SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BS 6002/17

Applicant:	**New Acland Coal Pty Ltd ACN 081 022 380**
	AND
First Respondent:	**Paul Anthony Smith, Member of the Land Court of Queensland**
	AND
Second Respondent:	**Oakey Coal Action Alliance Inc.**
	AND
Third Respondent:	**Chief Executive, Department of Environment and Heritage Protection**

Amended pursuant to the order of Bowskill J dated 28 November 2017.
Signed:
Clayton Utz - solicitors for the Applicant
Dated: 28 November 2017

SUPREME COURT OF QUEENSLAND BRISBANE

AMENDED 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 First 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 First Respondent in making the Decisions.

SUPREME COURT OF QUEENSLAND BRISBANE

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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.

   ~~(c)~~

4. 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 (**DEHP**) 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~~ Decisions, the First Respondent made ~~an~~ errors 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*,~~ in finding that:

   (a) the evening and night noise limits that should be set in the EA for the Stage 3 Project are lower than those in a stated condition of the Coordinator-General (**CG**) under s.47C of the *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWOA**);

   (ai) by reason of s.190(2) of the *EPA* the lower noise limits could not be recommended because that would be inconsistent with the CG stated condition;

   (aii) the only option was to recommend the EA Amendment Application be refused and the MLAs be rejected,

   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 First Respondent did not have jurisdiction to make the ~~EA~~ Decisions ~~and 50232 Decision~~ pursuant to s.20(2)(c) of the *JR Act*;

   (bi) the Decisions involved an improper exercise of power pursuant to ss.20(2)(e) and 23(a) of the *JR Act*;

   (c) the ~~EA~~ Decisions ~~and the 50232 Decision~~ involved errors of law pursuant to s.20(2)(f) of the *JR Act*; and

   (d) the ~~EA~~ Decisions ~~and the 50232 Decision~~ were otherwise contrary to law pursuant to s.20(2)(i) of the *JR Act*.

Particulars

(i)(A) Upon the proper construction of the *EPA*, the *MRA* and the *SDPWOA*, by reason of the CG's stated condition, the First Respondent did not have jurisdiction to consider whether lower noise limits should be set or to recommend the EA Amendment Application be refused and the MLAs be rejected because he considered that lower noise limits should be set.

(i)(B) Alternatively, upon the proper construction of s.190(2) of the *EPA*, lower noise limits were not inconsistent with the CG's stated

condition.

(i) ~~The~~ Alternatively, the First Respondent erred by interpreting ~~to the extent that he interpreted s.190(2) of~~ the *EPA* as mandating, in the event of the First Respondent reaching a conclusion that ~~a~~ lower noise limits amounted to an inconsistency with the ~~Coordinator-General~~ CG's stated condition, that the EA Amendment Application be recommended for refusal.

(iiA) The First Respondent did not conduct the balancing exercise required by s.191 of the *EPA*.

(ii) The First Respondent erred to the extent that he considered that he was compelled to recommend rejection of the MLAs for ~~this~~ the above reasons.

2. In making the ~~EA~~ Decisions, the First Respondent made ~~an~~ errors of law ~~by failing to properly apply the applicable legal principles regarding~~ in finding that air quality and noise limits in the Applicant's current EA may have been or had been exceeded ~~and the proper use which could be made of the EA in the circumstances~~, with the consequence that:

(a) the relevant conduct of the First Respondent in making the ~~EA~~ Decisions was unlawful under ~~ss.21(2)(b),~~ ss.21(2)(c), 21(2)(e) and 23(a), ~~and~~ s.21(2)(f) and 21(2)(i) of the *JR Act*;

(b) the First Respondent did not have jurisdiction to make the ~~EA~~ Decisions pursuant to s.20(2)(c) of the *JR Act*;

(c) the ~~EA~~ Decisions involved an improper exercise of power under ss.20(2)(e) and 23(a) of the *JR Act* ~~in that it involved the taking into account of irrelevant considerations~~;

(d) the ~~EA~~ Decisions involved an error of law pursuant to s.20(2)(f) of the *JR Act*; and

(e) the ~~EA~~ Decisions were ~~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.~~

(i) The First Respondent conducted or permitted an inquiry into and made findings in relation to possible or likely breaches of the Applicant's current EA in relation to air quality and noise when, on the proper construction of the *EPA* and the *MRA*, the Land Court did not have jurisdiction to do that.

