SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BS6002/17

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**

SECOND RESPONDENT'S OUTLINE OF ARGUMENT

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INTRODUCTION

Brief background

1. The Applicant, New Acland Coal Pty Ltd (**NAC**), seeks judicial review of decisions of a member of the Land Court acting in an administrative capacity to recommend:

   (a) under s 269 of the *Mineral Resources Act 1989* (**MRA**) that two applications for mining leases be rejected; and

   (b) under s 190 of the *Environmental Protection Act 1994* (**EPA**) that an application for an amendment to an existing environmental authority be refused,

   for Stage 3 of the New Acland Coal Mine (**the decisions**).

2. The decisions followed an enormous hearing before the learned Member, the longest in the over 120 year history of the Land Court.[1] The hearing took almost 100 sitting days, during which almost 2,000 exhibits containing many tens of thousands of pages of material, and well in excess of 2,000 pages of submissions were received by the court.[2] 28 expert and 38 lay witnesses gave evidence across multiple topics.[3]

3. NAC's original Application for review contained 14 grounds but it now seeks leave to file an Amended Application of 12 grounds (though numbered 1-15).

4. The Second Respondent (**OCAA**) does not object to NAC being granted leave to file the Amended Application and this outline of argument is based on the amended grounds.

Structure of OCAA's outline

5. The Amended Application presents the grounds of review in an order that is difficult to follow and is not reflected in the structure of NAC's outline of argument.

6. Further, many of NAC's grounds mix together traditional grounds of review in unconventional ways that are inconsistent with orthodox principles of administrative law.

7. Navigating the confusion and breadth of issues raised by NAC requires careful appreciation of the boundaries of judicial review.

8. Three basic components for resolving the issues raised by the review are:

   (a) the statutory framework within which the decisions were made;

   (b) a proper understanding of the relevant principles of judicial review; and

   (c) a careful consideration of *the whole of* the learned Member's reasons and the context of those reasons.

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[1] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP (No. 4)* [2017] QLC 24 (**reasons**) at [36].
[2] Reasons at [19].
[3] Reasons at [103]-[112].

9. OCAA's outline begins with these three fundamental components for resolving the issues raised by the review before considering the grounds of review grouped in a similar way to NAC's outline.

Glossary

10. The terms and acronyms used in this outline of argument are consistent with the terms and acronyms contained within the glossary of terms found in Appendix A, pp 406-422, of the learned Member's reasons.

STATUTORY FRAMEWORK

General principles

11. In the context of construing the multiple pieces of legislation relevant to the learned Member's decisions, a number of general principles are relevant:

    (a) The task of statutory construction must begin and end with a consideration of the text of the Acts considered in context.[4]

    (b) The primary object is to construe the relevant provisions so they are consistent with the language and purpose of all of the provisions read in the context of the whole Acts.[5]

    (c) An interpretation that would best achieve the objects of the Acts is to be preferred.[6]

    (d) The Acts should be construed on the *prima facie* basis that they are intended to give effect to harmonious goals.[7]

    (e) The MRA and EPA should be read so as to achieve a harmonious operation for both.[8]

    (f) Reconciling conflicting provisions will often require the Court to determine the hierarchy of the provisions.[9]

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[4] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ; *Thiess v Collector of Customs & Ors* (2014) 250 CLR 664 at 671-672 [22]-[23] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.
[5] *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.
[6] *Acts Interpretation Act* 1954 (Qld), s 14A; *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.
[7] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390, [93] per McHugh, Gummow, Kirby and Hayne JJ.
[8] *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [11] (Douglas J) citing *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 146 at [49].
[9] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390, [93] per McHugh, Gummow, Kirby and Hayne JJ.

(g) In considering whether an act done in breach of a statutory provision is invalid, the question is whether it was a purpose of the legislation that an act done in breach of the provision should be invalid[10] but that process is one of proper interpretation, not of convenience.[11]

(h) Multiple approval requirements stand together and operate cumulatively where each Act has a distinct purpose, different from the other.[12]

12. The following analysis applies these general principles.

Mineral Resources Act 1989 (Qld)[13]

13. The objects of the MRA are stated in s 2 of the Act:

> **2 Objectives of Act**
>
> The principal objectives of this Act are to—
>
> (a) encourage and facilitate prospecting and exploring for and mining of minerals;
>
> (b) enhance knowledge of the mineral resources of the State;
>
> (c) minimise land use conflict with respect to prospecting, exploring and mining;
>
> (d) encourage environmental responsibility in prospecting, exploring and mining;
>
> (e) ensure an appropriate financial return to the State from mining;
>
> (f) provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals;
>
> (g) encourage responsible land care management in prospecting, exploring and mining.

14. As relevant here, the process of obtaining a mining lease is set out in Ch 6 of the Act.

15. Section 235 provides the general entitlements of a holder of a mining lease, including to enter land the subject of the lease and carry out mining there. Until 6 December 2016, s 235(3) provided:

> (3) Where any Act provides that water may be diverted or appropriated only under authority granted under that Act, the holder of a mining lease shall not divert or appropriate water unless the holder holds that authority.

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[10] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390, [93] per McHugh, Gummow, Kirby and Hayne JJ.
[11] *Queensland Coal Pty Ltd v Shaw* [2002] 2 Qd R 288 at 292 [15] per Thomas JA (with whom Davies JA and Cullinane J agreed).
[12] *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 2 NSWLR 681 at 686 per Lord Wilberforce for the Privy Council; *South Australia v Tanner* (1988-89) 161 CLR 166 at 170-171 per Wilson, Dawson, Toohey and Gaudron JJ.
[13] OCAA's submissions use the version of the MRA in force at the time of the learned Member's decision on 31 May 2017. The closest compilation is of the MRA in force at 30 March 2017.

16. Section 235(3) of the MRA was omitted from the Act on 6 December 2016 as part of reforms to water laws.[14] The learned Member addressed the omission of s 235(3) of the MRA and other water law reforms in his reasons[15] and found that:[16]

> … it is necessary, for a proper consideration of MRA objections and EPA objections when water issues are raised as grounds of objection, for [the Land Court] to fully consider those issues under the MRA and EPA objection process.

17. Returning to the structure of Ch 6 of the MRA, s 245 of the MRA provides for mining applications to be made in the approved form.

18. Section 248 of the MRA requires an applicant for a mining lease to obtain the consent or views of holders of mining tenements (such as exploration permits) over the land the subject of the application but not affected landholders or the public generally.

19. Section 252 provides for the chief executive administering the MRA to issue a mining lease notice which, amongst other things, states the last objection day for lodging objections to the mining lease.

20. Section 252A provides for publication of the mining lease notice in a newspaper, etc, and notification of adjoining landholders and other who may be affected by the grant to the mining lease.

21. Section 260 allows any person to lodge an objection to the proposed mining lease stating the grounds of the objection and the facts and circumstances relied on by the objector.

22. Section 265 provides, that where there is a properly made objection to an application for a mining lease under the MRA (or objection to a corresponding application for an environmental authority under the EPA), the application and any objection are referred to the Land Court.

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[14] By the commencement of relevant sections of the *Water Reform and Other Legislation Amendment Act 2014* as amended by the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Act 2016* and the *Water Legislation Amendment Act 2016*.
[15] Reasons at [163]-[172].
[16] Reasons at [172].

23. Section 268 provides for the hearing of the objections by the Land Court. Section 269(1)-(3) provides:

> **268 Hearing of application for grant of mining lease**
>
> (1) On the date fixed for the hearing of the application for the grant of the mining lease and objections thereto, the Land Court shall hear the application and objections thereto and all other matters that pursuant to this part are to be heard, considered or determined by the Land Court in respect of that application at the one hearing of the Land Court.
>
> (2) At a hearing pursuant to subsection (1) the Land Court shall take such evidence, shall hear such persons and inform itself in such manner as it considers appropriate in order to determine the relative merits of the application, objections and other matters and shall not be bound by any rule or practice as to evidence.
>
> (3) The Land Court shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application.

24. The Court of Appeal has held s 268(3) qualifies s 263(2) and, therefore, the Land Court is precluded from entertaining an objection or submission by an objector to an application or any ground thereof, or any evidence in relation to a ground, where there has not been an objection duly lodged in respect of a matter which an objector subsequently wishes to agitate.[17] However, where an objection is properly made, its particulars may be changed and evidence in relation to it may be presented after the last objection day.[18]

25. Section 269(1)-(3) of the MRA provides for the Land Court to make a recommendation to the Minister after considering the objections:

> **269 Land Court's recommendation on hearing**
>
> (1) Upon the hearing by the Land Court under this part of all matters in respect of an application for the grant of a mining lease, the Land Court shall forward to the Minister—
>
> (a) any objections lodged in relation thereto; and
>
> (b) the Land Court's recommendation.
>
> ...
>
> (2) For subsection (1)(b), the Land Court's recommendation must consist of—
>
> (a) a recommendation to the Minister that the application be granted or rejected in whole or in part; and
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> ...
>
> (3) A recommendation may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers appropriate, including a condition that mining shall not be carried on above a specified depth below specified surface area of the land.

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[17] See *ACI Operations P/L v Quandamooka Lands Council Aboriginal Corp* [2002] 1 Qd R 347 at [6]-[7] per Davies JA and [57]-[62] per Mullins J (with whom Mackenzie J agreed); and *Lee v Kokstad Mining Pty Ltd* [2008] 1 Qd R 68 at [9] per Jerrard JA and [47] per Wilson J with whom Douglas J agreed. These decisions involved the Land and Resources Tribunal (**LRT**), from which the Land Court inherited its jurisdiction under the MRA and EPA in 2007 after the LRT was disbanded.

[18] See *Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors* [2007] QCA 338; (2007) 155 LGERA 322 at [49]-[51] per McMurdo P (with whom Holmes JA and Mackenzie J agreed).

