

parties and in members of the public a reasonable apprehension that the trial judge might not bring an unprejudiced mind to the resolution of the matter before him, namely, an assessment based upon the evidence, lay and medical, of an appropriate amount to compensate the respondent for the injuries she had suffered". In relation to the comments made during the trial, Dawson J was of a different view (at 576-7), observing that "to recognise a preconception and alert the parties to it is likely to assist rather than hinder an impartial approach".

[125] Brennan, Deane and Gaudron JJ (at 573) and Toohey J (at 587-8) considered that if the comments during the trial had stood alone, the appellant, having taken no clearly stated objection to them at the time, and having stood by until the contents of the judgment were known, could not rely upon them in seeking to set aside the judgment on the grounds of a reasonable apprehension of bias – that is, that the failure to take objection amounted to a waiver. Had he found the comments during trial gave rise to apprehended bias, Dawson J would also have held the failure to object to them amounted to waiver (at 577).

[126] But those comments did not stand alone. In the judgment, the trial judge made "derogatory and wide-sweeping" references to one of the medical witnesses, Dr Lawson – in terms including "even Dr Lawson"; "his evidence, which was as negative *as it always seems to be* – and based *as usual* upon his non-acceptance of the genuineness of any plaintiff's complaints of pain" (at 573). It was held that, viewed in the context of the earlier comments, the comments made about Dr Lawson in the judgment itself would have the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer.

[127] Brennan, Deane and Gaudron JJ described the comments made about Dr Lawson, during the trial, as "effectively revived" by what the judge said in his reserved judgment (at 573), and held that the appellant's failure to object to the comments during trial could not be seen as a waiver of any right to complain if comments made in the judgment itself would convey a reasonable apprehension that the decision *in the end* was affected by bias (at 573-4).

[128] Toohey J agreed that it was permissible to evaluate what appeared in the judgment in light of what had been said at the hearing, but said that even without doing that, the remarks about Dr Lawson in the judgment amounted to ostensible bias. Toohey J said "[o]nce it is accepted that there was bias, at any rate ostensible bias, in the judgment itself, no question of waiver or estoppel can then arise. What was delivered was a reserved judgment, without any opportunity for counsel to question what it contained" (at 588).

[129] Dawson J also thought it appropriate to consider the comments in the judgment, in the context of the remarks made during the trial and said "the conclusion is inevitable that his Honour failed to consider the evidence in the case fairly and impartially, putting to one side his preconceived views about the [insurer] and its witnesses" and failed to set aside his prejudice in his consideration of the evidence. Like Toohey J, Dawson J said that since the judgment was reserved there was no opportunity for the defendant to object to its contents. Consequently there could be no question of any waiver of the right to object (at 579).

Step 1: what is the matter which might lead a fair-minded lay observer to consider that the Land Court member might not bring an impartial mind to the matters he had to decide?

[130] The focus of NAC's argument is on the circumstances leading up to, and more particularly during, a hearing in the course of the Land Court proceeding on 2 February 2017. NAC contends that a fair-minded lay observer of that hearing might reasonably apprehend that the Land Court member felt personally disrespected and offended by NAC's corporate conduct in connection with some media reports which his Honour interpreted as conveying the imputation that delays in finalising the Land Court process were attributable to his Honour taking leave, which in turn was the potential cause of job losses in the community; and in that context, his Honour had a negative view of NAC's corporate conduct, as being disrespectful, engaging in tactics and other inappropriate conduct to achieve its objectives.[67] It is submitted a fair-minded observer might apprehend these feelings and views clouded his Honour's ability to assess NAC's actions and responses, in relation to the media reports, objectively.

[131] When consideration is given to the Reasons, NAC contends that the fair-minded lay observer might reasonably apprehend that the Reasons reveal the Land Court member continued to be affected by the 2 February 2017 hearing, which might have coloured his Honour's ability to assess the evidence and submissions of NAC objectively, in respect of some of the matters he had to decide.

[132] In terms of the *Ebner* test:

(a) step 1, the matter it is said might lead the Land Court member to decide the case other than on its merits, is the reasonable apprehension of personal offence on the part of the member, and the member's view of NAC's corporate conduct, arising from the 2 February 2017 hearing; and

(b) step 2, the logical connection between that matter, and the feared deviation from the course of deciding the case on its merits, is that despite the member indicating at the end of the 2 February 2017 hearing that he considered the matter closed, it might reasonably be apprehended from the Reasons that his Honour was still affected by the feelings and views arising from the 2 February hearing, and because of that might not have brought an impartial mind to the resolution of some of the questions he had to decide.

[133] In order to determine this question, it is necessary first to consider the chronology of events leading up to the 2 February hearing; then to address the 2 February hearing itself; and then to consider the Reasons.

Chronology leading up to the 2 February 2017 hearing

[134] The chronology of relevant events leading up to the 2 February 2017 hearing is as follows:

From the first	NAC seeks to have the matters progress with urgency,

[67] T 1-10.

directions hearing	including on the basis of a risk of job losses if the mining leases and amended environmental authority are not granted by a particular time; Land Court expedites pre-hearing processes to enable the hearing to commence in March 2016.[68]
9 November 2015	The member made an order for electronic filing, in terms that "all material which is to be filed or delivered in these matters, is to be filed or delivered to the Court as an electronic document…"[69]
7 March 2016	Hearing commenced, with the first witness called on 16 March 2016.[70]
12 July 2016	Article published in the Courier Mail, with the headline "Queensland economy: Acland mine jobs rest on legal delays", and including the following:[71] The delays in what was expected to be a 10-week case puts a question mark over the ability of New Hope to maintain jobs at the Darling Downs mine… The company last week lodged an affidavit of urgency to inform the court of the pressure, and sittings have been held well into the night to hear evidence. Land Court member Paul Smith told the court on Friday how galling it was for the court to be criticised over the delays when he had been hearing matters while so ill he had resorted to keeping a sick bucket under the bench.
7 August 2016	Mr Boyd, the Chief Operating Officer of New Hope Corporation Ltd (the parent company of NAC) gives evidence, and is questioned by the Land Court member in relation to matters of urgency, and concerns expressed by Mr Boyd that the approvals process was taking longer than expected.[72] Relevantly, this part of the evidence included statements by the Land Court member that: [I]t is a matter of deep personal concern to me how much personal resources I put into completing this matter.[73] Can you see why it becomes galling for this court, and I'm speaking personally now and certainly not on behalf of the [president] or other members of this court, why this court receives indirect criticism from your evidence as to the time that the process is taking and particular criticism

[68] Reasons at [114]-[117]. See also the affidavit of Bruce Denney, formerly the Chief Operating Officer of New Hope, sworn 21 October 2015 (exhibit 374 in the Land Court proceedings) at exhibit 1, tab 48, at [7]-[16].
[69] Affidavit of Geritz (17 October 2017), exhibit MGZ-7, order 2.
[70] Reasons at [94].
[71] Affidavit of Geritz (17 October 2017), at pp 29-31 of the exhibits.
[72] See the extract of the transcript set out at [223], pp 56-60 of OCAA's submissions; also exhibit 3, tab 13.
[73] Exhibit 3, tab 13, p 64-76.26.

	from other areas, not just even under print media, but also it would seem in other areas of Government, that it's the Land Court that is the holder of these approval processes when we come at the end of the chain after over 12 years and move heaven and earth to get a process through as quickly as possible with hundreds of thousands of pages of documents and working long hours, to be told it is the court, not the process, but the Land Court and these proceedings which is the cause of the delay and the cause of a loss of jobs potentially because of this court process. Can you see why personally when I've had to keep a bucket below the bench here so I could sit for a week when I was sick in the stomach to throw up in, why it becomes personally [galling] to receive that criticism?[74]
12 August 2016	Evidence in the hearing concluded.
5-7 October 2016	Closing submissions heard, following the filing of written submissions.[75]
14 December 2016	IESC provides further advice in relation to groundwater and surface water issues.
15 December 2016	NAC emails the Court and the parties about the IESC advice.[76]
16 December 2016	Deputy Registrar of the Land Court sends an email to all parties, advising of an issue in relation to the e-trial site and its searchability, and indicating the Land Court member requires the parties to appear to address that issue, and indicating he will also hear from the parties in relation to NAC's email of 15 December 2016.[77] This hearing was eventually scheduled for 12 January 2017.
19 December 2016	NAC files an application to reopen the hearing, to put the IESC 2016 advice into evidence.[78]
12 January 2017	Hearing in relation to the e-trial searchability issues, and directions hearing in relation to NAC's application to re-open. Directions are made enabling parties to file further submissions, to cater for the possibility that they may have missed something as a result of a defect in searching the e-trial documents.[79] Directions are also made for the hearing of NAC's application to reopen to take place on 2 February 2017, but

[74] Exhibit 3, tab 13, p 64-77.34-.46 (wording in square brackets represents corrections to what appears in the transcript).
[75] Reasons at [94].
[76] Inferred from contents of Deputy Registrar's email, referred to at next item in this chronology.
[77] Affidavit of Geritz (17 October 2017), exhibit MGZ-5, at p 7.
[78] Exhibit 1, tab 1.
[79] This is alluded to in exhibit 1, tab 17 (transcript of the hearing on 12 January 2017), although I have not seen a copy of the order made.

	on a broader basis than originally foreshadowed by NAC.[80] In the course of the hearing on 12 January 2017 the Land Court member commented that in terms of timing, dealing with the reopening would lead to problems, noting that he was due to go on leave from 4 February to 13 March, the arrangements having been in place for a year. His Honour offered to sit after 4pm to accommodate the reopening application before going on leave.[81]
18 January 2017	WIN News story airs, as follows:[82] **18 January 2017, 6:02PM** **ANCHOR** - Lincoln Humphries, News Anchor WIN News **REPORTER** - Caitlin Crowley, Reporter, WIN News **MACFARLANE** - Ian Macfarlane, CEO, Queensland Resources Council **KING** - Mr Paul King, Darling Downs Environment Council, Respondent **ANCHOR:** It's 10 years since the New Hope Group first applied to expand its New Acland Coal Mine. You'd think in all that time things will be pretty well sorted but no. A decision on stage 3 has been delayed again. After 6 months in the Land Court we don't expect to get the recommendations until April. **REPORTER:** A decision was expected at Christmas then by January. Now we understand the judge's recommendations on Acland Stage 3 are a further 3 months away. **MACFARLANE:** Every day that it takes extra is a day closer to the mine closing and all of those jobs, the permanent jobs, the contractors you know you're talking in excess of 6 or 700 jobs, will be lost to this area forever. **REPORTER:** A spokesperson for New Hope told Win News today it's exploring every avenue to ensure continuity of employment for staff in the transition to Stage 3 but it's no secret they're running out of coal. Once the court decision comes back State and federal ministers will have the final say on its approval. **KING:** It's extremely frustrating. New Acland Coal at a very late stage just before Christmas has sought to introduce new water evidence into the proceedings, long after evidence has closed. **REPORTER:** The company says the judge called everyone back and requested more information and now the judge is

[80] Exhibit 1, tab 2 (order of 12 January 2017) and exhibit 3, tab 4 (reasons delivered on 2 February 2017) at [94]-[98].

[81] Exhibit 1, tab 17, p 89-29.

[82] Affidavit of Geritz (17 October 2017), annexing as part of exhibit MGZ-8 the affidavit of Catherine Uechtritz, Senior Communications Advisor of New Hope, sworn 2 February 2017 (commencing at p 89 of the exhibits). The transcript of the WIN News story is referred to in [3] and is exhibit CDU-01 to Ms Uechtritz's affidavit (at p 95 of the exhibits).

	taking leave. All of that leaves workers around Oakey uncertain about their future. **MACFARLANE:** That mine has won an Australian award as the best rehabilitation mine in Australia. It's done to the best environmental standard and we need to just get on with it because Queensland needs the money, the royalties and the incomes. **REPORTER:** Caitlin Crowley, Win News.
23 January 2017	Courier Mail article published, as follows:[83] **Miner urges limits on state Land Court hearing times** The New Hope Group has called for time limits on Land Court actions as the case over its Acland coal mine expansion extends past a year. A court software glitch, judge's holiday and new evidence combined to put back a decision on the controversial case until April, 13 months after what was supposed to be a 10-week hearing began. The extension is likely to weigh on jobs at Acland mine because resources are depleted. The company said it won't know the full impact until its May budget reckoning. The Federal Government approved the mine expansion last week and scientific evidence in that decision will be presented to the Land Court. Grazier Frank Ashman, who has led the Oakey Coal Action Alliance, said his group was devastated by the Federal Government's approval. New Hope managing director Shane Stephan said all stakeholders could see there had to be a better way of handling disputes because the current system allows for 'almost endless' delays. 'There has to be limitations on time,' he said.
23 January 2017	Mrs Merilyn Plant, one of the objectors, sends an email to the Land Court and the parties, in relation to NAC's application to introduce the evidence of the 2016 IESC advice. The email includes the comment that "Also, as recently as the last few days we saw a media report on TV with Mr Macfarlane and during that report it was suggested 'his honour' by taking holidays was holding up the case".[84] It may be accepted this was a reference to the WIN news report.
25 January 2017	Deputy Registrar, at the direction of the Land Court member,

[83] Affidavit of Geritz (17 October 2017), annexing as part of exhibit MGZ-8 the affidavit of Shane Stephan, the Chief Executive Officer of New Hope, sworn 2 February 2017 (commencing at p 21 of the exhibits). The Courier Mail article is referred to in [2] and exhibit SS-01 to Mr Stephan's affidavit (at p 28 of the exhibits).

[84] Exhibit 1, tab 34, p 2.

	sends an email to the parties, communicating the following from the Land Court member:[85] I am very concerned about recent media stories which appear to emanate from New Acland Coal (NAC). These stories at worse amount to a diminution of my own reputation and an attack upon the integrity of the Land Court. The effect may lead to undermine public confidence in the judicial process. A Courier Mail article dated 23 January 2017 identified NAC as calling for time limits on Land Court hearings. In the article my February/March 2017 leave has been identified as one of the causes of the delay in my decision in this matter not being handed down until April 2017. There is no mention in this article (as I stated in open court) of my booking my family holiday some 12 months ago when the matter was thought to last 10 weeks, or that it is NAC's application to reopen the proceedings which is paramount to the April estimate. Nor is there any mention of the effort myself and court staff have put in to have this matter dealt with as quickly as possible (ie sitting at night etc). There has also been a recent WIN TV News report on the delay of the NAC decision. At one point the reporter commented on information supplied by NAC regarding the delay and then said, And now the Judge is taking leave Again I view these comments very seriously as not only an attack on my integrity but an attempt to erode public confidence in the Land Court itself. In my view these comments could be regarded as contempt of court and dealt with accordingly. However prior to dealing with the matter and holding a formal contempt hearing, I will provide NAC with an opportunity to explain its actions. Accordingly, irrespective of whether or not any party requests an oral hearing of the reopening issue, the parties are required to attend Court on 2 February 2017. I trust that this sufficiently communicates the manner in which I view the seriousness of the situation, particularly as on its face it may be construed as an attempt by NAC to distort the facts and erode public confidence in this Court. I will not allow any question of that nature to remain unexplored and unanswered. Put bluntly, any delay in this matter has resulted from the etrial computer issue (outside the control of this Court – within the control of the Department of Justice and Attorney-General) and, perhaps more significantly, the application by NAC to have fresh evidence/reopening of the case.
2 February 2017	NAC files, electronically, affidavits of Ms Uechtritz and Mr Stephan, in relation to the matters raised in the preceding email. The affidavits were not served on the other parties to the proceeding, on the basis that NAC considered the matters raised by the Land Court member were matters between the Court and NAC only. The covering email requested "If the Court is otherwise minded, the Applicant wishes to be heard before the affidavits are published by the Court", and indicated hard copies would be available at the hearing that

[85] Affidavit of Geritz (17 October 2017) at pp 17-18 of the exhibits.

	afternoon.[86] Ms Uechtritz addressed the WIN TV news report, and outlined the conversation Ms Uechtritz had with Ms Crowley, the reporter, on 18 January 2017. Ms Uechtritz said that, in response to a question from the reporter about what had caused the delay, she did not discuss the Land Court member's leave, but instead referred to the technical issues with the e-trial search function and the need to consider whether to allow the new IESC report to be considered as evidence in the hearing. Ms Uechtritz also said that she also told the reporter that, even when the Land Court member made his recommendations, there were other approval stages to get through (including the State Minister, who had to make the actual decision, and the need to obtain Federal Government approval). Ms Uechtritz denied using the words "and now the judge is taking leave", which were referred to in the WIN news report. Mr Stephan addressed the Courier Mail article. He referred to a text having been sent by the journalist, John McCarthy, to Ms Libby Beath, New Hope's Corporate Affairs Manager at about 9am on 22 January 2017, saying "Hi Libby, I understand the Acland rec from Land Court will be delayed until April because of new evidence, judges holidays and some software glitch at the court. Is this the case and if so what are the job impacts?" ([4]). Mr Stephen says he considered it appropriate to respond to the journalist's approach, and so telephoned the journalist at 11.20am on that day ([8] and [9]). In relation to that phone call, Mr Stephan said: 10. Mr McCarthy asked me to confirm that a recommendation from the Land Court would be delayed and I said that was my understanding. 11. I indicated to Mr McCarthy that His Honour had discovered a problem with respect to the search function of the software used by the Court to manage all of the documents in the proceedings and said words to the effect that His Honour had in my view quite rightly indicated that he was going to provide parties who may have been affected with an opportunity to review their submissions to address that issue. I specifically recall that I used the words 'quite rightly' as I sought to give credit to His Honour for identifying and advancing a proposal to deal with the search function problem… 12. I recall that I also expressly said to Mr McCarthy that the Applicant in these proceedings had sought to have a report from the Independent Expert Scientific Committee (IESC) admitted into evidence and that this application was being heard in early February. I said that I understood that environmental activist groups such as

[86] Affidavit of Geritz (17 October 2017) at [14] and pp 16-17 of the exhibits.

		Lock the Gate Alliance had lobbied government to establish the IESC and, in those circumstances, I found it difficult to reconcile the Alliance's criticism of the EPBC Approval, that had relied upon the positive advice received from the IESC.
	13.	To the best of my recollection, Mr McCarthy then referred to His Honour's leave. I recall saying words to the effect that everybody is entitled to their holidays. While I was aware of His Honour's planned leave for some months, I was not aware of the specific details as to when that leave was booked. In particular, I was not aware that His Honour had booked his leave some 12 months ago. In any event, there was no other discussion with Mr McCarthy associated with His Honour's leave, so the limits of my knowledge of that issue were not relevant.
	14.	In the course of responding to Mr McCarthy, I was aware and appreciative of the work that the Court and its staff have done in this matter including working extended hours and I did not criticise either His Honour or the Court in relation to any of the above matters.
	15.	Mr McCarthy wanted to know the impact that further delays in these proceedings would have on jobs and I informed him that the Applicant was also now required to obtain an associated water licence.
	16.	I informed him that the delays would weigh on jobs because of the depletion of the reserves and the full impact of this would be determined once the budget and production planning processes for the 2018 and 2019 financial years, which are currently being formulated, were finalised.

The 2 February 2017 hearing

[135] The first part of the hearing on 2 February 2017 was concerned with NAC's application to reopen, and the second part was concerned with the "completely separate and distinct"[87] issue concerning the Land Court member's email communication regarding the media reports. The latter commenced at p 90-21 of the transcript. This court also had the benefit of the audio recording of the 2 February hearing, which was played during the hearing in this court and which I have listened to again in the course of considering my decision.

[136] In order to address NAC's argument, it is necessary to refer in some detail to what transpired at the 2 February 2017 hearing:[88]

1. The member commenced by saying the issue was one which "one hesitates greatly in raising, but I do so **out of concern for the reputation of the Land Court, not out of any personal concern**".[89]

[87] See the transcript of the 2 February 2017 hearing: exhibit 1, tab 18, p 90-3.30.
[88] The bold emphasis in the parts quoted below has been added.
[89] T 90-21.45.

2. His Honour then read out the text of the email he had directed the Deputy Registrar to send to the parties (set out above).

3. The member indicated the proper procedure was to "bring to all parties' attention in a matter a concern held by the court and to give the party against who that concern is expressly addressed by the court **an opportunity to explain the situation** and it may be that the circumstances are not as they appear from the media. It would not be the first time that circumstances are different in the media to what they are in fact. So I have given this opportunity. It may be that the matter can be resolved and put to bed tonight. It may be that additional steps will have to be taken. It may be that I have to direct the registrar to institute contempt proceedings against NAC in this matter, but they are the three options that I see as possible at this stage."[90]

4. Senior Counsel for NAC, Mr Ambrose QC, formally read the affidavits of Mr Stephan and Ms Uechtritz, which had been filed electronically that day and submitted "that they provide an explanation as the court sought of NAC's actions relative to the media statements". It was also submitted that, if the court was satisfied with the explanation, no further step need be taken; but if not, the appropriate course was to proceed with its report and recommendation in relation to the substantive proceeding, and deal with the matter of the media reports at the conclusion.[91]

5. It is apparent the Land Court member had not read the affidavits prior to the hearing. His Honour asked Mr Ambrose to give him a "precis of what they say". Mr Ambrose declined, saying he would prefer to rely upon the whole of the documents, not a precis.[92]

6. In response to a direct question from the member, "The statement in the article relating to my leave, did he [Mr Stephan] convey that to the journalist or not?", Mr Ambrose responded "No". The member's response to this was to request the letter "that has obviously been written by NAC saying they had been misquoted by the Courier Mail". When Mr Ambrose responded to say "that hasn't been written", the member raised his voice and said "I am serious, Mr Ambrose".[93] A short time later the member indicated he would expect NAC to have taken its own defamation proceedings against the Courier Mail had they been misreported.[94]

7. After the first reference to NAC being misquoted, Mr Ambrose reiterated that his Honour needed to read the affidavit in order to fully understand it.[95] After the exchange in which reference to defamation proceedings was made, Mr Ambrose again submitted the member should read the material that had been called for.[96] At this point, Mr Ambrose offered to read the affidavits out in court, following which the member indicated he would adjourn to read the material.[97]

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90 T 90-21.4-.11.
91 T 90-23.
92 T 90-24.
93 T 90-24.
94 T 90-25.
95 T 90-25.5.
96 T 90-26.5.
97 T 90-26.21.

8. Just before adjourning, the member also said he would direct the registry be opened so that any party who wished to could search the file "to inform themselves as to what is going on". The following exchange took place:

> "MR AMBROSE: Your Honour, we have hard copies if you would benefit from those.
>
> HIS HONOUR: Of course I would benefit from hard copies.
>
> MR AMBROSE: Thank you.
>
> HIS HONOUR: I would assume that hard copies were filed, were they?
>
> MR AMBROSE: They were **filed in the ordinary way** ---
>
> HIS HONOUR: **By email**.
>
> MR AMBROSE: --- as was done with every other document in these proceedings.
>
> HIS HONOUR: **Of course**. [*There is then a delay of some 28 seconds, apparent from the audio recording, before his Honour continues*] Before I adjourn, perhaps at my own peril, I will make a further statement to help inform the parties. I am **trying my best to remove personal thoughts in this matter** from questions of the justice in this state and the perception of justice being undertaken by the courts, **but to put the matter into some perspective from a personal nature**. The leave that I am taking is a mixture of time to completely get away from everything, and jurisprudential leave where I am lecturing at a university and doing other matters. That was meant to occur last year. That was cancelled and rearranged because of this case.
>
> The trip that I am going on for personal reasons, I have had family members desperate to go to a remote part of this planet which you can only really get to in an easy way once per year. I was meant to do that trip in February 2016; I got rid of that trip because of this case; I got rid of all leave last year because of this case; I have sat at night because of this case, as have the parties. I wrote the draft judgment that you received today at 3 am on Monday morning in this matter. I believe that from a personal matter, I have gone far beyond what any normal judicial officer, as committed as they all are, to [putting self] to one side to meet the demands of a case.
>
> **At a personal level then, it cut deep** when I heard and read what was stated, **but putting my judicial hat on, I have to leave the personal cut to one side**. I normally don't deal in personal matters, but leaving all of what I have just said from a personal perspective to one side, **I now worry more about the reputation of this court** and it pains me, having been an officer of this court for 13 years, to see **questions of its integrity and the manner in which its members operate brought into public disrepute** and I am absolutely determined to have that question resolved in the affirmative, in

> the negative or in the need to be examined as much as I can tonight. Yes. Adjourn the court."[98]

9. After the adjournment, having read the affidavits, the Land Court member said he read in Mr Stephan's affidavit "confirmation in paragraph 10 that Mr Stephan confirmed the contents of the report as set out in the text of – is set out in paragraph 4, that the reason for the delay included the judge's holidays. So I have read a confirmation of what I am concerned about".[99]

10. Mr Ambrose responded that that was not a proper reading of paragraph 10, and what may be described as a fairly robust exchange ensued.[100] Mr Ambrose reiterated on a number of occasions that the newspaper article did not attribute to NAC the comments about the reasons for the decision being delayed, including the reference to a "judge's holiday", and that Mr Stephan's affidavit confirmed that he did not say that to the Courier Mail journalist.[101]

11. The Land Court member indicated that he "wanted to put this to bed tonight", but that "all I am hearing are **wormings and turnings** to do everything but put what could have been a simple matter simply to bed". He then said "And I don't understand the **games that have been played today** with filing this matter directly with me in my chambers without going through parties. I do not understand why an open transparent party would **depart from every tenant [sic, tenet] of the common law justice in this world, in common law terms**, by seeking to approach a judicial officer directly with filed material without filing it in the court, which is what I have been advised by the registrar of this court and by the deputy registrar it was sought to occur". His Honour asked "why did [you] attempt to have it [the affidavit material] conveyed directly to a judicial officer without going through a normal filing process?"

12. In response to these comments, Mr Ambrose said it was not a matter that involved any other party to the proceeding, which is why the material was not served, but that the affidavits were filed in the same manner as every other document in the proceeding (electronically, by email to the deputy registrar).[102]

13. The Land Court member said he would not take that any further, and then said:

> "You see, Mr Ambrose, I had wondered about something like, 'NAC is sorry with what has happened and in no way intended to do anything which may bring the court into disrepute.' Perhaps something like that would have been nice at the start of this. But I'll tell you an impression that could exist out there in public-land, particularly when they read paragraphs 4 and paragraph 10 of this affidavit which apparently I completely misconstrued in reading the affidavit. The rest of the affidavit is very well written, but paragraphs 4 and 10, when combined together, are an issue for concern, which on its face, NAC could have corrected.

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98 T 90-26.34 to 90-27.27.
99 T 90-28.30.
100 T 90-29 to 90-30.
101 T 90-29.19 to .23; 90-31 to 90-32.
102 T 90-30 to 90-31.