(ii) Alternatively, in making findings about possible or likely breaches of the Applicant's current EA in relation to air quality and noise, the First Respondent:

A. acted unreasonably, inconsistently and irrationally in that the First Respondent correctly found at paragraphs [571], [1792] and [1823] that the hearing did not involve judging or making findings in relation to the Applicant's current EA and that proof of environmental nuisance required different processes than those undertaken by the Land Court as part of the hearing;

B. erroneously construed the Applicant's current EA as imposing strict limits;

C. failed to consider the Applicant's evidence and submissions about the proper construction of the Applicant's current EA and possible or likely breaches of the Applicant's current EA in relation to air quality and noise; and

D. failed to provide adequate reasons for the findings or for rejecting the Applicant's evidence and submissions about the proper construction of the Applicant's current EA and possible or likely breaches of the Applicant's current EA in relation to air quality and noise.

3. In making the Decisions, the Respondent made ~~an~~ errors of law by ~~failing to properly interpret and apply the applicable onus of proof and proper scope of his jurisdiction~~ inquiring into and making findings about the past performance of DEHP, with the consequence that:

(a) the relevant conduct of the First Respondent in making the Decisions was unlawful under ~~ss.21(2)(b),~~ss.21(2)(c), 21(2)(e) and 23(a), and s.21(2)(f) of the *JR Act*;

(b) the First Respondent did not have jurisdiction to make the Decisions pursuant to s.20(2)(c) of the *JR Act*;

(b)(i) the Decisions involved an improper exercise of power pursuant to ss.20(2)(e) and 23(a) 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.~~

(i) The First Respondent conducted or permitted an inquiry into and made findings in relation to the past performance of DEHP when, on the proper construction of the *EPA* and the *MRA*, there was no jurisdiction to do that.

(ii) Alternatively, in making findings about the past performance of DEHP, the First Respondent:

A. acted unreasonably, inconsistently and irrationally in that the First Respondent correctly found at paragraphs [566] and [571] that the hearing was not an inquiry into the operations of DEHP or anything like it and did not involve judging or making findings in relation to the Applicant's current EA; and

B. failed to provide adequate reasons for the findings.

(iii) The Applicant repeats and relies on paragraph 2 above.

4. In making the Decisions, the First Respondent made ~~an~~ errors 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) (**EPR**) 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*;~~

(a) the Decisions involved an improper exercise of power pursuant to ss.20(2)(e) and 23(b) of the *JR Act*;

(b) ~~the Respondent made an~~ the Decisions involved 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~~ were otherwise contrary to law pursuant to s.20(2)(i) of the *JR Act*.

Particulars

(i) In determining that s.10 of the Noise EPP should be used to set the noise limits, the First Respondent asked himself the wrong question, being whether s.10 or Schedule 1 of the Noise EPP

should be used to determine noise limits and did not carry out the environmental objective assessment referred to in s.51(1)(a) of the *EPR* and then give consideration to relevant aspects of the Noise EPP (pursuant to s.51(1)(c) of the *EPR*). ~~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 First 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,~~ In giving determinative effect to the conclusion about the question referred to in paragraph (i) above, the First Respondent failed to ~~have regard to~~ correctly interpret and apply the Noise EPP, s.51 of the *EPR* and s.191 of the *EPA* and take relevant material into account including:

A. that the draft EA limits are consistent with acoustic quality objectives in the Noise EPP and are more onerous than the levels contemplated by Schedule 1 of the Noise EPP;

B. the expert evidence and submissions on matters relevant to the proper application of the statutory assessment regime including that the "existing acoustic environment" ~~in the application of~~ as referred to in s.10 of the Noise EPP includes the noise of existing mine activities;

C. the recognition in Schedule 1 of the Noise EPP that the evening acoustic quality objective may be higher than the night time acoustic quality objective given the higher ambient levels in a dwelling in the evening period;

D. that even if it was accepted that the acoustic quality objectives in Schedule 1 of the Noise EPP refer to total noise measured at a sensitive receptor, the conditions of the draft EA accommodate this;

E. that the recommended noise limits were artificial because they were based upon "*minimum deemed background noise levels of 30dB(A) in the evening and night and 35dB(A)*

during the day periods"; and

F. the acoustic quality objectives of the Noise EPP are intended to enhance or protect the environmental value of *"health and well being"*, so that if the Noise EPP recognises that those values are protected at 37dB(A) in the night time and 42dB(A) in the evening time, then a lower limit is neither reasonable or practical.

