

IN THE LAND COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBERS: EPA495-15, MRA496-15 & MRA497-15

Applicant: **NEW ACLAND COAL PTY LTD**

AND

Objectors: **FRANK ASHMAN & ORS**

AND

Statutory Party: **CHIEF EXECUTIVE, DEPARTMENT OF
ENVIRONMENT AND HERITAGE PROTECTION**

SUBMISSIONS ON COSTS BY THE OAKLEY COAL ACTION ALLIANCE INC

SUMMARY

1. These submissions are in response to the Court's request¹ for submissions from the parties in relation to costs of the hearing of the application for the grant of the mining leases under s 268 of the *Mineral Resources Act 1989* (**MRA**) and the objections decision hearing under s 188 of the *Environmental Protection Act 1994* (**EPA**) regarding the New Acland Coal Mine Stage 3 (collectively, **the hearing**).
2. The Oakey Coal Action Alliance Inc (**OCAA**) seeks an order that the Applicant, New Acland Coal Pty Ltd (**NAC**), pay OCAA's costs of and incidental to the hearing after the *Land Court (Transitional) Regulation 2017* came into effect on 27 January 2017.

BACKGROUND

3. The hearing occupied almost 100 days of sittings from March 2016 until April 2017.² It included an interlocutory hearing of a General Application filed by NAC on 19 December 2016 to reopen the hearing for new evidence concerning the Independent Expert Scientific

¹ *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP (No. 4)* [2017] QLC 24 at [1861].

² The objection decision lists the hearing days as (dates after 27 January 2017 are in bold): 7, 8, 9, 16, 17, 18, 21, 22, 23, 24, 29, 30, 31 March 2016; 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15 April 2016; 9, 10, 11, 12, 13, 16, 17, 18, 19, 23, 24, 25, 26, 27, 30, 31 May 2016; 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 June 2016 and 1, 5, 6, 7, 8, 11, 12, 13, 14, 15, 25, 26, 27, 28, 29 July 2016; 1, 2, 4, 5, 8, 9, 11, 12 August 2016; 1 September 2016; 5, 6, 7 October 2016; 1 December 2016; 12 January 2017; **2 February 2017; 3, 4, 5, 10, 11, 20 April 2017.**

Committee (**IESC**) 2016 Advice.³ That application was heard on 2 February 2017 and led to considerable further costs being incurred in the hearing with testimony from groundwater experts and subsequent submissions on 3, 4, 5, 10, 11 and 20 April 2017 (**the 2017 reopening of the hearing**).

4. The hearing occurred in a period when there was considerable uncertainty over the powers of the Land Court in relation to the exercise of administrative functions for hearing applications for mining leases under the MRA and environmental authorities under the EPA due to the decisions in *Dunn v Burtenshaw* (2010) 31 QLCR 156 and *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107 (**BHP Billiton**), including the power to award costs. Prior to *BHP Billiton* the Land Court had awarded costs in objections hearings under the MRA and EPA and this had been upheld in the Land Appeal Court.⁴
5. This period of uncertainty was evident in the first and second interlocutory decisions of the Court in this hearing, both delivered on 18 May 2016, when the Court dismissed an application by OCAA for disclosure of documents⁵ and dismissed an application by NAC for costs (**the earlier costs decision**).⁶
6. In the earlier costs decision the Court followed three recent decisions which, contrary to the earlier decisions noted above, had found that the Court did not have jurisdiction to award costs in matters such as this.⁷ The Court foreshadowed in making that ruling that legislative changes were pending to address this issue.
7. The legislative changes foreshadowed by the Court in the earlier costs decision were amendments made in 2015 to the *Land Court Act 2000* (**LCA**) to address concerns arising from the *BHP Billiton* decision about judicial immunity and other matters, including costs, when the Land Court exercised administrative functions such as when holding objections hearings under the MRA and EPA. The amendments were made by the *State Development and Public Works Organisation and Other Legislation Amendment Act 2015* (**SDPWOOLA Act**) (Act No 8 of 2015), including transitional provisions inserting a new ss 96 and 97 in the LCA as follows:

96 Privileges, protection and immunity for powers and functions before commencement

Section 35 as amended by the *State Development and Public Works Organisation and Other Legislation Amendment Act 2015* applies to the exercise or performance of a judicial power or administrative function by the Land Court, a member or a judicial registrar before the commencement as if the power or function were exercised or performed after the commencement.