26. Section 269(4) of the MRA provides the criteria for the Land Court's decision under s 269(1)-(3):

> (4) The Land Court, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, shall take into account and consider whether—
>
> (a) the provisions of this Act have been complied with; and
>
> (b) the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate; and
>
> (c) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and
>
> (d) the land and the surface area of the land in respect of which the mining lease is sought is of an appropriate size and shape in relation to—
>
> (i) the matters mentioned in paragraphs (b) and (c); and
>
> (ii) the type and location of the activities proposed to be carried out under the lease and their likely impact on the surface of the land; and
>
> (e) the term sought is appropriate; and
>
> (f) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and
>
> (g) the past performance of the applicant has been satisfactory; and
>
> (h) any disadvantage may result to the rights of—
>
> (i) holders of existing exploration permits or mineral development licences; or
>
> (ii) existing applicants for exploration permits or mineral development licences; and
>
> (i) the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management; and
>
> (j) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof; and
>
> (k) the public right and interest will be prejudiced; and
>
> (l) any good reason has been shown for a refusal to grant the mining lease; and
>
> (m) taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use.

27. The function of the Land Court under ss 268-269 of the MRA is similar to the function of the Mining Wardens Court the subject of *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 (***Sinclair***). Barwick CJ emphasised in *Sinclair*, in relation to an objections hearing for a mining lease application, that the hearing is not a mere formality but, rather, has an important function to examine the matters which would justify the objections raised to the grant of the mining lease.[19]

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[19] *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 481.

28. In *Armstrong v Brown* [2004] 2 Qd. R. 345 (***Armstrong***) at 348 [15], McMurdo J (with whom McPherson and Jerrard JJA agreed) observed that *Sinclair* still has application under the MRA and that a recommendation should not be made for the grant of a mining lease under the MRA "unless the circumstances warrant that recommendation, having regard to the purposes for which the Crown should give a right to mine its minerals."

29. In *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338; 155 LGERA 322 (***QCC***) at [53], McMurdo P (with whom Holmes JA and Mackenzie J agreed) emphasised that, irrespective of the content of any particular objection, the task of the (then) Land and Resources Tribunal[20] hearing objections under both the MRA and EPA was to consider all relevant matters and to decide what recommendation it should make to the Ministers. In doing so, her Honour referred to both *Sinclair* and *Armstrong*.[21]

30. In *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107 (***BHP Billiton***) Phillip McMurdo J stated in relation to the nature of the considerations for the Land Court in hearing objections to a mining lease under the MRA (footnotes in original):

> [42] But in referrals to the Land Court of the present kind, the scope of the court's factual inquiry is not defined by the parties. Their respective arguments and the evidence which they present are to be considered. But the Land Court must have regard to considerations which extend beyond the respective interests of the applicant and the objectors. In particular, it must consider the public interest.
>
> [43] In *Sinclair v Mining Warden at Maryborough*,[22] the High Court held that a writ of mandamus should be granted and directed to a mining warden who had erred in a case of the present kind. That was an application for a mining lease for which the appellant was an objector. One error of the warden was found to be in his failure to consider whether the granting of the application would prejudicially affect the public interest. Barwick CJ said that the warden was bound to consider that matter "irrespective of the interests of the objectors or their number and, indeed, irrespective of the existence of an objection on [the public interest] ground".[23]

31. While his Honour was not considering objections to mining applications under the EPA in that case, the same propositions are equally applicable to the EPA.

32. The language of the criteria in s 269(4) indicates a clear legislative intent to permit the Land Court a very wide scope and discretion to investigate proposed mining leases as appropriate to the facts and circumstances of each application and any objections made by the public. Of particularly wide ambit:

    (a) The mandatory requirement in s 269(4)(g) to consider whether "the past performance of the applicant has been satisfactory" is not limited to the applicant's criminal history or any enforcement action taken by a regulator and may include consideration of any "past performance of the applicant" such as its conduct in operating an existing mine. To limit this criterion to only considering an applicant's criminal history would

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[20] The LRT's jurisdiction to hear objections to mining applications under the MRA and EPA was transferred to the Land Court in 2007.
[21] *QCC v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338; 155 LGERA 322 at [53].
[22] (1975) 132 CLR 473.
[23] Ibid 480.

be to add words that are not found in the Act and not required by the scope or purpose of the statute.

(b) The mandatory requirement in s 269(4)(i) to consider whether "the operations … will conform with sound land use management" creates a wide discretionary criterion that logically allows consideration of the sustainability of the proposed operations and its effect on current and future land use management. Issues such as land rehabilitation and the effects of the proposed operations on land use management on neighbouring properties are also logically within the scope that may be considered under it. Given the importance of groundwater for agriculture there is no reason why the impacts of mining operations on the availability and quality of groundwater on surrounding farms could not be considered under this criterion in an appropriate case.

(c) The mandatory requirement in s 269(4)(j) to consider whether "there will be any adverse environmental impact caused by [the proposed mining] operations and, if so, the extent thereof" is limited only by the existence of a causal connection between the mining operations and the adverse environmental impact.[24] "Environment" is defined very widely in the MRA and includes "ecosystems and their constituent parts, including people and communities … all natural and physical resources … [and] economic, aesthetic and cultural conditions …".[25] The type of adverse environmental impact that may be considered under s 269(4)(j) is not limited and may logically extend to matters such as pollution, land degradation, noise, dust, and impacts to biodiversity or groundwater. The adverse environmental impact is not limited to the land the subject of the mining operations[26] and may extend to adverse environmental impacts on neighbouring land. There is no reason why the impacts of mining operations on the availability and quality of groundwater on surrounding farms could not be considered under this criterion.

(d) The mandatory requirement in s 269(4)(k) to consider whether "the public right and interest will be prejudiced" involves a discretionary balancing exercise of the widest import confined only so far as the subject matter and the scope and purpose of the statute may enable.[27] The benefits of a proposed mine in creating jobs and generating

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[24] e.g. s 269(4)(j) does not extend when assessing an application for a mining lease for a coal mine to considering greenhouse gas emissions contributing to climate change from a third party burning the coal from the mine: *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [23]-[33] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).

[25] Sch 2 (Dictionary) of the MRA states "***environment*** has the meaning given by the Environmental Protection Act" and s 8 of the EPA states "***Environment*** includes—

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

[26] Contrast the language of s 269(4)(m).

[27] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 (MacDonald P) at [43] citing *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-5 (Dixon J); *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [55]. Cf. *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 487 (Taylor J) and *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [8]-[12] (Tamberlin J).

royalties for the State are relevant to consider under this criterion, as are negative consequences on the environment and community conflict generated by a mining operation. The burning of coal by third parties contributing to climate change has been held to be relevant under this criterion of the MRA when assessing a coal mine even though such a matter is not relevant under s 269(4)(j).[28]

(e) The mandatory requirement in s 269(4)(l) to consider whether "any good reason has been shown for a refusal to grant the mining lease" is extremely wide and limited only by the subject matter, scope and purposes of the Act.[29] Clearly, there must be a *good* reason, as opposed to a reason that is extraneous to the purposes of the Act.[30] The question of whether good reason has been shown must depend on all the circumstances of the particular case.[31]

33. The wide scope of inquiry under s 269(4) of the MRA also needs to also be considered in the context of the inquiry being given to the Land Court, which is bound to exercise its jurisdiction in accordance with s 7 of the LCA. Under that section the Land Court "is not bound by the rules of evidence and may inform itself in the way it considers appropriate … without regard to legal technicalities".[32] Again, the scope of discretion granted to the Land Court is very wide.

34. Past review decisions have confirmed the wide scope of the inquiry and discretion to make recommendations under s 269 of the MRA, notably:

(a) The Land Court is free to decide the type or types of recommendations to make and this extends to making recommendations on an alternative basis.[33]

(b) The result of the Land Court's hearings under the MRA and EPA is the making of recommendations and the provision of information and a considered view to the ultimate decision makers for their further consideration.[34]

(c) Because the Land Court's recommendations had no final or determinative effect, in a judicial review challenge to such recommendations the Supreme Court should be hesitant to find invalidity in the form of expression of the recommendations.[35]

(d) The Land Court does not need to be satisfied that the grant of a mining lease and of an environmental authority met all statutory requirements or that the proposed mining activity would produce a net benefit taking all the relevant criteria into account.[36]

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[28] *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [36]-[41] (Douglas J); *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [39]-[43] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).
[29] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).
[30] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).
[31] See *Campbell v United Pacific Transport* [1966] Qd R 465, at 472 (Gibbs J) in the context of considering whether "good reason" had been shown by an applicant plaintiff for leave to proceed after six years without a step in the proceedings.
[32] This section is discussed further below, at [81]-[83].
[33] *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [14]-[15] (Douglas J).
[34] *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [14]-[15] (Douglas J).
[35] *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [14]-[15] (Douglas J).
[36] *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [18]-[24] (Douglas J).

(e) To recommend the grant of a mining lease under the MRA the Land Court must, in considering the factors under s 269(4) of the MRA, be satisfied that the circumstances warrant a recommendation having regard to the purposes for which the Crown should give a right to mine its minerals.[37]

35. Within the wide scope of the Land Court's inquiry and duty to proceed "without regard to legal technicalities", the weight to be given to considerations under s 269(4) is entirely a matter for the Land Court.[38] As Gibbs J stated in *Sinclair* regarding the similar role and considerations for the Mining Warden hearing objections to mining leases at the time:[39]

> It is of course entirely a matter for the warden to determine what weight should be attached to the various considerations in favour of and against the granting of an application and to decide for himself whether his recommendation will be that the application should be granted or that it should be rejected.

36. Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue) stated in *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47] in relation to the Land Court's considerations under the previous s 223 (now s 191) of the EPA and s 269(4) of the MRA:

> The word "consider", like expressions such as "have regard to" and "take into account", leaves it to the Land Court to decide what, if any, weight should be given to each of the matters set out in s 223.[40] The same analysis is applicable in relation to the requirement in s 269(4) of the *Mineral Resources Act* that the Land Court "shall take into account and consider" the identified matters.
>
> Accepting that the concept of "environmental harm" is of great significance in other aspects of the operation of the *Environmental Protection Act*, the relevant function of the Land Court is not qualified by any requirement about the manner in which it must consider the identified matters or about the weight to be given to any of the relevant considerations. I am unable to accept the appellant's argument that any such qualification is implied in that Act.

