

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BS 6002/17

Applicant:

New Acland Coal Pty Ltd ACN 081 022 380

AND

Respondent:

Paul Anthony Smith, Member of the Land Court of Queensland

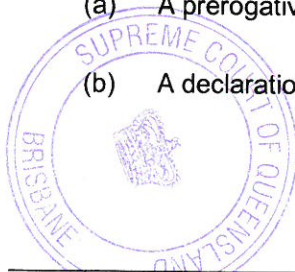
APPLICATION FOR A STATUTORY ORDER OF REVIEW AND APPLICATION FOR REVIEW

Application for the following relief:

1. To review pursuant to s.20 of the *Judicial Review Act 1991* (Qld) (**JR Act**) the decisions of the Respondent made on 31 May 2017 as recorded in the Land Court of Queensland decision *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* (No. 4) [2017] QLC 24 which:
 - (a) recommended under s.269 of the *Mineral Resources Act 1989* (Qld) (**MRA**) that the Applicant's mining lease application 50232 be rejected (**50232 Decision**);
 - (b) recommended under s.269 of the MRA that the Applicant's mining lease application 700002 be rejected (**700002 Decision**); and
 - (c) recommended under s.190 and s.191 of the *Environmental Protection Act 1994* (Qld) (**EPA**) that the application to amend the environmental authority number EPML 00335713 (**EA**) be refused (**EA Decision**).

The 50232 Decision, 700002 Decision and the EA Decision together are referred to as the **Decisions**.

2. To review pursuant to s.21 of the JR Act certain conduct of the Respondent in making the Decisions.
3. To review pursuant to s.43 of the JR Act the Decisions and to seek:
 - (a) A prerogative order of certiorari in respect of the Decisions; and
 - (b) A declaration that the Decisions are invalid.



APPLICATION FOR A STATUTORY ORDER
OF REVIEW AND APPLICATION FOR
REVIEW

Filed on behalf of the Applicant
Form 54 R.566

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- (c) To seek pursuant to s.10 of the *Civil Proceedings Act 2011* (Qld), s.58 of the *Constitution of Queensland 2001* (Qld) and this Court's inherent jurisdiction, a declaration that the Decisions are unlawful and invalid.

The Applicant is aggrieved by the Decisions because:

1. The Applicant is a legal entity being an Australian Proprietary Company that is limited by shares.
2. The Applicant currently owns and operates the New Acland Mine at Acland in the State of Queensland on mining leases 50170 and 50216.
3. The Applicant is the applicant under the MRA for mining lease applications 50232 and 700002 (the **MLAs**) which have been applied for by the Applicant to expand and continue the existing operations at the New Acland Mine (the **Stage 3 Project**).
4. The Applicant is the holder of the EA and is also the applicant for an amendment to that EA (**EA Amendment Application**).
5. The applications for the MLAs were objected to pursuant to s.260 of the MRA, and were then referred to the Land Court of Queensland with the objections under s.265 of the MRA.
6. In addition, submissions were made in relation to the EA Amendment Application under s.160 of the EPA.
7. After considering the submissions, on 28 August 2015, the Department of Environment and Heritage Protection decided that the EA Amendment Application be approved subject to conditions. Following that decision, several submitters gave notice under s.182 of the EPA that their submission be taken to be an objection, and those objections were then referred to the Land Court of Queensland under s.185 of the EPA.
8. The Applicant called evidence, made submissions and otherwise actively was a participant in the hearings held before the Land Court of Queensland which were held concurrently under s.268 of the MRA for the MLAs and s.188 of the EPA for the EA Amendment Application.
9. The Decisions respectively recommended the rejection of the MLAs and the refusal of the EA Amendment Application. Those recommendations if accepted by the final decision makers under the MRA and EPA will seriously affect the Applicant's interests as mining cannot occur on the MLAs and the mining at the New Acland Mine will cease when reserves of coal on the existing mining leases are exhausted.

The grounds of the application are:

1. In making the EA Decision, the Respondent made an error of law by failing to properly interpret and apply s.190(2) of the EP Act and, in making the 50232 Decision, failed to properly interpret and apply s.269(4) of the MRA, with the consequence that:

- (a) the relevant conduct of the Respondent in making the EA Decision and 50232 Decision was unlawful under ss.21(2)(b), 21(2)(c) and s.21(2)(f) of the JR Act;
- (b) the Respondent did not have jurisdiction to make the EA Decision and 50232 Decision pursuant to s.20(2)(c) of the JR Act;
- (c) the EA Decision and the 50232 Decision involved errors of law pursuant to s.20(2)(f) of the JR Act; and
- (d) the EA Decision and the 50232 Decision were otherwise contrary to law pursuant to s.20(2)(i) of the JR Act.