~~(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 First Respondent made an error of law pursuant to s.20(2)(f) of the *JR Act* and the Decisions involved an improper exercise of power pursuant to ss.20(2)(e) and 23(a) of the *JR Act* and were otherwise contrary to law pursuant to s.20(2)(i) of the *JR Act* in incorrectly applying the reasoning and result 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 First Respondent made ~~an~~ error~~s~~ of law pursuant to s.20(2)(f) of the *JR Act* and the Decisions involved an improper exercise of power pursuant to ss.20(2)(e), 23(a) and 23(b) of the *JR Act* and were otherwise contrary to law pursuant to s.20(2)(i) 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

(i) The First Respondent incorrectly applied the principle of intergenerational equity by considering that the principle was ~~as~~ a mandatory requirement which should be assessed by reference to whether it is or its sub-principles are complied with or breached, rather than correctly applying the principle as one of the considerations under the Standard Criteria and s.191 of the *EPA* to be balanced with other considerations including the economic benefits of the Stage 3 Project.

(ii) The First Respondent incorrectly applied the principle of intergenerational equity by the manner in which he applied the following sub-principles:

A. the "conservation of quality principle"; and

B. the "conservation of options principle".

(iii) In applying the principle of intergenerational equity, the First Respondent's reasoning was unreasonable, inconsistent and irrational and he took into account matters irrelevant to the application of the principle as follows:

A. at paragraph [1342], the First Respondent stated that the coal in relation to the Stage 3 Project will remain in the ground to be mined by future generations who perhaps find ways to do that when the risk to landowner groundwater

supplies is either completely removed or lessened and perhaps find processes of burning or using the energy produced by coal in such ways that no GHG or pollutant effect is caused; and

B. that conclusion was based on speculation by the First Respondent, not supported by evidence, and in circumstances where the First Respondent found at paragraphs [9] and [1090] - [1094], that there were no concerns regarding climate change and that the objections relating to climate change (scope 3 GHG emissions) had not been made out on the basis that, in summary, there would be no net increase in scope 3 GHG emissions as a result of the Stage 3 Project and there may in fact be less scope 3 GHG emissions.

(iv) In applying the principle of intergenerational equity, the First Respondent failed to take into account matters relevant to the application of the principle as outlined below.

(v) At paragraphs [1328] and [1329], the First Respondent accepts submissions of the Second Respondent to the effect that:

A. 457 ha of mine voids will be permanently lost to cropping;

B. 923 ha of good quality land within the MLA will probably be lost to cropping;

C. the Stage 3 Project will potentially remove the option for 22,000 ha (incorrectly referred to by Second Respondent as 20,000 hectares in one place in its submissions quoted by the First Respondent in paragraph [1328]) of land in the drawdown zone of the mine to be used for cropping; and

D. future generations will not have access to the mineral resources extracted by the proposal.

(vi) In accepting the submissions of the Second Respondent referred to above, the First Respondent failed to consider:

A. in respect of the 457 ha of mine void land, the CG's condition requiring NAC to secure an offset with respect to such land and related expert evidence;

B. in respect of the 923 ha of land within MLA 50232, the CG's imposed condition requiring the Applicant to rehabilitate

disturbed land to support the best post-disturbance land use possible and related expert evidence;

C. in respect of the 22,000 hectares of land that the First Respondent considered may be lost to cropping, this area was a theoretical figure assumed only for the purposes of the economic analysis and the undisputed expert evidence was that cropping within that area is predominantly dry land cropping which is not dependent on groundwater;

D. in respect of the 22,000 hectares of land in the drawdown zone, how any drawdown impacts will be managed in accordance with the evidence and submissions referred to in paragraph 15 below; and

E. in respect of access to the mineral resources by future generations, those same mineral resources would be extracted to benefit the current generation if the mine proceeds and this was a matter that needed to be considered as part of the balancing exercise that the First Respondent failed to undertake.