³ *New Acland Coal Pty Ltd v Ashman & Ors* (No. 3) [2017] QLC 1.

⁴ E.g. *Anson Holdings Pty Ltd v Wallace & Anor* [2010] QLAC 0002; *Anson Holdings Pty Ltd v Wallace* (2010) 31 QLCR 74; [2010] QLAC 4; *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd* (No 2) [2012] QLC 67; *Donovan v Struber & Ors* (No. 4) [2013] QLC 14; and *Hancock Coal Pty Ltd v Cassoni* (No. 5) [2014] QLC 33.

⁵ *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP* [2016] QLC 29.

⁶ *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP* (No. 2) [2016] QLC 30.

⁷ *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* (No. 2) [2016] QLC 22; *Baralaba Coal Pty Ltd & Anor (administrators appointed) v Stephenson & Anor* (No. 2) [2016] QLC 25; and *Legend International Holdings Inc v Taylor Aly Awaditijia & Anor* (No. 4) [2016] QLC 23.

97 Transitional regulation-making power

- (1) A regulation (a *transitional regulation*) may provide that the provisions of this Act, with necessary modifications provided in the regulation, apply to the Land Court in the exercise of a function or power conferred on the court under—
 - (a) section 32F; or
 - (b) the *Aboriginal Cultural Heritage Act 2003*, part 6, division 5 and part 7, division 6; or
 - (c) the *Environmental Protection Act 1994*, chapter 5, part 5, division 3, subdivision 3; or
 - (d) the following provisions of the *Mineral Resources Act 1989*—
 - (i) sections 72 and 75 to 78;
 - (ii) sections 85 and 85A;
 - (iii) sections 265, 268 and 269;
 - (iv) sections 279, 279A and 281;
 - (v) section 318BC; or
 - (e) the *Petroleum and Gas (Production and Safety) Act 2004*, sections 320 and 363I; or
 - (f) the *Torres Strait Islander Cultural Heritage Act 2003*, part 6, division 5 and part 7, division 6.
- (2) A transitional regulation may have retrospective operation to a day not earlier than the day of the commencement.
- (3) A transitional regulation must declare it is a transitional regulation.
- (4) This section and any transitional regulation expire 1 year after the day of the commencement.

8. The explanatory notes to the *State Development and Public Works Organisation and Other Legislation Amendment Bill 2015* expressly stated that the amendments to the LCA were to address the uncertainty that had arisen from the *BHP Billiton* decision.⁸

Land Court matters

The objective of the amendments to the *Land Court Act 2000* (LC Act) is to provide certainty to the Land Court in the exercise of its jurisdiction in a range of matters referred to the Land Court under various pieces of legislation (referral matters). This includes objections to mining lease applications and associated EAs which are referred to the Land Court under the *Mineral Resources Act 1989* (MR Act) and the *Environmental Protection Act 1994* (EP Act) for the purpose of the Land Court making recommendations to the responsible Ministers under those Acts.

The amendments will address issues arising from the recent decision in *BHP Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107 (the BHP case) in which the Supreme Court found that matters that were referred to the Land Court under the MR Act and EP Act were not ‘proceedings’ within the meaning of the *Land Court Rules 2000* (LC Rules) and that the functions of the Land Court in the exercise of this jurisdiction were of an administrative nature.

Achievement of policy objectives

...

⁸ *State Development and Public Works Organisation and Other Legislation Amendment Bill 2015 Explanatory Notes*, p 2.

Land Court matters

The Bill will achieve its policy objectives in relation to Land Court matters by amending the LC Act to:

- provide clarity and certainty in relation to immunity for members of the Land Court while exercising all judicial powers and performing all administrative functions, reinstating the position members thought to have applied before the BHP case;
- ensure this protection extends to judicial registrars, lawyers and agents appearing and witnesses attending before the Land Court, a member or judicial registrar;
- provide for a transitional regulation-making power for the application of specific LC Act provisions to referral matters, with both the regulation-making power, and any transitional regulations made under the power, to expire one year after the day of the commencement; and
- extend the existing rule-making power in the LC Act to ensure it applies to all functions and powers conferred on the Land Court under the LC Act or another Act, including the making of rules for procedures where the Land Court, a member or judicial registrar is exercising or performing an administrative function.