> Even if NAC did not intend for any of this to get in the public domain, it did. It did, after contact [was] made with their spokesman. It saw a concern by the court regarding the court being brought into disrepute, the court has in communications made to this court in various elements of the community been brought into disrepute by the reports that have occurred, **and I can get affidavit evidence if we have to go down that trail** in that respect, and **it creates a flavour in the community of the judge is taking holidays and costing lots of jobs**. That's the impression that is out there in punter-land, and perhaps in some warped universe, Mr Ambrose, I don't know, **that may suit your client to have that false impression out there**, because this evening you have gone to great lengths to have anybody read these affidavits, to have me have a precis of the affidavits, to have anything done in any way to openly distance your client from that out-there perspective, which is the very heart of the perception as to the reliability of justice in this state that I am concerned about."[103]

14. Mr Ambrose again sought to explain that NAC did not "in any way, shape or form, in any statement convey that impression", and to explain that the Land Court member's reading of paragraphs 4 and 10 of Mr Stephan's affidavit did not have the effect the member sought to attribute to them.[104] There follows an exchange in which the Land Court member suggests that Mr Ambrose has said NAC is happy with what is contained in the article, being an attack on the court. Mr Ambrose makes it plain he did not say that [*which the transcript confirms*].[105] I observe that the transcript confirms Mr Ambrose was at pains to try to explain that the Courier Mail article did not attribute the comment about "judge's leave" to NAC; and that Mr Stephan's affidavit made it plain that he did not make any such comment to the journalist.

15. The following exchange then took place:

> "MR AMBROSE: --- … you're asking NAC for an explanation of its contribution to the article in order to determine whether NAC has been in any way in contempt of court. That is what we're dealing with. A matter of law. One, that paragraph is not attributed to NAC. Two, that paragraph, even on its face, does not involve any disrespect to the court. Three, Mr ---
>
> HIS HONOUR: How can you say that? How can you possibly say that that paragraph does not show disrespect to the court? A long-running urgent matter with jobs it effects, and now the judge is going on holidays, which is exactly what the WIN TV article said.
>
> MR AMBROSE: Well, we will deal with the WIN TV article later.
>
> HIS HONOUR: How – I thought I had a thick skin, and for the last 17 years I've had to have a very thick skin a lot of times, but maybe I've just got too thin, I'm too old, and I should just retire, say that I'm biased in this matter and let you start again with a new member. Is that what you want?

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[103] T 90-31.
[104] T 90-31.
[105] T 90-32.

MR AMBROSE: It's a matter for your Honour's decision about that,

HIS HONOUR: No, no, it's a matter ---

MR AMBROSE: I'm not making an application ---

HIS HONOUR: It's a matter that can be an application by a party.

MR AMBROSE: I am not making an application.

HIS HONOUR: Well, it sounded like it.

MR AMBROSE: Well, again, with the greatest respect it's very difficult for me to understand how you can draw that imputation.

HIS HONOUR: Just excuse me for a second. **Mrs Plant,** I think it was you who started this ball rolling. Am I correct in your submissions you referred specifically to a WIN TV article which alerted me to what was occurred.

MS PLANT: I did – I did say that, because I saw that WIN article, and ---

HIS HONOUR: **Just to help my objectivity, do you have the view of the article and the WIN article that Mr Ambrose has, or I have. Just so that I can have a third view as to this**.

MS PLANT: I'm afraid I agree with you. I think Mr Ambrose is quite wrong and, to me, it's, really, just gone with everything that's happened in the past. I mean, myself ---

HIS HONOUR: I don't want to go into other things.

MS PLANT: No, okay.

HIS HONOUR: I don't want to ---

MS PLANT: Okay.

HIS HONOUR: Because, you see, that's when **I am trying so hard not to look at the personal side but at the court disrepute side** so that there cannot be an application that I am biased. That is so to show the elephant in the room that's what I'm concerned about, and that's what I raised without saying it to Mr Ambrose earlier this evening.

MS PLANT: No, I saw the – that WIN TV show – and that's exactly how I felt; that it was saying it was your fault.

HIS HONOUR: Well, you, obviously, are the same lesser intellect as I am, Mrs Plant.

MS PLANT: Probably. Probably.

HIS HONOUR: I'm sorry, Mr Ambrose, I have thrown out many lifelines to make this easier, and all I get is knocked down each time.

MR AMBROSE: Your Honour ---

HIS HONOUR: I am not going to delay dealing with this until after the recommendation is made so that you can then judicially review me on the basis of bias if a recommendation is against your client. I'm not going to do that. And that is **a legal tactic** which I know is open to you. You can frown as much as you want. I practised for a long time and I have pulled all the **tricks** that were in the book, as well. I'm not playing that game.

MR AMBROSE: I'm not pulling any tricks. I'm simply responding. And our principal submission is that in no way, shape or form did NAC attribute your Honour's holiday to a cause for the delay, and that's apparent on the face of Mr Stephan's affidavit. And Mr Stephan goes on in paragraph 3 to speak about the deep respect he had – 23 – the deep respect he had for the law and the [courts that] administer [it], and he said he has not sought to engage in any conduct which is critical of the court or your Honour, nor the conduct of this matter. He particularly explains how your Honour quite rightly acted in a certain way.

HIS HONOUR: **And all I have asked is for you to make a public comment saying that this was not in any way New Acland's intention for that to occur, and I have said that now five times and cannot get it out of you**."[106]

16. His Honour indicated he was going to adjourn the court at that point to allow Mr Ambrose to get instructions "formally, having heard from me". Mr Ambrose indicated he had those instructions, and the following exchange took place:

"MR AMBROSE: I have those formal instructions.

HIS HONOUR: Well, you've taken a long time in saying them.

MR AMBROSE: Well, with the greatest respect, let me make it very clear. It was never NAC's intention to convey any disrespect of your Honour or the court in its communication with any media outlet.

HIS HONOUR: **And [is] NAC going to communicate [that] to the two media outlets involved**?

MR AMBROSE: Well, we can.

HIS HONOUR: I could get in a space shuttle if they built one. It doesn't mean I'm going to. I'd like to know, and I'd like you to get instructions if that's what you intend to do or not.

MR AMBROSE: We will, your Honour. We will convey that, in no uncertain terms.

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[106] T 90-32.44 to 90-34.41.

> HIS HONOUR: Sorry? You will convey that or you will get those instructions?
>
> MR AMBROSE: No, we have the instructions. I have those instructions just then to say to you we will convey that – what I have just said – that it was never any intention to imply that your Honour's leave has contributed to the delay, or in any way to bring your Honour or the court into disrepute.
>
> HIS HONOUR: Mr Ambrose, **if I'd have heard that two hours ago, the course of the afternoon may have gone somewhat differently**. With that, having read the affidavits of Mr Stephan and Ms Uechtritz and being – I will use the words, advisedly **delighted** with the content of Ms Uechtritz' affidavit and, apart from my concern which I remain, regarding paragraph 10 and paragraph 4, otherwise, **very satisfied** with the affidavit of Mr Stephan with the statements that you have now made on the public record to the court, **I consider the matter closed**, and will not be making a directive to the registrar to issue any contempt proceedings in this matter."[107]

[137] In submissions before me various adjectives were used to describe this hearing – including unorthodox, unjustified and uncomfortable. To those, I would add unfortunate and inappropriate. Whilst reasonable minds might differ on the appropriateness, or necessity, for the instigation of the inquiry into the media reports in the first place, that having been done, for the express purpose of providing NAC "with an opportunity to explain its actions", the conduct of the hearing by the Land Court member was remarkable, in a number of respects, including:

1. Refusing, initially, to read the affidavits that had been filed and read in response to the direction to NAC to appear and explain its actions, in the face of repeated, and entirely appropriate, requests from Senior Counsel that the member do so.

2. After the adjournment, having seemingly read the affidavits, accusing NAC (or its legal representatives) of playing games and departing "from every tenet of the common law justice in this world" by seeking to approach a judicial officer directly with filed material – in circumstances where NAC had filed the affidavits electronically, by emailing the Deputy Registrar, in the same manner as every other document in the proceeding.

3. Persisting with his Honour's subjective view about the meaning and effect of paragraphs 4 and 10 of Mr Stephan's affidavit, in circumstances where, I accept, as submitted by NAC before me, an objective reading of paragraphs 9 to 16 of Mr Stephan's affidavit make it quite plain what Mr Stephan told the journalist, and what he did not (as to the latter, that he did not attribute his Honour's leave as a reason for delay, instead saying "everybody is entitled to their holidays"). There was no call for Mr Stephan to be cross-examined, including by the member, and no reason not to accept his evidence on its face.

4. Suggesting that his Honour could get affidavit evidence of some kind, it seems (although this part of the transcript is confusing) to demonstrate that the Land

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[107] T 90-35.9 to .47.

Court had been brought into disrepute in various elements of the community by the reports that have occurred.[108]

5. Turning to one of the lay objectors, Mrs Plant, whom his Honour later, in the Reasons at [531], described as a person whose "starting position is to give the benefit of blame to NAC", to "help [his] objectivity" in terms of his Honour's view of both the WIN News story and the Courier Mail article.

6. Indicating shortly after the adjournment that his expectation of what would have occurred at the start of the hearing was that NAC would give an apology, which suggests a level of prejudgment of NAC's responsibility for the comments in both media reports, which were of concern to his Honour.

7. Shifting the ground in terms of the purpose of the hearing, from a direction requiring NAC to provide an explanation of its actions in relation to the media reports, to a demand that NAC make a public statement that it was not NAC's intention to convey any disrespect of the Land Court member or the Land Court in its communications with the media and a demand that NAC convey that to the media outlets. Only after the statement was made, and an undertaking to convey that to the media outlets given, did his Honour express himself to have been "delighted" with Ms Uechtritz's affidavit and, subject to a lingering concern about paragraphs 4 and 10, "very satisfied" with Mr Stephan's affidavit, and that he considered the matter closed.

[138] OCAA submitted that, whilst acknowledging the hearing itself made for uncomfortable listening, both the beginning of it, and the way that it ended, were entirely appropriate. NAC emphasises the "everything inbetween". As I have said, I accept that reasonable minds might differ about the commencement or instigation of the inquiry. In my view, the manner in which the hearing ensued was inappropriate and unfortunate. I regard the way that it ended as concerning, rather than "entirely inappropriate", as, without properly dealing with NAC's explanation, in terms of its evidence and submissions, his Honour appears to have demanded a public comment on behalf of NAC, and for that to be conveyed to the media outlets, effectively as the price for taking no further action in terms of a possible contempt hearing.

[139] But it is important to keep in mind, as OCAA submitted and NAC agreed, that the application before this court is not a review of what occurred at the 2 February 2017 hearing, nor of the decision that was made at the end. The question for this court to determine, in the present context, is what an informed, fair-minded lay observer might apprehend from that hearing.

[140] In my view, objectively, such a fair-minded lay observer might reasonably apprehend that his Honour had taken personal offence at the imputation his Honour read into the media reports that his upcoming leave was the cause of further delay in finalising the proceeding, which in turn could be the cause of job losses. Further, the fair-minded lay observer might reasonably apprehend that his Honour laid the responsibility for that imputation at the feet of NAC, and as a result of his Honour's personal feelings, might

[108] I record that I do not accept the submission of OCAA that this comment by the Land Court member can somehow be explained or understood in light of another reference I was taken to, in the course of a directions hearing on 9 November 2015, at transcript p 2-16.10 (which refers to the registry staff speaking directly with parties). See T 3-32 to 3-33.

not have brought an objective and impartial mind to the evidence and submissions made to him by way of the demanded explanation. I consider a fair-minded lay observer might also reasonably apprehend, from the 2 February hearing, that his Honour had views about the conduct of NAC, that it was prepared to engage in inappropriate conduct, tactics, playing games and pulling tricks, in the manner in which it dealt with the Land Court in relation to this issue.

Step 2: what is the logical connection between that matter and the feared deviation from deciding the case on its merits, as it might appear from the Reasons?

[141] Turning then to the next part of the issue, which is whether the making of the decision, reflected in the Reasons, was affected by apprehended bias.

[142] The question is how it is said that the Land Court member's conduct of the 2 February hearing "might be thought (by the reasonable observer) possibly to [have diverted him] from deciding the case on its merits", because "unless that connection is articulated, it cannot be seen whether the apprehension of bias principle applies".[109]

[143] NAC's argument starts from the proposition that, as articulated in its written submissions, the Land Court member's comments, at the end of the 2 February hearing, would reasonably have led NAC to believe that the entire issue of delay and the causes of it was "closed".[110] In its oral submissions in reply NAC clarified that it does not submit that the issues of urgency, or NAC's conduct, became off limits because of the 2 February hearing. Rather, what NAC relies on is the *manner* in which the Reasons dealt with those issues, in some parts of the Reasons, which NAC submits might give rise to a reasonable apprehension that the 2 February hearing might have affected his Honour's ability to objectively determine the issues, or any of them.[111]

[144] NAC refers to a number of parts of the Reasons in order to make good its argument, as follows.[112]

Mr Beutel

[145] Mr Beutel, an objector, was described as one of the last remaining residents of the town of Acland. At [32] of the Reasons, the member said:

> "During the course of the lengthy hearing, a number of references were made to the Australian classic comedy film 'The Castle', likening the position portrayed in that film to that of Mr Beutel. A little person trying to protect his property from a corporate giant. In many ways the truth of Mr Beutel's position is far in excess of the fiction of 'The Castle'."

[146] At [469]-[475] the member records some general observations about Mr Beutel and his evidence, including, at [474] stating that "I find myself in general agreement with the analysis of the evidence of Mr Beutel as set out in part 73 of NAC's submissions". Then at [1369]-[1370], in the context of dealing with one of the key issues,

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[109] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [30].
[110] NAC's written submissions at [156].
[111] T 5-8 to 5-9.
[112] In the various passages quoted from the Reasons below, the bold emphasis has been added.

"community and social environment", an aspect of which was the "removal of Acland Township", the member said:

> "[1369] NAC does appear to have downplayed its part in the destruction of Acland as noted by Dr Ward. As noted by Mr Beutel, it could have rented the properties it acquired and kept the town alive. By removing most of the buildings in the town it has in all likelihood killed off any chance of the town of Acland surviving.
>
> [1370] In terms of community and social impacts they have been significant particularly for Mr Beutel, **and one wonders whether the removal of the buildings in Acland has been a deliberate ploy by NAC to pressure him to leave**. NAC may have acted within the letter of the law by their purchase and removal of Acland buildings, but as an example of engagement with the community, NAC has acted quite intentionally like a bull in a china shop."

[147] NAC emphasises the bold part of [1370], as presenting an impression, not a finding, which in any event is not based on evidence, and was not a matter put to any of NAC's witnesses, which as a matter of fairness it ought to have been.

[148] For completeness, I note that the member said the following, in concluding on the issue of "community and social environment":

> "[1420] NAC has much work to do to regain the trust of many in the local community. Its actions in removing approximately 27 buildings from Acland township, downplaying a significant community divide, dismissive treatment of people who do not agree with it, lack of appropriate community engagement and loose complaints management system has negatively impacted the local community.
>
> [1421] However NAC has also provided positive benefits for the community such as a wide ranging community sponsorship and donations program, protection and maintenance of cultural heritage sites and an apparent renewed commitment to community engagement.
>
> [1422] Overall, on balance, I do not believe Stage 3 should be rejected based on community and social impacts but conditions specifically around complaint management need to be tightened to ensure negative social impacts from the mine are diminished into the future."

[149] I accept NAC's submission that there was not evidence before the Land Court to support a finding that the removal of houses from Acland was a deliberate ploy by NAC to pressure Mr Beutel to leave. OCAA, being the only contradictor on this issue in the proceeding before me, did not take me to any such evidence (although did refer me to Mr Beutel's opening address, in which he made reference to his perception of intimidation).[113]

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[113] T 1-67.

[150] OCAA accepts this is a statement by the member about a tactic on the part of NAC, but says that it should be read in the context of Mr Beutel's submission of his perception of intimidation and other objectors' submissions as to the isolation of Mr Beutel, as a result of NAC's actions.[114] OCAA also says it ought rationally be concluded that the member's view about this was most likely formed prior to the circumstances of the 2 February hearing, and as such there cannot be said to be any logical connection between this, and the 2 February hearing.

[151] As to that last point, both NAC and OCAA made submissions in terms of which parts of the Reasons might have been written (or at least formulated, in terms of thought process) before or after the reopening in relation to groundwater which took place in April 2017. NAC submitted one could reasonably apprehend that, in respect of the lay witnesses, whose evidence was completed by the end of 2016, his Honour would have formed his views well before the 2 February 2017 hearing.[115] I accept that.[116]

[152] The bold part of [1370] is appropriately described as a gratuitous comment, not supported by objective evidence. However, I accept that aspects of NAC's corporate conduct were live issues during the whole of the hearing before the Land Court, as is reflected in the summary at [29]-[34] of the Reasons. In those circumstances, I am not persuaded that the fair-minded lay observer would connect this gratuitous comment, to the 2 February hearing, as opposed to other aspects of NAC's conduct addressed in the course of the hearing and Reasons. I am not persuaded that, in the context of the Reasons as a whole, the fair-minded lay observer might reasonably apprehend, from that comment, that his Honour remained affected by the 2 February hearing and because of that might be apprehended not to have brought an impartial mind to his task.

Urgency

[153] At [114]-[130] the Land Court member made some comments about the urgency attending the matter, on the basis of evidence and submissions on behalf of NAC, from "the very first directions hearing" (at [114]).

[154] There is some criticism of NAC's claims of urgency by the Land Court member, on the bases that:

(a) the approval process in relation to the (present) mining lease applications and environmental authority application have been ongoing since 2007 (at [120]);

(b) that process was effectively abandoned in 2012, with it not being until June 2014 that the mining lease application ML 50232 was amended to abandon a significant area and not until 2015 that the application for ML 700002 and the application to amend the environmental authority were made (at [121]); and

(c) the environmental impact statement for stage 2 of the project, which his Honour inferred must be dated around 2005, indicated a mine life of coal production until 2021 (at [123] and [124]), whereas in the context of the

[114] As also referred to in NAC's submissions below (exhibit 1, tab 26, [73.8]).
[115] T 1-40.16.
[116] It is consistent with what the member says at [129] and [1876] of the Reasons.

proceeding in relation to proposed stage 3 NAC relied on material indicating the coal reserves would be exhausted by 2017 or 2018 (at [55] and [125]).

His Honour was critical of NAC in two respects in relation to this. First, on the basis of what his Honour seemed to consider a lack of imprecision in the earlier, stage 2 EIS. However, NAC submits, and OCAA appears to have accepted,[117] that the obvious explanation for the difference in anticipated mine life reflected an increased production rate – from 4Mtpa, referred to in the stage 2 EIS, to the more recent production rate of about 5Mtpa. The second criticism was on the basis of a comment that NAC had, "interestingly", not referred to the stage 2 EIS in its chronology (at [123]).

[155] The Land Court member concluded the "urgency" section with the following:

"[126] It is my clear view that any urgency in these matters has risen as a direct consequence of the actions by NAC. These actions include the failed initial Stage 3 expansion after 5 years; a quicker depletion than earlier anticipated of the coal reserves in Stage 2; and the reopening of this hearing.

[127] Unfortunately, I feel compelled to place my views in this regard, based on the evidence before me, clearly on the public record **so that there can be no further confusion as to the cause or causes of delay resulting in urgency**.

[128] Despite all of my preceding comments under this heading, and despite my views as set out above, as indicated, all of the parties seek a decision in this matter as soon as possible. I agree that, after such a lengthy hearing, it is beneficial for all parties to know where they stand as regards the Land Court's recommendations. Many objectors simply want to get on with their lives: other objectors want certainty so that they can plan their future. Whatever the reason, it is because of the wishes of all parties to have a decision delivered quickly, and not just the claims for urgency by NAC, that these recommendations have been delivered in the speed in which they have.

[129] Of course, the Court has had the opportunity to work on the draft decision in these matters since the original close of submissions. That has allowed much work to be undertaken prior to the reopening of the hearing.

[130] In case my comments above can be taken as being either uncaring or dismissive (or both) of the plight of workers who may lose their jobs because of the depletion of coal in Stage 2, that is far from the case. **The simple point that I am trying to make is that, in my view, and supported by the evidence before me, the underlying cause for any such job loses falls squarely at the feet of NAC**."

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[117] OCAA's written submissions below, at exhibit 1, tab 27, at [286].

[156] NAC submits, particularly by reference to the emphasised parts of [127] and [130], that the fair-minded lay observer might apprehend from these comments that his Honour still had the 2 February hearing in his mind, in terms of his Honour's personal concern about the public perception about causes of delay in finalising the proceeding, and the impact of that on job losses. NAC also points to the use of the word "interestingly" in [123], as suggesting there was something "sinister", "perhaps a deliberate non-inclusion of something in the chronology"; and the use of the word "notably" in [55] where reference was earlier made to the stage 2 EIS suggesting a mine life until 2021, again suggesting "there might be something not quite right about that".[118]

[157] I accept that the highlighted references in [127] and [130] of the Reasons may reasonably be perceived to be linked to what took place at the 2 February hearing. But they may equally reasonably be linked to earlier statements by the Land Court member, for example, in the course of his Honour's questioning of Mr Boyd on 7 August 2016 (referred to in the chronology above). In any event, the logical connection required is between what might reasonably have been apprehended as a result of the 2 February hearing, and a reasonable apprehension, from the Reasons, that his Honour might not have brought an impartial mind to his task. I am not persuaded that this is shown, by reference to this section of the Reasons.

[158] I do not think the use of the words "notably" and "interestingly" would be apprehended to bear the connotation submitted by NAC.

Mr Denney's affidavit

[159] Mr Denney was (up until December 2015), the chief operating officer of New Hope Corporation Ltd. The treatment by the Land Court member of Mr Denney's evidence, culminating in his Honour expressing the view that he was "extremely troubled" by it, "to such an extent that I afford it little or no weight (at [231]) is the subject of ground 12, discussed from [366] below. But in the present context, NAC emphasises the following:

> "[228] When I consider Mr Denney's evidence as a whole, it becomes abundantly clear that much of what is contained within his affidavit material and quoted in the first person is in fact the opinions of others which have been passed on to him. In my view, on too many occasions it is not Mr Denney's own, independent knowledge.
>
> [229] I do not accept the submissions of NAC in this regard [*which are recorded at [221] of the Reasons*]. It is an extremely simple matter for an affidavit to be written in such a way as to make it abundantly clear when someone such as Mr Denney is relying upon the views of subordinates when expressing an opinion. Given that the rules of evidence do not apply in the Land Court, there was no danger of Mr Denney having his affidavit excluded on the basis of hearsay had it honestly and truthfully stated the position as it really was, **instead of being drafted in a way to deceive the reader into thinking that all of the statements expressed were Mr Denney's own opinion**, at least in all those circumstances where he used the word "I" or the like."

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[118] T 1-34.

[160] NAC emphasises the words "drafted in a way to deceive", and submits it is one thing to say the affidavit was not properly drafted, and another thing to imply that this has been done to deceive. The paragraph needs to be read as a whole. Perhaps "deceive" is too strong a word, but objectively the point being made is that the way in which Mr Denney's affidavit was drafted created a false, or incorrect, impression that the opinions and statements were his own, as opposed to opinions or statements expressed or made by others, albeit with which he agreed.

[161] In other parts of the Reasons, the member makes observations about the statements of evidence of other lay witnesses, similarly criticising hearsay statements.[119] It might be fair to say that the member took a more charitable approach to the comments made about that evidence, in contrast to Mr Denney. But on the other hand, those witnesses were objectors, who were not legally represented; whereas Mr Denney was the chief operating officer of the applicant, which was represented by a large legal team. I am not persuaded this supports the apprehended bias argument.

Attributions of disrespect

[162] NAC points to three parts of the Reasons, in which it submits the Land Court member attributes disrespect by NAC towards objectors, which it submits ought to be seen in the context of the 2 February hearing.

[163] The first relates to Mrs Harrison, an objector who had built a house on a property near the mine, and had previously carried on a business promoting alpacas from that property. Of Mrs Harrison, the Land Court member said:

> "[522] NAC in its submissions, part 77, states that Mrs Harrison has no actual evidence of the mine having adversely impacted her alpaca business and, indeed, the business is now flourishing. NAC appears to base this submission on the fact that Mrs Harrison's alpaca business is doing well at the new property. This was, however, not the key thrust of Mrs Harrison's evidence
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> [523] I accept her evidence that NAC's Stage 1 and Stage 2 mining had a negative impact on her alpaca business at Bremar. NAC's submissions read **almost as if they had done her a favour** by causing her to move her alpaca business to a new location. **It is a pity that NAC in its submissions** could not accept the impacts that dust, noise, and overspill of light had on Mrs Harrison, her alpaca business and tourists that came to visit the alpaca business as a consequence NAC's Stage 1 and Stage 2 operations."

[164] NAC refers to its submissions before the Land Court in relation to this issue,[120] which were to the effect that the evidence did not support a conclusion that the mine had adversely affected Mrs Harrison's alpaca business, as the evidence showed the business doing better at the new property than it was before. NAC submits that the emphasised

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[119] For example, Reasons at [400]-[403] in relation to Mr Cook; at [408]-[409] in relation to Mr Ashman; at [427]-[430] in relation to Mr Scholefield.

[120] Exhibit 1, tab 26 at [77.5]-[77.10].

comments are emotive, and not reflective of an objective assessment of NAC's submissions.

[165] The next two arise once again in relation to the key issue of "community and social environment". Under the sub-heading "community division", at [1389] and [1390] of the Reasons, the member said:

> "[1389] I also note with concern that actions that create divisions also come from pro-mine supporters. I note for example the evidence of Mr Beutel regarding his car probably being vandalised while he joined the court as part of its view of the mine and surrounds. Also I am concerned with the events described in Dr Plant's evidence (**despite NACs attempts to ridicule Dr Plant over this**) that someone has come onto her father's property and moved a large and heavy runway marker (witches hat and tyre) onto his runway while his plane was in the air. The Plants thought this serious enough to call the police and install security cameras. I also note a dead chicken was left in Mr Plant's gateway as possibly a message to not oppose the mine. While it has not been suggested that NAC was behind any of these instances, they concern me, especially what may happen if the mine expansion is not approved. The community division is certainly not coming just from those opposed to revised Stage 3.
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> [1390] **NAC has sought to portray the local objectors as bigoted individuals who are not interested in facts, only in spreading misinformation about NAC**. I do not believe this to be the case. As discussed previously in this decision, I find the majority of the objectors and the witnesses who supported them are honest, hardworking, regular folk whose character has been unfairly besmirched by NAC. In effect, NAC's treatment of objectors and their witnesses in these proceedings confirms their evidence that NAC has a tendency to treat anyone who disagrees with it in a dismissive and disrespectful manner."