Particulars

- (i) The Respondent erred to the extent that he interpreted s.190(2) of the EPA as mandating, in the event of a conclusion that a lower noise limit amounted to an inconsistency with the Coordinator-General's stated condition, that the EA Amendment Application be recommended for refusal.
 - (ii) The Respondent erred to the extent that he considered that he was compelled to recommend rejection of the MLAs for this reason.
2. In making the EA Decision, the Respondent made an error of law by failing to properly apply the applicable legal principles regarding the current EA and the proper use which could be made of the EA in the circumstances, with the consequence that:
- (a) the relevant conduct of the Respondent in making the EA Decision was unlawful under ss.21(2)(b), 21(2)(c) and s.21(2)(f) of the JR Act;
 - (b) the Respondent did not have jurisdiction to make the EA Decision pursuant to s.20(2)(c) of the JR Act;
 - (c) the EA Decision involved an improper exercise of power under s.20(2)(e) of the JR Act in that it involved the taking into account of irrelevant considerations;
 - (d) the EA Decision involved an error of law pursuant to s.20(2)(f) of the JR Act; and
 - (e) the EA Decision was otherwise contrary to law pursuant to s.20(2)(i) of the JR Act.

Particulars

The Respondent incorrectly assessed the past performance of the Applicant with respect to the current EA by considering that:

- (i) there were exceedances of certain criteria in the EA predominantly on the basis of the lived experiences of the objectors; and

(ii) such exceedances amounted to a failure to comply with the EA, which, as a result, led to the Respondent incorrectly making adverse findings against the Applicant with respect to its past performance.

3. In making the Decisions, the Respondent made an error of law by failing to properly interpret and apply the applicable onus of proof and proper scope of his jurisdiction, with the consequence that:
- (a) the relevant conduct of the Respondent in making the Decisions was unlawful under ss.21(2)(b), 21(2)(c) and s.21(2)(f) of the JR Act;
 - (b) the Respondent did not have jurisdiction to make the Decisions pursuant to s.20(2)(c) of the JR Act;
 - (c) the Decisions involved an error of law pursuant to s.20(2)(f) of the JR Act; and
 - (d) the Decisions were otherwise contrary to law pursuant to s.20(2)(i) of the JR Act.

Particulars

The Respondent erred by interpreting his administrative role as vesting him with an unfettered inquisitorial role that was not otherwise confined by the applicable objection provisions of the EPA and the MRA under which the proceedings were brought.

4. In making the Decisions, the Respondent made an error of law and failed to properly apply the applicable legal principles regarding the *Environmental Protection (Noise) Policy 2008* (Qld) (**Noise EPP**) and s. 51 of the *Environmental Protection Regulation 2008* (Qld) with the consequence that:
- (a) the relevant conduct of the Respondent in making the Decisions was unlawful under ss.21(2)(b), 21(2)(c) and s.21(2)(f) of the JR Act;
 - (b) the Respondent made an error of law pursuant to s.20(2)(f) of the JR Act; and
 - (c) the making of the Decisions involved an improper exercise of power contrary to s.20(2)(e) of the JR Act in that the Respondent failed to take relevant considerations into account.

Particulars

- (i) In determining that s.10 of the Noise EPP refers to the noise which an activity or project is "permitted" to cause, and that the appropriate noise level for evening and night operations should be set in accordance with s.10, the Respondent failed to consider that s.10(2) of the Noise EPP applies "to the extent that it is

reasonable to do so".

- (ii) In determining that s.10 of the Noise EPP refers to the noise which an activity or project is "permitted" to cause, and that the appropriate noise level for evening and night operations should be set in accordance with s.10, the respondent failed to give reasons why it was reasonable to apply s.10(2) of the Noise EPP.
 - (iii) Further, or in the alternative, the Respondent failed to have regard to the "existing acoustic environment" in the application of s.10.
 - (iv) The Respondent erred in applying s.10 of the Noise EPP rather than Schedule 1 of the Noise EPP in respect of noise levels for evening and night, including that there is a distinction between the Schedule 1 Acoustic Quality Objectives for the evening and night-time periods.
 - (v) The Respondent erred in failing to properly interpret and apply s.10 and Schedule 1 of the Noise EPP.
5. In making the Decisions, the Respondent made an error of law by adversely assessing the credit of a number of the Applicant's witnesses without first affording those witnesses the opportunity to address the bases of that assessment in accordance with the principles of natural justice, with the consequence that:
- (a) the relevant conduct of the Respondent in making the Decisions was unlawful under ss.21(2)(b), 21(2)(c) and s.21(2)(f) of the JR Act;
 - (b) the Respondent did not have jurisdiction to make the Decisions pursuant to s.20(2)(c) of the JR Act;
 - (c) the Decisions involved an error of law pursuant to s.20(2)(f) of the JR Act; and
 - (d) the Decisions were otherwise contrary to law pursuant to s.20(2)(i) of the JR Act.