37. Returning to the statutory scheme, once the Land Court makes its recommendation under s 269 the mining application proceeds for final determination by the Minister administering the MRA. The principal criteria for the Minister's decision to grant a mining lease are provided by s 271:

> **271 Criteria for deciding mining lease application**
>
> In considering an application for the grant of a mining lease, the Minister must consider—
>
> (a) any Land Court recommendation for the application; and
>
> (b) the matters mentioned in section 269(4).

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[37] *Armstrong v Brown* [2004] 2 Qd R 345, 348 at [15]; *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [21] (Douglas J).

[38] Other than cases of legal unreasonableness: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J; or irrationality: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

[39] *Sinclair v Mining Warden* (1975) 132 CLR 473 at 482. Similarly, see *Rathborne v Abel* (1964) 38 ALJR 293 (HCA) at 295 per Barwick CJ and 301 per Kitto J; and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 per Mason J.

[40] See *Rathborne v Abel* (1964) 38 ALJR 293 at 295, 301; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

38. Section 271A of the MRA provides for the final decision in the application process whereby the Minister decides to grant or reject the application:[41]

> **271A Deciding mining lease application**
>
> (1) The Minister may, after considering the criteria under section 271 for a mining lease application, decide to—
>
> (a) grant the applicant a mining lease for the whole or part of the land in the proposed lease area; or
>
> (b) reject the application; or
>
> (c) refer the matter to the Land Court to conduct a hearing or further hearing on the application generally or on specific matters raised by the Minister.

39. The Land Appeal Court in *Dunn v Burtenshaw* (2010) 31 QLCR 156; [2010] QLAC 5 examined the history of the Land Court's role under s 269 and similar functions exercised by Mining Wardens in Western Australia. The Land Appeal Court noted in relation to the MRA in force in 2010: [42]

(a) the role of the Land Court pursuant to s 269 of the MRA is to make a recommendation to the Minister;

(b) the Land Court's recommendation in no way ultimately, or even in an interim way, determined the rights or entitlements of an applicant for a mining lease; and

(c) notwithstanding the Land Court's recommendation, the Minister remained entitled to either recommend to the Governor-in-Council that a mining lease be granted or to reject the application.

40. The third of these propositions has changed slightly due to amendment of the MRA[43] in 2012 to allow the Minister rather than the Governor-in-Council to grant a mining lease under ss 234 and 271-271A. The third proposition is now: notwithstanding the Land Court's recommendation, the Minister remains entitled to either grant or reject the application for a mining lease.

41. These propositions are equally applicable to the Land Court's role under the EPA to make recommendations on environmental authorities for mining to the administering authority.

Environmental Protection Act 1994 (Qld)[44]

Relevant amendments

42. As a preliminary issue, we note that the EPA has been amended substantially on numerous occasions since its enactment, several of which are relevant to construing the version in

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[41] Note MRA, s 234, provides power to the Minister to grant a mining lease.
[42] At [18]-[27] and [46] per Jones J, Cochrane and Isdale MM. See also *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors (No. 2)* [2016] QLC 22 at [7] (MacDonald P).
[43] By the *Mines Legislation (Streamlining) Amendment Act 2012*, which relevantly commenced on 19 October 2012.
[44] OCAA's submissions use the version of the EPA in force at the time of the learned Member's decision on 31 May 2017. The closest compilation is of the EPA in force at 6 December 2017.

force at the time relevant to the learned Member's decision and for considering earlier case law regarding the Act.

43. The most significant amendments to be aware of in this regard are that the EPA was amended on 31 March 2013 by the commencement of the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012* (**Greentape Act**). The most relevant changes for considering previous case law include:

    (a) renumbering of relevant chapters and sections, including Ch 5 (Environmental Authorities and Environmentally Relevant Activities) and renumbering the section that the Land Court's objection decision was made under from ss 222 and 223 (before the Greentape Act) to ss 190 and 191 (after the Greentape Act);

    (b) amending the standard criteria in Sch 4 (Dictionary) to include the principles of environmental policy as set out in the Intergovernmental Agreement on the Environment, including intergenerational equity (this principle was not specifically listed before the Greentape Act amendments); and

    (c) changing the final decision-maker for an environmental authority, which the Land Court makes its recommendation to, from the Minister administering the EPA to the Administering Authority.[45]

44. NAC applied to amend its existing environmental authority for the New Acland Coal Mine (covering stages 1 and 2) to allow for Stage 3 on 13 April 2015,[46] therefore the EPA in force after the Greentape Act applied to the application.

45. In considering earlier case law on the EPA, the *Xstrata*[47] and the *Hancock*[48] cases considered the EPA in force before the Greentape Act commenced.[49]

46. Only the decisions involving the Carmichael Coal mine consider the EPA in force after the Greentape Act commenced, including the *Adani* decision of the Land Court[50] and the Supreme Court's decision in subsequent judicial review proceedings.[51]

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[45] Sch 4 (Dictionary) of the EPA defines "administering authority", relevantly, as "the chief executive". The "chief executive" is the chief executive (i.e. Director-General) of the public sector entity administering the EPA, the Department of Environment and Heritage Protection: *Acts Interpretation Act 1954* (Qld), s 33(11). Section 518 of the EPA allows delegation by the administering authority, relevantly to "an authorized person or public service officer".

[46] Reasons at [67].

[47] *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-op Ltd & Ors* (2012) 33 QLCR 79; [2012] QLC 13 (***Xstrata***) (MacDonald P).

[48] *Hancock Coal Pty Ltd v Kelly & Ors and DEHP (No 4)* (2014) 35 QLCR 56; [2014] QLC 12 (Smith M) (***Hancock***); *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 (Douglas J); *Coast and Country Association of Queensland Inc v Smith & Ors* [2016] QCA 242 (Margaret McMurdo P and Fraser and Morrison JJA).

[49] While *Hancock* was decided after the Greentape Act commenced, it considered the pre-Greentape version of the EPA due to transitional provisions for applications commenced prior to the amendments: see *Hancock* at [61].

[50] *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 (***Adani***) (MacDonald P)

[51] *Land Services of Coast and Country Inc v Chief Executive, DEHP & Anor* [2016] QSC 272 (Bond J).

47. Further amendments to the EPA relevant to the learned Member's decision were amendments made to the Act as part of reforms to the *Water Act* that commenced on 6 December 2016.[52]

48. However, these amendments have little effect in this case due to transitional provisions. As NAC's EA application was made before 6 December 2016:

    (a) NAC's EA application must be decided as if the amending Act had not commenced;[53] and

    (b) NAC must apply for an associated water licence under Ch 9, Pt 8 of the *Water Act*, thereby allowing for objections by the public and appeal to the Land Court in relation to the associated water licence.

49. Were NAC to apply after 6 December 2016 for a site-specific EA for a mine involving underground water rights:

    (a) the application under the EPA would require additional environmental impact material in relation to underground water;[54] and

    (b) NAC would not need to apply for an associated water license under the *Water Act* as underground water issues will be determined as part of the MRA and EPA process.

50. The learned Member addressed the amendments to the MRA and the EPA due to the *Water Act* reforms in his reasons[55] and found that:[56]

> [172] It remains my view that, despite the new processes under the Water Act and in particular the transitional provisions, it is necessary, for a proper consideration of MRA objections and EPA objections when water issues are raised as grounds of objection, for [the Land Court] to fully consider those issues under the MRA and EPA objection process.

51. Unless otherwise noted, the following discussion of the EPA reflects the version in force at the time relevant to the learned Member's decision.

Relevant structure, scope and purpose of the EPA

52. Section 3 states the objects of the EPA:

> **3 Object**
>
> The object of this Act is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (***ecologically sustainable development***).

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[52] By the commencement of relevant sections of the *Water Reform and Other Legislation Amendment Act 2014* as amended by the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Act 2016* and the *Water Legislation Amendment Act 2016*.
[53] EPA (as in force after 6 December 2016), s 748.
[54] EPA (as in force after 6 December 2016), ss 126A and 227AA.
[55] Reasons at [163]-[172].
[56] Reasons at [172].

53. To achieve the objects of the EPA stated in s 3, the body of the Act then creates a toolbox of mechanisms to meet the objects of the Act. Section 4 of the EPA describes how the object stated in s 3 is to be "achieved" and relevantly provides that it is achieved through an "integrated management program that is consistent with ecologically sustainable development" under the Act. The program is cyclical and involves four different "phases".[57]

54. Section 5 imposes an obligation on any person performing a function or exercising a power under the Act:[58]

> **5 Obligations of persons to achieve object of Act**
>
> If, under this Act, a function or power is conferred on a person, the person must perform the function or exercise the power in the way that best achieves the object of this Act.

55. The toolbox created under the EPA for achieving its object include, relevantly, licensing systems for a range of activities that may harm the environment, of which mining is one. The process of applying for an environmental authority for mining activities is now contained in Ch 5 of the EPA.

56. Ch 5 provides different processes for different types of applications of which "site specific applications" are the most rigorous.[59]

57. NAC applied under s 224 to amend its existing environmental authority for the New Acland Mine on 13 April 2015.[60]

58. The Administering Authority decided under s 228 that the application involved a major amendment,[61] therefore, the application Parts 3 to 5 of Ch 5 applied to the amendment application as if it were a site-specific application.[62]

59. This meant that the application was required to be publicly notified under s 152 of the EPA and any person was able to make a submission under s 160 of the Act.

60. Section 172 provides for the administering authority to make a preliminary decision on whether to grant an environmental authority for a site-specific application:

> **172 Deciding site-specific application**
>
> (1) This section applies for a site-specific application.
>
> (2) The administering authority must decide that the application—
>
> (a) be approved subject to conditions; or
>
> (b) be refused.