[166] In relation to the emphasised part of [1389] NAC submits that this also is not an objective assessment of the evidence and the submissions of NAC; that it is an unjustified attribution of ridicule and of disrespect shown by NAC. NAC points to the evidence of Mr Plant (Dr Plant's father) that he had done all he could to find out who may have been responsible for moving the runway marker, without success;[121] and the evidence of Dr Plant, in cross-examination by Senior Counsel for NAC, when it was put to her "And are you suggesting that the mine was responsible for that?[122] NAC refers to its submissions before the Land Court in which, by reference to the evidence, it was submitted that Dr Plant's "belief that these incidents were attributable to the mine, or any supporter of it, is a step too far from reasonable".[123] NAC's point is that its submission was that the attribution of responsibility for the incident to the mine was not reasonable, not that Dr Plant's description of, and concern about, the incident itself was unreasonable.

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[121] Exhibit 1, tab 11 (transcript p 77-33).
[122] Exhibit 1, tab 10 (transcript p 74-33).
[123] Exhibit 1, tab 26 at [69.3].

[167] In relation to [1390], NAC submits this is a generalised conclusion, unsubstantiated by reference to any particular evidence, in circumstances where elsewhere in the Reasons the Land Court member has expressed various views about the credit of objectors, sometimes critical of them, including at times accepting NAC's submissions (positive and negative) in relation to their evidence.[124] A survey of those parts of the Reasons where the Land Court member addresses the evidence of the objectors confirms the submission made before me by NAC about [1390] of the Reasons. But that is an important point. The fair-minded lay observer must be taken to be informed by reading the Reasons as a whole. Having done so, the fair-minded observer would appreciate that the Land Court member had expressed a variety of views about the evidence of the lay witnesses, including that where those witnesses were also objectors particular caution had to be exercised in assessing the weight to be given to their evidence.[125] The choice of the word "bigoted" is a poor one, given the ordinary meaning of that word, and the particular connotation that it bears in every day usage.[126] But criticism of a decision-maker for a poor choice of words, or an incorrect statement, is to be distinguished from a finding that it might reasonably be apprehended by a fair-minded observer that they have not brought an impartial mind to their task.

[168] The observations, in relation to both [523] and [1389] may well be apt, in the sense that those paragraphs include gratuitous comments, as opposed to objective analysis of evidence or submissions made. But in circumstances where, firstly, those views may reasonably be inferred to have been formed by the Land Court member prior to the 2 February hearing,[127] and there is not demonstrably a logical connection between the Land Court member's conduct at the 2 February hearing, in terms of his Honour's personal expression of offence and hurt, and accusation of inappropriate conduct by NAC in the context of the matters dealt with at that hearing, and these comments about some of the lay witnesses, I am not persuaded that they support a finding of apprehended bias.

Other matters

[169] The next matter referred to by NAC appears in [1633]. This is in the part of the Reasons dealing with the key issue of groundwater, in particular by reference to the evidence from the reopened hearing, concerning the 2016 IESC advice. At [1632]-[1635] the member says:

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[124] Reference is made, for example, to the member's findings about Mr Cook at [400]-[403], Mr Ashman at [409], Mrs Spies at [415], Mr Scholefield at [428]-[430] (where the member described his answers to a line of questioning as "too cute by far"), Mr Noel Wieck, at [454]-[462] (the member describing some of this witness' submissions as "misguided and ill-informed, and bordering on being in contempt of court), Mr Grant Wieck at [465], Mr Beutel at [474], Mrs Mason at [488], Ms Munro at [492], Dr Plant at [509]-[510] (the member describing Dr Plant as a person who "certainly has a fixation of being anti-NAC"), Mrs Harrison at [525], Mrs Merilyn Plant at [531] (the member saying her "starting position is to give the benefit of blame to NAC"), Mr Plant at [539], Mr Hassall at [541]-[544] and Mr Faulkner at [557]-[558].

[125] See, for example, Reasons at [397], [409], [467], [475].

[126] Cf [6.5] of NAC's submission before the Land Court (exhibit 1, tab 26), where NAC submitted that "[m]ost of the objections to the applications are made by a relatively small number of members of the local community" and "there has been a high degree of anti-coal/anti-development emotion associated with these proceedings".

[127] As NAC submitted before me: 1-40.16.

"[1632] To begin with, some overarching observations should be made about the manner in which the evidence from the various IESC Advices have been presented to the Court.

[1633] As regards the 2014 and 2015 IESC Advices, it can be accepted that the IESC is critical in both reports of NAC's work undertaken with respect to groundwater. The IESC 2014 and 2015 Advices were tendered through expert witnesses put forward by OCAA. **I am in no doubt that, but for the objections on groundwater in this matter, neither the 2014 nor 2015 IESC Advice would have been placed before this Court by NAC**.

[1634] It could be said that is a natural consequence of the adversary system in which this Court operates. That may be so. However, it must also be considered in light of the evidence of Mr Denney and Mr Boyd for NAC that NAC now operates on a new form of openness and credibility compared to its former dealings at Acland. Just as Mr Boyd indicated that no one in the Acland community was informed of the opening up of west pit despite it being understood to be part of the revised Stage 3 operations because NAC was legally entitled to open west pit and did not have to tell anyone, then so to was the general disregard NAC demonstrated towards the 2014 and 2015 IESC Advices.

[1635] However, come the 2016 IESC Advice, the shoe is snuggly on the other foot. The 2016 Advice and subsequent letter was sufficient to cause the Federal Minister to give EPBC approval for the revised Stage 3. Absent all of the evidence that I have considered at the original hearing, my reading of the 2016 IESC Advice would certainly of itself appear to satisfy all requirements of the MRA and the EPA with respect to controlling issues of environmental harm which flow as a necessary consequence of mining operations. Once more, however, in this case, all is not as it appears. I will deal with a key shortcoming that I see in the 2016 IESC Advice later in this key issue."

[170] NAC submits that it may reasonably be apprehended, from the emphasised part of [1633], that the member considered NAC may have conducted itself in such a way as to deliberately attempt to avoid scrutiny of significant information. I accept that [1633] may well be read in this way. On its face, the conclusion is illogical, and unfounded, because "<u>but for</u> the objections on groundwater", there would have been no call for the IESC Advices to be placed before the Court. OCAA submits [1633] should not be read in that way, because it accepts that, "on its face, literally read, it makes no sense".[128] OCAA submits the point being made was that those two reports had not come before the court as a result of NAC tendering them; they were tendered by OCAA. Further, OCAA submits that to use this as a hook to suggest it would indicate to a reasonable lay observer some sort of apprehended bias is too long a bow to draw.

[171] After going on to address the 2016 IESC Advice, and the weight to be given to it having regard to the documents the IESC had before it, the member said this at [1663]:

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[128] T 3-48.

> "[1663] NAC seeks this Court to accept that the independent experts of the IESC had in their own right access to exactly the same documents that the experts in these proceedings had access to including the new EIS, the AEIS and the documents provided with respect to the 2016 IESC Advice. I not only agree with the statutory party that that submission should not be accepted, **but consider that it is in effect showing great disrespect to both this Court and the IESC**. No reasoned and reasonable observer could possibly consider that the IESC had before it for the purposes of its 2016 advice the same material as the experts in this hearing. They did not have the benefit of any of the concessions or views of the various experts with respect to the various topics that the IESC had to consider. **This Court would be lead into error if it were to assume that the IESC had all the information that this Court had to consider** what is in many respects the same issue. This is but another example of the submissions by NAC taking an extreme stance in like manner to which they are critical or, indeed highly critical, of the stance taken by OCAA and a number of the objectors."

[172] NAC submits that this paragraph is based on a misreading of its submissions before the Land Court and a misstatement of the statutory party's submissions. From those parts of NAC's submissions before the Land Court that I was taken to, it is apparent NAC was not submitting the IESC had "all the information that [the Land Court] had"; but was submitting that the IESC had access to all the source information ("the same base information") that the experts who had earlier given evidence, prior to the reopened hearing, had access to.[129] There are internal inconsistencies in [1663]. The first sentence of it is what NAC submitted. The second and third sentences, however, suggest the member misread or misunderstood what was being contended by NAC – as though it was a submission that the IESC had all the same material as had been tendered in the Court. What the statutory party had submitted should not be accepted,[130] was NAC's contention that it did not matter that the IESC were not provided with all of the material that had been tendered before the Land Court, and the transcript of evidence (in relation to the groundwater issue).

[173] I accept the submission that the Land Court member's conclusion, that NAC's submission showed "great disrespect to both this Court and the IESC", was unfounded in the circumstances. NAC submits that given this relates to the post 2 February resumed hearing, what a fair-minded lay observer might apprehend is that his Honour was attributing disrespect to NAC without a proper understanding of the submissions. I agree with that. But that is not the test that I am concerned with. What I need to be satisfied of, is that the fair-minded lay observer might reasonably apprehend that, being still affected by his Honour's personal offence and views formed at the 2 February hearing, his Honour might not have brought an impartial and independent mind to the task. I am not persuaded of that. The question of NAC's corporate conduct, in its dealings with members of the community, was a live issue in the Land Court proceedings. I am not persuaded, to the requisite standard, that there is the requisite connection between this statement, or the one complained of in [1633], and the

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[129] See NAC's written submissions at [182] and [183], referring to its submissions before the Land Court, following the reopened hearing, at exhibit 1, tab 35, [3.45] and [3.69].

[130] See Exhibit 1, tab 37, [45].

circumstances of the 2 February hearing, as opposed to broader issues otherwise involved in the proceeding.

[174] In addition, NAC submits that the shortcomings of [1663] support its contention, addressed in relation to the issue of groundwater below, that the Land Court member did not give consideration to the evidence and submissions of NAC from the resumed (reopened) hearing. NAC submits an informed lay observer would have the real apprehension that the lack of consideration was connected with a view that NAC had shown disrespect to the member in the lead up to the resumed hearing and during the course of it.[131] I am not persuaded it is appropriate to reach that conclusion, in the absence of something more concrete to found the connection. A failure to consider the evidence and arguments may indicate error, but not, unless firmly established, bias.

Epilogue

[175] This brings me to the last part of the Reasons relied upon by NAC , the "epilogue", which reads as follows:

> "[1862] I suspect that old, wise heads would caution me against providing this epilogue at the conclusion of this decision. For obvious reasons, including keeping the outcome of my recommendations strictly confidential until the time of their delivery, I have not sought the counsel of either old or young wise heads. I will simply rely upon what is clearly my own old head, although I will leave judgment as to the wisdom involved to others.
>
> [1863] In writing this epilogue, the test that I have applied to myself is this; what would I be happy to say on a podium at a conference, knowing that what I said would become public property?
>
> [1864] I am sure that many of those who have appeared before me throughout this lengthy hearing could point to areas from the transcript where I have been critical of a particular party. Examples that spring very quickly to mind include my concerns about NAC as expressed on the evening of 2 February 2017; my concerns about the statutory party and the manner in which complaints have been handled and whether the statutory party has conducted itself as a model litigant; Mr King, representing DDEC, for the manner in which he has at times participated in rhetoric more in keeping with a political arena rather than that of a Court; and Mr Wieck who continuously made statements at witnesses during cross examination rather than asking questions of witnesses, and who also made some rather outrageous comments in response to queries I made when I was doing no more than exploring options and various ideas. I am sure that there are many more examples that the parties could refer to.
>
> [1865] It is of course at times a necessary function for someone in my position to be robust. It comes with the territory of fierce independence. Allow me, however, to provide just a little insight about myself.

[131] NAC's written submissions at [185]; T 2-25.

[1866] Just as I do with every matter that I hear, when I was allocated this matter I had no idea of the issues involved or any preconceptions with respect thereto. Just like it always is, it was no more and no less than having the evidence speak for itself and applying the law to the best of my ability to my findings of evidence, and let the result sit wherever it fell, without fear or favour to anyone.

[1867] I suppose that we all consider that we have special and unique backgrounds and upbringings, but I like to think of my own background is something that is quite unique in the skills that I have acquired which come into play in dealing with matters such as this one. I was born and raised in Ipswich. In my formative years, Ipswich was very much a "coal town". My father's side of the family was from Ipswich, and close relations of mine worked underground in the coal mines, and as a small boy I was fascinated by the stories I was told of working under the earth. As times changed, mining changed to open cut mining in Ipswich, and the stories I heard changed. My first experience of going deep underground in a coal mine was in my primary school years in the mid 1960's. I was spellbound and fascinated. Likewise, I also went to open cut mines and experienced close up firsthand the huge machinery which looked gigantic to a small boy. I developed a love of mining and development and all things associated therewith which has followed me throughout my professional career, with my first appearance in the Warden's Court occurring in Ipswich in the early 1980's.

[1868] A completely different set of skills, experience, knowledge and understanding however comes from my mother's side of the family. She was raised on a sugar cane farm at Sharon near Bundaberg. Through her and her family, I developed a great love of visiting farmland and appreciating the role that the primary production community plays in our society. Planting things into the ground and nurturing and watching them grow still gives me great joy.

[1869] My upbringing taught me an upfront appreciation of the diversity of views and uses that could apply to the same situation; that is, a piece of land could be used as very productive cropping land, or it could also contain vast wealth in minerals, or it may indeed be locked out from either minerals or farming by the residential development of a city.

[1869] I have known of the New Hope group for many many decades. As I indicated at the time of seeing the list of shareholders of New Hope, I know one of those shareholders. No party took any objection to my knowing that person. I was the Member of the Land and Resources Tribunal responsible for the original recommendation for the Stage 1 New Acland Mine. I also presided over the Land and Resources Tribunal matter that involved a significant cultural heritage dispute in the development stages of Stage 1. I also gave the recommendations for the expansion of the New Oakley Mine, part of the New Hope group, near Rosewood.

[1871] In recommending previous mining matters for the grant of mining leases and environmental authorities, I have done so to the best of my ability on the basis of the evidence before me. I have done exactly the same in this case, except the outcome has been the opposite.

[1872] Just as I know countless objectors have been disappointed with decisions of mine in mining matters in the past, so do I accept and realise that NAC and its workforce will be disappointed in my decision in this matter. I cannot however be influenced by the feelings of any parties.

[1873] I have simply done the best that I could with the evidence I had, applying my understanding of the law, in fearless independence without fear or favour for any party, issue or cause.

[1874] Another matter that I wish to raise relates to the standard, both from an editorial and substantive sense, of the reasons set out in this decision.

[1875] As I have indicated, I have done my upmost to deliver my decision in this matter as quickly as possible, in fact on many occasions working into the wee hours of the morning and whilst on annual leave. In my view, it has been a remarkable effort by the staff of the Land Court to support me in having this decision completed and handed down a mere twelve days after the close of the receipt of written submissions on the reopening. Those who work diligently behind the scenes in our courts are rarely provided with the recognition they deserve. In this particular instance, the officers of the Land Court who have played a part in the delivery of this decision have done outstanding work.

[1876] Having said that, though, there are observations which I feel compelled to make. This decision is in my view far too long but, as I have quoted from Mark Twain in an earlier decision, 'I didn't have time to write a shorter decision'. Also, it needs to be borne in mind that this decision has been written in component parts over many months, since the original close of the hearing in October 2016. I apologise for those areas in which there have been duplications by myself in the reasoning. I could have easily taken another month to carefully check and review, put to one side, and then come back and check and review this decision in its entirety and still not go a great deal past scratching the surface. As I have indicated with respect to the urgency of my decision in this matter for the benefit of all concerned, I thought it more appropriate to deliver my decision as quickly as possible and live with the consequences of poor drafting.

[1877] I should also stress that, to have considered this matter in a more fulsome manner, and consistent with the timelines for delivery of decisions in matters such as *Hancock*, *Adani* and *Xstrata*, I could have justifiably used another 6 months in drafting this decision. Again, I will live with the consequences that my urgent writing of this decision may necessarily lead to.

[1878] I can only reiterate that I have carefully and, I trust, thoroughly considered all of the evidence before me, and provided my reasoned and

> honest recommendations in accordance with that work. Even if not worded as eloquently as I would have liked, and bearing in mind that these reasons only touch upon a fraction of the evidence compared to the huge amount of material that was placed before me, it is my belief that, even if I had taken an additional 6 months to provide my decision, the outcome would not have changed."

[176] NAC submits the epilogue is an unprecedented piece of writing[132] which presents as an anticipatory defence of the member's independence, of the adequacy of his consideration of the evidence and submissions, and of the adequacy of his reasons. NAC further submits that the epilogue indicates the member had the 2 February hearing in his consciousness when preparing the decision. NAC refers to the following observation made by Aickin J (albeit in dissent as to the result in that case) in *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12[133] at 16:

> "The critical question however is not whether a judge believes he or she has prejudged a question, but whether that is what a party or the public might reasonably suspect had occurred… In some circumstances repeated denials of prejudging might well convey the impression of 'protesting too much' …"

[177] NAC submits that a fair-minded lay observer might consider that is what the epilogue does – it protests too much.

[178] OCAA submits that a beneficial construction of the Land Court member's reasons, referring to the epilogue as well as other parts of the Reasons where he expressed his independence ([456] and [1678]), would be simply that he was telling the truth in making repeated statements that his decision was made independently and impartially.

[179] On that analysis, the observation by Brennan, Deane and Gaudron JJ in *Vakauta v Kelly* (1989) 167 CLR 568 at 571, adapted to refer to comments made at the end of the Reasons, is apt:

> "Knowledge of his or her own integrity can sometimes lead a judge to fail to appreciate that particular comments made in the course of a trial may wrongly convey to one or other of the parties to the litigation or to a lay observer an impression of bias."

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[132] Although acknowledging the epilogue is "unorthodox", OCAA points out that there is another example of an epilogue, in the decision of the same Land Court member in *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* (2014) 35 QLCR 56 at [421] and [427]-[432]. At [421] the member says "In case it is of any interest to anyone, one side of my family includes proud work in the coal mines of Ipswich, while the other side of my family worked the land growing sugar cane. As for me, it was an honour and a privilege to serve the people and government of Queensland as a public servant for over 25 years". The latter paragraphs comprise no more than an apology for the length of the decision, for the delay in completing the decision due to an accident, and thanks to those responsible for organising the electronic material and the staff of the Land Court. These paragraphs, one might also observe are unnecessary additions to the reasons for decision of a judicial officer; but they bear no comparison with the content of the epilogue in this case.

[133] A case in which an allegation of apprehended bias was made against the judge, arising from comments made during the hearing about what she considered an appropriate outcome, which were alleged to reflect prejudgment of the matter by the judge. At the same time as making those comments, her Honour expressly added statements to the effect that she was not to be taken to have prejudged the matter.

[180] In my respectful view, the inclusion of an epilogue such as appears at the end of the Reasons has no place in any statement of reasons, whether for an administrative or judicial decision. It undermines, rather than reinforces, the appearance of independence and objectivity on the part of the decision-maker.

[181] However, for the summary of reasons now expressed, I am not persuaded that this supports the conclusion that the member might be apprehended, from these comments, to have deviated from the course of deciding the case before him on the merits, keeping in mind the need for this ground to be firmly established, given the serious nature of it.

Conclusions in relation to apprehended bias ground

[182] As I have concluded at paragraph [140] above, objectively, from the 2 February hearing, a fair-minded lay observer might reasonably apprehend that his Honour had taken personal offence at the imputation his Honour read into the media reports that his upcoming leave was the cause of further delay in finalising the proceeding, which in turn could be the cause of job losses. Further, the fair-minded lay observer might reasonably apprehend that his Honour laid the responsibility for that imputation at the feet of NAC, and as a result of his Honour's personal feelings, might not have brought an objective and impartial mind to the evidence and submissions made to him by way of the demanded explanation. I consider a fair-minded lay observer might also reasonably apprehend, from the 2 February hearing, that his Honour had views about the conduct of NAC, that it was prepared to engage in inappropriate conduct, tactics, playing games and pulling tricks, in the manner in which it dealt with the Land Court in relation to that issue.

[183] I accept that, by failing to take any action immediately following the 2 February hearing, NAC may be taken to have waived any objection, on the basis of the circumstances and conduct of that hearing alone, to the Land Court member continuing to hear and determine the proceeding.[134] Although NAC submits there was a fact of which it was not then aware, namely the finding the member made in the Reasons about Mrs Plant, in my view, the conduct of the member, in turning to Mrs Plant to "confirm his objectivity" at the 2 February hearing is egregious in any event – regardless of the view his Honour had, it seems, otherwise formed. I do not consider that not being aware of this could, without something more, alter the conclusion as to waiver.

[184] However, I also accept, as a matter of principle, that if there was something in the Reasons which indicated an effective revival of the matters apprehended from 2 February (in particular, of personal offence, leading to a perception of a lack of objectivity or impartiality) or that "in the end" the making of the decision might reasonably be apprehended, by the fair-minded lay observer, to have been affected by bias, the waiver of the right to object on the basis of the 2 February hearing alone, would not prevent reliance on an objection in respect of the decision once made.[135] In this regard, I do not consider that NAC's argument in this matter suffers from the fallacious reasoning criticised in the *Michael Wilson* case. In its argument, NAC does not seek to use the Reasons to identify what it is said might lead the member to decide the case on its merits (that is, step 1) – it relies upon the 2 February hearing for that.

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[134] *Vakauta v Kelly* (1989) 167 CLR 568 at 573, 577 and 587-8; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [76].

[135] *Vakauta v Kelly* (1989) 167 CLR 568 at 573-4, 579 and 588.

[185] Having addressed each of the particular parts of the Reasons relied upon by NAC in making its argument on this ground, it is also necessary to step back, and consider those arguments more broadly, in the context of the Reasons as a whole, which is the context in which the fair-minded lay observer is to be assumed to have regard to them.

[186] This was a case in which the member was faced with diametrically opposed views.[136] It seems fair to assume that emotions ran high, perhaps particularly in the case of the lay objectors who participated and gave evidence. The hearing and determination of the matter was clearly an onerous task for the member. The fair-minded lay observer might reasonably apprehend that the language used by the Land Court member in his Reasons was at times blunt and colloquial.[137] Having regard to ordinary judicial practice, there are parts of the Reasons which make for uncomfortable reading, particularly the "epilogue". It might reasonably be apprehended that, inconsistently with the role of a judicial officer as a dispassionate, objective decision-maker, the Land Court member has said too much. The Reasons give the impression that many of his personal thoughts and feelings about the case, and the participants in it, are expressed in the Reasons, unnecessarily and undesirably. On the other hand, whilst I accept that a statistical analysis of points won or lost is not an appropriate barometer on its own,[138] I consider the fair-minded lay observer might reasonably apprehend, from the Reasons as a whole, that the member has decided the many issues he had to determine variously, in favour of one side of the argument or another.

[187] Overall, on balance, acknowledging that the circumstances of the 2 February hearing, and some aspects of the Reasons, made this argument one which was open, and not unreasonable, it is my view that on a reading of the Reasons as a whole, the fair-minded lay observer would not reasonably be left with the impression that the Land Court member may not have brought an impartial mind to the resolution of the questions he was required to decide.

[188] I therefore find that ground 13 has not been established.

Groundwater

[189] The nature and extent of any impact that mining operations under the proposed stage 3 would have on groundwater supplies was a key issue in the Land Court hearing, and one of the principal reasons for the Land Court member recommending refusal of the mining lease and environmental authority applications. The particular issue was the risk of depletion or loss of groundwater supplies to properties in the vicinity of the mine.[139] The Land Court member held that, despite the requirement for NAC to apply for an associated water licence under the *Water Act* before it could take or interfere with groundwater, "it is necessary, for a proper consideration of MRA objections and EPA objections when water issues are raised as grounds of objection, for this court to fully consider those issues under the MRA and EPA objection process" (at [172]). His Honour's ultimate conclusion on the issue of groundwater was as follows:

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[136] As recorded, for example, at [24], [25], [28]-[31] and [362]-[363] of the Reasons.

[137] For example, Reasons at [376] (describing Mr Vonhoff as "a little smug"), [430] (describing Mr Scholefield's answers as "too cute by far"), [456] (describing Mr Noel Wieck "misguided and ill-informed" with some of his comments said to border on contempt) and [1325] (describing Mr Wieck as demonstrating traits of "conspiracy theory" and a "big brother" mentality).

[138] Cf [286] of OCAA's written submissions.

[139] See, for example, Reasons at [1337], [1342], [1517], [1518], [1627].

> "[1679] I am not satisfied by what is in effect proposed by the draft EA and the additional conditions proposed for the draft EA that a significant amount of further reporting and research should be undertaken post approval and, in some circumstances, before mining commences, and in other circumstances, after mining commences. The risks to the very valuable underground water resources in the Acland area are simply too great for that approach to be reasonably taken.
>
> [1680] To be as blunt as possible, I find the state of the groundwater evidence before me, save for the 2016 IESC Advice and indeed, the 2015 and 2014 IESC Advices, as a muddle. There are simply too many unresolved questions; too many issues upon which the experts agree that the current model [is] inadequate, and too little of substance in promises and assurances for the future without the ability to give reasoned views on specific data at this time of the approval process, for me to be satisfied that groundwater issues have been properly addressed. Hence, I recommend that NAC's revised Stage 3 project not be approved due to groundwater concerns.[140]
>
> [1681] In short, should NAC wish to have the revised Stage 3 approved, it should take a corporate deep breath, and have the expert scientific modelling and other scientific data that it is now promising to prepare properly undertaken and prepared and resubmitted.
>
> [1682] I of course have no power or authority to require NAC to take 'a corporate breath'. I can but make my recommendations as required by the laws of this state."

[190] NAC's challenge to the lawfulness of the decision in so far as it concerns the issue of groundwater is addressed in grounds 10 and 15.

[191] Ground 10 contends the decision involved a lack of jurisdiction, an error of law and an improper exercise of power (by taking into account irrelevant considerations), and was otherwise contrary to law in that the first respondent incorrectly found, at [172] of the Reasons, as a matter of construction, that it was necessary for groundwater issues to be "fully considered" in the hearing before him, when upon the proper construction of the MRA, the EPA and the *Water Act*:

1. The potential impacts of taking and interfering with groundwater, on the quantity of groundwater available to surrounding landowners, are to be assessed and managed under the associated water licence and underground water obligations provisions of the *Water Act* and were outside the scope of the Land Court's jurisdiction for the hearing.

2. Even if the Land Court had jurisdiction to consider those potential impacts, it was not necessary or appropriate for those potential impacts to be "fully considered", as such a consideration was inconsistent with the overall statutory scheme and involved precluding or prejudging the outcome of the approvals process under the *Water Act*.

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[140] See also the Reasons at [1799].

[192] Alternatively, ground 15 contends that, if it was within the Court's jurisdiction, the decision involved a breach of the rules of natural justice, and an error of law, in that the first respondent failed to consider, or constructively rejected without adequate reasons, NAC's "substantial, clearly articulated evidence and submissions" in relation to the legal framework applicable to the stage 3 expansion as a whole, in particular in so far as groundwater issues are concerned.