Particulars

The relevant witnesses affected by this error included:

- (i) Bruce Denney;
- (ii) Deidre Elliott;
- (iii) Denis Janetzki;
- (iv) Leone Janetzki;
- (v) David Cooper;
- (vi) Graham Cooke;

- (vii) Tracey Tierney;
- (viii) Donald Ballon; and
- (ix) Brian Barnett.

6. In making the Decisions, the Respondent made an error of law pursuant to s.20(2)(f) of the JR Act in incorrectly applying the reasoning 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] QLC 013 (**Wandoan**) to the facts of the case which was the subject of the Decisions.
7. In making the Decisions, the Respondent made an error of law pursuant to s.20(2)(f) of the JR Act 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.

Particulars

The Respondent incorrectly applied the principle of intergenerational equity as a mandatory requirement which should be assessed by reference to whether it is complied with or breached, rather than correctly applying the principle as one of the considerations under the Standard Criteria.

8. The making of the Decisions by the Respondent involved an error of law pursuant to s.20(2)(f) of the JR Act and an improper exercise of power pursuant to s.20(2)(e) of the JR Act in that the Respondent took into account irrelevant considerations and failed to take into account relevant considerations in interpreting and applying the principles of intergenerational equity contained within the Standard Criteria as mandated by s.191 of the EPA.
9. The making of the Decisions by the Respondent involved an error of law pursuant to s.20(2)(f) of the JR Act in that the Respondent incorrectly applied the principle of intergenerational equity as a ground of refusal of the MLAs and by considering that principle to be relevant under the criteria in s.269(4)(i), s.269(4)(k) and s.269(4)(m) of the MRA.
10. The making of the Decisions by the Respondent involved an error of law pursuant to s.20(2)(f) of the JR Act in that the Respondent incorrectly considered the impact of the drawdown in aquifers as a basis for the Decisions having regard to the MRA and/or EPA, when that matter is not regulated by the MRA or the EPA but is regulated by the *Water Act 2000* (Qld).
11. The making of the Decisions by the Respondent involved an improper exercise of power contrary to s.20(2)(e) of the JR Act in that the Respondent:
 - (a) took irrelevant considerations into account;
 - (b) failed to take relevant considerations into account; and

- (c) purported to exercise the power in a way that was so unreasonable that no reasonable person could so exercise the power and/ or involved irrational reasoning and/or conclusions.

Particulars

- (i) The Respondent took into account the broader historical activities of the Applicant and the New Acland Mine project and the alleged past conduct of the Applicant and complaint histories, such matters being irrelevant considerations to the proper making of the Decisions.
 - (ii) The Respondent demonstrated irrational reasoning in that he accepted evidence from lay objectors in respect of matters requiring technical expertise where those witnesses had no demonstrated expertise, in preference to the established experts who gave evidence on behalf of the Applicant.
 - (iii) The Respondent demonstrated irrational reasoning in that he made findings that were unsupported by any probative evidence.
12. In making the Decisions, the Respondent breached the rules of natural justice pursuant to s.20(2)(a) and s.21(2)(a) of the JR Act in that the Respondent made adverse conclusions in circumstances where he had failed to properly put to the Applicant and the Applicant's witnesses relevant adverse material and concerns.
13. In making the Decisions, the Respondent breached the rules of natural justice pursuant to s.20(2)(a) and s.21(2)(a) of the JR Act in that the Decisions were made in circumstances where there was apprehended bias.

Particulars

- (i) The Respondent threatened contempt proceedings against the managing director and chief executive officer of New Hope Corporation Limited, the parent company of the Applicant, and also against a senior employee of New Hope Corporation Limited, and during a preliminary hearing engaged in intemperate exchanges with the Applicant's Senior Counsel, called into question the Applicant's bona fides, suggested that the Applicant had inferred bias against the Respondent in circumstances where no such inferences reasonably could be drawn, and then sought the assistance of an objector to determine the issue.
- (ii) The Respondent unreasonably assessed the credit/motivation of the Applicant and the Applicant's witnesses in an adverse manner while not undertaking a similar exercise in respect of the objectors.