9. Section 96 of the LCA commenced on the date of assent to the amending legislation, 22 July 2015; however, s 97 did not commence until 23 July 2016.⁹ It expires on 23 July 2017.
10. While s 97 of the LCA commenced on 23 July 2016, no regulations were made under it until the *Land Court (Transitional) Regulation 2017 (the transitional regulation)* came into effect on 27 January 2017. The transitional regulation lists a number of provisions of the LCA,¹⁰ including the power to award costs in s 34, that apply to what it termed “recommendatory provisions”, including objection hearings to mining leases under the MRA and environmental authorities under the EPA.
11. The explanatory notes to the transitional regulations also stated that their purpose was to remedy the uncertainty arising from the decision in *BHP Billiton*:¹¹

⁹ The list of amending legislation in the current version of the LCA notes that this section commenced automatically under the *Acts Interpretation Act 1954*, s 15DA(2).

¹⁰ Section 3(1) of the *Land Court (Transitional) Regulation 2017* provided that following provisions of the Act apply to the Land Court in the exercise of a function or power conferred on the Court under a recommendatory provision as if the exercise of the function or power under the recommendatory provision were a proceeding: s 5 (Jurisdiction of Land Court); s 7A(2)(a) and (c) and (3) (Land Court has power of the Supreme Court); s 9 (Contempt and contravention of orders); s16 (Appointment of president and other members of Land Court); s 22 (Directions); s 24 (Appearance); s 25 (Adjournments); s 27 (What happens if member dies or is incapacitated); s 33 (Land Court may make declarations); s 34 (Costs); s 36 (Preliminary conference); s 37 (ADR process applies to proceedings started under this part), other than to the extent the *Civil Proceedings Act 2011*, part 6 refers to case appraisal; s 42 (Retirement of members); s 46 (Retirement of judicial registrars); and s 52 (Court records).

¹¹ *Land Court (Transitional) Regulation 2017 Explanatory notes for SL 2017 No. 2*, p 1.

Policy objectives and the reasons for them

The objective of the Transitional Regulation is to provide greater certainty to the Land Court in exercising functions or powers conferred on the court under certain “recommendatory provisions” (as defined in clause 3(3) of the Transitional Regulation).

The Transitional Regulation addresses issues arising from the decision in *BHP Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107 (BHP decision), in which the Supreme Court found that matters that were referred to the Land Court under the *Mineral Resources Act 1989* and the *Environmental Protection Act 1994* were not “proceedings” within the meaning of the *Land Court Rules 2000*, and that the court’s functions in the exercise of this jurisdiction were of an administrative nature.

The BHP decision gave rise to some uncertainty regarding the exercise of the Land Court’s jurisdiction in relation to a range of matters referred to the court under various pieces of legislation, and specifically, in relation to matters of an administrative nature.

As a result, amendments to the *Land Court Act 2000* (LC Act) were progressed in the *State Development and Public Works Organisation and Other Legislation Amendment Act 2015* (Amendment Act) to address immediate concerns regarding the immunity of the Land Court, and provide a temporary mechanism (through the transitional regulation-making power in section 97 to specifically apply other provisions of the LC Act to matters listed in section 97, as appropriate.

12. While s 97(2) of the LCA provided that the transitional regulation “may have retrospective operation to a day not earlier than the day of the commencement” of s 97 of the LCA, namely 23 July 2016, the transitional regulation itself does not state it has retrospective operation.
13. In making the objection decision in relation to this hearing, the Court declined to make an order that there be no costs of the hearing due to these changes in the Court’s powers to award costs and invited submissions from the parties on costs.¹²
14. Further legislative changes to the LCA were made by the *Court and Civil Legislation Amendment Act 2017 (CCLA Act)*, Part 16, ss 140-146, which commenced on the date of assent, 6 June 2017. The amendments insert new ss 52A and 52B in the LCA in materially identical terms to the transitional regulation thereby providing that the Court’s power to award costs in s 34 applies to “recommendatory provisions”, including objections hearings to mining leases under the MRA and environmental authorities under the EPA.
15. The CCLA Act also inserted a new costs power for the Land Appeal Court in s 57A which provided in s 57A(2) (emphasis added):

... the Land Appeal Court may order costs for the proceeding in which the decision appealed against was made, **whether or not the court or tribunal that made the decision made, or had power to make, an order for costs for the proceeding;**
16. The *Court and Civil Legislation Amendment Bill 2017 Explanatory Notes* reflected the language of these amendments.