---

[57] cf. *Land Services of Coast and Country Inc v Chief Executive, DEHP & Anor* [2016] QSC 272 at [18] (Bond J).
[58] Bond J discussed the operation of s 5 in *Land Services of Coast and Country Inc v Chief Executive, DEHP & Anor* [2016] QSC 272 at [10] and [15]-[21].
[59] EPA, s 112.
[60] Reasons at [67].
[61] Reasons at [70].
[62] EPA, s 232. Note also ss 234, 235 and 238.

61. The criteria for a preliminary decision on a site-specific application (as well as a variation application) are stated in s 176:

> **176 Criteria for decision—variation or site-specific application**
>
> (1) This section applies for a variation or site-specific application.
>
> (2) In deciding the application, the administering authority must—
>
> (a) comply with any relevant regulatory requirement; and
>
> (b) subject to paragraph (a), have regard to each of the following—
>
> (i) the application;
>
> (ii) any standard conditions for the relevant activity or authority;
>
> (iii) any response given for an information request;
>
> (iv) the standard criteria.
>
> (3) Despite subsection (2)(b), if the application is a variation application, the matters mentioned in subsection (2)(b) may only be considered to the extent they relate to the subject of the condition to be changed.

62. The "standard criteria" are defined in Schedule 3 (Dictionary) to the EPA:

> ***standard criteria*** means—
>
> (a) the following principles of environmental policy as set out in the Intergovernmental Agreement on the Environment—
>
> (i) the precautionary principle;
>
> (ii) intergenerational equity;
>
> (iii) conservation of biological diversity and ecological integrity; and
>
> (b) any Commonwealth or State government plans, standards, agreements or requirements about environmental protection or ecologically sustainable development; and
>
> (d) any relevant environmental impact study, assessment or report; and
>
> (e) the character, resilience and values of the receiving environment; and
>
> (f) all submissions made by the applicant and submitters; and
>
> (g) the best practice environmental management for activities under any relevant instrument, or proposed instrument, as follows—
>
> (i) an environmental authority;
>
> (ii) a transitional environmental program;
>
> (iii) an environmental protection order;

> (iv) a disposal permit;
>
> (v) a development approval; and
>
> (h) the financial implications of the requirements under an instrument, or proposed instrument, mentioned in paragraph (g) as they would relate to the type of activity or industry carried out, or proposed to be carried out, under the instrument; and
>
> (i) the public interest; and
>
> (j) any relevant site management plan; and
>
> (k) any relevant integrated environmental management system or proposed integrated environmental management system; and
>
> (l) any other matter prescribed under a regulation.

63. The principles of environmental policy referred to are defined in the *Intergovernmental Agreement on the Environment* of 1992 (**IGAE**)[63] as follows:

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

64. Following the administering authority's decision to grant a draft environmental authority, a person who made a submission about the application may give a notice that its submission be treated as an objection under s 182. If that occurs, as it did here, the application and the objection are referred to the Land Court by the administering authority under s 185 to make an objection decision.

65. Section 186 lists the parties to the objection decision hearing to include the administering authority, the applicant and objectors.

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[63] The definition of the IGAE in the EPA notes that "A copy of the Intergovernmental Agreement on the Environment is in the *National Environment Protection Council (Queensland) Act 1994*, schedule."

66. Section 188 provides for the objection decision hearing to be linked to any objections hearing under s 268 of the MRA:

> **188 Objections decision hearing**
>
> (1) The Land Court may, of its own initiative, make orders or directions it considers appropriate for a hearing for the objections decision (the ***objections decision hearing***).
>
> (2) However, the Land Court must make an order or direction that the objections decision hearing happen at the same time as a hearing for an application for the grant of a mining lease and any objections to the grant under the Mineral Resources Act, section 268 for the relevant mining tenure.

67. The nature of the Land Court's objection decision is stated in s 190:

> **190 Nature of objections decision**
>
> (1) The objections decision for the application must be a recommendation to the administering authority that—
>
> (a) if a draft environmental authority was given for the application—
>
> (i) the application be approved on the basis of the draft environmental authority for the application; or
>
> (ii) the application be approved, but on stated conditions that are different to the conditions in the draft environmental authority; or
>
> (iii) the application be refused; or
>
> (b) if a draft environmental authority was not given for the application—
>
> (i) the application be approved subject to conditions; or
>
> (ii) the application be refused.
>
> (2) However, if a relevant mining lease is, or is included in, a coordinated project, any stated conditions under subsection (1)(a)(ii) or (b)(i)—
>
> (a) must include the Coordinator-General's conditions; and
>
> (b) can not be inconsistent with a Coordinator-General's condition.

68. The matters to be considered by the Land Court in making the objection decision are listed in s 191:

> **191 Matters to be considered for objections decision**
>
> In making the objections decision for the application, the Land Court must consider the following—
>
> (a) the application;
>
> (b) any response given for an information request;
>
> (c) any standard conditions for the relevant activity or authority;
>
> (d) any draft environmental authority for the application;
>
> (e) any objection notice for the application;
>
> (f) any relevant regulatory requirement;
>
> (g) the standard criteria;
>
> (h) the status of any application under the Mineral Resources Act for each relevant mining tenure.

69. The obligation to consider "any relevant regulatory requirement" in s 191(f) includes requirements imposed by the *Environmental Protection Regulation 2008* and other statutory instruments created under it including the *Environmental Protection (Noise) Policy 2008*. These requirements are considered further below in relation to NAC's grounds regarding noise.

70. The weight to be given to considerations under s 191 is entirely a matter for the Land Court.[64] As noted earlier in relation to s 269(4) of the MRA, Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue) stated in *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47] in relation to the Land Court's considerations under the previous s 223 (now s 191[65]) of the EPA and s 269(4) of the MRA:

> The word "consider", like expressions such as "have regard to" and "take into account", leaves it to the Land Court to decide what, if any, weight should be given to each of the matters set out in [s 191].[66] The same analysis is applicable in relation to the requirement in s 269(4) of the *Mineral Resources Act* that the Land Court "shall take into account and consider" the identified matters.
>
> Accepting that the concept of "environmental harm" is of great significance in other aspects of the operation of the *Environmental Protection Act*, the relevant function of the Land Court is not qualified by any requirement about the manner in which it must consider the identified matters or about the weight to be given to any of the relevant considerations. I am unable to accept the appellant's argument that any such qualification is implied in that Act.

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[64] Other than cases of legal unreasonableness: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J; or legal irrationality: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (discussed at [171]-[185] below).

[65] To reflect the current legislation, s 191 has been substituted for the reference to s 223 as denoted by square brackets in the extracted quoted.

[66] See *Rathborne v Abel* (1964) 38 ALJR 293 at 295, 301; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

71. Following the objection decision, notice of the decision is given to the MRA Minister and the State Development Minister,[67] and the application returns to the administering authority to make a final decision whether to grant the environmental authority and on what conditions under s 194. Section 194 provides:

> **194 Final decision on application**
>
> (1) This section applies if—
>
> (a) the administering authority referred the application to the Land Court under section 185 and an objections decision is made about the application; or
>
> (b) the administering authority referred the application to the Land Court under section 185 because of an objection notice but, before an objections decision is made about the application, all objection notices for the application are withdrawn.
>
> (2) The administering authority must decide—
>
> (a) if a draft environmental authority was given for the application—
>
> (i) that the application be approved on the basis of the draft environmental authority for the application; or
>
> (ii) that the application be approved, but on stated conditions that are different to the conditions in the draft environmental authority; or
>
> (iii) that the application be refused; or
>
> (b) if a draft environmental authority was not given for the application—
>
> (i) that the application be approved subject to conditions; or
>
> (ii) that the application be refused.
>
> (3) The administering authority must make a final decision on the application—
>
> (a) if the MRA Minister or State Development Minister is given a copy of the objections decision under section 192—within 10 business days after the end of the longer period within which either Minister must give advice relating to the application under section 193; or
>
> (b) otherwise—within 10 business days after receipt by the authority of notice under section 182(4) that the last remaining objection notice for the application is withdrawn.

[67] EPA, s 192.

> (4) In making the decision, the administering authority must—
>
> (a) have regard to—
>
> (i) the objections decision, if any; and
>
> (ii) all advice, if any, given by the MRA Minister or the State Development Minister to the administering authority under section 193; and
>
> (iii) if a draft environmental authority was given for the application—the draft environmental authority; and
>
> (b) if a draft environmental authority was not given for the application—
>
> (i) comply with any relevant regulatory requirement; and
>
> (ii) subject to subparagraph (i), have regard to the following—
>
> (A) the application;
>
> (B) any standard conditions for the relevant activity or authority;
>
> (C) any response given for an information request;
>
> (D) the standard criteria.

72. As is the case under the MRA where the Minister makes the final decision on whether to grant a mining lease under s 270, under the EPA the language of s 194 makes it clear that the administering authority need only consider the recommendation of the Land Court about an application. The administering authority is not bound to follow any recommendation of the Land Court.

73. Bond J considered the nature of a decision under s 194 in *Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor* [2016] QSC 272. That case involved a judicial review challenge to the grant of an environmental authority for a coal mine that had been the subject of an objection hearing in the Land Court. His Honour held at [20] that s 194(4)(a) limits the mandatory considerations which a decision maker is required to take into account and the role of the administering authority under it is take into account the things that were before it in this way, rather than being either obliged or entitled to undertake additional research or investigations.

74. While not addressed by Bond J in that case, read in the context of surrounding provisions of the EPA, s 194 is not a complete statement of the matters to be considered in making the final decision on whether to grant an environmental authority following an objections hearing. For instance, ss 203 and 205 provide constraints on the power to impose conditions on the environmental authority, which would apply to any conditions imposed under s 194(2)(a)(ii).