(vii) At paragraph [1334], the First Respondent concludes that "*there is a tension between a requirement for a make good agreement and intergenerational equity*" and at paragraph [1336] that the Applicant's draft make good agreement "*does not…make any real effort to meet the needs of impacted landholders in 200 years time*". In doing so, the First Respondent misunderstood the effects of a make good agreement generally, misunderstood and misinterpreted the Applicant's draft make good agreement and failed to consider the evidence and submissions referred to in paragraph 15 below . The First Respondent further failed to consider in accordance with case authority that the Applicant would comply with its legal obligations in respect of the Stage 3 Project.

~~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 First Respondent involved a lack of jurisdiction pursuant to s.22(c) of the JR Act, an improper exercise of power pursuant to ss.20(2)(e) and 23(a) of

the JR Act, an error of law pursuant to s.20(2)(f) of the *JR Act* and was otherwise contrary to law pursuant to s.20(2)(i) of the *JR Act* in that the First 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 First Respondent involved a lack of jurisdiction pursuant to s.22(c) of the JR Act, an error of law pursuant to s.20(2)(f) of the *JR Act* and the Decisions involved an improper exercise of power pursuant to ss.20(2)(e) and 23(a) of the JR Act and were otherwise contrary to law pursuant to s.20(2)(i) of the *JR Act* in that the Respondent incorrectly ~~considered the~~ found at paragraph [172] as a matter of construction ~~impact of the drawdown in aquifers as a basis for the Decisions having regard to~~ of the *MRA* and/~~or~~ *EPA* that it was necessary for groundwater issues to be "*fully considered*" in the hearing before him, when ~~that matter is not regulated by the MRA or the EPA but is regulated by the~~ upon the proper construction of the MRA, the EPA and the *Water Act 2000* (Qld) (**Water Act**):

    (a) 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;

    (b) alternatively, it was not necessary for those potential impacts to be "*fully considered*" at the hearing and such a consideration was inconsistent with the statutory scheme and involved precluding or pre-judging the outcome of the approvals processes under the *Water Act*.

~~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 First Respondent made ~~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~~.~~ and the conclusions were unreasonable and irrational, with the consequence that:

(a) the Decisions involved a breach of the rules of natural justice pursuant to s.20(2)(a) 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

(i) During the hearing, shortly after commencement of the evidence of the Applicant's lay witness Mr Denney, the First Respondent informed the legal representatives of the Applicant and the Second Respondent that he had wondered whether Mr Denney was being coached in the witness box but had concluded this was not the case and that what he observed was simply the over-exuberant reactions of the Applicant's employees in the gallery. At the request of the First Respondent, the employees were spoken to and the issue was not raised again. Mr Denney gave evidence for a further 5 days. At paragraphs [214] to [218], the First Respondent's observations in connection with these matters formed a substantial part of his reasons for giving little or no weight to Mr Denney's evidence (apart from documents). The First Respondent also criticised the Applicant for not addressing the matter in its submissions even though he had not again raised it and had previously indicated that no coaching was occurring. Further, it was unreasonable or irrational to give little or no weight to Mr Denny's evidence (apart from documents) without regard to the content of the evidence or whether it was controverted or corroborated.

(ii) The land on which the mine is located and much of the surrounding land, including in Acland itself, is owned by a related company of the Applicant. Over

a period of time most of the buildings on the owned land have been lawfully removed. Mr Beutel, one of the objectors, is one of the remaining residents of Acland. The First Respondent suggested at paragraph [1370] that the removal of buildings from the owned land may have been part of a deliberate strategy to put pressure on Mr Beutel to relocate. This suggestion was not put to the Applicant during the course of the hearing. Further, the conclusion had no reasonable or rational basis in the evidence and is not accompanied by adequate reasons.

13. In making the Decisions, the First 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.~~ In the circumstances particularised below, a fair minded lay observer might reasonably apprehend that the Member might not have brought an impartial mind to the Decisions.