¹² *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP (No. 4)* [2017] QLC 24 at [1853]-[1861].

WHEN THE COURT OBTAINED POWER TO ORDER COSTS

17. As in all matters of statutory interpretation, including the cost rules in the LCA, the task is to give effect to the purpose and language of the legislation reading the provisions in the context of the legislation as a whole.¹³
18. As is clear from their context and the explanatory notes, the amendments to the LCA in the SDPWOOLA Act, the transitional regulations and the CCLA Act were remedial changes to alleviate the administrative difficulties and uncertainty caused by the decision in *BHP Billiton*. As remedial legislation, it can be presumed the legislature intended them to take effect immediately on coming into force and to apply to administrative powers and functions exercised and performed in relation to all hearings and proceedings before the Court at the time they came into force.
19. With the exception of the retrospective operation of judicial immunity provided by s 96 of the LCA, the provisions did not expressly have retrospective operation but applied to anything done after they came into force.
20. While s 97(2) of the LCA provided that the transitional regulation “may have retrospective operation to a day not earlier than the day of the commencement” of s 97 of the LCA, namely 23 July 2016, the transitional regulation itself does not state it has retrospective operation.
21. Given the difference in language of ss 96 and 97, and the absence of retrospective operation provided in the transitional regulation or the CCLA Act, OCAA submits that the costs power the power should not be applied retrospectively to costs incurred prior to the transitional regulations coming into force but may be applied to cost incurred after they came into force. That is, OCAA submits the Court has power to award costs incurred *after* the coming into force of the transitional regulation on 27 January 2017.
22. The differences in language of ss 34 and 57A also support this construction. Section 57A(2) expressly allows the Land Appeal Court to award costs for proceedings below even when the Land Court did not have power to award costs. In contrast, the language of the Land Court’s power to award costs in s 34 is silent on this issue.
23. Also supporting the construction that the power to award costs applied to hearings that had been brought before the transitional regulation came into effect and applied to costs incurred after that, it is noteworthy that the transitional provisions did not provide a provision similar to s 945 of the *Sustainable Planning Act 2009 (SPA)* which was inserted when the cost rules in the Planning and Environment Court changed from own costs to the normal costs rule in 2012. That provision provided that the former cost rule “continues to apply to a proceeding in the court that has been brought before the commencement” of the new cost rule. No similar transitional provision was provided in the SDPWOOLA Act, the transitional regulations or the CCLA Act. These omissions are also consistent with the

¹³ As stated in, e.g., *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382, [69]-[71] per McHugh, Gummow, Kirby and Hayne JJ; *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573 at 592-593 [44]-[46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; and *Thiess v Collector of Customs & Ors* (2012) 250 CLR 664 at 671-672 [22]-[23] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.

remedial effect of the amendments being intended to take immediate effect for all matters before the Court.

24. OCAA notes that s 20 of the *Acts Interpretation Act 1954 (AIA)* provides default transitional arrangements for amendments to legislation but does not appear to apply to the present case. The only potentially relevant provisions of s 20 are ss 20(2)(b) and 20(2)(c). For the purposes of s 20(2)(b) of the AIA, the hearing was “begun” under the MRA and the EPA when the Land Court received the referral under s 265(2) of the MRA. It was not “begun” under the LCA, which provides for costs and, consequently, s 20(2)(b) does not apply. Nor did NAC have “a right, privilege or liability acquired, accrued or incurred” that no costs would be awarded after the transitional provisions commenced for the purposes of s 20(2)(c) of the AIA.¹⁴
25. OCAA notes that the ruling in this case may affect other hearings involving the Court’s new powers for recommendatory provisions that are currently before the Court that were commenced prior to s 97 of the LCA on 23 July 2016, the transitional regulation on 27 January 2017 or ss 52A and 52B of the LCA on 6 June 2017. There are, as yet, no published decisions applying the Court’s new powers for recommendatory provisions, including the new costs power. While it is difficult to speculate on the circumstances that may arise in other cases, given that the amendments were intended to remedy the difficulties and uncertainty caused by *BHP Billiton* it is likely that in most cases the preferable construction is that the amendments apply to such hearings (e.g. in relation to the power to make directions under s 22 of the LCA).