Should NAC be permitted to raise the challenge to the Land Court's jurisdiction?

[193] As a preliminary issue OCAA submitted that NAC should not be permitted to raise a challenge to the Land Court's jurisdiction to deal with the potential impacts of taking and interfering with groundwater, as it did not raise the point before the Land Court member. Although, OCAA properly acknowledges that the argument raises a matter of law, and does not challenge the well-established principle that the parties cannot, by consent, confer jurisdiction on a court that it does not have.[141]

[194] NAC contends that it did raise the point below, but proceeded to deal with the proceeding in a manner consistent with previous Land Court decisions, particularly of the first respondent, in which it had been held that it was within the jurisdiction of the Land Court, on the hearing of mining lease and environmental authority applications and objections, to address the issue of the potential impact of mining activities on groundwater.

[195] I am satisfied it is appropriate to deal with the jurisdictional point on this application as it is a matter of law, going to the question of the jurisdiction of the Land Court in a particular respect. I accept it was a matter raised before the Land Court, although having regard to the matters referred to at paragraphs [240]-[243] below, the position was far from clear.

Does the Land Court have jurisdiction to fully consider groundwater issues?

[196] I reiterate the matters addressed at [26]-[34] and [55]-[74] above in relation to the scope of the jurisdiction and function of the Land Court, in the present context. That is informed by the statutory provisions which confer jurisdiction on the Court, and define its function, namely, ss 268 and 269 of the MRA and ss 180, 184, 190 and 191 of the EPA. Although the Court is given jurisdiction to determine the relative merits of the mining lease application, objections to it, and other matters (relevantly, the application to amend the environmental authority) (s 268(2) MRA), it is not the objections which inform the scope of the court's jurisdiction, it is the statutes. In so far as an objection seeks to deal with an issue which is outside the scope of the Land Court's function, the Court does not have jurisdiction to deal with it.

[197] The question raised in this case is whether the activity of taking or interfering with groundwater, including where that occurs incidentally as a consequence of another activity, which the mining lease holder would be entitled to carry out under the proposed mining lease (such as digging a pit), is something that occurs under the authority of the mining lease, or which the mining lease holder is entitled to do under the mining lease, and therefore a matter the Land Court is required, or permitted, to consider.

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[141] See *Thomson Australian Holdings Pty Ltd v The Trade Practices Commission* (1981) 148 CLR 150 at 163.

The position before December 2016

[198] As at 27 September 2016, ss 234 and 235 of the MRA relevantly provided:[142]

> "**234 Minister may grant mining lease**
>
> (1) The Minister may grant to an eligible person or persons, a mining lease for all or any of the following purposes –
>
> (a) to mine the mineral or minerals specified in the lease and for all purposes necessary to effectually carry on that mining;
>
> (b) such purposes, other than mining, as are specified in the mining lease and that are associated with, arising from or promoting the activity of mining.
>
> **235 General entitlements of holder of mining lease**
>
> (1) … during the currency of a mining lease, the holder of the mining lease and any person who acts as agent or employee of the holder … for a purpose or right for which the mining lease is granted –
>
> (a) may enter and be –
>
> (i) within the area of the mining lease; and
>
> (ii) upon the surface area comprised in the mining lease;
>
> for any purpose for which the mining lease is granted or for any purpose permitted or required under the lease or by this Act;
>
> (b) may do all such things as are permitted or required under the lease or by this Act …
>
> (3) **Where any Act provides that water may be diverted or appropriated only under authority granted under that Act, the holder of a mining lease shall not divert or appropriate water unless the holder holds that authority**."

[199] At this time,[143] s 808 of the *Water Act* 2000 prohibited a person from taking (s 808(1)) or interfering with (s 808(2)) water to which the *Water Act* applies, unless authorised to do so under that Act. Groundwater is water to which the *Water Act* applies.[144] Section 206 made provision for an owner of land (defined in s 203 to include an applicant for, or the holder of a mining lease) to apply for a water licence for taking water and using the water, or to interfere with the flow of water on, under or adjoining any of the land.

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[142] In the parts of the legislation set out below, the bold emphasis in the body of the provision has been added.

[143] See *Water Act* as at 22 November 2016.

[144] See s 19 (vesting rights in water in the State) and the definition of "water" in schedule 4, as including underground water.

[200] The effect of these provisions would seem to be that, at this time, the holder of a mining lease was required to obtain a water licence under chapter 2 of the *Water Act* in order to lawfully take or interfere with water, including groundwater. "Taking", for water, is defined to include diverting water. There is no definition of "interfering" with water in the legislation. It bears its ordinary meaning, which in this context is a broad one, meaning to obstruct, hinder, get in the way of or prevent the flow of water.[145]

[201] I say "would seem to be", because a different view has previously been taken by the first respondent, in an earlier decision in relation to another mine, ***Hancock*** *Coal Pty Ltd v Kelly and Department of Environment and Heritage Protection (No 4)* (2014) 35 QLCR 56. In *Hancock,* his Honour noted the distinction between the language used in s 235(3) of the MRA (divert or appropriate) and the language used in the *Water Act* (taking and using or interfering with). His Honour said he was in no doubt that a *Water Act* licence was required to take or use any underground water (at [112]), but considered the position less clear in relation to interference with the flow of water, given the interaction between ss 234 and 235 of the MRA and the *Water Act.* Having referred to ss 234(1) and 235(3) of the MRA, and noting the different terminology used, his Honour said:

> "[117] In my view, s 235(3) of the MRA must be strictly applied. It applies to circumstances where mining involves the taking and using of water, including the diversion of a watercourse, and perhaps, arguably, the diversion of underground water, **but not to the interference with the flow of underground water** under s 206(1)(b) of the *Water Act*.
>
> [118] There is tension between the requirement for a water licence to interfere with water under the *Water Act* on the one hand, and the positive pronouncement in s 234(1) of the MRA on the other.
>
> [119] Without doubt, the mining lease in this case will authorise Hancock to dig a deep pit.
>
> [120] Also without doubt, because of s 235(3) of the MRA, Hancock cannot take or divert water from those deep pits without a water licence. However, **it is at least arguable that Hancock, as part of its authorised mining activities, could interfere with water, as an activity associated with or arising from [*referring to s 234(1)(b)*] the mining, without the mandate for an authority under the *Water Act***, as the interference with water is a necessary consequence of the mining activities authorised under s 235(1) of the MRA, and such interference is not of the nature of those to which s 235(3) of the MRA applies.
>
> [121] It would appear nonsensical for this Court, as part of these proceedings, to be permitted to consider the question of, and consequences which flow from, interference with groundwater, but not consider any aspect or

[145] See, for example, *Cornerstone Properties Ltd v Caloundra City Council* [2005] QPELR 96 at [109] per Rackemann DCJ (the word interfere "ordinarily means to obstruct, hinder or get in the way"). See also, albeit in a different statutory context, the discussion of the ordinary meanings of the word in Greenwood J's decision in *Satellite & Wireless Pty Ltd v Gold Coast City Council* [2013] FCA 193 at [111]-[112] and [114] (concluding that the "dominant notion in all of the received meanings of the term is an intervention that prevents a process, an action, a function, an activity or a motion occurring").

> consequence which arises from the taking or diversion of groundwater."[146]

[202] As a matter of legislative history, I observe that s 235(3) of the MRA appeared, in the same form, as s 7.4(2) of the *Mineral Resources Act* 1989 as originally enacted. At that time, the relevant Act regulating water was the *Water Resources Act* 1989. The language of "divert or appropriate" was the language used in that Act.[147] That explains the difference in the language used, when compared with the *Water Act* 2000.

[203] The reasoning referred to in paragraph [201] above explains the first respondent's view, first articulated in *Hancock* but then later applied by his Honour,[148] including in the present case, that it was within the jurisdiction of the Land Court, in hearing the mining lease and environmental authority applications and objections, to deal with groundwater issues.

[204] In *Xstrata* President MacDonald took a similar, but narrower approach. Her Honour noted that it is clear from s 235(3) of the MRA that the MRA does not authorise the holder of a mining lease to divert or appropriate water unless the holder has an authority under the *Water Act*. Since water diversions and extractions are not activities that are authorised by the MRA, they are outside the scope of an environmental authority under the EPA. That being the case, she did not consider the Land Court had power to make recommendations under the EPA in relation to activities involving the extraction or diversion of water (at [210] and [211]). However, her Honour considered the position was different "in relation to the Court's ability to consider the impacts of the mining operations, in terms of any drawdown in the aquifers and variation in groundwater quality" that may occur as a consequence of the mining activities or the dewatering of the mine pits (at [213]-[214]). I infer this was on the basis that such consequences did not fall within the meaning of "water diversions and extractions". In contrast to the first respondent's approach in *Hancock*, and reflected in this case, President MacDonald did not consider it was within the Land Court's jurisdiction under the MRA and the EPA to "fully consider" groundwater issues.

[205] President MacDonald made some observations, at the end of her reasons in *Xstrata* at [606]-[610], about the unsatisfactory circumstance brought about by the separate processes provided for under the *Water Act*, on the one hand, and the MRA and the EPA, on the other. As will be seen below, those observations were eventually acted upon, in the amendments which commenced on 6 December 2016.

[206] For reasons that I will now turn to, it is not necessary, in light of amendments to the MRA and *Water Act* that took effect from 6 December 2016, to directly address whether the first respondent's approach, as articulated in *Hancock*, was or was not correct. In short, this is because the dilemma posed by the different language, as

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[146] Emphasis added.

[147] See, for example, in the *Water Resources Act* 1989 as originally enacted: s 4.8(1) (prohibiting a person from diverting or appropriating water from a watercourse, lake or spring, other than in particular circumstances), a provision which was expressed to apply notwithstanding anything in the MRA, and also s 4.40 (making it an offence, otherwise than under the authority of the Act, to use, divert, appropriate, take, dispose of, waste, pollute, interfere with or obstruct water, or the flow of water in, inter alia, an underground or other source of water).

[148] For example, in *Endocoal Ltd v Glencore Coal Queensland Pty Ltd and Department of Environment and Heritage* (2014) 35 QLCR 462.

between "diversion and appropriation" in s 235(3) of the MRA and "taking and diverting" in the *Water Act* no longer exists. As a consequence of the legislative amendments, contrary to [120] of *Hancock*, it is no longer arguable that [NAC], as part of its authorised mining activities, could interfere with water, as an activity associated with or arising from the mining, without the mandate for an authority under the *Water Act*.

[207] In the Reasons in this case, the first respondent referred to the "recent legislative amendments" to the MRA and *Water Act*, observing at [169] that before NAC "can exercise its rights under s 334ZP of the MRA to take or interfere with groundwater, it must first obtain an associated water license (sic) under the Water Act". Nevertheless, at [172] his Honour said:

> "It remains my view that, despite the new processes under the Water Act and in particular the transitional provisions, it is necessary, for a proper consideration of MRA objections and EPA objections when water issues are raised as grounds of objection, for this court to fully consider those issues under the MRA and EPA objection process."

[208] In the absence of any other exposed reasoning, I infer this was on the basis of his Honour's reasoning first expressed in *Hancock*. For the following reasons, in my view that was an error.

Amendments which took effect from 6 December 2016

[209] Relevant amendments to the *Water Act* and the MRA were effected by the *Water Reform and Other Legislation Amendment Act* 2014 (**WROLA**) and the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Act* 2016 (**EPOLA**).

[210] The WROLA, although enacted in 2014, was amended twice in 2016,[149] and in so far as it amended provisions of relevance in the present case, did not commence until 6 December 2016.

[211] The amendments effected to the MRA by the WROLA were as follows:

1. Section 235(3) has been omitted from the MRA.[150]

2. A new chapter 12A has been inserted into the MRA, containing "provisions about water for mineral development licences and mining leases" (ss 334ZP to 334ZZK).[151] Relevantly:

   (a) Section 334ZP(1) to (3) now provides that:

   > "(1) **The holder of a … mining lease may take or interfere with underground water[152] in the area of the … lease if**

[149] By the *Water Legislation Amendment Act* 2016 (Act No. 60 of 2016) and by the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Act* 2016 (Act No. 61 of 2016).

[150] Section 10 of the WROLA.

[151] Section 11 of the WROLA.

[152] "Underground water" is defined in schedule 2 to the MRA, by reference to schedule 4 of the *Water Act*, where it is defined to mean "water that occurs naturally in, or is introduced artificially into, an aquifer".

the taking or interference happens during the course of, or results from, the carrying out of an authorised activity for the … lease.

Examples –

1 mine dewatering of underground water to the extent necessary to achieve safe operating conditions in the mine

2 taking underground water as a result of evaporation from an open mine pit

(2) The rights of the holder of the … mining lease under subsection (1) –

(a) are the holder's ***underground water rights*** for the … lease; and

(b) are subject to the holder complying with the holder's underground water obligations.[153]

(3) Underground water taken or interference with under subsection (1) is ***associated water***."

(b) Section 334ZR now provides that "taking, interfering with, or using underground water under s 334ZP is authorised for the Water Act", with a note below that section referring to s 808 of the *Water Act.*

(c) Where the holder of a mining lease already had a water licence or water permit under the *Water Act* at the time of commencement of these amendments, s 334ZP(8) and (9) provide that:

"(8) Subsection (9) applies if, after the commencement of this section, the holder of a …mining lease exercises an entitlement under a water licence or water permit under the Water Act to take or interfere with water.

(9) To remove any doubt, it is declared that the exercise of the entitlement by the holder of the … mining lease during the course of, or resulting from, the carrying out of an authorised activity for the … lease is also an exercise of the holder's underground water rights under this section and is subject to compliance with the holder's underground water obligations."

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[153] "Underground water obligations" is defined in schedule 2 to the MRA to mean, in the case of the holder of a mining lease, the holder's underground water obligations under chapter 3 of the *Water Act* and any other obligation under that chapter with which the holder is required to comply, if failure to comply with the obligation is an offence. I note that a summary of the underground water obligations under chapter 3 of the *Water Act* appears at pp 141-147 of NAC's written submissions.

3. A transitional provision, s 839, was inserted into the MRA,[154] which provided:

> "**839 Restriction on entitlement to use underground water – Act, s 334ZP**
>
> (1) This section applies in relation to a … mining lease if, before the commencement –
>
> (a) either –
>
> (i) an environmental authority was granted in relation to the … mining lease; or
>
> (ii) an application for an environmental authority, or for an amendment of an environmental authority, in relation to the … mining lease was made but not decided; or
>
> (iii) if an environmental authority in relation to the … mining lease had not been granted or applied for – there is a notified coordinated project in relation to the licence or lease; and
>
> (b) the entity who is or will be the holder of the … mining lease did not hold but would have been required to hold, a water licence or water permit to take or interfere with underground water in the area of the … lease if the taking or interference were to have happened during the course of, or as a result of, the carrying out of authorised activities for the … lease.
>
> (2) **Section 334ZP does not apply to the holder of the … mining lease until the holder has an associated water licence[155] to take or interfere with associated water in the area of the … lease**.
>
> (3) For the purposes of section 334ZP(8) and (9), an associated water licence is taken to be a water licence.
>
> (4) This section applies whether the … mining lease was granted before or after the commencement."

[212] Section 839 applies to NAC's application for ML 50232 because, before the commencement (6 December 2016), an application for amendment of the environmental authority had been made but not yet decided, and NAC did not hold, but would have been required to hold, a water licence to take or interfere with underground water (by virtue of s 808 of the *Water Act*). Accordingly, in the case of NAC, and its mining lease application the subject of this proceeding, s 235 no longer operates; but s

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[154] See s 31 of the EPOLA, which amended the WROLA, by inserting a new s 11A, which effected this amendment to the MRA.

[155] "Associated water licence" is defined in s 839(5) by reference to s 1250B of the *Water Act.*

334ZP does not apply until NAC has an associated water licence to take or interfere with associated water in the area of the lease. That is, NAC is not (or would not be, if the mining lease were granted) authorised to take or interfere with underground water in the area of the lease if the taking or interference happens during the course of, or results from, the carrying out of an authorised activity for the lease, without first obtaining an associated water licence.[156]

[213] Corresponding amendments were made to the *Water Act*. Relevantly:

1. Section 2 (purposes of the Act and their achievement) was replaced, and now provides, in part:

> "(1) The **main purposes** of this Act are to provide a framework for the following –
>
> (a) the sustainable management of Queensland's water resources and quarry material by establishing a system for –
>
> (i) the planning, allocation and use of water; and
>
> (ii) the allocation of quarry material and riverine protection;
>
> (b) the sustainable and secure water supply and demand management for the south-east Queensland region and other designated regions;
>
> (c) **the management of impacts on underground water caused by the exercise of underground water rights by the resource sector**;
>
> (d) the effective operation of water authorities."[157]

2. Chapter 9 (transitional provisions and repeals) was amended, to insert a new part 8 (transitional and saving provisions for WROLA) into the *Water Act.*[158] Part 9 deals, inter alia, with applications for associated water licences (in the circumstances contemplated by s 839 of the MRA, which are also reflected in s 1250A of the *Water Act*). Relevantly:

   (a) An associated water licence authorises the taking of or interference with underground water in the area of a mining tenure if the taking or interference happens during the course of, or results from, the carrying out of an authorised activity for the tenure (s 1250C(1)).

   (b) The procedure involved on an application for an associated water licence is essentially the same as it was for an application for a water licence, prior to

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[156] The provisions in relation to associated water licences are contained in chapter 9, part 8 of the *Water Act* – see ss 1250A to 1250G.
[157] Section 59 of WROLA, as amended by s 12 of the *Water Legislation Amendment Act* 2016.
[158] Section 201 of the WROLA, as amended by s 36 of the EPOLA.

the amendments (by reference to ss 111 and 112; s 1250D(4)). This includes the ability of the chief executive to request additional information (s 111), the requirement for public notification (s 112(3)), the ability to make submissions about the application, which must be considered by the chief executive (s 112(4) and s 1250E), the requirement for the chief executive to consider the criteria in s 1250E, a requirement for the chief executive to give notice of their decision to any person who made a submission (s 1250F). There is also a requirement for the chief executive to consider the purpose of the *Water Act* as stated in s 2(1)(c) when making a decision in relation to an associated water licence – that one of the main purposes of the Act is the management of impacts on underground water caused by the exercise of underground water rights by the resource sector. Submissions can be made, and must be taken into account in deciding whether to grant or refuse the application (s 1250E).

(c) In addition to any additional information provided under s 111 and the submissions, the other matters the chief executive must consider in deciding whether to grant or refuse the application (s 1250E) are:

> "(c) existing water entitlements and authorities to take or interfere with water; and
>
> (d) any environmental assessments carried out in relation to the mining tenure, including –
>
> (i) any conditions imposed on the mining tenure or on the environmental authority granted in relation to the mining tenure; and
>
> (ii) any report prepared by the Coordinator-General under the [*State Development Act, s 34D*] evaluating the EIS prepared in relation to the mining tenure; and
>
> (e) any information about the effects of taking, or interfering with, water on natural ecosystems; and
>
> (f) any information about the effects of taking, or interfering with, water on the physical integrity of watercourses, lakes, springs and aquifers; and
>
> (g) strategies for the management of impacts on underground water, including the impacts of dewatering; and
>
> (h) strategies and policies for the relevant coastal zone; and
>
> (i) the public interest."

(d) Once a decision has been made, an information notice is required to be given, inter alia, to any person who made a submission (s 1250F). Provision is made under the Act for internal review of decisions made under the Act, on the application of a person who has been given an information notice (s 851(1) and s 862), and following that, appeal to the

Land Court (s 877). On an appeal from a decision, for example to grant an associated water licence, the Land Court has the powers referred to in s 882, which include confirming, setting aside, or amending the decision. The effect of this is that the Land Court has power to make a binding decision on appeal – as opposed to a recommendation.

(e) Under s 1250R, until all rights of review and appeal under the *Water Act* in relation to the granting of an associated water licence are exhausted, the holder of the licence is taken not to have complied with their underground water obligations for the purposes of s 334ZP of the MRA.

(f) (Like s 839(3) of the MRA) section 1250S provides that an associated water licence is taken to be a water licence for the purposes of, inter alia, s 334ZP(8) and (9) of the MRA. As already noted above, the effect of s 334ZP(8) and (9) of the MRA is that where a mining lease holder exercises an entitlement under a water licence under the *Water Act* to take or interfere with water, the exercise of that entitlement during the course of, or resulting from, the carrying out of an authorised activity for the mining lease is also an exercise of the holder's underground water rights under s 334ZP and is subject to compliance with the holder's underground water obligations.

[214] As Mr Clothier QC, for NAC, acknowledged, until all rights of review and appeal under the *Water Act* in relation to any decision to grant NAC an associated water licence are exhausted, NAC cannot carry out operations which it might otherwise be authorised to carry out under the proposed mining lease, such as digging a pit, if the consequence of digging the pit could be to interfere with groundwater.[159]

Effect of the transitional provision in s 748 of the EPA

[215] Before proceeding, there is one other aspect of the amendments to the legislation that I need to deal with. There was no dispute between the parties before me as to the obligation of NAC to obtain an associated water licence, as plainly contemplated by s 839 of the MRA. However, there was an argument, by reference to another provision of EPOLA, which effected amendments to the EPA, that notwithstanding that being the effect of the amendments to the MRA, the application to amend the environmental authority was required to be dealt with and decided by the Land Court, as if, in effect, s 839 of the MRA and the "associated water licence" provisions of the *Water Act* had not been enacted, but s 235(3) of the MRA had been omitted, and s 334ZP inserted. The effect of that argument is that the application to amend the environmental authority was required to be dealt with and decided on the basis of a fiction, that the mining lease, if granted, *would* authorise the taking or interference with underground water, without any associated assessment process under the *Water Act* (even though, in reality, and as matter of legal fact, by virtue of the legislative provisions just referred to, that would not be the case).

[216] The argument relies upon s 748 of the EPA, a transitional provision inserted into the EPA by the EPOLA.

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[159] See T 5-31. See also the explanatory notes to the Bill which became EPOLA at p 12, which confirms that the restriction under s 839 and the requirement to obtain an associated water licence is imposed "to ensure the underground water impacts of these proposed mining projects is appropriately assessed and conditioned in advance of any dewatering activities commencing".

[217] The amendments effected to the EPA by the EPOLA included, relevantly:

1. To add a definition of "underground water rights" to s 112 (inter alia, by reference to the meaning of that term under the MRA (as to which, see s 334ZP(2)(a), above)); and

2. To insert a new s 126A and s 227AA into the EPA.

   (a) Section 126A appears in chapter 5, part 2, division 3 (applying for environmental authorities). Section 125 contains the requirements for applications generally including particular requirements for a variation or site specific application, including an assessment of the likely impact of each relevant activity on the environmental values, and details of management practices proposed to prevent or minimise adverse impacts (s 125(1)(l)). Section 126 contains requirements for a site-specific application for a CSG activity.

   (b) The new s 126A relevantly provides:

   > "(1) This section applies to a site-specific application, **involving the exercise of underground water rights**, for –
   >
   > (a) a resource project that includes a resource tenure that is a … mining lease …; or
   >
   > (b) a resource activity for which the relevant tenure is a … mining lease….
   >
   > (2) The application must **also** state the following – [in (a) to (f) there are a range of matters that must be addressed, detailing the underground water rights which will be carried out, the areas in which they will be exercised, details about each aquifer affected or likely to be affected, the environmental values that will be affected by the exercise of underground water rights and the extent of the impact, any impacts on groundwater, and strategies for avoiding, mitigating or managing those impacts.]"

   (c) Section 227AA appears in chapter 5, part 7 (amendment of environmental authorities by application). Section 226 sets out the requirements for an amendment application generally, which includes a requirement for an assessment of the likely impact of the proposed amendment on environmental values (226(1)(k)). Section 227 sets out the requirements for an amendment application relating to an environmental authority for a CSG activity.

   (d) New s 227AA then provides:

   > "(1) This section applies for an amendment application if –

(a) the application relates to a site specific environmental authority for –

(i) a resource project that includes a resource tenure that is a … mining lease …; or

(ii) a resource activity for which the relevant tenure is a … mining lease …; and

(b) the proposed amendment **involves changes to the exercise of underground water rights**.

(2) The application must also state the matters mentioned in section 126A(2) …"

(e) It is clear that s 126A and s 227AA apply to applications for, or to amend, site specific environmental authorities, in respect of which the amendments to the MRA apply, in particular s 334ZP. The reference to "underground water rights" is, by virtue of the amendment to s 112 of the EPA, a reference to the meaning of that term under s 334ZP(2)(a) of the MRA, which is in turn a reference to the exercise of rights to take or interfere with underground water conferred on the holder of a mining lease by that provision.

3. EPOLA also effected an amendment to s 207(1) (dealing with conditions that may be imposed on an environmental authority), to include a condition relating to the exercise of underground water rights (s 207(1)(g)).

4. Lastly, EPOLA amended the EPA by the insertion of a transitional provision, s 748, which provides as follows:

"**748 Particular applications made but not decided before commencement**

(1) This section applies if –

(a) an application of a type mentioned in section 126A or 227AA was made before the commencement; and

(b) immediately before the commencement, the application had not been decided.

(2) The application must be dealt with and decided as if the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Act 2016* had not commenced."

[218] OCAA submits, by reference to s 748, that the application made by NAC is an application of a type mentioned in, particularly, s 227AA (because it is an application to amend a site-specific environmental authority), which had not been decided immediately before the commencement (6 December 2016), therefore it must be dealt with and decided as if the EPOLA had not commenced, which includes all the

provisions of EPOLA, including those that amended the WROLA (which in turn amended the MRA (to include s 839) and the *Water Act* (to include the associated water licence provisions)). On this line of reasoning, OCAA submits it was appropriate for the Land Court to "fully consider" groundwater issues, because the effect of the legislation, without the amendments made by EPOLA, was that NAC would have rights to take or interfere with underground water under the mining lease it was applying for (by operation of s 334ZP).

[219] The third respondent appeared to endorse this approach.[160]

[220] I do not accept this construction. In my view, the proper construction of s 748 of the EPA is that it means applications of the type mentioned in s 126A and s 227AA are to be dealt with and decided as if the amendments to the EPA effected by the EPOLA had not commenced. That is, they are to be dealt with and decided, without the additional obligation imposed by ss 126A and 227AA, in terms of what is to be provided with the application.

[221] This construction accords with the ordinary meaning of the words used in s 748, and the purpose of the provision, which is simply to make provision for the application of the legislation (that is the EPA) in its pre-amendment form, to existing applications yet to be decided.[161]

[222] This construction is confirmed[162] by the explanatory notes to the Bill which became EPOLA, where it is said (at p 7):

> "The new section 748 is a consequential amendment required because of the insertion of section 126A and 227AA by this Bill. This transitional provision provides that environmental authority applications and amendment applications which are in progress upon commencement are to be decided under the old provisions. This will maintain the status quo for the assessment process for applications which have been made but not decided before commencement."