(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~~. The First Respondent:

A. listed a hearing on 2 February 2017 for the Applicant to explain its actions in relation to 2 press reports that the First Respondent stated:

(I) appeared to emanate from the Applicant;

(II) identified the First Respondent's leave as a cause of delay in making the Decisions;

(III) may have amounted to a diminution of the First Respondent's own reputation, an attack upon the integrity of the First Respondent and the

Land Court, an attempt to erode public confidence in the Land Court and a contempt of the Land Court;

B. at a hearing on 2 February 2017 in relation to the Applicant's application to reopen the hearing, published an interlocutory decision and read in open Court a passage of that decision (paragraph [97]) in which the First Respondent found the Applicant was the cause of delay in making the Decisions; and

C. at the hearing on 2 February 2017 in relation to the possible contempt:

(I) stated that the 2 press reports conveyed the impression that the First Respondent's leave was a cause of delay in making the Decisions and would cost lots of jobs;

(II) stated that at a personal level the 2 press reports cut deep and that maybe the First Respondent was too thin skinned and should retire or recuse himself for bias;

(III) initially would not read 2 affidavits on behalf of the Applicant and, upon later reading the 2 affidavits, unreasonably concluded that 1 of the deponents had confirmed to the press that the First Respondent's leave was a cause of delay in making the Decisions;

(IV) engaged in intemperate and sarcastic exchanges with the Applicant's Senior Counsel in which the First Respondent called into question the Applicant's bona fides, suggested that it may suit the Applicant to create a false impression in the community and suggested that the Applicant had alleged bias against the First Respondent in circumstances where no such conclusions could reasonably be made;

(V) requested the objector (Mrs Plant) who had brought 1 of the press reports to the First Respondent's attention and who was highly deposed against the Applicant, to help his

objectivity as to what the press reports conveyed;

(VI) without any finding of contempt, sought a public statement from the Applicant to the effect it was not the Applicant's intention to create the impression that the Member's leave was a cause of delay in making the Decisions and a commitment that the Applicant would communicate that to the relevant press.

(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.~~ The First Respondent's reasons for the Decisions gives rise to an apprehension that the First Respondent continued to be affected by the views he had formed in respect of the 2 press articles and the 2 February 2017 hearing in that:

A. at paragraphs [114]-[130] the First Respondent revisited the issues of the cause of delay (including paragraph [97] of the interlocutory decision published on 2 February 2017) and found that the Applicant was, and the First Respondent was not, the cause of any delay;

B. at paragraphs [123]-[126], the First Respondent stated that it was telling against the Applicant's claims of urgency that in 2005 it had estimated that there was sufficient resource to last until about 2021, that the change in estimate was unexplained and that it was interesting the Applicant had not referred to the 2005 estimate;

C. those statements were unreasonable and irrational, made without consideration or analysis of relevant evidence and submissions and without adequate reasons;

D. at paragraphs [1862]-[1878], the First Respondent included an epilogue that was irrelevant to the Decisions, referred to the hearing on 2 February 2017

and sought to explain the First Respondent's independence by reference to the First Respondent's personal history.

(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.~~ The First Respondent's reasons for the Decisions include emotive statements favourable to several objectors and emotive statements attributing disrespect, offence, or improper conduct or motives to the Applicant as a result of legitimate actions or submissions on its behalf. The statements were made without consideration or analysis of relevant evidence and submissions and without adequate reasons. The statements are:

A. At paragraph [30], in respect of the evidence of some objectors.

B. At paragraph [32], in respect of the position of an objector (Mr Beutel) being in many ways far in excess of the fiction in the movie, The Castle.

C. At paragraphs [73] - [77], [862], [1353], [1368] - [1370], in respect of Acland. At [1370], the First Respondent speculates whether the removal of buildings from land in Acland purchased by an associated company of the Applicant was a deliberate ploy to pressure Mr Beutel to leave Acland.

D. At paragraphs [507] and [1389], in respect of submissions on behalf of the Applicant concerning an objector (Dr Plant).

E. At paragraph [523] of the Decisions, in respect of submissions on behalf of the Applicant concerning an objector (Mrs Harrison).

F. At paragraph [744], in respect of an analogy between the method of addressing complaints concerning the Applicant's mining activities and a robbery.