EXERCISE OF THE COURT’S DISCRETION

26. On the basis that the Court has power to award costs incurred after the transitional regulation came into effect on 27 January 2017, the question becomes whether the Court should exercise its discretion to award costs.
27. While the Land Court’s jurisdiction to award costs has changed materially since the decision in *BHP Billiton*, earlier cases can still provide useful guidance on the principles to be applied when the Court has jurisdiction.¹⁵ These include:
- (a) the conduct of the parties;¹⁶
 - (b) the relative success of the parties;¹⁷
 - (c) whether there was any reasonable prospect of success in pursuing the objection;¹⁸
 - (d) whether the case was fairly arguable,¹⁹ including both the legal basis for the case and the factual evidence brought in support of the case;

¹⁴ For discussion of s 20 of the AIA, see *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 Qd R 162 (Fitzgerald P with whom Dowsett J agreed, Pincus JA dissenting).

¹⁵ In particular, OCAA refers the Court to *Anson Holdings Pty Ltd v Wallace & Anor* [2010] QLAC 0002; *Anson Holdings Pty Ltd v Wallace* (2010) 31 QLCR 74; [2010] QLAC 4; *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd (No 2)* [2012] QLC 67; *Donovan v Struber & Ors (No. 4)* [2013] QLC 14; and *Hancock Coal Pty Ltd v Cassoni (No. 5)* [2014] QLC 33.

¹⁶ Per *Anson v Wallace* [2010] QLAC 0002 at [37].

¹⁷ *Hancock Coal Pty Ltd v Cassoni (No. 5)* [2014] QLC 33.

¹⁸ *Anson Holdings Pty Ltd v Wallace & Anor* [2010] QLAC 0002 at [37].

- (e) whether the proceeding involved an untested point of law;²⁰
- (f) whether the objector acted in the public interest;²¹
- (g) whether there was public interest in the issues and outcome;²²
- (h) whether a party may be said to have a personal or financial interest in the outcome;²³
and
- (i) whether there is a statutory right to object²⁴ and any such right was exercised reasonably and responsibly.²⁵

Conduct of NAC

28. Unlike *Hancock Coal Pty Ltd v Cassoni (No. 5)* [2014] QLC 33 (***Hancock No. 5***), in this hearing the Applicant's conduct has substantially and unreasonably lengthened the hearing and considerably added to the costs to all of the parties, notwithstanding the its persistent position as to the urgency of the matter.²⁶
29. While the Court may consider it has reason to reflect on NAC's conduct throughout the hearing, OCAA confines its submissions to NAC's more recent conduct including the reopening of the hearing in relation to the IESC 2016 Advice and what the Court has described as NAC's unreasonable delay in giving the objectors access to material relevant to the IESC 2016 Advice.²⁷
30. This is a particularly relevant factor in the circumstances of this case that should be taken into account in awarding costs.²⁸

Success or failure

Groundwater

31. In the period when the Court's discretion to award costs was restored, after 27 January 2017, the only issue in the proceeding in relation to which costs were incurred was with

¹⁹ Per the High Court in *Oshlack* (1998) 193 CLR 72 at 80-81 and *Solomon Services Pty Ltd v The Council of the Shire of Woongarra* [1988] 2 Qd R 202 at 207 upheld by the Court in *BHP Queensland Coal Investments Pty Ltd & Ors v Cherwell Creek Coal Pty Ltd (No 2)* [2009] QLAC 0008.

²⁰ See also *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd (No 2)* [2012] QLC 67.

²¹ Per the High Court in *Oshlack* (1998) 193 CLR 72 at 80-81; See also *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd (No 2)* [2012] QLC 67.

²² Per the High Court in *Oshlack* (1998) 193 CLR 72 at 122; see also *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth - Brisbane Co-Op Ltd (No 2)* [2012] QLC 67.

²³ *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd (No 2)* [2012] QLC 67.

²⁴ Per *Anson v Wallace* [2010] QLAC 0002 at [10].

²⁵ Per *Anson v Wallace* [2010] QLAC 0002 at [10]; see also *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd (No 2)* [2012] QLC 67 at [40].

²⁶ See [114]-[116].

²⁷ *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1 at [97]; *New Acland Coal Pty Ltd v Ashman & Ors (No. 4)* [2017] QLC 24 at [119].

²⁸ See *Anson Holdings Pty Ltd v Wallace* (2010) 31 QLCR 74; [2010] QLAC 4 at [9]; *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-Op Ltd (No 2)* [2012] QLC 67 at [11].

respect to groundwater and surface water, in response to the Applicant's application to reopen the evidence in respect of the IESC 2016 Advice.