- (iii) The Respondent alleged that a key witness of the Applicant was coached in the course of his evidence. The Respondent then ultimately concluded that the witness was not so coached. However, the Respondent then proceeded to attribute significant weight about the coaching allegation when making his final assessment in the Decisions about the credit of this witness and his ultimate finding, where he attributed "little or no weight" to the evidence of the witness.
- (iv) The tone of the Respondent's reasoning in respect of the Decisions suggests that there was mala fides by the Applicant in respect of various steps undertaken throughout the course of the progression of the broader New Acland Mine project, in circumstances where the evidence demonstrated that all actions undertaken by the Applicant were legal, and when objectively assessed, did not establish any mala fides.
- (v) The Respondent rejected the evidence of the Applicant and the Applicant's witnesses, notwithstanding the absence of any probative contrary evidence.
- (vi) The Respondent unreasonably and/or irrationally assessed the character, motivations and/or conduct (current and previous) of the Applicant.
- (vii) The Respondent adopted a position of de facto advocacy in respect of the objectors' contentions and evidence, including by failing to reasonably assess questions of credit arising in respect of those objectors as compared to the treatment of the Applicant, and by adopting unnecessarily emotive language throughout the proceedings and the Decisions in a way that was not consistent with the evidence that was in fact led during the proceedings.
- (viii) The Respondent based his Decisions upon the objectors' evidence in circumstances where he made no or limited reference to the relevant evidence of the Applicant.
- (ix) The Respondent, in the Decisions, rejected the evidence of a number of the Applicant's witnesses, but then failed to provide adequate explanation for such rejection, instead justifying the absence of any explanation by reference to the length of the reasons as a whole, or on the basis that it was unnecessary.
- (x) The Respondent, on one occasion, threatened to dismiss all evidence in chief (though subsequently determined not to do so)

where leave had not first been sought, despite objection not having been taken, following an otherwise valid objection taken by the Applicant's Senior Counsel.

- (xi) The Respondent directed the production of further evidence outside the intended scope of the proceedings.
- (xii) The Respondent drew adverse conclusions from any legitimate challenges raised by the Applicant to the evidence or submissions of the objectors and then relied upon those adverse conclusions as a basis for the Decisions.

14. The making of the Decisions involved an improper exercise of power contrary to s.20(2)(e) of the JR Act in that they involved an exercise of power, including under s.191 of the EPA and s.269 of the MRA, in a manner that was so unreasonable that no reasonable person could so exercise the power and/ or involved irrational reasoning and/or conclusions.

Particulars

- (i) The Applicant repeats and relies on the grounds set out in paragraphs 1 to 11.
- (ii) The Respondent erred by finding that "at least one of the fundamental principles of intergenerational equity, that being the 'conservation of quality principle' has the real possibility to be breached by the revised Stage 3 operations" in reliance on "the environmental pollution that will be caused by the Stage 3 mining operations within the ML land, apart from those relating to fracturing and depletion of aquifers" in circumstances where such a finding was inconsistent with, and was not supported by the findings of the Respondent on the other environmental impacts of the Stage 3 Project.
- (iii) The Respondent in the Decisions relied on the submissions of the Applicant and its conduct during the hearing as evidence of a dismissive attitude of the Applicant to the community.
- (iv) The Respondent, in the Decisions, rejected the evidence of a number of the Applicant's witnesses, but then failed to provide adequate explanation for such rejection, instead justifying the absence of any explanation by reference to the length of the reasons as a whole, or on the basis that it was unnecessary.
- (v) The Respondent drew his own conclusions from a site visit with respect to a matter that required expert knowledge without evidence from the relevant experts on the matter.

- (vi) The Respondent found that a witness of the Applicant, Mr Graham Cooke, had a financial interest in the mine proceeding where the relevant witness had a compensation agreement and make good agreement to compensate for future losses and then used such finding in assessing the credibility of the witness.
- (vii) The Respondent took into an account irrelevant considerations by considering issues associated with the development of the "West Pit".
- (viii) The Respondent accepted the "lived experiences" of objectors without considering the authorities that indicate that such evidence should be viewed with caution.
- (ix) The Respondent put documents to at least one lay witness of the Applicant (Mr Denney) that he indicated he had "randomly" selected from the etrial website including documents that required expert knowledge and asked the witness to interpret the documents.
- (x) In assessing the credibility of Mr Denney, the Respondent indicates that Mr Denney did not refer to the sources of information for his beliefs and gives only two examples which do not support the finding and then finds that Mr Denney's evidence, which consisted of an enormous amount of material and many days of oral evidence, should be afforded little or no weight.
- (xi) The Respondent generally misinterpreted the current EA conditions.
- (xii) The Respondent made adverse findings against the Applicant and the Department of Environment and Heritage Protection on the basis of what the Respondent referred to as a "literal truck load of evidence" without identifying and providing sufficient reasoning in relation to such alleged evidence.
- (xiii) The Respondent made findings in relation to the historical performance of the Applicant without properly considering the conditions that existed at the time of the relevant activities.
- (xiv) In respect of health impacts, the Respondent failed to properly have regard to the Applicant's submissions about the absence of any evidence of a mental illness caused by mining.
- (xv) The Respondent made adverse findings with respect to the loss of land associated with final voids without taking into account the