G. At paragraphs [1247] and [1390], in respect of disrespect allegedly shown by the Applicant towards objectors.

H. At paragraph [1633], in respect of whether the Applicant would have provided advice of the Independent Expert Scientific Committee (IESC) under materially different circumstances.

I. At paragraph [1663], in respect of disrespect allegedly shown by the Applicant towards the members of the Independent Expert Scientific Committee (**IESC**) and the First Respondent.

~~(v) The Respondent rejected the evidence of the Applicant and the Applicant's witnesses, notwithstanding the absence of any probative contrary evidence.~~

(vi) The First Respondent unreasonably and/or irrationally assessed the character, motivations and/or conduct (current and previous) of the Applicant - refer to particulars in paragraphs (iii) and (iv) above.

~~(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 First 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 findings against the Applicant – refer to the particulars in paragraphs (iii) and (iv) above ~~the Decisions~~.

(xiii) The Applicant repeats and relies upon the matters set out in paragraphs 2, 7 and 12 above and 14 and 15 below.

14. The making of the Decisions involved an improper exercise of power contrary to s.20(2)(e) and 23(g) 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~~ 13 above and 15 below.

~~(ii) The First 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.~~

15. The Decisions involved the First Respondent failing to consider, or constructively rejecting without reasons, the Applicant's substantial, clearly articulated evidence and submissions upon which it relied and failing to adequately explain the reasons for the Decisions meaning that:

(a) the Decisions involved a breach of the rules of natural justice pursuant to s.20(2)(a) of the *JR Act*;

(b) the First 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

(i) The First Respondent failed to consider how the concerns that he had about the uncertainty associated with the groundwater modelling were proposed to be managed and addressed through the legal framework applicable to the Stage 3 Project as a whole with respect to groundwater issues including the CG imposed, stated and recommended conditions, the draft EA conditions, the Applicant's proposed conditions to ML 50232, the conditions of the Applicant's approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the associated water

licence conditions and the underground water obligations under the *Water Act* and associated evidence and submissions.

(ii) The First Respondent failed to provide any or adequate reasons explaining what were the groundwater risks to adjoining landowners that could not otherwise be managed through the legal framework applicable to the Stage 3 Project as referred to above.

(iii) The First Respondent failed to consider the evidence that at the end of mining the impacts on the quantity of water available to nearby landowners would be known and failed to consider how such impacts were proposed to be managed and addressed through the legal framework referred to above, including make good agreements, and associated submissions.

(iv) The First Respondent expressed concern as to how a landowner could prove a loss to their bores *"with certainty"* and the prospect of them having to undertake *"very expensive litigation"* should the Applicant not accept it had caused an impact. The First Respondent failed to consider how such matters were proposed to be managed and addressed through the legal framework applicable to the Stage 3 Project.

(v) The First Respondent failed to consider the basis of and reasons given for the groundwater advice from the IESC in December 2016 and associated evidence and submissions.

(vi) The First Respondent failed to consider additional groundwater material that was considered by the IESC in December 2016 and associated submissions.

(vii) The First Respondent failed to consider 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 and associated submissions.

(viii) The reasons for the Decisions are inadequate in identifying the First Respondent's consideration of and conclusions with respect to the above matters.

(ix) The Applicant also relies upon paragraphs 1 to 14 above to the extent that those paragraphs also deal with a failure to consider and a failure to provide adequate reasons.

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 by a Member other than the First Respondent 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:

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
Solicitor's business address:	Level 28, Riparian Plaza, 71 Eagle Street Brisbane Qld 4000
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Telephone:	(07) 3292 7000
Fax:	(07) 3221 9669
E-mail address:	mgeritz@claytonutz.com

Signed: _____

Description: Solicitors for the Applicant

Dated: ~~15 June~~ 28 November 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~~ C/- Gerard Sammon GR Cooper Crown Solicitor 11th Floor, State Law Building 50 Ann Street Brisbane, QLD, 4000
of:	**Oakey Coal Action Alliance Inc.** C/- Environmental Defenders Office (Qld) Inc 8/205 Montague Rd West End, QLD, 4101
of:	**Chief Executive, Department of Environment and Heritage Protection** C/- Peter Dwyer GR Cooper Crown Solicitor 11th Floor, State Law Building 50 Ann Street Brisbane, QLD, 4000