[223] Although OCAA and the third respondent contended that the "status quo", as referred to in the explanatory notes, should be understood as the practice that had developed in the Land Court of considering groundwater issues,[163] I do not accept that. The explanatory note plainly refers to the "old provisions", which I take to mean the provisions of the EPA prior to amendment.

[224] For completeness, I note that although this argument was advanced by OCAA before the Land Court, it does not appear that the Land Court member accepted it (cf the Reasons at [166]-[172]). On my reading of these paragraphs, his Honour considered it appropriate to fully consider groundwater issues, not on the basis of the legal fiction postulated by OCAA (and the third respondent before me), but rather on the basis of his Honour's already established view, as articulated in *Hancock*.

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[160] T 4-68. This was not an argument advanced by OCAA in its written submissions, although it was pressed in the oral submissions, and addressed orally by both the third respondent and NAC, in reply.

[161] See *R v Sayers* (1998) 96 A Crim R 76 at 82-83, as to the general function of a transitional provision.

[162] See s 14B(1)(c) of the *Acts Interpretation Act* 1954.

[163] Oral submissions on behalf of OCAA at T 4-52; and on behalf of the third respondent at T 4-68.

Summary of the position after 6 December 2016

[225] In summary, then, after 6 December 2016, the position was, in so far as an applicant in the position of NAC is concerned:

1. NAC would **not** be entitled (authorised) to take or interfere with underground water in the area of the lease, if the taking or interference happens during the course of, or results from, the carrying out of an authorised activity for the lease (such as digging a pit) **until** it had obtained an associated water licence to take or interfere with such water under the *Water Act*.

2. Taking or interfering with underground water is not an activity that NAC would be entitled to carry out, under the proposed mining lease or the MRA, in relation to the proposed mining lease area. NAC would require an associated water licence under the *Water Act* to lawfully carry out such activity. It is therefore not a "mining activity" within the meaning of s 110 of the EPA, and therefore not an environmentally relevant activity for the purpose of ss 18 and 107.

3. The operations to be carried on under the authority of the proposed mining lease must be read subject to s 839 of the MRA, with the effect that those operations do not include taking or interfering with underground water, in the course of or as a result of carrying out an authorised activity, unless and until NAC holds an associated water licence.

Conclusions as to jurisdiction to consider groundwater issues in this case

[226] For new applications, the practical problem highlighted by President MacDonald in *Xstrata* at [606]-[610] and by the first respondent in *Hancock* at [121]-[130] is resolved. The effect of s 334ZP(1) is to make it clear that the rights conferred on the holder of a mining lease will include taking or interfering with underground water. Accordingly, that will be an activity the holder is entitled to carry out under the proposed mining lease and the MRA (for the purposes of the EPA) and be part of the operations to be carried on under the authority of the proposed mining lease. Issues as to the potential environmental impacts of such activity, on the supply of underground water to adjoining properties, will plainly be within the jurisdiction of the Land Court in a hearing under ss 268 and 269 of the MRA and ss 190 and 191 of the EPA.

[227] But that is not the case in relation to NAC's application. In my view, the legislative amendments analysed above remove the basis for the construction articulated by the first respondent in *Hancock* at [120]. In so far as NAC's application is concerned, it was not within the jurisdiction of the Land Court, having regard to s 269(4)(i) and (j) of the MRA, to consider, and base its recommendation to refuse the mining lease applications on, the potential impacts 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. As that is not an activity that NAC would be entitled to carry out under the proposed mining lease, nor was it within the jurisdiction of the Land Court to consider and base its recommendation on that issue, for the purposes of

the application to amend the environmental authority (being an authority for mining activities).[164]

[228] The clear legislative intention, in so far as applicants in NAC's position are concerned, is that the potential impacts of taking or interfering with underground water in the area of a mining tenure, which necessarily includes the potential impact on the availability of such water to surrounding landowners, are to be assessed and managed under chapter 9, part 9 of the *Water Act*. In the context of the hearing conducted by the Land Court in this case, there was no jurisdiction conferred on the Court under the *Water Act*.

[229] Even if it be accepted that the Land Court has jurisdiction to take into account broader considerations, for example, under s 269(4)(k) and (l) of the MRA (whether the public right or interest will be prejudiced; or there is good reason shown why the mining lease should not be granted) or under s 191(g) of the EPA (by reference to the standard criteria which also includes the public interest), in my view those provisions do not expand the jurisdiction of the Land Court to "fully consider" activities which are not authorised under the mining lease or the MRA, but depend upon authorisation being granted under another Act, namely the *Water Act*.

[230] The error is demonstrable from the outcome in this case. Having determined that, despite the process required to be undertaken under the *Water Act*, it was nonetheless necessary for the Land Court to fully consider groundwater issues raised by the objections, his Honour's ultimate conclusion (at [1680]) was that the groundwater evidence was a "muddle", with "too many unresolved questions" and too much uncertainty, for him to be satisfied groundwater issues had been "properly addressed", leading to the conclusion that he would recommended the stage 3 expansion not be approved. His Honour suggested NAC "take a corporate deep breath", effectively suggesting that it do further work and "resubmit" it. But the practical effect of that decision, involving an analysis undertaken without reference to the specific legislative regime established to assess the very issue his Honour was concerned about, was to have prejudged the outcome of that process, without allowing it to take its course. Although the Land Court's decision is (only) a recommendation, in a realistic sense, it has a significant impact on the ultimate decision-makers, both under the MRA and the EPA. That is demonstrated in this case by the fact that the administering authority under the EPA has already made its decision (being subject to tight time frames) to refuse the application to amend the environmental authority.

[231] In this regard, in my view the observations of Thomas J in *Walker v Noosa Shire Council* [1983] 2 Qd R 86 at 90 (Campbell and McPherson JJ agreeing) are apposite:

> "With increasing government controls it is commonplace for an applicant to require multiple consents from different authorities or from the same authority in different capacities. With the exceptions I have already mentioned (illegality or obvious futility) it may be said that in general it is

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[164] For completeness, I record that my conclusion in this regard is not based upon NAC's additional submission that consideration of the potential impacts on the quantity of groundwater available at surrounding landowners' agricultural bores did not concern an "environmental value" for the purposes of the EPA: cf [326] of NAC's submissions. I was not persuaded that the terms "environment" or "environmental value" ought properly to be construed to be limited to the quality of groundwater, and not the quantity. But this does not alter my conclusion in relation to jurisdiction.

> desirable that such applications be considered on their merits one at a time, and without undue speculation on the fate of other necessary applications."

[232] As Thomas J observed at pp 88 and 90, in this case, in so far as the groundwater issue was concerned, it is difficult to see why his Honour did not make a recommendation, referring to his concerns, and making it clear (consistent with the legislation in any event) that if the mining lease was granted, operations should not be permitted to commence until an associated water licence was obtained (as in *Hancock*).

[233] To be clear, even if a different view should be taken on the question of the jurisdiction of the Land Court (whether that be on the basis that the "operations to be carried on under the authority of the proposed mining lease" is broad enough to include operations that depend upon first obtaining a separate licence under the *Water Act*, or on the basis of public interest considerations) in my view it was an error of law for the first respondent to proceed to "fully consider" groundwater, without regard to the substantial, and separate, statutory regime established for the assessment and authorisation of the activity of taking or interfering with underground water under the *Water Act*.

[234] In my view, the Land Court member erred in law in concluding, at [172] of the Reasons, that "despite the new processes under the Water Act and in particular the transitional provisions, it is necessary, for a proper consideration of MRA objections and EPA objections when water issues are raised as grounds of objection, for this court to fully consider those issues under the MRA and EPA objection process". Firstly, this was an error because it was not within the jurisdiction of the Land Court, on a hearing under the "MRA and EPA objection process" to address the impact of an activity which was not authorised under the proposed mining lease or the MRA. Secondly, it was an error in so far as the Land Court member regarded his function as defined by the scope of the objections, as opposed to the statutes conferring jurisdiction on the Court. Thirdly, it was an error because it resulted in the Land Court member considering an issue, without reference to the specific statutory regime established to deal with that issue, in a manner which, for all practical intents and purposes, precluded or prevented that process from being implemented. It was an error to disregard the *Water Act* provisions.

[235] OCAA relied on *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1974] 2 NSWLR 681 and *South Australia v Tanner* (1989) 166 CLR 161 to support the contrary argument as to jurisdiction. These decisions were referred to by the first respondent in *Hancock* at [124]-[126], as supporting his Honour's construction of the legislation leading to the conclusion that it was within the Land Court's jurisdiction to fully consider groundwater issues under the MRA, notwithstanding the *Water Act* provisions (in particular, by reference to the statement at p 686 of *Wyong* that each of the Acts have different purposes, each of which is capable of being fulfilled,). The principle addressed in *Wyong* and applied in *Tanner* (namely, how to construe two Acts, one earlier in time than the other, operating in different fields, but seemingly in conflict with one another, involving the application of the *generalia specialibus* rule) is not one which is relevant here. It can be seen why the first respondent referred to these cases in *Hancock,* because of the view his Honour reached, as a matter of construction, as to the potential for some aspects of the interference with water to be authorised under the MRA. When that arguable construction is removed, as in my view it has been by the amendments to the legislation, there is no longer any question of both the MRA and

the *Water Act* operating in the same field, in so far as associated water licences are concerned. They are part of an overall scheme, including the EPA, to be construed on the presumption that they are intended to work together.[165] But the purpose of the *Water Act* provisions, in so far as it concerns the assessment of an application for an associated water licence, is not capable of being fulfilled when that process is prevented from taking its course, which is the result of the Land Court member's approach in this case.

[236] It is important to note that the particular issue addressed by the Land Court member was the nature and extent of any impact of the proposed mining activities on groundwater aquifers, on the quantity of groundwater supplies available to surrounding landowners. NAC's submission as to jurisdiction does not contend that all issues concerned with groundwater are outside the scope of the Land Court's function. It accepts, for example, that it might be the case that authorised activities under a proposed mining lease may potentially impact on the *quality* of groundwater by creating contaminants that get into waterways or groundwater. The point is, however, that the taking of or interference with underground water – that is, the potential impact on the *quantity* of groundwater, which was the issue dealt with by the Land Court – is not an authorised activity.

[237] I am satisfied ground 10 has been established.

[238] Subject to hearing submissions of the parties, the appropriate order consequent upon ground 10 being made out, is that the decision to recommend refusal of the mining lease applications, and the application to amend the environmental authority, be set aside, and that the matter be returned to the Land Court for further consideration on the basis that it was not within the Court's jurisdiction to fully consider groundwater issues, and therefore not appropriate to base a recommendation for refusal on that issue.

[239] To the extent that members of the community, including objectors who participated in this hearing, may be concerned about an order in those terms, it is important to emphasise the process that is required to be undertaken under the *Water Act*, referred to in paragraph [213] above, which will enable submissions to be made, objection to be taken, and a hearing before the Land Court if necessary, in the process of NAC endeavouring to obtain an associated water licence.

[240] Before leaving this topic, in fairness to the Land Court member I observe that although it is apparent that NAC did record, as a matter of law, its disagreement with the previous decisions in *Hancock* and *Endocoal*, there does not appear to have been a detailed argument put to his Honour as to why the legislative amendments post 6 December 2016 changed the position as to jurisdiction. From a brief review of the submissions made to the Land Court it appears that there was initially some uncertainty about how the amendments to the legislation might operate in relation to NAC. For example, from NAC's submissions made in August 2016, after the main tranche of the hearing, it appears to have been contemplated that there would be no transitional provisions, such as were ultimately enacted, and that the amendments initially proposed

[165] *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [49].

in the WROLA when enacted in 2014, would apply to NAC's mining lease application.[166]

[241] It was in this context that NAC, at the end of the original hearing, in August 2016, made the following submission:

> "[11.8] As a final point, it is noted that, **as a matter of law, we respectfully disagree with previous decisions of this Court relating to whether the ML authorises interference with groundwater** (in our view, such authorisation can only be done in accordance with the Water Act). This matter was extensively addressed in the decision of this Court in *Endocoal Limited v Glencore Coal Queensland Pty Ltd and Department of Environment and Heritage Protection.* For the purposes of this matter, we do not seek to take the point any further because of:
>
> (a) the Applicant's clear and unwavering commitment to make good any impacts caused by the mining operations (which should not be seen to be diminished in any way by the comments in this paragraph); and
>
> (b) the imminent commencement of WROLA, which puts it beyond doubt that the ML authorises interference with groundwater and outlines an extensive regime dealing with how such impacts are to be managed."[167]

[242] In December 2016 the Land Court directed the parties to provide submissions on the impact of the water reform legislation. In so far as the jurisdiction issue is concerned:

1. NAC submitted that the amendments did not impact on the Land Court's consideration of the matters outlined in s 269(4) of the MRA and s 191 of the EPA, although did provide the Court and the parties with greater certainty that groundwater issues will be appropriately managed and addressed.[168]

2. OCAA submitted that the amendments, in particular the requirement for an associated water licence, were irrelevant to the Land Court's consideration, relying upon the argument repeated before me as to the effect of the transitional provision in s 748 of the EPA.[169]

3. The statutory party submitted that with the removal of s 235(3) of the MRA, there was no longer any question as to the Land Court's jurisdiction to consider underground water impacts as part of its consideration of the mining lease applications and environmental authority amendment application, although also submitted that an appropriate approach, if the Court was persuaded by the objectors' submissions as to the unsatisfactory nature of the groundwater

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[166] See, for example, NAC's submissions (26 August 2016) at exhibit 1, tab 26, [6.100] and [11.1]-[11.3]; OCAA's submissions (13 September 2016) at exhibit 1, tab 27, [251]-[252]; cf the third respondent (statutory party's) submissions (19 September 2016) at exhibit 1, tab 28, [32]-[39]; NAC's submissions in reply (30 September 2016) at exhibit 1, tab 29, [2.79].

[167] NAC's submissions (26 August 2016), exhibit 1, tab 26. Emphasis added.

[168] NAC's submissions (1 December 2016), exhibit 1, tab 30, at [5]-[9].

[169] OCAA's submissions (13 December 2016), exhibit 1, tab 31, [12]-[13].

evidence, was to make a recommendation that either or both the mining lease(s) and the environmental authority be subject to a condition that NAC apply for an associated water licence.[170] I note that the first part of this submission completely ignored the operation of s 839 of the MRA.

4. In reply, NAC said that it did not endorse the statutory party's submission in this regard "because it is now abundantly clear that the ML does not authorise any take or interference with water in the current circumstances as the AWL will provide this authorisation". NAC also said: "However, the Applicant acknowledges this Court's previous findings[171] that it can consider groundwater impacts because they are a necessary consequence of the mining even if the ML does not authorise the taking of or interference with water".[172] Separately, in relation to OCAA's argument in relation to s 748, NAC submitted this was "simply wrong".[173]

5. In further submissions, requested by the Land Court member after the reopened hearing, NAC essentially repeated the position it had put in its 1 December 2016 submissions[174] and OCAA did the same.[175]

[243] It is fair to say that in so far as jurisdiction is concerned the position was far from clear.

The alternative ground – failure to consider or give adequate reasons

[244] Given the conclusion I have reached in relation to ground 10, it is not necessary to address the alternative ground 15 (failure to consider, and failure to give reasons). In order to record the view I formed, having regard to the detailed submissions made, I will do so, albeit briefly.

[245] Ground 15 relies upon the principle that a failure to deal with a substantial, clearly articulated argument presented for the Court's determination can amount, at the least, to a failure to accord procedural fairness, and may amount to a constructive failure to exercise jurisdiction.[176]

[246] As already discussed above, the Court is not obliged to deal with every argument raised and every possibility that could be adverted to, but is obliged to deal with evidence, and arguments, on central or critical issues, in order to explain why the case has been decided in a particular way.[177] The point was articulated by Samuels JA in *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728, as follows:

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170 Statutory party's submissions (13 December 2016), exhibit 1, tab 32, [32].
171 Referring to *Endocoal Ltd v Glencore Coal Queensland Pty Ltd* (2014) 35 QLCR 462 at [76]-[82].
172 NAC submissions in reply (15 December 2016), exhibit 1, tab 33, at [5].
173 Ibid, at [13].
174 NAC's submissions (28 April 2017), exhibit 1, tab 39.
175 OCAA's submissions (5 May 2017), exhibit 1, tab 40.
176 *Dranichnikov v Minister for Immigration and Multicultural Affairs & Indigenous Affairs* (2003) 73 ALD 321 at [24]-[25] per Gummow and Callinan JJ and at [95] per Hayne J; *DWN042 v Republic of Nauru* (2017) 350 ALR 582 at [17] per Keane, Nettle and Edelman JJ. See also *CDD15 v Minister for Immigration and Border Protection* (2017) 250 FCR 587 at [18]-[20].
177 See *Segal v Waverley Council* (2005) 64 NSWLR 177 at [43], [65]-[77] and [93]; see also *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 476 per Fitzgerald P and 484 per McPherson and Davies JJA.

> "a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her. However, for a judge to ignore evidence critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the judge … may promote a sense of grievance in the adversary and create a litigant who is not only 'disappointed' but 'disturbed' … It tends to deny both the fact and the appearance of justice having been done."

[247] NAC's alternative contention is that if (contrary to the view I have formed) it was within the jurisdiction of the Land Court, on the hearing under s 268 of the MRA and s 190 of the EPA, to fully consider the impact of taking or interfering with groundwater supplies on adjoining landowners, the Land Court has failed to accord NAC procedural fairness by failing to consider substantial parts of its argument in relation to the groundwater issue, in particular, the operation and effect of the overall legal framework applicable to stage 3, including not only the associated water licence provisions of the *Water Act*, but also the suite of conditions imposed or stated by the Coordinator-General, the draft environmental authority conditions, the conditions proposed by NAC for the mining lease (which adopted the Coordinator-General's recommended conditions under the *Water Act*) and the Commonwealth EPBC Act approval conditions.[178]

[248] NAC further contends that, to the extent it may be assumed or inferred, from general statements in the Reasons that the member considered all the evidence and submissions, that he did consider this argument, there has been a failure to provide reasons to adequately explain the decision.

[249] OCAA's response to this argument, in its written submissions, was that it represented an impermissible challenge to the merits of the decision. In oral submissions, OCAA advanced a further argument that the approach taken by the Land Court member in the Reasons was explicable by the fact that the case before him was run on the basis that deficiencies in the groundwater modelling was effectively a "guillotine" issue.[179] Consequently, having decided that issue in the way that his Honour did, it was not necessary for him to address the other matters in any detail. NAC disputes this. Having regard to the submissions of the parties to which I was taken in the course of argument, I do not accept OCAA's submission in this respect. It is reasonable to infer, from the Reasons, that groundwater modelling deficiencies was the basis upon which the Land Court member reached the decision that his Honour did, reflected at [1678]-[1681]. But I am not persuaded that is how the case was run before him – particularly on behalf of NAC, but also as reflected in the third respondent's submissions before the Land Court, which placed particular emphasis on the significance of the assessment and management of groundwater impacts, post the amendments to the *Water Act*.[180]

[250] In so far as that legislative scheme is concerned, it follows from the conclusions I have already reached in relation to ground 10 that I accept the argument that, even if acting within jurisdiction, the Land Court member erred in law by failing to properly consider

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[178] The "suite of conditions" are set out in schedule 1 to NAC's written submissions.

[179] T 3-72.32, 3-73.23, 3-80.38.

[180] See, for example, the third respondent's submissions (19 September 2016), exhibit 1, tab 28 at [9]-[12] and [36]-[39]; and (13 December 2016), exhibit 1, tab 32 at [20]-[21] and [31]-[32].

and give effect to the new *Water Act* provisions which applied to the assessment and management of the impacts of taking or interfering with underground water as a consequence of mining activities.

[251] In relation to what was described as the "adaptive management program" more broadly, incorporating the suite of conditions included within the legal framework applicable to stage 3, I accept the submission for NAC, by reference to the submissions I was taken to, that it was a substantial part of NAC's case, before the reopening, that the suitability of the groundwater modelling, at the stage of the Land Court's hearing, needed to be considered in the broader context of those conditions.[181] Following the reopening, there was particular emphasis on the 2016 IESC advice (which was an important, but I accept not the only, aspect of the evidence addressed at the reopened hearing[182]) and also a reiteration of NAC's argument that concerns about the groundwater conceptualisation and modelling could be addressed by the suite of applicable conditions, emphasising again the Coordinator-General's conditions, the draft environmental authority conditions, and also by reference to the revised position of the IESC and the Commonwealth Minister's conditions under the EPBC Act approval (which had been granted by this time), as well as the associated water licence provisions of the *Water Act*.[183]

[252] In the Reasons, the Land Court member refers, in passing, to part of NAC's argument in this respect. For example, at [1518] (by reference to OCAA's submission), [1523] (the argument that "conditions proposed by NAC particularly relating to faulting which seek to ensure that faulting is addressed in a review of the model prior to mining commencing"), [1528] (referring to NAC's argument by reference to the draft environmental authority conditions, including as proposed to be amended by NAC), [1536] (in relation to make good agreements)[184] and at [1579] (again in relation to the draft environmental authority). In expressing conclusions on the groundwater evidence at the original hearing, at [1626]-[1630], the member says he finds great difficulty with the modelling of groundwater as presented at the original hearing, and says he "was not satisfied in general terms of the groundwater case put by NAC…" (at [1627]). His

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[181] See, for example, NAC's submissions (26 August 2016), exhibit 1, tab 26, at [6.97]-[6.101], [6.103], [6.105], [6.111], [6.125]-[6.128]; and part 2 of the submissions dealing with groundwater, headed "groundwater conditions", at pp 183-193. See also NAC's reply submissions (30 September 2016), exhibit 1, tab 29, at [2.31]-[2.32], [2.77]-[2.84].

[182] It is common ground that the reopened hearing was not concerned solely with the receipt into evidence, and consideration of, the 2016 IESC advice. The Court heard further evidence from three of the groundwater experts, in light of the 2016 IESC advice. The parties made detailed (and lengthy) written submissions following the hearing. See also the Reasons at [1437]-[1438] and [1655].

[183] NAC's submissions (28 April 2017), exhibit 1, tab 35, at [3.6], [3.8], [3.11], [3.23] and section 14, pp 73-81 (with NAC emphasising [14.40], [14.48] and [14.51]); NAC's reply submissions (19 May 2017) at [2.12]-[2.15]. See also NAC's submissions in this court at [344]-[348].

[184] At [1536] the member attributes to NAC a submission that make good agreements provide the necessary protection for potentially affected land owners. I accept the point made by NAC that this submission is attributed to NAC in OCAA's submissions ((13 September 2016), exhibit 1, tab 27 at [53]). In its reply submissions NAC expressly submitted that this misconstrued its position; that make good agreements are only part of the response to any uncertainty in the model; and made reference to the detailed groundwater conditions: NAC's reply submissions (30 September 2016), exhibit 1, tab 29, at p 171, point 6.106. The groundwater conditions are set out in annexure A to the reply submissions, commencing at p 279, and include the draft environmental conditions (with changes proposed highlighted) (from p 279), the Coordinator-General imposed conditions (from p 289) and proposed conditions of the mining lease, to incorporate a recommended Coordinator-General condition (from p 291).

Honour reiterates that make good agreements cannot be a complete answer to this uncertainty (at [1629]).

[253] His Honour then turns to consider whether his conclusions were changed in light of the 2016 IESC advice, and the reopened evidence (at [1631]). NAC is critical of that approach, submitting the member ought to have made his decision having regard to the evidence overall, rather than in a staged manner. I would not accept that as a fair criticism in a general sense, as it is a matter for the decision-maker how they approach their task. But I do think that this two stage approach may have led the member to give somewhat myopic consideration to the evidence, and arguments, before him. The focus of the reasons, dealing with the reopened hearing, is on the weight to be given to the 2016 IESC advice. The conclusion reached is that the court can place limited weight on it, because of the "narrowness of the questions asked of the IESC" and the failure to provide the IESC with all the evidence from the Land Court's hearing (at [1677]). Without reference to any of the other evidence given at the reopened hearing, the conclusion expressed at [1679]-[1680] is effectively the same as that reached after the original hearing, that the current modelling is inadequate, and there is too little of substance in promises and assurances for the future (by reference to the draft environmental authority conditions) to be satisfied groundwater issues have been properly addressed.

[254] There is no analysis, on the face of the Reasons, of what "the groundwater case" put by NAC was, and no explanation for why the member was not satisfied of that case. There is no reference to the substance of the suite of conditions. There is passing reference to one part of that suite, the draft environmental authority conditions, but not to the content of them, and no reference at all to the Coordinator-General's conditions (including as proposed by NAC to be incorporated into the mining lease conditions) or the Commonwealth's EPBC Act approval conditions, the associated water licence and underground water rights obligations under the *Water Act,* or NAC's submissions in relation to these matters. There is, as already noted, no reference to the other evidence from the reopened hearing, apart from the 2016 IESC advice.

[255] Had I reached a different view in respect of ground 10, I would have formed the view that ground 15 was established, on the basis that there has been a failure to accord procedural fairness, significantly by failing to address at all the operation of the associated water licence provisions of the *Water Act,* but also by failing to address, other than in passing, and incompletely, a substantial case advanced by NAC, concerning the operation and effect of the combined role of the various other approvals and conditions. The merit of the arguments is not for this court to consider, but I do accept, on the face of the exposed reasoning, the force of the argument that there has been a failure to consider this broader argument or, to the extent it was considered, a failure to adequately articulate the reasons for rejecting it.

[256] I would add that, given the significance of the 2016 IESC advice, and the role of the IESC under the EPBC Act (as to which see [78] above), procedural fairness may also have required the Land Court to give the parties the opportunity to address the deficiency his Honour was concerned about, and which led him to effectively disregard that evidence, before proceeding to determine the matter. However, this was not a matter the subject of submissions before me.

Intergenerational equity

[257] There is a direct relationship between the Land Court member's conclusions in relation to groundwater, and his Honour's conclusion that "the principles of intergenerational equity mean that the revised stage 3 operations should not be approved" (at [1344]). At [1337] his Honour said:

> "The key question, therefore, is whether or not there is a real possibility of the groundwater available to landholders surrounding and in the vicinity of Stage 3 both during operations and for generations to come being effected. That question is of course answered as can be seen by my analysis of the key issue groundwater. I am satisfied, given the totality of the groundwater evidence before me in this case, that there is a real possibility of landholders proximate to Stage 3 suffering a loss or depletion of groundwater supplies because of the interaction between the revised Stage 3 mining operations and the aquifers. I am also convinced that the potential for that loss or interference with water continues at least hundreds of years into the future, if not indefinitely."