condition requiring that loss to be offset and the evidence of the Applicant that such offset had already been secured.

- (xvi) The Respondent erred in making the Decisions by recommending refusals on the basis of groundwater considerations, because of the risk to the surrounding landholders and the poor state of the current model where:
- A. the Respondent misconstrued matters of agreement and disagreement between the groundwater experts;
 - B. the Respondent made an unfair and unreasonable assessment of the credibility of the respective groundwater experts;
 - C. the Respondent failed to consider key evidence by placing no or little weight on the groundwater advice from the Independent Expert Scientific Committee (IESC) in December 2016;
 - D. the Respondent failed to have regard to additional groundwater material that was considered by the IESC in December 2016;
 - E. the Respondent failed to have regard to the expert evidence in relation to the additional groundwater material considered by the IESC in December 2016 and other related issues addressed by the experts during the re-opened hearing;
 - F. the Respondent failed to have proper regard to the groundwater conditions imposed on the Stage 3 Project and proposed by the Applicant;
 - G. the Respondent assessed reliability and uncertainty of the groundwater modelling without considering the classification and confidence level of the modelling under the Australian Groundwater Modelling Guidelines 2012;
 - H. the Respondent failed to properly consider analogous and relevant authorities including *Wandoan and Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors [2015] QLC 48*;
 - I. the Respondent failed to provide any or adequate

reasons explaining what were the groundwater risks to adjoining landowners that could not otherwise be managed by the conditions imposed on the Stage 3 Project and proposed by the Applicant;

- J. the Respondent failed to have proper regard to the fact that the mining leases and EA do not authorise any interference with or taking of groundwater and that the Applicant will require an associated water licence pursuant to the *Water Act 2000* (Qld);
- K. the Respondent misdirected himself by considering that make good agreements would not be an appropriate means of mitigating groundwater risks to landowners and on that basis finding that intergenerational equity will be breached and by misconstruing the Applicant's proposed make good condition and template make good agreement; and
- L. the Respondent misconstrued the evidence about the post-mining groundwater impacts associated with the Stage 3 Project.

The Applicant claims:

1. A declaration that the Decisions are invalid and of no effect.
2. An order quashing or alternatively setting aside the Decisions with effect as from 31 May 2017.
3. An order referring the matters to which the Decisions relate back to the Land Court of Queensland for further consideration and determination consistent with the reasons of this Court and according to law.
4. Such further or other order as the Court considers appropriate.
5. Costs.

TO THE RESPONDENT

A directions hearing in this application (and any claim by the Applicant for an interlocutory order) will be heard by the Court at the time, date and place specified below. If there is no attendance before the Court by you or by your counsel or solicitor, the application may be dealt with and judgment may be given or an order made in your absence. Before any attendance at that time, you may file and serve notice of address for service.

APPOINTMENT FOR DIRECTIONS HEARING

Time and date: 10am, 17 July 2017

Place: QEII Courts of Law Complex
415 George Street, Brisbane, QLD, 4000

Signed:

Registrar of the Supreme Court, BRISBANE Registry

Dated: 15 June 2017



PARTICULARS OF THE APPLICANT:

Name: **New Acland Coal Pty Ltd ACN 081 022 380**
 Applicant's residential or business address: c/o New Hope Group,
 Building 3, 22 Magnolia Dr, Brookwater QLD 4300
 Applicant's solicitor's name: Mark Geritz
 and firm name: Clayton Utz
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 Fax: (07) 3221 9669
 E-mail address: mgeritz@claytonutz.com

Signed:

Description: Solicitors for the Applicant

Dated: 15 June 2017

This application is to be served on: **Paul Anthony Smith, Member of the Land Court of Queensland**
 of: Land Court of Queensland
 Level 8, 363 George Street
 Brisbane, QLD, 4000