75. Section 203 of the EPA provides general requirements for conditions on environmental authorities:

> **203 Conditions generally**
>
> (1) The administering authority may only impose a condition on an environmental authority or draft environmental authority if—
>
> (a) it considers the condition is necessary or desirable; and
>
> (b) if the authority is for an application to which section 115 applies—the condition relates to the carrying out of the relevant prescribed ERA.
>
> (2) Despite subsection (1), if a regulatory requirement requires the administering authority to impose a condition on an environmental authority or draft environmental authority, the administering authority must impose the condition.
>
> (3) Subsection (1) only applies for a proposed condition for an environmental authority given for a standard application if—
>
> (a) the application relates to a mining lease; and
>
> (b) a properly made submission was made for the application; and
>
> (c) the condition is not a standard condition for the relevant activity or authority.

76. Section 205 of the EPA constrains the condition-making power under the EPA where the Coordinator-General has stated conditions for an environmental authority under the *State Development and Public Works Organisation Act 1971* (Qld):

> **205 Conditions that must be imposed for site-specific applications**
>
> (1) This section applies for a site-specific application if—
>
> (a) the administering authority decides to approve the application subject to conditions; and
>
> (b) the application relates to a coordinated project.
>
> (2) The administering authority must impose on the environmental authority or draft environmental authority any conditions for the authority stated in the Coordinator-General's report for the EIS or IAR for the project as conditions for the relevant activity (***Coordinator-General's conditions***).
>
> (3) Any other condition imposed on the authority can not be inconsistent with a Coordinator-General's condition.

77. The relationship between the MRA, EPA and the *State Development and Public Works Organisation Act 1971* (Qld) is discussed below at [107]-[121].

Land Court of Queensland Act 2000 (Qld)

78. Underpinning the conduct of the hearing before the learned Member and his Honour's reasons for his recommendations under the MRA and EPA is the nature of the Land Court established under the *Land Court of Queensland Act 2000* (**LCA**).[68]

79. Phillip McMurdo J held in *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107 (***BHP Billiton***) that the Land Court exercised an administrative function (rather than engaging in a judicial proceeding) when considering objections to mining applications under the MRA.[69]

80. The decision in *BHP Billiton* and the limitations on the Land Court's powers in objection hearings under the MRA and EPA were central to the learned Member's first two preliminary decisions in the hearing:

    (a) The first preliminary decision refused an application by OCAA for disclosure from NAC of records related to noise, air and complaints due to lack of a power to order disclosure;[70] and

    (b) The second preliminary decision refused an application by NAC for costs of OCAA's unsuccessful application for disclosure of documents due to lack of a power to award costs.[71]

81. A further aspect of the LCA that underpinned the hearing before the learned Member is s 7, which provides:

> **7 Land Court to be guided by equity and good conscience**
>
> In the exercise of its jurisdiction, the Land Court—
>
> (a) is not bound by the rules of evidence and may inform itself in the way it considers appropriate; and
>
> (b) must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts.

82. The learned Member stated in *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9 at [1]-[3] in deciding an objection to an affidavit being filed:

> [1] The Court has a number of factors it must take into account. Perhaps the most important of those is s.7 of the *Land Court Act 2000*, which in shorthand form, says that this Court must operate with as little formality as possible, but in order to ensure that justice is done between the parties. So in other words, cut through what otherwise would be referred to as an Australian euphemism and get to the heart of the matter in a way that everybody gets to have their say and understands what is going on.

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[68] Note in considering the LCA that in 2015 amendments were made to the Act 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* (Act No 8 of 2015). OCAA does not consider the amendments are relevant here other than to understand the relevant version of the LCA and context of the *BHP Billiton* decision.

[69] Note the amendments to the LCA to address concerns arising from the *BHP Billiton* decision about judicial immunity and other matters discussed in the preceding footnote, n 68.

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

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

> [2] Now that itself can be a difficult provision to apply because it also contains provision that the Court is not to be bound by the rules of evidence, and is to follow principles of equity and good conscience. It is of course, the very rules of evidence that have to be considered in applying what relevance and weight is provided to any material, and so it simply comes to a strange situation where you receive material which may not have otherwise been received under the rules of evidence, and use those same rules of evidence to deal with that material. So even on its face, a legislative provision which appears to make the Land Court, as it has been referred to, as the "People's Court", is not as straightforward as it would otherwise seem.
>
> [3] … I am concerned that this is obviously a very large project, involving a huge sum of money, and it has been viewed by both the State and Federal Government as a project of national significance. I must take that into account. I must also take into account the rights of the objectors that they too have the right to have their day in Court and be properly heard, and to have the Court properly consider all elements of the case in a fair, open and unbiased way.

83. The learned Member considered s 7 of the LCA in the third preliminary decision in the hearing, *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1 at [40]-[55]. The learned Member stated at [47] (footnote omitted):

> [47] The overarching requirement in s 7 of the LCA for the Land Court does not empower the Land Court to dispense justice other than in accordance with basic common law principles of natural justice and procedural fairness.

84. These principles and their statutory context underpinned the conduct of the hearing and the learned Member's decisions.

Function of the Land Court hearing mining applications under the MRA and EPA

85. The express purpose and principal function of the hearing of mining objections under the MRA and the EPA by the Land Court is to provide recommendations to the MRA Minister and the Administering Authority, respectively.

86. However, that is not the only purpose of the hearing.

87. Another important public purpose is apparent from the legislative framework and context of the Land Court's role in hearing objections to mining applications under the MRA and EPA.

88. That purpose is to provide an independent, public forum where objectors can call evidence and test the mining company's evidence.

89. The function of the Land Court is similar to the function of the Mining Wardens Court the subject of *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 (***Sinclair***).[72] Barwick CJ, with whom Murphy J agreed, stated in ***Sinclair*** at 481 (emphasis added):

> It is to my mind very important that hearing of an application and of objections thereto by a mining warden take place according to law. The purpose of notifying the making of the applications, indicating the time for objections and of the date of hearing, is to afford the

[72] The Land Court inherited the jurisdiction to hear mining objections from the Land and Resources Tribunal, which in turn inherited it from the Mining Wardens Court. In *Armstrong v Brown* [2004] 2 Qd R 345 at 348 [15], McMurdo J (with whom McPherson and Jerrard JJA agreed) observed that *Sinclair* still has application under the MRA. Cf. *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338; 155 LGERA 322 at [53], McMurdo P, with whom Holmes JA and Mackenzie J agreed.

> applicant on the one hand an opportunity to justify in a public hearing the granting of a mining lease, both in point of area and in point of term, and also **to give the public an opportunity of opposition supported by evidence** to the grant of a mining lease. I cannot accept the proposition that the hearing of the application and of the objections is a mere formality: nor can I accept the submission made on behalf of the respondent company that the warden cannot be expected to examine in depth matters which would justify a recommendation that the application be refused or **which would justify the acceptance of objections raised to the grant of the mining lease**.

90. The learned Member accepted in *Hancock* the observations of Barwick CJ from *Sinclair* as applying to the Land Court hearing objections to mining applications under the MRA and EPA and stated:[73]

> [417] … I too cannot accept the proposition that the hearing of the application and of the objections is a mere formality.

91. The learned Member stated in *Hancock* that the Land Court hearing objections to mining applications under the MRA and EPA is not a "rubber stamp"[74] on government decisions supporting large mining applications, rather:[75]

> [3] … I am concerned that this is obviously a very large project, involving a huge sum of money, and it has been viewed by both the State and Federal Government as a project of national significance. I must take that into account. I must also take into account the rights of the objectors that they too have the right to have their day in Court and be properly heard, and to have the Court properly consider all elements of the case in a fair, open and unbiased way

92. Allowing members of the community who object to a mine to be heard in an independent, public forum serves important public purposes and policy objectives of promoting transparency in decision-making and, thereby, promoting public acceptance of decisions to grant approvals for mines or to reject mining applications.

93. In addition to holding a public hearing, the express obligation on the Land Court to provide reasons for its decisions under s 269(5) of the MRA and the obligation implied in s 190 of the EPA to provide reasons serve multiple purposes. The obligation to provide reasons serves a range of public interests, including in many cases they promote the acceptance of decisions once made and increasing public confidence in, and the legitimacy of, the administrative process.[76]

94. The statutory context indicating that part of the legislative intent in the MRA and EPA of providing for a hearing of objections to mining applications being heard by the Land Court is to promote public confidence in the application process includes:

    (a) The MRA Minister and the Administering Authority each have or comprise large departments administering their respective Acts with extensive expertise in regulating mining. In this context, what is the need for the Land Court's hearing and recommendation? What can the Land Court, composed of lawyers, possibly

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[73] *Hancock Coal Pty Ltd v Kelley & Ors & DEHP (No 4)* (2014) 35 QLCR 56; [2014] QLC 12 at [417].
[74] *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9 at [4]; *Hancock Coal Pty Ltd v Kelley & Ors & DEHP (No 4)* (2014) 35 QLCR 56; [2014] QLC 12 at [7] and [415].
[75] *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9 at [3].
[76] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 242 per Kirby J.

add that the specialist staff employed by the MRA Minister's department and the Administering Authority not provide?

(b) Applications for mining leases under the MRA and related site-specific applications under the EPA are publicly notified[77] and any person can make an objection/ submission,[78] so people who wish to object can make objections and their views can be taken into account by the MRA Minister and the Administering Authority in deciding applications under the MRA and EPA. In this context, why do the MRA and EPA provide for a public hearing in the Land Court?[79]

(c) Large mines such as the New Acland Mine Stage 3 invariably[80] undergo an environmental impact statement (**EIS**) under the SDPWOA, which provides for public notification[81] and allows for public submissions.[82] Again, this provides an opportunity for public input into the decision-making process. In this context, why do the MRA and EPA provide for a public hearing in the Land Court?

(d) Site-specific applications for mines that have received a draft environmental authority (**EA**) from the Administering Authority under s 172 of the EPA, such as the mine in this case had, already have the support of the expertise of the Administering Authority. The Administering Authority has already decided under s 172 that the EA should be "approved subject to conditions" rather than refused. What is the role of the Land Court given this?