[258] As a consequence, the Land Court member considered that at least one of the principles of intergenerational equity, that being the "conservation of quality principle"[185] has the real possibility to be breached by the stage 3 operations (at [1338]). His Honour regarded this breach as sufficient to warrant rejection of the mining lease applications and application to amend the environmental authority.[186]

[259] The Land Court member also considered that there was a real risk of a breach of (another of the sub-principles) the principle of conservation of options (at [1341]), going on to explain how this might be addressed by not allowing stage 3 to proceed, at [1342]:

> "Not allowing the revised Stage 3 to proceed as contemplated by the current applications on the basis of an infringement of the principle of intergenerational equity has a number of consequences. Firstly, of course, it removes the real possibility of depletion or loss of groundwater to properties in the vicinity of the mine. But there is another, less mentioned option that is also conserved. If the revised Stage 3 does not proceed, the coal contained within the MLAs of the revised Stage 3 will remain in the ground. They will not be depleted or lost; they will be available for future generations who perhaps find ways to mine the coal in the future in ways that either completely remove or at least lessened the extent of risk to local landholder groundwater supplies, as well as, perhaps, finding processes of burning or using the energy produced by coal in such ways that no GHG or pollutant

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[185] Noting that the identification of this as one of the "sub-principles" of the principle of intergenerational equity was on the basis of extra-curial writing by Justice Preston in 2005 (see the Reasons at [1308]), subsequently referred to by Pain J in *Gray v The Minister for Planning & Ors* (2006) 152 LGERA 258 (see the Reasons at [1309]). As submitted by NAC at [413(d)] of its written submissions, the principle has in other cases been articulated more broadly, including by Justice Preston himself, for example, in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 at [116] (that "the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations").

[186] Reasons at [14], [1344], [1799], [1804], [1808] and [1839].

> effect is caused by the use of the coal mined, thus potentially increasing the value of that coal as a resource in the future."

[260] But it does not appear his Honour considered this "less mentioned option" warranted the refusal of the applications, which was appropriate given both the speculative nature of it, and his Honour's findings concerning climate change (at [1092]-[1094] of the Reasons).

[261] NAC's challenge to the decision in so far as it concerns intergenerational equity is addressed in grounds 7 and 9 of the application for review. Ground 7 contends that the first respondent erred by failing to properly interpret and apply the principle of intergenerational equity contained within the standard criteria, as mandated by s 191 of the EPA. Ground 9 contends that the first respondent erred, by incorrectly applying the principle of intergenerational equity as a ground of refusal of the mining lease applications and by considering the principle to be relevant under the criteria in s 269(4)(i), (k) and (m) of the MRA.

[262] It is apparent from reading [1303] to [1344] of the Reasons, together with [14] and [1799], [1804], [1808] and [1839], that the basis for the Land Court member's conclusion, that the principles of intergenerational equity were breached in at least one regard, sufficient to warrant rejection of the mining lease applications and application to amend the environmental authority, was his Honour's finding of a real possibility of landholders proximate to stage 3 suffering a loss or depletion of groundwater supplies as a consequence of the impact of mining operations on aquifers, with the potential for that loss or interference to continue for generations to come.

[263] Although the Land Court member said he accepted certain submissions of OCAA in relation to intergenerational equity (which do not appear to deal with groundwater) (see the Reasons at [1328]), his Honour then said at [1329] that "does not necessarily mean that a breach of the principles of intergenerational equity has occurred or that the revised Stage 3 should not proceed". His Honour did not return to that point, and did not in any other part of the Reasons express a different view. A fair reading of the Reasons supports the conclusion that the basis for the finding of a breach of the principles of inter-generational equity was the groundwater concerns, and not any other issue(s).

[264] It follows from the conclusion I have reached in relation to ground 10 of the application (that the Land Court member erred in law in his consideration of groundwater issues), that that error infects the Land Court's member's conclusion as to breach of at least one of the principles of intergenerational equity. In the circumstances, it is unnecessary to address the further errors NAC contends were made by the Land Court member in his consideration of this issue.[187]

[265] However, I will address one of them, which is the balancing exercise, both in terms of consideration of the issue of intergenerational equity itself, and then more broadly, in terms of balancing all the various considerations the Land Court member had to take into account, in determining the relative merits of the applications and objections, and deciding what recommendation to make. This issue is also raised in relation to noise, discussed below.

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[187] NAC's submissions at [407]-[410] and [412]-[420].

[266] NAC contends that "in treating the principle of intergenerational equity as some form of stand-alone requirement that was capable of being 'breached', such that that breach was 'sufficient to warrant rejection of the MLAs and draft EA applications', the Member has given the principle a determinative status that it was not intended to have under either the EPA" or the Intergovernmental Agreement on the Environment (IGAE).[188]

[267] Under s 191(g) of the EPA, which refers to the "standard criteria", one of the standard criteria that must be considered is the identified principles of environmental policy as set out in the IGAE: the precautionary principle, intergenerational equity and conservation of biological diversity and ecological integrity. The authorities have recognised that none of the principles of ecologically sustainable development (which include these three principles) should be viewed in isolation, with one of them being given overriding weight compared to other factors to be considered, when deciding how to proceed.[189] Accepting that the weight to be given to any particular consideration was a matter for the Land Court member to determine, the language used by his Honour in the Reasons does tend to indicate that his Honour gave one of these principles an overriding weight, without referring at all (in this context), for example, to the precautionary principle, and without, on the face of the exposed reasoning, balancing the principle of intergenerational equity, with the other factors to be considered, either under the standard criteria, or s 191 more broadly.

[268] In that regard, NAC submits that rather than considering this issue in isolation from the other issues in the case, what the member was required to do, as part of the process of considering a range of matters, as required in particular under s 191 of the EPA, was carry out a balancing exercise in determining what the final decision ought to be.[190]

[269] OCAA submits there is no "superadded" balancing exercise required by s 269(4) of the MRA or s 191 of the EPA, and refers, by analogy, to the conclusion reached by Douglas J in *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260 at [24] that in the absence of any statutory requirement that a net (economic) benefit be shown to justify a recommendation for the grant of a mining lease, his Honour was not prepared to add such a concept to the considerations already required under s 269(4) of the MRA.[191]

[270] I do not regard that analogy as helpful, as there is a significant difference between the balancing exercise which NAC contends is required, and the addition of a consideration of net (economic) benefit rejected by Douglas J in *Coast and Country.*

[271] The authorities support the conclusion that in exercising its function under the MRA and the EPA the Land Court is necessarily obliged to weigh up (that is, balance) the various considerations that each statute requires be taken into account in order to arrive at its recommendations.[192] The Land Court has a discretionary power in terms of what

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[188] See s 191(g) and para (a) of the definition of "standard criteria" in the EPA. NAC's submissions at [413].

[189] See, for example, *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 at [154]-[155], [182] and [183] per Preston CJ (Land and Environment Court).

[190] NAC's submissions at [408] and [412].

[191] OCAA's submissions at [513]-[514].

[192] See, for example, *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 482 per Gibbs J, at 485 per Stephen J (referring to the process involving the "weighing against each other [of] conflicting merits and demerits" and also "to weigh in the scales") and at 487 per Jacobs J; *Rathborne v Abel* (1964) 38 ALJR 293

recommendation it makes, following a hearing. That is a power exercisable by reference to considerations the scope of which is defined by the legislation, but in respect of which the decision-maker is allowed some latitude as to the choice of the decision to be made. Within that decision-making process no one consideration and no combination of considerations is necessarily determinative of the result.[193]

[272] As to whether the Land Court member did this, OCAA points to [198] of the Reasons (which appears at the start of the Reasons, under the heading "onus of proof"), in which his Honour says "the Court must balance all of the relevant considerations and make recommendations as provided by the MRA and the EPA". But NAC says the Reasons reveal that in relation to intergenerational equity, as well as noise which I will come to next, his Honour did not act on that general statement. Rather, his Honour proceeded on the basis that the conclusion as to breach of one of the principles of intergenerational equity warranted refusal, on a standalone basis (referring to [14] and [1344] in particular). There is merit to that submission, given the language used in these paragraphs.

[273] As already noted, though, the conclusion in relation to intergenerational equity was inextricably linked to the conclusion in relation to groundwater. It follows, from my finding that ground 10 is established, that the Land Court member's conclusion in respect of this issue cannot stand, in any event.

[274] I find that ground 7 is established (having regard to particular (i), and consequent upon my finding in relation to ground 10). I have not addressed the remaining parts of ground 7.

[275] In relation to ground 9, there is also an overlap with my conclusions on ground 10 (in terms of jurisdiction under s 269(4) of the MRA). Separately, as to the question whether it was an error to apply the principle of intergenerational equity as a ground of refusal of the mining lease applications, by considering that principle to be relevant under s 269(4)(i), (k) and (m),[194] I note the following. The principles of environmental policy under the IGAE, of which intergenerational equity is one, are not matters expressly, or directly, captured by any of the considerations under s 269(4) of the MRA. For that reason, it may be correct to conclude that, looked at in isolation, the principles are not matters to be taken into account under the s 269(4) analysis. However, the legislation expressly requires the hearing of the mining lease and environmental authority applications to be heard and determined together. The conclusion reached in relation to the environmental authority application, in respect of which the decision-maker must take into account the principles (as part of the "standard criteria", under s 191(g) of the EPA), is relevant to and may affect the consideration of various of the matters under s 269(4). So whilst it may not be the correct approach to apply one of the principles of environmental policy, intergenerational equity, as a

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at 301 per Kitto J and at 295 and 299 per Barwick CJ; *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 at [46]; and *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347 at [36] per Preston CJ.

[193] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19] per Gleeson CJ, Gaudron and Hayne JJ, referring to *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76.

[194] See the Reasons at [1799], [1802]-[1803], [1804] and [1808], where the member summarises his conclusions in relation to s 269(4)(i), (j), (k) and (m) of the MRA, respectively, including by reference to intergenerational equity.

ground of refusal of a mining lease application, having regard to the matters in s 269(4), it would not be an error to take into account the conclusion reached in relation to the environmental authority application (which may be on the basis, inter alia, of application of such principles), in deciding what recommendation to make about the mining lease application. Having said that, this is not a matter necessary for me to determine on this application, and it is preferable to leave this question of construction open for another case.

Noise

[276] The Land Court member found, by reference to s 10 of the *Environmental Protection (Noise) Policy* 2008[195] (**EPP Noise**), that the appropriate noise levels for both evening and night operations should be set at 35 dB.[196] The Coordinator-General's evaluation report had stated conditions for the draft environmental authority which set the noise levels at 42 dB for day (7am to 6pm) and evening (6pm to 10pm) and 37 dB for night (10pm to 7am).[197] The Land Court member found that as a consequence of his conclusion that lower limits were appropriate for the evening and night times, "[t]his is a clear case of inconsistency between what I consider should be recommended by this Court and the CG's conditions" (at [784]) and concluded that "[a]s a consequence I am compelled to recommend that the MLs … not be granted and the draft EA not be granted because my recommendation would be inconsistent with the CG's stated conditions" (at [786]; also saying at [1838] that "I have no option but to recommend refusal").

[277] Review of this part of the decision is sought on the basis of grounds 1, 4 and 6 of the application. Reflecting these grounds, in its submissions NAC contended that the Land Court member made the following errors:

1. First, the Land Court member asked himself the wrong question, and in doing so failed to take into consideration relevant material. It is submitted the member erred by failing to consider and carry out the environmental objective assessment referred to in s 51(1)(a) of the *Environmental Protection Regulation* 2008 (**EPR**), and then giving consideration to the relevant aspects of the EPP Noise (pursuant to s 51(1)(c)) (instead merely asking himself whether s 10 or schedule 1 of the EPP Noise should be used to determine the noise limits) (ground 4).[198]

2. Second, the Land Court member erred in deciding that the decision in *Xstrata* supported setting the levels at 35 dB (ground 6).[199]

3. Third, the Land Court member erred in concluding that it was open to him to consider whether different noise limits to those contained in the Coordinator-General's conditions should be preferred; or alternatively, if it was open to him to prefer lower noise limits, in concluding that he was compelled to recommend that

[195] Made under s 26 of the EPA, which enables the Minister to make environmental protection policies to enhance or protect Queensland's environment, including about noise (s 27(2)(h)).
[196] Reasons at [773]-[776].
[197] Reasons at [745], table F1b.
[198] NAC's submissions at [248]-[249] and [252]-[265].
[199] NAC's submissions at [250] and [266]-[270].

the environmental authority amendment application and mining lease applications be refused (ground 1).[200]

First error – did the Land Court member ask himself the wrong question and fail to take into account relevant considerations?

Was the Land Court member required to carry out the environmental objective assessment referred to in s 51 of the Environmental Protection Regulation?

[278] As already noted s 191 of the EPA requires the Land Court to consider a number of things in making an objections decision for the application to amend the environmental authority. They include:

(f) any relevant regulatory requirement; and

(g) the standard criteria.

[279] The term "regulatory requirement" is defined in schedule 4 to the EPA as follows:

"***regulatory requirement*** means a requirement under an environmental protection policy or a regulation for –

(a) the administering authority to –

(i) approve or refuse, or follow stated procedures for evaluating, any of the following applications –

(A) an application for an environmental authority;

(B) an amendment application or surrender application for an environmental authority;

… or

(ii) impose or amend a condition of an environmental authority or an approval of a transitional environmental program; or

(b) the Land Court to make an objections decision under section 191."

[280] The first question, having regard to this definition, is what is it that the Land Court must consider, under s 191(f)? NAC submits it is the regulatory requirement which is set out in s 51 of the EPR, which in turn refers to environmental protection policies (the relevant one in this case being the EPP Noise), having regard to paragraph (a) of the definition just set out. OCAA submits that paragraph (a) of the definition does not apply, because that is directed to the administering authority. OCAA submits it is paragraph (b) of the definition that applies. But on that basis, there is no relevant "regulatory requirement" (because there is no regulation or environmental protection policy that requires the Land Court to make an objections decision under s 191 – the only requirement to make an objections decision comes from s 191 itself).[201]

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[200] NAC's submissions at [251] and [271]-[290].

[201] T 4-31 to 4-33 and 4-36.10. Cf OCAA's written submissions at [344].

[281] I do not accept OCAA's submission in this regard. Read literally, and into the fabric of the substantive provision (s 191(f)), paragraph (b) of the definition does not make sense, as demonstrated below:

> "In making the objections decision for the application, the Land Court must consider the following:
>
> …
>
> (f) any relevant [requirement under an environmental protection policy or a regulation for the Land Court to make an objections decision under section 191]."

[282] A definition in an Act is no more than an aid to construing the provisions of the Act itself.[202] It cannot operate to alter the otherwise plain meaning of the provision, and if it does not fit comfortably into the text, the exercise of construction needs to address any linguistic, logical or grammatical infelicities that arise.[203]

[283] In terms of legislative history, a definition of "regulatory requirement" was first included in the EPA in 2007.[204] At that time, although worded slightly differently, it was essentially in terms of paragraph (a) of the definition (referring to a requirement under an environmental protection policy or a regulation for the administering authority to do certain things). The definition was amended in 2011[205] so that it referred to "a requirement under an environmental protection policy or a regulation for –

> (a) the administering authority to [do certain things, including grant or refuse to grant or follow stated procedures for evaluating an environmental authority application]; or
>
> (b) the Land Court to make an objections decision under section 223; or
>
> (c) the Minister to make a decision under section 247."

[284] The definition was further amended, in 2012, to its current form.[206]

[285] The explanatory notes to the Bill which became the 2011 amending Act[207] (which first introduced para (b) into the definition) include the following:

> "This clause amends the definition of 'regulatory requirement' in the Dictionary of the *Environmental Protection Act 1994* to provide for decisions by the Minister or a court. Sections 223 and 247 of the *Environmental Protection Act 1994* require the Minister or a court to consider the regulatory requirements, which are specified in the

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[202] *Kelly v R* (2004) 218 CLR 216 at [103] per McHugh J; *Hastings Co-operative Ltd v Port Macquarie Hastings Council* (2009) 171 LGERA 152 at [16]-[18]; see also *Lamb v Brisbane City Council* [2007] 2 Qd R 538 at [47].

[203] *Commissioner of Police v Kennedy* [2007] NSWCA 328 at [44] per Basten JA; *SZGIZ v Minister for Immigration & Citizenship* (2013) 212 FCR 235 at [30] per Allsop CJ, Buchanan and Griffiths JJ.

[204] *Environmental Protection and Other Legislation Amendment Act* 2007 (Act No. 56 of 2007), s 32.

[205] *Environmental Protection and Other Acts Amendment Act* 2011 (Act No. 3 of 2011), s 15.

[206] *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act* 2012 (Act No. 16 of 2012), s 62. The removal of para (c) of the definition reflected the fact that provision was no longer made for the making of a decision by the Minister under what was s 247.

[207] Explanatory notes to the Environmental Protection and Other Acts Amendment Bill 2009.

> *Environmental Protection Regulation 2008*. However, the current definition of 'regulatory requirement' does not reflect this. This amendment corrects this error."

[286] It is difficult to make sense of the last two sentences. But as Chesterman J said in *Netstar Pty Ltd v Caloundra City Council* (2003) 127 LGERA 228 (at 235), "[i]t does not matter. The task of the court is to construe the words that actually appear in a statute. It is not to divine what the draughtsman thought he [or she] was doing".

[287] In my view, addressing the linguistic, logical and grammatical infelicities that arise from the form of the definition, s 191(f) ought to be construed as requiring the Land Court to consider any relevant regulatory requirement, being a regulatory requirement imposed on the administering authority under a regulation made, or environmental protection policy approved, under the EPA that is relevant to the objections decision the Land Court is required to make.

[288] In the present context, the relevant regulatory requirements are to be found in chapter 4, part 2 of the EPR, and the EPP Noise.

[289] NAC next submits that the effect of s 191(f) is that the Land Court, in making its objections decision, is obliged to carry out the environmental objective assessment referred to in s 51(1)(a) of the EPR.

[290] Section 51(1) of the EPR relevantly provides:

> "The administering authority must, for making an environmental management decision[208] relating to an environmentally relevant activity, other than a prescribed ERA –
>
> (a) carry out an environmental objective assessment against the environmental objective and performance outcomes mentioned in schedule 5, part 3, tables 1 and 2;
>
> …
>
> (c) consider each of the following under any relevant environmental protection policies –
>
> (i) the management hierarchy;
>
> (ii) environmental values;
>
> (iii) quality objectives;
>
> (iv) the management intent. …"

[291] As discussed above, in terms of the scheme under the EPA, prior to the application (for an approval for mining activities) being referred to the Land Court for an objections

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[208] Defined in s 48 of the EPR as a decision under the EPA for which the administering authority making the decision is required to comply with regulatory requirements. As the amendment application by NAC was declared a major amendment (cf s 48(2)(b)), the decision of the administering authority on the application was an environmental management decision.

decision, the administering authority has to make a decision on the application (see ss 171, 172 and 176 of the EPA). In deciding the application, s 176(2)(a) provides that the administering authority must "comply with any relevant regulatory requirement". The decision is therefore an "environmental management decision" within the meaning of s 48 of the EPR.

[292] The effect of NAC's submission is that, in making the objections decision, the Land Court effectively steps into the shoes of the administering authority. In my view, that is not the effect of s 191(f). Importantly, what s 191(f) requires the Land Court to do is consider any relevant regulatory requirement. In contrast, s 176(2) requires the administering authority to comply with any relevant regulatory requirement.[209] The objections decision required to be made by the Land Court is not, as defined in s 48 of the EPR, an "environmental management decision". Section 51 of the EPR is, in its terms, a mandatory direction to the administering authority. Section 191(f) of the EPA does not, in its terms, require the Land Court to comply with any relevant regulatory requirement, as though it were the administering authority. It (only) requires the Land Court to consider any relevant regulatory requirement, which as discussed above, means a relevant regulatory requirement imposed on the administering authority.

[293] In my view, under s 191(f) the Land Court was obliged to consider the environmental objective assessment undertaken by the administering authority under s 51(1)(a) of the EPR, but was not required to carry out such an assessment itself.

[294] The administering authority's assessment report was in evidence before the Land Court.[210] OCAA submits that s 51 of the EPR was not the subject of any particular emphasis in the Land Court proceedings;[211] the focus was on the EPP Noise. This seems to be correct. I note, for example, that in its submissions to the Land Court NAC said that its "primary position is that it is unnecessary to look beyond what the applicable legislation, contained in the EPP (Noise) requires".[212]

[295] Having said that, it remains the fact that the Land Court was required, under s 191(f), to consider the administering authority's environmental objective assessment under s 51(1)(a). It is not apparent from the exposed reasoning that it did so. There is no reference to s 51[213] or the environmental objective assessment report in the Reasons. However, there was clearly consideration of the draft environmental authority conditions proposed by the administering authority. Relevantly, as required by s 205 of the EPA, the draft environmental authority included the conditions as to noise limits stated by the Coordinator-General.

[296] As discussed above, on a critical issue, generalised statements in the Reasons to the effect that the member has considered all the evidence would not suffice. But where

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[209] See, to similar effect – in terms of an obligation on the administering authority to "comply with" any relevant regulatory requirement – ss 175(2)(a), 194(4)(b), 241(a), 268(a), 318ZI(1)(a), 338(1)(a); cf s 295(3)(a) (in making a decision on the amount and form of financial assurance required under an environmental authority, the administering authority must "have regard to" any relevant regulatory requirement).

[210] Exhibit 12 before the Land Court (exhibit 1, tab 43).

[211] Referring, for example, to NAC's submissions (26 August 2016) at exhibit 1, tab 26 at [33] (referring, inter alia to [269] of Mr Denney's affidavit, which in turn refers to the assessment undertaken by the administering authority and its assessment report – see exhibit 1, tab 55) and [41.71].

[212] Exhibit 1, tab 26, [41.62].

[213] Apart from in the context of quoting sections of the EPP Noise.

the parties did not emphasise the matter in their submissions to the Court, I am reluctant to reach a conclusion of error on the basis of failing to take into account a relevant consideration (the administering authority's environmental objective assessment under s 51(1)(a)). It is open to infer the Land Court did have regard to the administering authority's assessment report. The weight placed on that was a matter for the Land Court.

Did the Land Court member err in the manner in which he dealt with the EPP (Noise)?

[297] The EPP (Noise) was also a relevant regulatory requirement that the Land Court had to consider under s 191(f). It would also be a relevant consideration, within the meaning of "standard criteria" under s 191(g).[214]

[298] Apart from the argument in relation to s 51(1)(a) of the EPR, in ground 4 NAC also contends that the Land Court member erred in the manner in which he dealt with the EPP Noise. It contends that, in determining that s 10 of the EPP Noise should be used to set the noise limits, the first respondent failed to correctly interpret and apply the EPP Noise, s 51 of the EPR and s 191 of the EPA, and failed to take relevant considerations into account.[215]

[299] Putting to one side NAC's argument in relation to s 51(1)(a) of the EPR, NAC's contention is that the Land Court member fell into error by confining his consideration to the question whether the noise limits in s 10 or schedule 1 to the EPP Noise should apply, and failed to carry out the full exercise that was required of him.[216]

[300] It is difficult, in analysing NAC's argument on this point, to extricate what it says about s 51(1)(a) of the EPR, in order to identify precisely the error, from a judicial review point of view, that is contended to have been made in the Land Court member's interpretation and application of the EPP Noise. In this particular context, I consider there is merit to OCAA's submission that NAC's argument (for example at [262] of NAC's submissions) has the appearance of a challenge to the merits of the decision.

[301] Unquestionably, the Land Court member had to consider the EPP Noise. He did that. He made reference to the evidence, both lay and expert, before him in relation to noise. The lay evidence was referred to by his Honour in the context of past performance of NAC.[217] The conclusion his Honour reached as to appropriate noise levels was based upon his analysis of the expert evidence of Mr Savery (called by OCAA) and Mr Elkin (called by NAC).

[302] The Land Court member made reference to various parts of the EPP Noise, including s 5 (the purpose of the policy), s 6 (how the purpose of the policy is to be achieved), s 7 (environmental values for the acoustic environment), s 9 (management hierarchy for noise) and s 10 (controlling background creep), as well as schedule 1 (acoustic quality objectives). The member did not expressly refer to s 8 (which is the provision of the policy which refers to schedule 1).[218] That is not an omission relied upon by NAC as demonstrating error. It is fairly described as an oversight, rather than an error –

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[214] As found by the Land Court member at [750] and [751] of the Reasons.
[215] Paragraph (iii) of the particulars to ground 4.
[216] T 2-48.40; NAC's written submissions at [262]-[265].
[217] Reasons at [720]-[727].
[218] Reasons at [752]-[756].

because the member has clearly paid close attention to schedule 1 in considering this issue.

[303] The experts each had a different view about what the outdoor noise levels should be. Mr Elkin considered the limits set out in the draft environmental authority (based on the Coordinator-General's stated conditions, of 37 dBA at night and 42 dBA during the day and evening) to be appropriate, relying on schedule 1 to the EPP Noise, among other things. Mr Savery considered that the outdoor noise limits should be based on the background creep requirements in s 10 of the EPP Noise, resulting in 35 dBA at night and 40 dBA during the day and evening (on the basis of an agreed level of 30 dBA for the "existing acoustic environment").[219]

[304] The Land Court member's ultimate conclusion was on the basis of a preference for Mr Savery's approach over that of Mr Elkin's. His Honour makes reference to the different perspectives of each of schedule 1 (the acoustic quality objectives for a sensitive receptor at a particular place (relevantly here a dwelling)) and s 10 (a statement of a management intent for an activity involving noise that, to the extent it is reasonable to do so, noise from an activity that varies over time should not be more than 5 dBA greater than the existing acoustic environment).[220] It is apparent that his Honour was persuaded by the evidence of Mr Savery (an extract of which is set out at [768]), that the noise levels ought to be set by reference to the noise that the mining activity itself should be allowed to make (see at [775]), which I note is consistent with the wording of condition F1 as proposed to be amended by NAC (see at [746] and [801]). In that context, in my view, the Land Court member can be seen to have had regard to the EPP Noise, and to the evidence before him, and formed a view about that evidence, in the context of the EPP Noise provisions. The Land Court member, on my reading of this part of the Reasons, did not impermissibly conclude that the noise levels in s 10 should apply. He reasoned to that conclusion, upon a consideration of the EPP Noise more broadly, and the expert evidence before the Court.

[305] On a fair reading of the Land Court member's consideration of the key issue of noise in the Reasons, I do not accept that any error, as a matter of law, in the interpretation or application of the EPP Noise has been demonstrated; nor that it has been demonstrated that his Honour failed to take into account something he was required to. To the extent that a different view may have been taken of the evidence, for example on the basis of the factors referred to in [262] of NAC's submissions, resulting in a different conclusion, that is not a matter for this court within the scope of a judicial review application.