32. OCAA was wholly successful in relation to groundwater which was a primary ground for the recommendations of refusal.²⁹
33. NAC were entirely unsuccessful in their submission that the conditions accepted by the IESC were satisfactory to resolve the groundwater issues.
34. In particular the reopening of the evidence to admit the IESC 2016 Advice and supporting evidence from NAC was wholly unsuccessful in altering the weight of evidence prior to the reopening, that the groundwater modelling was unsatisfactory to warrant approval.
35. Consequently, in light of OCAA's successful outcome, OCAA was put to unnecessary expense to respond to the application for reopening, and evidence brought by NAC at the reopening.

Other issues

36. As the issues within the period of the Courts discretion to award costs were confined to groundwater and surface water, this matter is distinguishable from *Hancock No. 5* in which the totality of the issues in the proceedings were relevant for the consideration of costs.
37. However, for completeness, OCAA submits that overall OCAA was wholly successful in obtaining a recommendation of refusal, whereas NAC was wholly unsuccessful in seeking a recommendation of approval, with or without additional conditions. OCAA evidently had a reasonable basis for pursuing the objection and reasonable prospects of success.
38. OCAA was also successful in achieving either recommendation of refusal, significant additional conditions or significant concessions on key evidence in OCAA other grounds of objection. In particular, OCAA refers to the Court's findings on:
 - (a) groundwater;³⁰
 - (b) noise impacts;³¹
 - (c) agricultural land and intergenerational equity;³²
 - (d) air quality;³³ and
 - (e) economics.³⁴

Other relevant factors

²⁹ *New Acland Coal Pty Ltd v Ashman & Ors (No. 4)* [2017] QLC 24 at [16], [1626]-[1630]

³⁰ *New Acland Coal Pty Ltd v Ashman & Ors (No. 4)* [2017] QLC 24 at [16], [1626]-[1630].

³¹ See, e.g. *New Acland Coal Pty Ltd v Ashman & Ors (No. 4)* [2017] QLC 24 at [773] – [775].

³² See *New Acland Coal Pty Ltd v Ashman & Ors (No. 4)* [2017] QLC 24 at [14], [1299], [1315], [1341], [1344].

³³ See *New Acland Coal Pty Ltd v Ashman & Ors (No. 4)* [2017] QLC 24 at [610], [613]-[614], [621]-[623], [635], [641], [650], [655], [673] and [697].

³⁴ See, e.g., *New Acland Coal Pty Ltd v Ashman & Ors (No. 4)* [2017] QLC 24 at [882], [899], [900], [924], [1038] and [1051].

39. With respect to other relevant factors set out above, there is no disentitling conduct by OCAA that would affect the exercise of the Court's discretion and:

- (a) OCAA at all times exercised its statutory right reasonably and responsibly.³⁵
- (b) OCAA itself has no direct financial interest in the outcome, although several of its members attested to the loss of income should the mine impact their farm.³⁶
- (c) OCAA acted in the public interest in bringing its case and there is a public interest in the issues and outcome, particularly with respect to the protection of groundwater resources and ongoing amenity as a consequence of noise and air quality impacts in the local area.³⁷

40. OCAA therefore submits that:

- (a) The Court's discretion to award costs was enlivened from 27 January 2017;
- (b) After 27 January 2017 NAC unreasonably and unnecessarily reopened the evidence in respect of the 2016 IESC Advice;
- (c) NAC caused undue delay and expense to the parties by its conduct, including the refusal to provide necessary documents in timely manner;
- (d) NAC was wholly unsuccessful in changing the Court's ultimate recommendation in respect of groundwater through the reopening;
- (e) such circumstance warrant the exercise of the Court's discretion to order NAC pay OCAA's costs of and incidental to the hearing after the transitional regulation came into effect on 27 January 2017.

**Dr Chris McGrath
Counsel for OCAA
16 June 2017**

³⁵ We note in particular the Court's finding at [115] of the decision that the "the objectors have met the expedited time frame sought by NAC both before and throughout the hearing."

³⁶ See, for example, the Lay Witness Statement of Frank Ashman (OCA.0009).

³⁷ See *New Acland Coal Pty Ltd v Ashman & Ors (No. 4)* [2017] QLC 24 at [1804] – [1806].