95. Given this legislative context, it appears clear that part of the legislative intent in the MRA and EPA of providing for a hearing of objections to mining applications being heard by the Land Court is to promote public confidence in the application process.

96. The highly contentious circumstances of the hearing in this case epitomises the Land Court's important role in providing an independent forum for public debate over mining applications. As the learned Member has stated in previous cases, the Land Court is "not a rubber stamp"[83] on applications.

97. In summary, the dual purposes of the Land Court's decisions and recommendations on mining applications following objections hearings under the MRA and EPA can be said to be:

(a) primarily to provide recommendations to the MRA Minister and the Administering Authority; and

(b) in addition, to provide an independent, public forum for community debate about mining applications and, thereby, reduce community conflict by promoting

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[77] MRA, s 252A and EPA, ss 149-157.
[78] MRA, s 260 and EPA, ss 160-161 (submission) and s 182 (objection notice).
[79] MRA, s 268 and EPA, ss 184-192.
[80] See, e.g., the *Xstrata*, *Hancock*, and *Adani* decisions referred to earlier and *Hancock Galilee Pty Ltd v Currie & Ors* [2017] QLC 35 where an EIS under the SDPWOA was prepared for each mine. Mines which are not declared a coordinated project under the SDPWOA can undergo an EIS under Ch 3 of the EPA.
[81] SDPWOA, ss 29(1)(b) and 33.
[82] SDPWOA, s 34.
[83] *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9 at [4]; *Hancock Coal Pty Ltd v Kelley & Ors & DEHP (No 4)* (2014) 35 QLCR 56; [2014] QLC 12 at [7] and [415].

transparency, public confidence, and acceptance of the approval or rejection of mining applications.

98. These dual purposes provide a logical explanation for why the learned Member in this case went further than merely addressing the statutory criteria in s 269(4) of the MRA and s 191 of the EPA.

99. His Honour was clearly very conscious of the community division and conflict[84] that the New Acland Mine had created and he (with respect, properly) sought to reduce this conflict (or at least provide a public forum where these concerns could be raised by objectors) as much as possible in conducting the hearing and his reasons.

100. His Honour's purpose in providing the epilogue to his reasons explaining his personal background and independence can be seen as a logical and worthy attempt to build acceptance of his reasons by parts of the community, such as employees at the mine, who would no doubt be bitterly disappointed and directly affected by his recommendations to reject the mine. That is clearly the purpose of, for instance, [1871]-[1873] of the epilogue:

> [1871] In recommending previous mining matters for the grant of mining leases and environmental authorities, I have done so to the best of my ability on the basis of the evidence before me. I have done exactly the same in this case, except the outcome has been the opposite.
>
> [1872] Just as I know countless objectors have been disappointed with decisions of mine in mining matters in the past, so do I accept and realise that NAC and its workforce will be disappointed in my decision in this matter. I cannot however be influenced by the feelings of any parties.
>
> [1873] I have simply done the best that I could with the evidence I had, applying my understanding of the law, in fearless independence without fear or favour for any party, issue or cause.

101. The form of reasons adopted by the learned Member served legitimate public purposes consistent with the objects of the MRA and EPA by promoting the public acceptance of his decisions and increasing public confidence in, and the legitimacy of, the administrative process.[85]

Water Act 2000 (Qld)

102. The learned Member addressed the *Water Act 2000* (***Water Act***) and recent amendments to it and the MRA and EPA at [163]-[172] of his reasons.

103. In summary, the learned Member held that:

(a) the further approval requirements to take or interfere with groundwater under the *Water Act* did not mean that the impacts of the proposed mine on groundwater used by surrounding farms were irrelevant when considering the criteria in s 269(4) of the MRA and s 191 of the EPA; and, consequently,

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[84] e.g. reasons at [1371]-[1391] under a heading of "Community Division".

[85] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 242 per Kirby J.

(b) "it is necessary, for a proper consideration of MRA objections and EPA objections when water issues are raised as grounds of objection, for [the Land Court] to fully consider those issues under the MRA and EPA objection process."[86]

104. OCAA submits, with respect, his Honours reasons on this issue are correct.

105. NAC did not dispute the learned Member's jurisdiction to consider groundwater issues in its submissions to him during the objection hearing. However, NAC now alleges the learned Member acted outside his jurisdiction in considering the impacts of the proposed mine on groundwater used by surrounding farms.

106. OCAA makes further submissions below in response to NAC's submissions challenging the learned Member's jurisdiction to consider groundwater.

SDPWOA

107. The *State Development and Public Works Organisation Act 1971* (Qld) (**SDPWOA**) establishes a statutory office of the Coordinator-General with responsibilities for coordinating development in Queensland.[87]

108. The Coordinator-General has power in s 26 to declare a "coordinated project" (previously termed a "significant project"), which must undergo an environmental impact statement (**EIS**) under Part 2 of the SDPWOA.

109. Stage 3 of the New Acland Mine was declared a "significant project" (later termed a "coordinated project") under s 26 of the SDPWOA on 18 May 2007.[88]

110. Under the SDPWOA an EIS is publicly advertised for submissions.[89]

111. After the EIS is finalised the Coordinator-General prepares a report evaluating the EIS, which may state conditions for the project.[90]

112. The Coordinator-General's report recommended approval of the revised mine.[91]

113. The Coordinator-General's recommendation to approve the revised mine does not, itself, grant approval for the mine under the MRA or EPA, but the recommendation and conditions imposed by the Coordinator-General have consequences for the later consideration of the applications for the mine under the MRA and EPA.

114. Under the SDPWOA, where the Coordinator-General states conditions for a project in the report evaluating the EIS, the SDPWOA generally provides that those conditions prevail "to the extent of the inconsistency" with conditions imposed under other Acts.[92] Of particular relevance are ss 46 and 54D, which apply to conditions imposed under the MRA and EPA:

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[86] Reasons at [172].
[87] See SDPWOA, ss 4, 8 and 10.
[88] Reasons (Appendix C – Chronology), p 457.
[89] SDPWOA, ss 29, 33 and 34.
[90] SDPWOA, s 34D.
[91] The Coordinator-General's Report was Exhibit 16 before the Land Court.
[92] SDPWOA, ss 39(7), 46, 54E, 76P(2) and 76P(3). See also ss 47B and 47C.

46 Coordinator-General's conditions override other conditions

(1) This section applies if—

(a) the proposed mining lease is granted; and

(b) the conditions of the mining lease include a Coordinator-General's condition; and

(c) there is any inconsistency between the Coordinator-General's condition and another condition of the mining lease.

(2) The Co-ordinator-General's condition prevails to the extent of the inconsistency.

(3) In this section—

Coordinator-General's condition means—

(a) a Coordinator-General's condition that, under section 45, is taken to have been included in the proposed mining lease; or

(b) a condition that is substantially the same as a condition mentioned in paragraph (a).

…

54E Imposed conditions override conditions of other approvals

If an imposed condition for the undertaking of the project is inconsistent with a condition of an approval that applies to the undertaking of the project, the imposed condition prevails to the extent of the inconsistency.

115. The only exception stated in the SDPWOA where the Coordinator-General's conditions do not prevail over conditions imposed under other Acts is in relation to a condition for the granting of a proposed petroleum lease determined or declared under the *Native Title Act 1993* (Cth) (**NTA**) ss 36A, 38 or 42. Section 49C of the SDPWOA provides that the "Coordinator-General's condition does not apply to the extent of the inconsistency" with conditions imposed over those sections of the NTA.[93]

116. The EPA contains corresponding provisions that conditions imposed by the Coordinator-General's report under s 26 of the SDPWOA prevail to the extent of inconsistency. Section 190 of the EPA was set out above at [67] and ss 205(2) and (3) were set out above at [76].

117. The SDPWOA, MRA and EPA establish a clear hierarchy[94] of provisions whereby conditions imposed by the Coordinator-General's report under s 26 of the SDPWOA prevail over conditions imposed by other decision-makers under the MRA or EPA.

118. While conditions imposed by the Coordinator-General prevail, the Coordinator-General's recommendation on whether to approve or refuse a project is not binding.

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[93] Note also s 54W(2)(b) and 54ZC(3)(b) regarding bilateral agreements with the Commonwealth under the EPBC Act.

[94] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390, [93] per McHugh, Gummow, Kirby and Hayne JJ.

119. Despite a recommendation from the Coordinator-General to approve a project and impose conditions, the statutory language makes clear that:

(a) the Land Court retains the power under s 269(2) to recommend a mining lease application be rejected in whole or in part;

(b) the Land Court retains the power under s 190(2) of the EPA to recommend refusal of an environmental authority after considering the criteria in s 191;

(c) the Minister administering the MRA retains the power under s 271A to reject the application for a mining lease;

(d) the administering authority retains the power under s 194 to refuse an application for an environmental authority (or an application to amend an environmental authority assessed as a major amendment in accordance pursuant s 232).

120. While the Land Court, the Minister or the administering authority are constrained in imposing conditions, the weight that these decision-makers give to the Coordinator-General's recommendation and restrictions on their condition-making powers in making their respective recommendations or decisions to refuse or approve applications under ss 190 and 194 of the EPA and ss 269 and 271A of the MRA is a matter for them.

121. While the Land Court's decisions to recommend refusal or approval of applications under s 190 of the EPA and s 269 of the MRA are not fettered by the Coordinator-General's report, the extent to which the Land Court may recommend conditions is more complicated. The key issue is what conditions are "inconsistent" with conditions imposed by the Coordinator-General. That question ultimately depends on the nature of the conditions and the circumstances of each case.

122. The Land Court has considered the extent to which it may recommend conditions dealing with issues addressed by conditions in the Coordinator-General's report in a number of cases, including *Xstrata*, which the learned Member discussed at [173]-[191] of his reasons. His Honour's analysis is addressed further below in response to NAC's grounds of review.