Second error – reliance upon Xstrata

[306] It is appropriate to briefly address the second contended error here. At [777] of the Reasons, after expressing the conclusion his Honour had reached as to the appropriate noise levels (consistent with Mr Savery's evidence), the Land Court member commented that "[t]here is a further reason that these levels are appropriate. That is because they are consistent with President MacDonald's conclusions in *Xstrata*". NAC's complaint is that reliance upon the outcome, in another case, in a different

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[219] See the Reasons at [718] (table setting out summary of areas of disagreement between the experts, in particular at points 4, 5, 6) and at [768] (para 10 of Mr Savery's evidence); also T 4-17.

[220] Reasons at [766] and [767].

factual context, is misplaced; and NAC further submits that in any event the Land Court member has misunderstood the reasoning and circumstances in *Xstrata*. I do not propose to dwell on this. I accept it is a fair criticism to say that the member's reliance, in support of his own decision on the evidence before him, upon the outcome in another case, based on different evidence and circumstances, was misplaced. To rely upon the reasoning process, or explanation or application of principle is of course a different matter. But this is not something that I would regard as significant in the present case.

Third error – inconsistency with Coordinator-General condition

[307] By ground 1 of the application NAC contends that the Land Court member erred in a number of ways: in determining that it was open to him to consider whether a condition with lower noise limits for the evening and night should apply (the paramountcy point); in determining that such a condition was inconsistent with the Coordinator-General's condition (the no direct inconsistency point); in determining that his Honour was compelled as a result to recommend refusal (the CG amendment point); and in failing to carry out the balancing exercise.

Paramountcy point

[308] NAC's first argument is that s 190(2) ought to be construed so as to deny the Land Court any scope either to impose a different condition (whether more or less stringent) than a Coordinator-General condition, or to recommend refusal of the application on the basis of a view that a more stringent condition than that imposed by the Coordinator-General should apply.

[309] As already discussed, s 190 of the EPA, which identifies the nature of the objections decision to be made by the Land Court, relevantly provides:

> "(1) The objections decision for the application must be a recommendation to the administering authority that –
>
> (a) if [*as was the case here*] a draft environmental authority was given for the application –
>
> (i) the application be approved on the basis of the draft environmental authority for the application; or
>
> (ii) **the application be approved, but on stated conditions that are different to the conditions in the draft environmental authority**; or
>
> (iii) the application be refused;
>
> …
>
> (2) **However**, if a relevant mining lease is, or is included in, a coordinated project, **any stated conditions** under subsection (1)(a)(ii) … –
>
> (a) **must** include the Coordinator-General's conditions; and

(b) **can not be inconsistent with** a Coordinator-General's condition."

[310] NAC contends that it is apparent from the scheme of the legislation, in this context including particularly the *State Development Act* and the EPA, that the Coordinator-General imposed conditions "cover the field" of the particular subject of the condition, with the effect that anything inconsistent with that (either an inconsistent condition, or a recommendation for refusal on the basis of a preference for a different condition) being ineffective (impermissible).

[311] For this contention NAC relies on the test of indirect inconsistency developed in the context of s 109 of the Commonwealth Constitution, in contrast to the test of direct inconsistency.[221] Direct inconsistency may arise where there is a collision between two legislative provisions (or conditions), and it is impossible to simultaneously obey both. Indirect inconsistency arises where, although there may not be contradiction, there is overlap, and there can be discerned an intention that one law (or condition) was to cover the field on the particular topic, leaving no room for operation for the other law (or condition).

Consideration of this issue in previous Land Court decisions

[312] This issue was considered in *Xstrata*.[222] In relation to the Land Court's power to recommend conditions for an environmental authority, President MacDonald referred to s 49 of the *State Development Act* (now s 47C) and said that s 222(2) (now s 190(2)) of the EPA "limits the Court's conditioning powers insofar as any conditions recommended by the Court must include the Coordinator-General's conditions and must not be inconsistent with a Coordinator-General's condition" (at [30]). In relation to the power to recommend conditions in relation to the proposed mining lease, her Honour said that, on a strict reading of s 46 of the *State Development Act* (now s 45) it would appear there is no prohibition on recommending conditions for the mining lease which are inconsistent with the Coordinator-General's conditions, but expressed the opinion that "it would defeat the intent of both the *State Development Act* and the EPA to recommend conditions for the proposed mining leases that would be inconsistent with the draft EA", and said she was not prepared to adopt that course (at [32]).

[313] As to the meaning of "inconsistent" for the purposes of s 222(2) [s 190(2)], her Honour adopted the approach of Kirby P in *Coffs Harbour Environment Centre Inc v Minister for Planning* (1994) 84 LGERA 324. In that case, Kirby P held that the term "inconsistency" in s 36 of the *Environmental Planning and Assessment Act* 1979 (NSW) (dealing with the situation where there is inconsistency between environmental planning instruments) was to be construed having regard to the ordinary meaning of the word, without the gloss which had developed around the meaning of the word in a constitutional context. On that basis, Kirby P said (at 331) "there will be an inconsistency if, in the provisions of one environmental planning instrument, there is 'want of consistency or congruity'; 'lack of accordance or harmony'; or

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[221] See, for example, *Majik Markets Pty Ltd v Brake & Service Centre Drummoyne Pty Ltd* (1991) 28 NSWLR 443 at 448-449.

[222] The competing submissions are referred to at [33] and [34] of *Xstrata.* Save for the reference to s 216(2) of the EPA (which provided that a Coordinator-General's condition included in the draft environmental authority can not be objected to by anyone), which was subsequently repealed, the argument in *Xstrata* was the same as that raised here.

'incompatibility, contrariety or opposition' with another environmental planning instrument."

[314] Applying that approach, President MacDonald said:

> "[44] … the word 'inconsistent' as it is used in s 222(2)(b) [s 190(2)(b)] of the EPA should be given its ordinary and natural meaning. The Macquarie Dictionary defines 'inconsistent' as:
>
> 1. lacking in harmony between different parts or elements; self contradictory.
> 2. lacking agreement, as one thing with another, or two or more things in relation to each other; at variance.
> 3. not consistent in principle, conduct etc.
> 4. acting at variance with professed principles.
> 5. logic: incompatible.
>
> [45] These definitions contemplate that, as a pre-requisite for determining inconsistency, there must be two or more 'parts' or 'elements' under consideration. The question is whether those elements lack harmony or are self-contradictory or are at variance etc. In other words, under this definition, the issue of inconsistency does not and can not arise if there is only one condition dealing with a particular topic. If one is asked to examine whether there is an inconsistency, there must necessarily be two or more conditions for examination. Thus, in my view, the ordinary meaning of 'inconsistent' indicates that it was not the intention of Parliament, as expressed in s 222(2)(b) [now s 190(2)(b)] of the EPA, that any Coordinator-General's condition would prevent the Court from recommending any conditions dealing with the same subject matter, for the draft EA.
>
> [46] Further, if the Legislature had intended that the Court could not impose a condition dealing with the same subject matter as a Coordinator-General's condition, the Legislature could have said so using clear words to that effect. There are no such clear words in the EPA, or indeed the MRA or the *State Development Act*.
>
> [47] I consider therefore that the Court has power under the EPA to recommend conditions for the draft EA dealing with the same subject matter as conditions imposed by the Coordinator-General, provided that the Court's recommended conditions do not contradict or lack harmony with the Coordinator-General's conditions."

[315] At the time *Xstrata* was decided, the EPA also included a provision (s 216(2)) that "a Coordinator-General's condition included in the draft [environmental authority] under section 210 can not be objected to by anyone". In *Xstrata* that provision was also relied upon, to contend that the Court could not entertain the subject matter of an objection to a Coordinator-General's condition. President MacDonald indicated she would not be prepared to read s 216(2) in that way, because to do so would render s 222 nugatory (at [49]). It was further submitted, as I understand [50] of *Xstrata*, that it

would be contrary to ss 216(2) and 222(2) for the Court, inter alia, to recommend against approval of the draft EA, in response to an objection going to the subject-matter of the Coordinator-General's condition, because if a person is not able to object to a Coordinator-General's condition itself, then nor is an objector able to do so by challenging the appropriateness of the condition and inviting a particular course of action to deal with the criticism of it (such as refusal). Her Honour said she found it unnecessary, in the circumstances of that case, to deal with that submission.

[316] However, reflecting the corollary of that argument, her Honour also recorded a submission, at [34] (in general terms) and again at [360] (in relation to air) and [418] (in relation to noise), made on behalf of an objector, that if the Court was to accept that a Coordinator-General's condition was inadequate for the purpose required, and that the conditions proposed in the draft environmental authority which are imposed by the Coordinator-General cannot be altered, the Court ought to recommend unfavourably against the grant of the mining lease applications while such conditions remain.

[317] Although her Honour did not expressly address this submission; nor did her Honour act on it. In some respects, this was because her Honour was not persuaded the condition was unreasonable or inadequate (for example, in relation to air at [367] and in relation to noise at [419]-[425]); although her Honour at [367] and [425] reiterated in any event that the effect of s 222(2) was that she had no power to contradict or change a condition imposed by the Coordinator-General. But even where it seems her Honour was of the view that a condition was inadequate, she gave effect to the primacy of the Coordinator-General condition. This is demonstrated, for example, in [264]-[265] of *Xstrata* where her Honour said (in the context of groundwater monitoring):

> "[264] In my view, Condition W38 as imposed by the Coordinator-General and included in the draft EA will not establish a comprehensive monitoring program. No monitoring is proposed within MLA 50229, the area of which is more than half the size of the total lease areas, and the monitoring on MLA 50231 is limited. Outside the MLA areas, the monitoring is limited to one site only.
>
> [265] Had it been open to me, I would have recommended that further monitoring take place before the mining operations commence. However, as discussed at [47] above, the effect of s 222(2) of the EPA is that the Court cannot recommend the inclusion of conditions in the draft EA which are inconsistent with a Coordinator-General's condition. The Coordinator-General has recommended a groundwater monitoring program for the shallow and alluvium aquifers in Condition W38. To recommend a more comprehensive program would be inconsistent with Condition W38 and would therefore be contrary to s 222(2) of the EPA. Nevertheless, I will draw this issue to the attention of the Minister administering the EPA.[223]
>
> [266] Similarly, for the reasons set out at [32], I do not consider that I can recommend further monitoring conditions be imposed on the proposed MLs."

[223] Which her Honour then did in [610] of *Xstrata*.

[318] In *Hancock,* a decision of the first respondent, his Honour adopted President MacDonald's reasoning in *Xstrata* at [45]-[47] (at [78]). At [330] his Honour said "it is beyond doubt that this Court cannot recommend conditions which are inconsistent with Coordinator-General conditions". As a matter of fact, in so far as additional groundwater monitoring was concerned, his Honour said he did not regard that as inconsistent with the relevant Coordinator-General's conditions, but rather as complimentary to them (see, for eg at [340] and [344]).

[319] In the present case, the Land Court member said this about the "inconsistency test":

> "[186] I agree with and adopt President MacDonald's analysis and conclusion with respect to the test for inconsistency (as outlined in the *Xstrata* decision). The Court must not recommend conditions that lack harmony with, or are incompatible with, contradict, or are directly inconsistent with CG stated conditions.
>
> [187] I disagree with the President's application of that test in the *Xstrata* case to the extent she believed that to recommend a more comprehensive monitoring regime is inconsistent with an existing monitoring regime conditioned by the CG. As I stated in *Hancock*, a more comprehensive monitoring regime is complementary with, rather than inconsistent with, an existing monitoring regime conditioned by the CG. Every case however will need to be determined on its own facts and merits.
>
> [188] I am minded to accept a very narrow definition of what is inconsistent because this will allow for a proper conditioning of projects after hearing all the relevant evidence, rather than not recommending conditions the Court believes are relevant or refusing the EA altogether because a relevant condition cannot be recommended due to inconsistency with a CG condition.
>
> [189] However, that does not mean that there will never be inconsistency with a CG condition: that is far from the case. Take for instance a recommendation which included a recommendation for additional monitoring and the establishment of more stringent compliance levels. The additional monitoring would be complimentary to existing CG requirements, and permissible, while the imposition of more stringent compliance levels (such as reduced allowable maximum noise limits) would be inconsistent and not allowable.
>
> [190] I have concerns with the legislative prohibition on the court recommending conditions inconsistent with CG conditions. My concerns are based on the following two points:
>
> (a) In this matter the CG issued his evaluation report on 19 December 2014 endorsing the project and stating conditions to be included in a draft EA. On 28 August 2015, Mr Loveday on behalf of EHP issued the draft EA and retained all the CG stated conditions.
>
> Since the CG evaluation report and subsequently the draft EA was issued, relevant legislation and policies have changed. The Water

> Act legislation has changed and also the 2016 NEPM has issued with changed air quality standards. Given the time between when the CG may condition a project and when the Land Court may hear and determine any objections relevant to that project; relevant laws, policies and guidelines may change. This then creates a difficult situation where the new law/policy etc. may require a change to the outdated CG conditions but the Court can not recommend a change if it is inconsistent.
>
> (b) CG evaluation of the EIS an[d] AEIS was no doubt thorough but it was not as thorough as the evaluation of those documents in the court proceedings before me. Nor did the CG have the assistance of expert opinion tested by cross-examination. Consequently what I find to be errors in expert reports and modelling in many vital areas such as water, noise and dust were only ascertained as part of the Land Court proceedings and not discovered by the CG in his evaluation process.
>
> The inconsistency requirement has an unwelcome hindering effect on the court in circumstances where the CG has relied upon incorrect modelling and the court is unable to correct conditions made by the CG in reliance on that incorrect modelling.
>
> [191] I will leave the question of solutions to what I consider this most unsatisfactory position to Parliament."

[320] His Honour later said this, after reaching the conclusion that lower noise limits than those imposed by the Coordinator-General's conditions, should apply:

> "[782] Important consequences, as contemplated by President MacDonald in *Xstrata*, flow as a consequence of my considering of the noise limits should be properly set using s 10 of the EPP (Noise). At [418] of *Xstrata*, President MacDonald quoted from the submissions of Mr Ambrose QC who acted for an objector in that case:
>
> > 'Further, if the conditions proposed in the draft EA cannot be challenged because they are set by the Coordinator-General, the MLAs ought to be refused while such conditions remain.'
>
> [783] In this regard, President MacDonald had this to say at [425] of *Xstrata*:
>
> > "In any event, the limits set in the draft EA cannot be altered because they were imposed by the Coordinator-General.'
>
> [784] I agree with both the submissions by Mr Ambrose QC in *Xstrata* as quoted above and the conclusions of President MacDonald. This is a clear case of inconsistency between what I consider should be recommended by this Court and the CG's conditions.
>
> [785] I am compelled to comply with the legislation in this regard. This is not an area in which there can be any question of a Land Court

> recommendation simply clarifying or enhancing that of the CG; to recommend a different noise limit to that as determined by the CG is directly inconsistent.
>
> [786] As a consequence I am compelled to recommend that the MLs and EPA not be granted and the draft EA not be granted because my recommendation would be inconsistent with the CG's stated conditions.
>
> [787] I find this a most unsatisfactory position to be placed in, but the legislation leaves me no option. One could be forgiven for thinking the position that I find myself in is absurd, given that this Court has heard in such extensive detail from two highly regarded experts in the acoustic field, as well as all of the material that was before the CG. In simple terms, this Court has had the benefit of much more information placed before it than the CG, and that information and evidence has been subject to intense scrutiny, yet I am precluded from recommending the result of that evidence to either the MRA Minister or the administering authority for the EPA."

[321] Before proceeding to consider the issues, I observe that his Honour has, in my respectful view, misread President MacDonald's decision in *Xstrata.* As discussed above, her Honour did not accept the submission advanced on behalf of the objector (quoted at [782] of the Reasons). Her Honour did not expressly address it; but nor did she act upon it.

Does the Coordinator-General's process, leading to the statement of conditions for an environmental authority, "cover the field"?

[322] The questions for determination are:

1. Whether the Land Court can consider the subject-matter of a Coordinator-General's condition at all?

2. If it can, what powers does the Land Court have, to the extent it regards a Coordinator-General's condition as inadequate?

[323] As to the first question, it is important to understand clearly the focus of NAC's argument. I have referred above to NAC's reliance upon the principle of indirect inconsistency. President MacDonald made reference to the development of the two categories of inconsistency in the constitutional context, in *Xstrata* (at [38]-[41]). But that was in the context of considering the proper construction to be given to the word "inconsistent" in s 190(2). Her Honour ultimately determined that a more straight-forward approach was appropriate – having regard to the natural and ordinary meaning of the word. As I understand its argument, NAC deploys these analogous principles in a (perhaps subtly) different way in this part of its argument. It is not directly, at this point, addressing the meaning to be given to "inconsistent", per se, but rather utilising the analogy to support its submission that, as a matter of construction, a legislative intention can be discerned that the Coordinator-General's conditions cover the field,

leaving no room for operation for inconsistent actions (whether in the form of inconsistent conditions, or a recommendation for refusal).[224]

[324] NAC submits that the various requirements, in the *State Development Act* and the EPA, that the Coordinator-General conditions must be included in any environmental authority, even following an objections hearing; together with the provisions indicating primacy of the Coordinator-General conditions, in the event of any inconsistency, reveal an intention that those conditions are fixed, and are to be taken to be appropriate for the project. NAC emphasises the comprehensive and rigorous process which applies where a project is declared a significant project (now a coordinated project), and therefore becomes subject to assessment by the Coordinator-General under the *State Development Act* and submits that the provisions mandating inclusion of Coordinator-General conditions, and as to the primacy of those over any other conditions, are to be construed in that context. NAC also emphasises the fact that a Coordinator-General's decision to state conditions relating to a project is not subject to judicial review.

[325] Consideration of this argument requires further analysis of the relevant provisions.

[326] Following substantial amendments to the *State Development Act* and the EPA in 2001,[225] responsibility for the coordination of the assessment of environmental impacts of mining projects declared to be significant projects rested with the Coordinator-General, to be carried out under the *State Development Act*, rather than under the EPA.[226] At this time, amendments were also made to the EPA, to include s 210 [the precursor to s 205] and what became s 222(2) [in similar terms to s 190(2)], in relation to the objections decision of, at that time, the Land and Resources Tribunal.[227]

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[224] Relying upon *Viskauskas v Niland* (1982) 153 CLR 280 at 291-292 (for the statement of principle, in the constitutional context); *Makucha v Albert Shire Council* [1993] 1 Qd R 493 at 495-497 (in the context of resolving inconsistency between a local authority by-law and the *Local Government (Planning and Environment) Act* 1990) and *Hannay v Brisbane City Council* (1997) 94 LGERA 212 (as to whether public advertising requirements under the relevant Act were a "code", or whether an additional obligation to notify could be inferred).

[225] *State Development and Other Legislation Amendment Act* 2001 (Act No. 46 of 2001).

[226] See, for example, s 37 of the EPA (part 1, dealing with the EIS process, applies for projects other than coordinated projects), s 60(2) of the EPA (the EIS process is taken to have been completed, for a coordinated project, if the Coordinator-General's report for the EIS for the project has been given to the project's proponent) and ss 164, 165, as amended by the 2001 Act. The EIS process, for a coordinated project, is dealt with in ss 29A to 34D of the *State Development Act*. See also ss 125(1)(l) and 125(3)(b) of the EPA – where the Coordinator-General has evaluated an EIS for each relevant activity the subject of an application for an environmental authority, and there are Coordinator-General's conditions that relate to each relevant activity, the requirement under s 125(1)(l) to include, in the application, an environmental impact assessment does not apply. The "decision stage" for an application for an environmental authority starts after the Coordinator-General gives the proponent a copy of his report for the EIS (s 167(2)(a) EPA).

[227] At this time the ultimate decision, on the application for an environmental authority, was made by the Minister, under s 225. The Minister was required to consider the Tribunal's objections decision and any Coordinator-General's conditions included in the draft environmental authority, but was (expressly) not bound to impose those conditions on the environmental authority granted by the Minister. This remained the case after the 2001 amendments. Following the amendments effected by the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act* 2012, the administering authority is now the ultimate decision-maker (see s 194). The administering authority does not enjoy the same decisional freedom as the Minister previously did, being constrained, if it decides to grant the environmental authority, to include the Coordinator-General conditions, and not include any inconsistent conditions (s 205).

[327] The *State Development Act* contains provisions dealing which the relationship between the environmental assessment undertaken under the supervision of the Coordinator-General, and other assessment regimes that may apply to a coordinated project. For example:

1. Sections 36-42A deal with the relationship with the *Sustainable Planning Act* 2009, where a project involves development requiring an application for a development approval.

   Relevantly, s 39(1)(a) provides that the Coordinator-General's report for the EIS for the project may state for the assessment manager the conditions that must attach to the development approval. Section 39(3) expressly declares that this provision does not limit the assessment manager's power, under the *Sustainable Planning Act*, to assess the development application and impose conditions not inconsistent with conditions that must be attached under sub-s (1)(a). Section 39(2) does empower the Coordinator-General to state that the application must be refused. But the combined effect of s 39(1)(a) and (3) is that, whilst the Coordinator-General may state conditions that must be included, that does not mean the assessment manager must grant the development approval. It simply means that if the development approval is granted, it must include the Coordinator-General conditions, and cannot include any inconsistent conditions.

2. Sections 44-46 deal with the relationship with the MRA.

   As already discussed, the Coordinator-General's report for the EIS for the project *may* state conditions for the proposed mining lease (s 45(1)) and if it does the Coordinator-General must give the MRA Minister a copy of the report, and the conditions of the *proposed* mining lease are taken to include the CG's conditions (s 45(2)). Again, this does not mean the Minister must grant the mining lease. If the proposed mining lease is granted, having regard to s 46, there is no express obligation imposed on the Minister to include the Coordinator-General's conditions in the mining lease, but if they are included (see s 46(1)(a)) they prevail over any other condition in the mining lease (s 46(1)(c)). There is no provision in the MRA which provides otherwise.

3. Sections 47B and 47C deal with the relationship with the EPA.

   Section 47C provides that the Coordinator-General's report for the EIS may state conditions for the proposed environmental authority. If it does, the Coordinator-General must give the EPA Minister a copy of the report.

   Unlike the MRA, the EPA does contain provisions dealing with Coordinator-General conditions, relevantly:

   (a) s 205, which provides that <u>if</u> the administering authority decides to approve the application for an environmental authority related to a coordinated project (s 205(1)), the conditions of the environmental authority (or draft environmental authority) must include the Coordinator-General's conditions (s 205(2)) and any other condition imposed can not be inconsistent with a Coordinator-General's condition (s 205(3)); and

(b) s 190, which provides that if the Land Court's decision is a recommendation that the application for an environmental authority be approved, but on conditions that are different from the draft (s 190(1)(a)(ii)), any such stated conditions must include the Coordinator-General's conditions, and any other condition imposed can not be inconsistent with a Coordinator-General's condition (s 190(2)).

Once again, on a proper construction of those provisions, they do not oblige, or require the decision-maker (in the case of s 190) to recommend the application be approved or (in the case of s 205), to approve the application, because the Coordinator-General has imposed conditions. The provisions operate at the point the decision-maker has decided to make the recommendation for approval, or to approve the application, and operate to constrain the conditioning powers of the decision-maker insofar as any conditions recommended by the Court, or imposed by the administering authority, must include the Coordinator-General's conditions and must not be inconsistent with a Coordinator-General's condition (as explained in *Xstrata* at [30]).

4. More generally, apart from those legislative contexts, under which approval for the project is required to be obtained, ss 54A to 54E enables the Coordinator-General to impose other conditions for the undertaking of the project. Any such conditions prevail over the conditions of any approval applying to the project, to the extent of the inconsistency.

[328] There is a clear legislative intention, having regard to the *State Development Act* provisions just referred to, that if a relevant approval or authority is granted for the undertaking of a coordinated project, the Coordinator-General's conditions have primacy. But there is not a clear legislative intention that the Coordinator-General's EIS process, culminating in a report under s 34D, is to bind the decision-makers responsible for the grant of those other approvals or authorities, in terms of the exercise of their discretionary power to do so.

[329] It follows that, in my view, the proper construction of s 190(2) of the EPA is that this provision does not operate as a constraint on the discretionary power conferred on the Land Court, by s 190(1), to determine whether it will recommend approval of the application, either on the terms of the draft environmental authority proposed, or on different conditions, or recommend refusal of the application. Section 190(2) operates at the point at which the Land Court has reached the decision that it will recommend approval, on different conditions (s 190(1)(a)(ii)), to constrain, or limit, the Land Court's power to impose conditions. I agree with President MacDonald's analysis in *Xstrata* at [30] in this regard.[228]

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[228] For completeness, I record that whilst President MacDonald noted, at footnote 10 to [44] of *Xstrata* that the explanatory memorandum to the Bill which became the amending Act No. 46 of 2001 (by which what is now s 190(2) was first inserted into the EPA) is silent as to the basis for that, it was drawn to my attention that in fact the explanatory memorandum does address this provision. However, it is unnecessary for me to refer in detail to that. In my view, what is said about clause 19 of the Bill (referring to this amendment to what was then s 222) in the explanatory memorandum is consistent with the construction that applies, having

[330] So in answer to NAC's paramountcy point, I find that s 190(2) does not prevent the Land Court considering the particular subject-matter of a Coordinator-General's condition; nor does it prevent the Land Court recommending refusal of the application on the basis of a view that the Coordinator-General's condition(s) on particular matter(s) are inadequate. In short, the Land Court is not bound to make a positive recommendation, simply because the Coordinator-General has considered, and imposed conditions in relation to, certain matters. Notwithstanding the imposition of Coordinator-General conditions, the Land Court retains its discretionary power under s 190(1). But if, in the exercise of that discretionary power, the Court decides to recommend approval, on conditions which are different to the draft environmental authority, the constraint in s 190(2) applies.

The discretionary power

[331] The important point, for present purposes, is that the Land Court's power under s 190(1) is discretionary. The Land Court member did not err, in my view, in so far as his Honour considered the subject-matter of a Coordinator-General condition (relevantly, as to the noise limits to be applied). The error, in my view, which is manifest on the face of the Reasons, is the Land Court member's conclusion that, having reached the view, on the material before him, that a more stringent condition as to evening and night noise limits ought to apply, than that which had been imposed by the Coordinator-General, his Honour was "compelled" to recommend refusal; that he had no other option.[229]

[332] OCAA submits that, giving a beneficial construction to the Reasons, consistent with its argument as to the application, for example, of the principles in *Wu Shan Liang*, statements by the Land Court member to the effect that he was "compelled" to recommend refusal, and had no other option but to do so, are to be read as expressions reflecting the weight he attached to particular considerations, in the exercise of his discretion, rather than as expressions indicating he considered he was compelled as a matter of law to reach a particular conclusion.[230]

[333] I do not accept that submission. The error which I find is manifest on the face of the Reasons is demonstrated not only by the language used, which is unambiguously not the language of discretion, but also by the fact that the exposed reasoning does not demonstrate the Land Court member weighing up (or balancing) considerations leading to a view that, in the exercise of the discretionary power reposed in him, it was appropriate to recommend refusal.[231]

[334] It is open to the Land Court, in deciding what recommendation to make, under s 190(1), to have regard to the constraint imposed on its conditioning power by s 190(2). The situation could arise where the Land Court is satisfied it is appropriate to recommend approval of the application for an environmental authority, albeit on different conditions to those contained in the draft environmental authority. But having regard to the constraint on its conditioning powers, if the effect of s 190(2) is to prevent the Court from including, as part of its recommendation, a condition it otherwise regards as

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regard to the words used, and the context of the provision within the legislative scheme including the *State Development Act*.

[229] Reasons at [3], [786]-[787], [1196], [1808], [1838], [1858]-[1859].

[230] OCAA's written submissions at [392]-[398].

[231] See again [271] above, and the authorities there referred to.

necessary and appropriate, that may cause the Court, in the exercise of its discretionary power, to recommend refusal.

[335] On the other hand, the inconsistent condition that the Court is concerned about may not be such as to lead it to the view that it is appropriate to recommend refusal. This approach can be seen reflected in *Xstrata* at [264]-[266].

[336] But this is part of the balancing exercise that is inherent in the exercise of the discretionary power – is the view held by the Court about a condition, which is inconsistent with a Coordinator-General condition, such that it is appropriate to recommend refusal? Or do other considerations outweigh the inconsistent condition, such as to lead to the view that it is appropriate to recommend approval, despite the constraint on the conditioning power?

[337] Even where the inconsistent condition is considered sufficiently important by the Land Court that, in its absence, the approval ought to be refused, there may be other options available, including making any recommendation for approval subject to a condition that it not take effect unless and until an application is made by the proponent to the Coordinator-General to change the condition, and on the basis of that application, or otherwise (for example, on the Coordinator-General's own initiative) the condition being changed, consistent with the Land Court's recommendation.

[338] I can see no reason why this would be impermissible.[232] The *State Development Act* makes provision for a proponent of a coordinated project to make an application for changes to be made to the conditions imposed or stated by the Coordinator-General, and the Coordinator-General also has the power to consider such a change of his or her own initiative. Once the Land Court's objections decision under s 190 has been made, a copy of it must be given, by the Land Court, to both the MRA Minister and the *State Development Act* Minister (s 192). Those Ministers are then to give any advice to the administering authority (under the EPA) that they consider may help to make a decision about the application (s 193), following which the administering authority is required to make the decision. There is clearly a continuing cooperative approach, as between the MRA Minister, the *State Development Act* Minister and the administering authority under the EPA. In those circumstances, particularly where this is the only basis on which the Land Court would recommend refusal (preference for an inconsistent condition), it seems entirely reasonable and appropriate to allow for this process to occur.

[339] The important point for present purposes is that s 190(2) does not have the effect of *compelling* the decision-maker to make a particular decision, in the exercise of the discretionary power under s 190(1). The use of language such as "compelled" and "no option" is demonstrative of a failure to exercise the discretionary power conferred on the decision maker.

No direct inconsistency in any event?

[340] It remains to deal with NAC's argument that there is, in any event, no direct inconsistency between the condition as to noise limits preferred by the Land Court

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[232] Cf the submission of OCAA at T 4-30; and NAC's contrary submissions at T 5-49 to 5-50.

member, and that imposed by the Coordinator-General, because it is possible to obey both conditions.

[341] I agree with the reasoning of President MacDonald in *Xstrata,* that the word "inconsistent" in s 190(2) is to be construed having regard to its ordinary meaning. The parties did not contend otherwise. So the question is whether the condition preferred by the Land Court is inconsistent with (in the sense of contradicting, or lacking harmony with, or being incompatible with) the condition imposed by the Coordinator-General.

[342] In the particular context that this issue arises, NAC submits that a more stringent noise limit (preferred by the Land Court) does not contradict or lack harmony with a less stringent noise limit (imposed by the Coordinator-General), because compliance with the former necessarily involves compliance with the latter. Therefore, NAC submits, there is no direct inconsistency because it is possible to obey both conditions.[233]

[343] But testing that proposition: although a proponent would obey the Coordinator-General's condition, by complying with the Land Court's recommended condition, the converse is not true. If the holder obeys the Coordinator-General's condition, it does not comply with the Land Court's recommended condition. If both conditions were included in the environmental authority, how is the holder of the authority to choose which condition to comply with? As Hayne J observed in *Momcilovic v R* (2011) 245 CLR 1[234] at [346] "[t]he need to make a choice between the [conditions] bespeaks antinomy: contradiction or contrariety".

[344] Suggesting an answer to this conundrum, NAC submits that a condition which is more onerous will be the "driving condition" in the package of conditions that is imposed.[235] But there is no basis, in the legislation, for such a rule.[236] Apart from the effect of s 190(2) and s 205(2) of the EPA, there is no guidance as to which condition prevails (cf s 46(2) (in relation to mining lease conditions) and s 54E (in relation to other conditions) of the *State Development Act*). On the other hand, it is apparent, from the scheme of the legislative provisions, including the *State Development Act* and the EPA, that the very purpose of s 190(2) and s 205(2) is to establish the "rules" for conditions imposed on environmental authorities, by (or on the recommendation of) various entities throughout the decision-making process. The Coordinator-General's conditions have primacy, in the sense that they must be included in the environmental authority, and no condition recommended by the Land Court, or imposed by the administering authority, can be inconsistent with that provision.

[345] In terms of the ordinary meaning of the term, there is inconsistency between a condition that the level of noise generated by the mining activities during the evening does not exceed 35 dB (as proposed by the Land Court) and a condition that the level of noise at such times does not exceed 42 dB (as imposed by the Coordinator-General). A more

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[233] As NAC notes, the third respondent appears to support this construction (third respondent's written submissions at [16] and [27]).

[234] Albeit in dissent as to the question of inconsistency in that case.

[235] T 5-48.5.

[236] Cf for example *Coffs Harbour Environment Centre Inc v Minister for Planning* (1994) 84 LGERA 324, the decision cited by President MacDonald in *Xstrata* at [42] in which Kirby P held that the term "inconsistency" in s 36 of the *Environmental Planning and Assessment Act* 1979 (NSW) was to be construed according to its ordinary meaning. Section 36 provided the "rule" for dealing with an inconsistency between environmental planning instruments.

stringent (lower) noise limit does contradict, and lack harmony with a less stringent (higher) noise limit. The two conditions deal with the identical subject-matter, and prescribe a different rule of conduct.[237] That is a clear case of inconsistency, which is the very thing s 190(2) is intended to prevent.

[346] However, for the reasons already given, I find the Land Court member did err by failing to exercise the discretionary power conferred on him by s 190(1).

[347] I therefore find that ground 1(aii) has been established, but that the remaining parts of ground 1, and grounds 4 and 6 have not.

Inquiring into the DEHP and the current environmental authority

[348] NAC contends that, despite statements by the Land Court member to the contrary (for example at [566] and [571] of the Reasons) his Honour impermissibly conducted an inquiry into the conduct of the Department of Environment and Heritage Protection (DEHP) and purported to make findings about breaches of the existing environmental authority.

[349] These complaints are the subject of grounds 2 and 3 of the amended application. Ground 2 contends the Land Court member erred in finding that air quality and noise limits in NAC's current environmental authority may have been or had been exceeded. Ground 3 contends the Land Court member erred by inquiring into and making findings about the past performance of the DEHP. NAC contends that in doing so the Land Court member acted outside the scope of the Court's jurisdiction and, if within jurisdiction, the findings involve inconsistency and irrationality and are made without reference to or analysis of the applicable law, evidence or submissions.

[350] In so far as the argument about inquiring into the conduct of the DEHP is concerned, NAC emphasises [566] of the Reasons, in which the member said:

> "There are a number of aspects of the actions that had been attributable to EHP throughout these preceding's (sic) that I could make comment on, but as has been pointed out strongly by the submissions of the statutory party, this hearing is not an inquiry into the operations of the statutory party or anything of the like. I agree."

[351] NAC also refers to the questioning by the Land Court member of Mr Loveday, the officer of the Department with delegated authority to make a decision in relation to the environmental authority amendment application,[238] and to the criticism of Mr Loveday's evidence at [571] of the Reasons. NAC also refers to the member's statements, in relation to a standard relating to air quality, at [634] of the Reasons, of concern at the Department's failure to update NAC's current environmental authority to refer to the appropriate standard, and his lack of confidence in the Department acting to amend the environmental authority in the future. The complaint is that this led the member to conclude that particular conditions should be included in the draft (amended) environmental authority, if it was granted.

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[237] See, by analogy, *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563 per Mason J.

[238] See NAC's submissions at [206].

[352] In so far as the argument about inquiring into past compliance with the current environmental authority is concerned, NAC again points to the member's statements, for example at [571] that "Of course, I am not here to judge or make findings as such relating to the current EA, and I will refrain from doing so…", but then submits, in effect, that his Honour does precisely that, by reference to [1792] of the Reasons where his Honour says:

> "While I do agree with NAC's own evidence that it needed to 'lift its game' as regards its engagement with the community, the fact remains that there have been no convictions or show case notices issued against NAC; nor have there been any environmental nuisances proven as an absolute certainty to have occurred. Such proof of course requires process different to those undertaken by this Court as part of the objections hearing. That said, however, I am satisfied that exceedances of EA conditions have occurred from a time to time by NAC as part of its Stage 1 and Stage 2 operations and, further, that NAC has not been diligent in keeping a record of complaints made to it regarding issues such as excessive noise, dust, light spillage and the like."

[353] NAC submits that the reference in the fourth line of this paragraph, to "environmental nuisances proven as an absolute certainty to have occurred" should be read as meaning proven *before the Land Court member, in the proceedings before his Honour*, to have occurred. I do not accept that as a fair reading of the paragraph. The very next sentence makes it clear his Honour has not purported to undertake that task himself.

[354] NAC also complains that his Honour has expressed the view that he is satisfied "exceedances" of the environmental authority conditions have, or may have occurred, in circumstances where:

1. The current environmental authority does not impose limits per se, either in respect of noise or air. Focussing on the noise condition, the authority is drafted in terms of a condition that "noise from the activity must not cause an environmental nuisance, at any sensitive place". If there is a complaint, there is provision for monitoring to be undertaken, and if that monitoring demonstrates that the noise limits set out in the document are not being exceeded, the holder is not in breach of the condition;[239] and

2. His Honour has not referred to the evidence, and provided sufficient reasons for the conclusion that there have been "exceedances".

[355] I am not persuaded any error under grounds 2 and 3 has been established.

[356] In so far as jurisdiction is concerned, the past performance of the applicant is expressly a matter the Land Court is required to have regard to, under s 269(4)(g) of the MRA. The Land Court is also required to consider what conditions are appropriate to be imposed on the mining lease and/or the amended environmental authority, if granted. In my view, the Land Court member's consideration of both the past conduct of the Department, in its administration of the current environmental authority, and the past performance of NAC, were relevant matters to have regard to, within that context.

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[239] See exhibit 1, tab 44, pp 18-19.

[357] In so far as the complaint about the Land Court member being satisfied that exceedances of the current environmental authority have or may have occurred is concerned, again focussing on noise:

1. Firstly, it is apparent that there are "noise limits" identified in the current environmental authority (for example, schedule D, tables 1 and 2). Notwithstanding the structure of the provisions (a prohibition on creating environmental nuisance, with monitoring to occur if there is a complaint, which is to determine if there are "exceedances" of the limits identified in schedule D, tables 1 and 2), it is not unreasonable or irrational, when referring to the evidence before the Court, from objectors who described their past experience of noise from the mining activities, and of NAC's responses to complaints, together with the evidence of the experts, to observe that there have been "exceedances" from time to time.

2. Secondly, that comment needs to be read in the light of other parts of the Reasons, including:

   (a) the summary of objections at [85] (in particular point 14 on p 23) and [86] (point 27 on p 28); and

   (b) [720]-[727], and also [734]-[739] in relation to noise.[240]

[358] Ultimately, this was not a matter on the basis of which the Land Court member would have recommended refusal of the mining lease applications (see at [1793] and [1824]). NAC submits it would have influenced the views his Honour expressed about what he regarded as appropriate conditions, in the event the approval was granted (referring for example to [1196], [1198] and [1199] of the Reasons). In my view, that is not unreasonable. Having said that, it is not apparent that his Honour's findings in relation to past performance affected his conclusion as to the appropriate noise limits; as opposed to his Honour's conclusion as to the *form* conditions in the amended environmental authority concerning air quality and noise should take, being based on NAC complying with strict limits for air quality and noise, rather than being complaint based, and providing for real time monitoring (see at [1199]).

[359] In that context, it might reasonably be thought that the pragmatic approach his Honour took to dealing with this issue in the Reasons was an appropriate one. In so far as particular evidence about noise is concerned, his Honour records, in a short-hand way, acceptance of a number of factual matters built into a question put by Mr Holt QC, for OCAA, to Mr Elkin, one of the noise experts (see at [726] and [727]). NAC did not contend, before me, that there was any error in the content of that question.[241] His Honour also referred to some aspects of the expert evidence, where there was agreement (at [722]-[725]). His Honour's finding at [1792] that "exceedances of EA conditions have occurred from time to time by NAC as part of its Stage 1 and Stage 2 operations" is made in the context of a broader consideration of the past performance of

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[240] See also [587]-[590] in relation to dust, noting the member's observation at [587], by reference in general terms to the evidence of some objectors that "it is quite possible EA limits with respect to dust and particulate matter have been exceeded".

[241] OCAA also drew attention to references in its written submissions below (exhibit 1, tab 27), at [601], [602] and [626], to evidence of Mr Elkin, the noise expert called by NAC, in relation to exceedances of the noise limit identified in the current environmental authority.

NAC, in its dealings with complaints made by residents living in proximity to the mine. It can only be taken as a finding that the noise limits *identified* in the current environmental authority (noting NAC's point about the proper construction of the authority) have been exceeded from time to time in the past. It is not, and ought not be taken to be, a finding that environmental nuisance, in breach of the current environmental authority (in the sense of an offence under the EPA), had occurred. His Honour expressly disavowed any such finding (at [571] and [1792]).

Remaining grounds of review

[360] It only remains necessary to address ground 12. Grounds 14 and 15 deal with the apprehended bias and groundwater grounds, which I have already addressed above.

Procedural fairness

[361] Ground 12 contends the decision involved a breach of the rules of natural justice, in that the Land Court member made adverse conclusions in circumstances where he failed to properly put to NAC and NAC's witnesses relevant concerns. In particular, this is contended in relation to:

1. The credit findings made against Mr Denney, and rejection of all of his evidence.

2. The findings or comments made about NAC acquiring land in Acland.

[362] As to the second matter, I have addressed this at [145]-[152] above. As a matter of fairness, such an assertion ought to have been put to a relevant witness for NAC, and/or counsel for NAC in the course of submissions. There was a breach of the rules of natural justice in that respect, but this is not a matter that affects the outcome of this review proceeding.

[363] As to the first matter, the findings about Mr Denney's evidence, this is dealt with at [212]-[231] of the Reasons, culminating in a conclusion by the Land Court member that, on the basis of a number of factors, he was "extremely troubled by Mr Denney's evidence, to such an extent that I afford it little or no weight", save for the documents annexed to his affidavits, the majority of which were not challenged and are therefore able to be relied upon, save for one exhibit.

[364] NAC makes two complaints about the treatment of Mr Denney's evidence. First, it contends that it was denied procedural fairness in circumstances where the member raised an issue about whether Mr Denney was being coached whilst giving oral evidence during the course of the hearing, which was addressed in a private session with the legal representatives, but then did not raise any continuing concern about it until [214]-[218] of the Reasons. It is submitted that his Honour ought to have raised his continuing concern with NAC's legal representatives during the hearing, to enable further submissions to be made about it.

[365] The second complaint is that it was irrational to completely reject the whole of Mr Denney's evidence, regardless of whether matters were controverted, or controversial, or corroborated.

[366] As to the first matter, the circumstances in which the coaching issue regarding Mr Denney was raised is addressed in Mr Geritz's affidavit (filed 17 October 2017) at [3]-

[10]. The first day of the hearing of evidence (following openings and a site inspection) was 16 March 2016. Mr Denney was the second witness called by NAC on that day. At the end of the court day, shortly after Mr Denney had started in cross-examination, the Land Court member invited the legal representatives for NAC and OCAA to see him about a matter, outside of court. A meeting then took place in the member's chambers. Mr Geritz describes what occurred at this meeting (and this is not disputed by OCAA):

> "7. The First Respondent:
>
> (a) described two people sitting in the public gallery that he said he believed were representatives of the Applicant, firstly, a lady that he said was of Latin or Mediterranean appearance and secondly, a man, who the First Respondent said looked like a union official;
>
> (b) said that these two people, the lady in particular, were nodding or shaking their heads indicating that they either agreed or disagreed with the propositions the witness was considering;
>
> (c) said that the lady was also nodding or shaking her head when the First Respondent was making statements and because of this it was probably simply her nature to be demonstrative;
>
> (d) said he was concerned that Mr Denney was looking at these people when providing his answers to questions with the suggestion that Mr Denney was taking cues from these people;
>
> (e) said that **he did not think that the gestures indicated that any coaching had actually occurred, and instead were more likely exuberance**; and
>
> (f) requested the lawyers and counsel for the Applicant to advise the two people, who he believed were representatives of the Applicant, to stop making any gestures that could be ostensibly perceived as influencing the witness giving evidence.
>
> 8. After the meeting in chambers concluded, I relayed the First Respondent's concerns regarding the gestures to the relevant personnel.
>
> 9. Mr Denney continued to give evidence **for a further five days**.
>
> 10. After the meeting in chambers of 16 March 2016 referred to above, the issue was not mentioned again until the First Respondent raised it in his reasons, at paragraphs [214]-[219]."[242]

[367] What the Land Court member said at [214]-[219] of the Reasons is:

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[242] Emphasis added.

"[214] Mr Denney has 40 years' experience in mining in Australia and the United States of America. He held the role of Chief Operating Officer of New Hope for a period of 5 years. **Observations that I made on numerous occasions** led me to believe that Mr Denney may have been receiving coaching from the gallery of the Court. I raised my concern in a private session of lawyers representing parties. I informed them of my observations that prior to answering questions, Mr Denney was looking to a person or persons in the gallery, seemingly for direction. I further advised that I had seen two people nodding or shaking their heads when Mr Denney looked in their direction. His answers were either a yes whenever he saw a nod or a no whenever he saw a head shake.

[215] NAC's legal representatives assured me that they would take the matter up immediately with those employees of NAC who were seated in the public gallery in the area to which Mr Denney was looking. **The nodding and shaking of heads did not occur again during Mr Denney's evidence**.

[216] The question may be asked as to why I did not take immediate action against the members of the public sitting in the court room who I was concerned may have been coaching the witness. Firstly, none of the legal representatives suggested that it was necessary for such a course of action to be taken. Also, I could not be certain what I observed was not more in the nature of the person showing their own over-excited responses to questions themselves rather than deliberate coaching. Viewed with the benefit of hindsight, and having observed one of those persons in particular throughout a significant part of the hearing, my view is that that person at least was in all likelihood merely being over exuberant in their own reaction to questions, as I did observe the same reaction, not so much when witnesses were giving evidence in the future, but when counsel or one of the objectors were making submissions or statements to the court.

[217] At any rate, even though **I consider on the balance of probabilities that what I observed as coaching may have only been exuberance**, that still does not excuse Mr Denney. Even if he was not looking to the gallery for assistance as part of a prearranged coaching exercise, **at the very least Mr Denney looked to the gallery to employees of NAC and observed their responses to questions before giving his own response**, which invariably followed precisely the indication that he had seen. It was entirely inappropriate of Mr Denney to do this, and this factor must be taken into account in my assessment of Mr Denney as a witness.

[218] In this regard, **I am surprised that NAC in its submissions did not touch upon the issue of coaching** or any impact that viewing answers from the gallery may have had on Mr Denney's credit, despite being aware of my concerns in this regard raised at the private session.

[219] There is another significant factor which is linked to the above. I have provided my observations as to Mr Denney's evidence up to the time that I became concerned about issues of coaching. After that time, the nature

> of Mr Denney's evidence changed. He was much more uncomfortable in answering questions. He hesitated and corrected himself, particularly when shown documentary evidence to show that answers he had given were not factually correct. In short, Mr Denney presented quite differently as a witness after he was unable to take any assistance from the gallery."[243]

[368] There are some discordant matters that emerge from the description of what transpired on 16 March 2016 (which, as noted, is not controversial as between NAC and OCAA) and what appears in these paragraphs of the Reasons. The issue was raised at the end of the first day of evidence (16 March 2016). Mr Denney was the second witness, and had just gone into cross-examination before court adjourned for the day. In that context, the member's reference to "observations that I made on numerous occasions" (at [214]) is somewhat unclear. Presumably, that can only be observations made on 16 March 2016. It is not apparent what the issues were in respect of which the member was concerned that Mr Denney may have been looking to the public gallery for reassurance, before answering a question. Mr Denney went on to give evidence for a further five days. No further nodding or shaking of heads was observed. The member's observations that he presented quite differently as a witness after he was unable to take any assistance from the gallery (at [219]) may well be explained by the fact that he was being cross-examined, presumably for most of that five days (as opposed to giving evidence in chief, on the first day).

[369] Quite apart from this matter, the Land Court member identified another source of concern regarding Mr Denney's credit, because his affidavit was written in the first person, and contained the usual declaration at the end (that the facts and circumstances deposed to were within his own knowledge, save where identified as being based on information and belief), but his Honour formed the view that many of the things asserted by Mr Denney were not in fact within his own knowledge.

[370] OCAA submits that NAC was "overwhelmingly on notice" from the time of the private session, on the afternoon of 16 March 2016, of the member's concerns in this regard, and submits they were also alluded to in the course of oral submissions on 7 October 2016,[244] which it says is a complete answer to the breach of natural justice complaint.[245]

[371] The part of the exchange between the member and Mr Ambrose QC for NAC in oral submissions which OCAA points to is as follows:

> "HIS HONOUR: Well, anyway, while we're dealing with witnesses, I read with interest your analysis of all of the – all your witnesses. In a number of respects, my initial analysis was somewhat different, and I was – the main one to raise is Mr Denney. And I – **as I mentioned at the time when I made observations regarding his evidence, which you've dealt with in part in your submissions, I notice, I still find it very difficult to give credit to anything much of what he said** when he swore [in] the first person that it was all information within his own knowledge, did not in any way throughout the affidavit refer to the information being obtained from

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[243] Emphasis added.
[244] Exhibit 1, tab 16, T 86-90.
[245] T 4-47 to 4-48.

> others but did in the witness box – I could – I've really gone on and on and on in the past with examples where Mr Denney was unsatisfactory. Where would your case be if I threw out all of his evidence?
>
> MR AMBROSE: Are you serious? Throw out all of his evidence?
>
> HIS HONOUR: Well, clearly where there's a document that is not contested."[246]

[372] If the emphasised part is to be taken to be a reference back to the private session on 16 March 2016, his Honour did not, on that occasion, inform NAC's legal representatives that, as a result of the perceived interaction between Mr Denney and the people in the public gallery, on 16 March 2016, he would find it difficult to give credit to anything much of what Mr Denney said. He expressed a concern that Mr Denney was looking at people in the gallery and taking cues from them, said he did not think any coaching had actually occurred, but was more likely exuberance, and asked for something to be done about it, which it was.

[373] In my view, on balance, if the Land Court member was going to place significant weight on this issue (which it appears his Honour did, albeit as one of a number of factors), he ought to more clearly have put NAC on notice about that, and given it an opportunity to make submissions, given how the matter was addressed on 16 March 2016, and the fact that Mr Denney's oral evidence then proceeded for a further five days, with no further issues arising. To the extent that his Honour considered it a surprising omission from NAC's closing submissions, it was appropriate to alert counsel for NAC to this during the oral argument. There was a failure to afford procedural fairness in that respect.[247]

[374] But in a practical sense, it is difficult to determine what flows from that. There were clearly other reasons, of which NAC was on notice, which influenced the view his Honour ultimately formed as to the credibility of Mr Denney's evidence.

[375] More broadly, in relation to the second complaint made by NAC, whilst it was a matter for the Land Court member to assess the credibility and reliability of the witnesses, and the weight to be given to any witness' evidence, it is a fair criticism to say that simply rejecting all of the evidence of Mr Denney was a step too far. In so far as his affidavit or oral evidence dealt with uncontroversial, or uncontroverted matters, or was corroborated by other witnesses or documents in evidence, which the member did accept, an adverse finding as to credit ought not to have resulted in that evidence simply being rejected.[248]

[376] Once again, it is difficult to see what flows from this. Ground 12 contends that the outright rejection of Mr Denney's evidence was unreasonable or irrational. In a procedural sense, I agree that it was unreasonable. In a judicial review context, however, this conclusion does not of itself provide a ground of review. In order to give rise to particular relief, it would be necessary to show that the rejection of the evidence

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[246] Exhibit 1, tab 16, T 86-90. Emphasis added.
[247] See *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104 at [2] and [30].
[248] See, by analogy, *Fox v Percy* (2003) 214 CLR 118 at 128 [28]; and *Putland v Nowak* [2012] QCA 121 at [83] per Muir JA (Holmes JA and Mullins J agreeing).

resulted in some reviewable error in relation to the decision. That further step was not undertaken here.

Proposed Orders

[377] The relief sought by NAC in its amended application includes an order setting aside the decision, with effect from 31 May 2017, and an order referring the matter back to the Land Court for consideration and determination, by a member other than the first respondent, consistent with the reasons of this court and according to law. At the hearing, the parties agreed it would be appropriate for me to deliver my reasons in relation to the application, and then give the parties time to consider the reasons before making submissions as to the appropriate form of orders to be made.

[378] For the reasons set out above, I find the following grounds have been established, with the consequence that it will be appropriate 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 (Reasons at [1879]):

1. Ground 10, in relation to groundwater.

2. Ground 7, in relation to intergenerational equity, consequent upon the conclusion in relation to ground 10.

3. Ground 1(aii) (by reference to particulars (i), (iiA) and (ii)), in relation to noise.

[379] It is also appropriate that an order be made referring the matter to which the decision relates back to the Land Court for further consideration, in accordance with these reasons and according to law, with appropriate directions (s 30(1)(b) of the JR Act) to limit the scope of further consideration only to such aspects of the matter as is necessary, having regard to these reasons, to provide a time frame for the further consideration, and to address any preparatory steps the parties consider may be necessary.

[380] I invite submissions from the parties in relation to the appropriate orders and directions, including in relation to the submission foreshadowed by NAC that the matter be referred back to a different member of the Land Court, and the matters addressed in the "statement of agreed course of action" following the administering authority's decision of 14 February 2018 (exhibit 4). I will also hear the parties in relation to costs.