Regional Planning Interests Act 2014 (Qld)

123. In addition to approval under the MRA and EPA, Stage 3 of the New Acland Mine requires further approval under the *Regional Planning Interests Act 2014* (Qld) (**RPIA**); however, while raised by some objections, that approval was not the subject of the hearing before the learned Member and he held:

> [1747] As regards the RPIA, it is true that NAC has not obtained an approval under that legislation. That is, however, quite a separate approvals process to those currently before the Court pursuant to the MRA and the EPA. Whilst the question of NAC's failure to date to obtain RPIA approvals may be relevant to a consideration of the urgency of the applications, it is not a factor which is appropriate for me to take into account under the current objections process.
>
> [1748] It is a matter for NAC to apply for, and comply with, the various processes under the RPIA in accordance with its own timetable.

124. The learned Member's is consistent with authority that in general it is desirable where multiple approvals are required for a project that such applications be considered on their

merits one at a time, and without undue speculation on the fate of other necessary applications.[95] These principles are discussed further below at [449]-[467].

EPBC Act

125. The Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) protects matters of national environmental significance, which, since 2013, have included a water resource impacted by coal seam gas or large coal mining development.[96]

126. When assessing a coal seam gas or large coal mining development that the Commonwealth Environment Minister believes is likely to have a significant impact on a water resource, the Commonwealth Environment Minister must obtain the advice of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (**IESC**).[97] The Minister must consider that advice in deciding whether to approve, refuse or impose conditions on the proposed action.[98]

127. OCAA submits that three propositions summarise the relevant relationship between the EPBC Act and the approval processes under the MRA and EPA:

    (a) The EPBC Act operates concurrently with State and Territory laws such as the MRA and EPA.[99]

    (b) Decisions under the EPBC Act by the Commonwealth Environment Minister or the IESC are not binding on the Land Court or other decision-makers administering the MRA or EPA.

    (c) Decisions under the EPBC Act by the Commonwealth Environment Minister or the IESC may be taken into account when assessing a proposal under the MRA or EPA.

128. Stage 3 of the New Acland Mine was approved under the EPBC Act on 18 January 2017.[100]

129. The learned Member considered the EPBC Act approval and the IESC advices relevant to Stage 3 of the mine together with the expert evidence presented at the hearing.[101]

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[95] *Walker v Noosa Shire Council* [1983] 2 Qd R 86 at 88-89 per Thomas J (whom DM Campbell and McPherson JJ agreed).
[96] EPBC Act, ss 24D and 24E.
[97] EPBC Act, s 131AB. The Committee is a statutory body established under s 505C and its functions are stated in s 505D of the Act.
[98] EPBC Act, s 136(2)(fa).
[99] In a similar way to the Commonwealth broadcasting legislation and State planning legislation considered in *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47. See also EPBC Act, s 10.
[100] Reasons at [1746].
[101] Reasons at [1631]-[1680].

CROSS-CUTTING PRINCIPLES OF ADMINISTRATIVE LAW

Five cross-cutting principles are relevant

130. Five fundamental principles of administrative law are foundational to addressing NAC's grounds of review:

(a) The limits of judicial review;

(b) The principles for interpreting the reasons of an administrative decision-maker;

(c) The principles for the sufficiency of reasons of an administrative decision-maker;

(d) The principles of relevant and irrelevant considerations; and

(e) The principles of legal rationality and reasonableness.

131. Further fundamental principles of administrative law that address specific parts of NAC's grounds of review, such as the principles of waiver of apprehended bias, are addressed in the specific parts of this outline addressing those issues. This part is intended to focus on cross-cutting issues that span multiple, disparate grounds.

The limits of judicial review

132. Martin J recently provided a succinct statement of the limited nature of judicial review in the context of dismissing an application under the *Judicial Review Act 1991* (Qld) (**JR Act**) to a decision of the Minister administering the MRA:[102]

> The JR Act does not provide the court with an unfettered capacity to review an administrative decision. An applicant must identify relevant legal error before the court can make an order under s 30 of that Act. Any application must be considered in the light of these principles:
>
> (a) The JR Act does not make the Supreme Court a merit review tribunal.[103]
>
> (b) The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case or a relitigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power.[104]
>
> (c) The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[105]

133. A common feature of NAC's grounds and arguments is that they seek to exceed these orthodox boundaries of judicial review and seek a complete re-evaluation of the merits of

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[102] *ERO Georgetown Gold Operations Pty Ltd v Cripps, Minister for Natural Resources & Mines & Anor* [2015] QSC 1 at [19] (footnotes in original).
[103] *Concord Data Solutions Pty Ltd v Director-General of Education* [1994] 1 Qd R 343 at 346–347.
[104] *Re Minister for Immigration and Multicultural Affairs ex p. Applicant S20/2002* (2003) 198 ALR 59 per Kirby J at [114].
[105] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 per Brennan J at 35-36.

the case where adverse findings were made against it. Ordinarily, findings of fact cannot be challenged on judicial review.[106]

Principles for interpreting the reasons of an administrative decision-maker

134. The learned Member's functions in making his recommendations under the s 269 of the MRA and s 190 of the EPA were administrative rather than judicial.[107]

135. Accordingly, the reasons for his decisions should be interpreted according to the well-known principles for interpreting decisions of administrative decision-makers.

136. The leading authority remains *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (***Wu Shan Liang***). In that case, which involved judicial review of three decisions by ministerial delegates concerning the refugee status of three applicants, each of the delegates provided detailed written statements of reasons. Those statements explained why, although it was accepted that each applicant feared punishment for reasons of imputed political opinion if he were returned to China, those fears were not well-founded. Each delegate indicated that he/she considered that certain matters which were relied upon by the applicants were "speculative", including that if the applicants were returned to a particular part of China they would be subjected to excessively punitive fines which would amount to persecution.

137. Below, the Full Court had set aside the decisions on the basis that the reference to "speculative" and "speculation" in the statements of reasons revealed that the delegates had not applied the "real chance" test in accordance with *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (***Chan***) at 413. This conclusion was reached notwithstanding that it acknowledged that the delegate had started and finished with a correct test, but the Full Court regarded the references to "speculative" and "speculation" as demonstrating that the delegate's assessment had shifted from one of an assessment of "real chance" to an assessment of "balance of probabilities".

138. On appeal, the following propositions were described by the plurality (Brennan CJ, Toohey, McHugh and Gummow JJ) at 272 as "well settled":

    (a) a court should not be concerned with looseness in language nor with unhappy phrasing in the reasons of an administrative decision-maker; and

    (b) the reasons for an administrative decision which is the subject of judicial review "are not to be construed minutely and finely with an eye keenly attuned to the perception of error".

139. The plurality described (at 272) these propositions as recognising:

> … the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

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[106] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 340-341 per Mason CJ.
[107] *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107 (Philip McMurdo J).

140. The plurality added that in subjecting a decision about refugee status to judicial review, the Court must "beware" of turning a review of the reasons of the decision-maker upon principles into a reconsideration of the merits of a decision.

141. It was held that the Full Court had fallen into error because of the meaning and significance it attributed to the references in the delegates' statements of reasons of the word "speculative". Rather than suggesting that the delegates had misapplied the correct test in their assessment of the future chances of persecution, the High Court concluded (at [43]) that, in the particular context, it was equally the case that the word was used to refer to "the probative force of the material before the delegate". This meaning would not indicate that the delegates had departed from the *Chan* test. The Court proceeded on the basis that this construction of the delegates' reasons was one which was equally available to that found by the Full Court. Evidently, the Court considered it unnecessary to go further and determine whether the alternative meaning was the only meaning. This ambiguity in the proper meaning of "speculative" formed a central part of the Court's view that the reasons did not disclose reviewable error in the application of the *Chan* test. The plurality observed at 278:

> There is certainly nothing which would suggest such a conclusion in sufficiently strong terms to overcome a properly "beneficial construction" of the delegates' reasons.

142. It is important to note that the High Court justified the need for a restrained approach in construing an administrator's statements of reasons by reference to the limited nature of judicial review and the need to avoid a judicial review court straying into an impermissible review of the merits of an administrative decision. This approach to construing statements of reasons has been applied in many subsequent cases involving judicial review of administrative decisions, not confined to decisions relating to refugee status.

143. NAC's construction of the learned Member's reasons fail to acknowledge or apply these well-settled principles for interpreting the reasons of an administrative decision-maker. NAC consistently seeks to interpret the learned Member's reasons minutely and finely, with an eye keenly attuned to the perception of error. Where more than one interpretation is open on the reasons, NAC consistently seeks to ignore a beneficial construction. The errors of this approach are examined in more detail below.

Principles for determining the sufficiency of reasons

144. Within the broad principle that the reasons of an administrative decision-maker are to be given a beneficial interpretation, the sufficiency of reasons is a matter of fact and degree that varies according to the circumstances and the statutory function served by the giving of reasons.

145. In *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 22 CLR 480 (***Wingfoot***) the High Court considered the adequacy of reasons given by a Medical Panel under s 68(2) of the *Accident Compensation Act 1985* (Vic). The Court held unanimously (emphasis added):[108]

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[108] At 497-498 [43], [45] and [46] per French CJ, Crennan, Bell, Gageler and Keane JJ.

> [43] The starting point for considering the standard required of a written statement of reasons under s 68(2) of the Act is recognition that there is in Australia no free-standing common law duty to give reasons for making a statutory decision.[109] The duty of a Medical Panel to give reasons for its opinion on a question referred to it is **no more and no less than the statutory duty imposed** by s 68(2) itself. **The content of that statutory duty defines the statutory standard that a written statement of reasons must meet to fulfil it**. …
>
> [45] General observations, drawn from cases decided in other statutory contexts and from academic writing, about functions served by the provision of reasons for making administrative decisions are here of limited utility. To observe, for example, that the provision of reasons imposes intellectual discipline, engenders public confidence and contributes to a culture of justification, is to say little about **the standard of reasons required of a particular decision-maker in a particular statutory context**. The standard of reasons required even of courts making judicial decisions can vary markedly with the context.
>
> [46] Two considerations are of particular significance in determining by implication the standard required of a written statement of reasons in order to fulfil the duty imposed on a Medical Panel by s 68(2) of the Act. One is **the nature of the function performed** by a Medical Panel in forming and giving an opinion on a medical question referred to it. The other is **the objective, within the scheme of the Act, of requiring** the Medical Panel to give **a written statement of reasons for that opinion**.

146. The High Court's reasons in *Wingfoot* make it clear that observations and principles drawn from cases decided in other statutory contexts about the adequacy of reasons for making administrative decisions are of limited utility. The adequacy of the reasons of an administrative decision-maker varies according to the statutory function served by the reasons.

147. For this reason, decisions involving the adequacy of reasons of other administrative decision-makers exercising different statutory functions,[110] the adequacy of the reasons of the Land Court exercising judicial functions,[111] or the adequacy of reasons of other courts[112] should be considered with caution when assessing the adequacy of reasons for administrative decisions under s 269 of the MRA and s 190 of the EPA.

148. No previous decisions of the Supreme Court or Court of Appeal have addressed the adequacy of reasons of a member of the Land Court exercising administrative functions to make decisions under s 269 of the MRA and s 190 of the EPA.

149. In relation to the learned Member's obligation to give reasons for his decisions in this case, NAC's outline at [107] states (footnote in original):

> [107] A number of considerations combine to require that in the present case the standard of reasons required in the Decision was the same as that applicable to a judge in civil proceedings. They are that:
>
> (a) the hearing was before a Court before an experienced judicial officer;
>
> (b) the hearing was in a matter involving parties, some of whom were legally represented;

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[109] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.
[110] e.g. the Medical Board the subject of the decision in *Wingfoot.*
[111] e.g. *Chief Executive, Department of Natural Resources and Mines v Kent Street P/L* [2009] QCA 399; (2009) 171 LGERA 365; 30 QLCR 291 at [226]-[229] per P Lyons (with whom McMurdo P and Keane JA agreed); and *Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads* [2014] QLAC 3 at [47]-[50].
[112] e.g. *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219.

> (c) the hearing was attended by many of formalities of a civil proceedings, including taking formal evidence[113];
>
> (d) there were substantial lay witness and expert statements;
>
> (e) there were substantial written submissions made by the parties; and
>
> (f) the hearing occupied almost 100 days.

150. None of the considerations listed by NAC at [107] of its outline refer to the statutory functions served by the learned Member's reasons.

151. The reasoning in *Wingfoot* set out above indicates NAC's approach to the adequacy of the learned Member's reasons is in fundamental error.

152. Together with NAC's failure to acknowledge the well-settled principles for interpreting the reasons of an administrative decision-maker discussed above,[114] this is the second fundamental error in NAC's approach to considering the learned Member's reasons.

153. In NAC's analysis of the relevant principles to determine the adequacy of the learned Member's reasons, it cited *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 (***Cypressvale***) at [101] of its outline but has not understood it.

154. In a different way to its use by NAC the Court of Appeal's reasoning in *Cypressvale* provides useful guidance on general principles for determining the adequacy of reasons for decisions of the Land Court exercising administrative functions under the MRA and EPA. The nature of the tribunal the subject of the appeal in that case was similar to the nature of the Land Court under the LCA. It was "not … bound by the rules or practice of any court or tribunal as to procedure or evidence but may conduct its proceedings and inform itself on any matter in such manner as it thinks proper".[115] McPherson and Davies JJA noted:

> In the present case it appears from the terms of the *Retail Shop Leases Act* that the function of a Tribunal in deciding a question of compensation in a case of this kind is to act as a specialist tribunal providing a relatively informal and expeditious venue for determining disputes between landlords of retail shopping centres and their tenants.

155. Fitzgerald P, who dissented on the result but not on the relevant principles to be applied, held as a matter of general principle on the sufficiency of reasons:[116]

> The nature and extent of the obligation to give reasons varies according to the circumstances; the obligation is, after all, an aspect of the duty to act fairly in the particular circumstances. The broad principle deducible from the cases is that the decision-maker is required to give reasons which disclose what was taken into account and in what manner, and thus whether an error has been made …

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[113] Section 11 of the *LCA*.
[114] At [134]-[143] above discussing the well-settled principles in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.
[115] *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 465, lines 40-45.
[116] *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 467, lines 45-53.

156. McPherson and Davies JJA stated similar general principles on the sufficiency of reasons (emphasis in bold added):[117]

> Whether or not reasons given for a decision can be characterised as adequate or otherwise involves a variety of different considerations. What is adequate depends on the circumstances of the case. …
>
> **The extent of the duty to give reasons is affected by the function that is served by the giving of reasons**. …
>
> … In the end, the question whether reasons are ''adequate'' falls to be considered in the context afforded by the nature of the question which has to be decided and other factors, including the functions, talents and attributes of the tribunal members or the individual in whom the duty of deciding questions of that kind has been vested. Considerations of the cost to litigants and the general public in requiring reasons to be given is another factor which must be weighed: *Soulemezis v. Dudley (Holdings) Pty Ltd* (1987) 10 N.S.W.L.R. 247, 279, per McHugh J.

157. McPherson and Davies JJA continued (emphasis in bold added):[118]

> From the many cases in which the question of adequacy has been considered it is possible to extract some indications of what is required or expected. It has already been noticed that **the choice between conflicting witnesses, including experts, is recognised as often being a matter not of reasoning but of judgment**: *Housing Commission v. Tatmar Pastoral Co.* Also, ''**where the resolution of a case depends *entirely* on credibility, it is probably enough that the judge has said that he believed one witness in preference to another** … The position will usually be different if other evidence and probabilities are involved'': *Soulemezis v. Dudley (Holdings) Pty Ltd* (1987) 10 N.S.W.L.R. 247, 280, per McHugh J.A. **It has been said to be ''plainly unnecessary'' for a judge to refer to all the evidence led in the proceedings, or to indicate which of it is accepted or rejected**: *Mifsud v. Campbell* (1990) 21 N.S.W.L.R. 725, 728, although failure to explain the basis of a crucial finding of fact involves a breach of principle: *ibid*, citing *Soulemezis*, at 281. But the obligation of doing so does not exist in respect of every matter, of fact or law, which was or might have been raised in the proceedings: *Housing Commission v. Tatmar Pastoral Co.*, at 385. **Nor is it necessary for a judge who is exercising a discretionary judgment to detail each factor which he has found to be relevant or irrelevant**, or to itemise, for example, in the assessment of damages for tort, **which of the factual matters to which he has had regard**: *ibid*, at 386.

158. After noting the statutory context of the Tribunal, including that consist of three members, including a chairman who is a judge or retired judge or a barrister or solicitor, McPherson and Davies JJA noted:[119]

> The Tribunal obviously has some judicial attributes; but it is plainly not intended simply to mimic a court of law, or to conduct its proceedings in the manner of a court, or even to decide disputed questions in precisely the same way as a court. The ''adequacy'' or otherwise of its reasons must be viewed in the light of these considerations.

159. The Court of Appeal's reasoning in *Cypressvale* has clear application in considering the adequacy of the learned Member's reasons in the present proceedings where he was exercising an administrative function.[120]

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[117] *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 482, lines 34-36, at 483, lines 25-26, and at 482, lines 10-18.
[118] *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 484, lines 1-21.
[119] *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 484, lines 1-21.
[120] As to the Land Court's duty to give reasons when exercising a judicial function, see *Chief Executive, Department of Natural Resources and Mines v Kent Street P/L* [2009] QCA 399; (2009) 171 LGERA 365; 30 QLCR 291 at [226]-[229] per P Lyons (with whom McMurdo P and Keane JA agreed); and *Cidneo Pty Ltd v Chief Executive, Department of Transport and Main Roads* [2014] QLAC 3 at [47]-[50].

160. Applying the principle that the "extent of the duty to give reasons is affected by the function that is served by the giving of reasons", several aspects of the statutory context of the learned Member's decision and reasons that are material to consider in determining the sufficiency of his reasons are:

(a) Under s 7 of the LCA the Land Court is intended to be a relatively informal, practical decision-maker that is not bound by the rules of evidence or legal technicalities.

(b) Under s 268(2) of the MRA the hearing of objections to the mining lease is also a relatively informal, practical process in which the Land Court is instructed to:

> … take such evidence, shall hear such persons and inform itself in such manner as it considers appropriate in order to determine the relative merits of the application, objections and other matters and shall not be bound by any rule or practice as to evidence.

(c) Under s 269(5) of the MRA the Land Court's has a duty to provide reasons if it recommends rejection of a mining lease application in whole or in part. The duty is stated as follows:

> Where the Land Court recommends to the Minister that an application for the grant of a mining lease be rejected in whole or in part the Land Court shall furnish the Minister with the Land Court's reasons for that recommendation.

(d) An objection decision under s 190 of the EPA consists of a recommendation. There is no express requirement to provide reasons for the recommendation but, in practice, reasons are required to address the matters required to be considered in s 191.

(e) Under the MRA and EPA, the learned Member's decision and reasons are not finally determinative of the parties' rights but resulted merely in non-binding recommendations to the MRA Minister and the Administering Authority.

(f) The Administering Authority was itself a party to the hearing before the learned Member under s 186(a) of the EPA. Representatives of the Administering Authority, therefore, were already directly informed of all of the evidence and submissions heard by the learned Member.

(g) In making their final decisions under the MRA and EPA, the MRA Minister and the Administering Authority have access to the application, all of the material before the Land Court, and can be informed by experts within their departments.

161. Viewed within the statutory context of the MRA, EPA and LCA, the primary function served by the Land Court giving reasons is to inform and guide the MRA Minister and the Administering Authority in making their respective decisions under the MRA and EPA.

162. The learned Member correctly identified this function on several occasions in his reasons and this clearly guided the extent that he provided reasons. He noted:[121]

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[121] Reasons at [36], [38] and [210].

> [36] … Although this decision will of necessity be very lengthy, it will not run into many thousands of pages, for to do so would be of little utility to those tasked with the job of reading this decision and making their own decisions in light of my recommendations. …
>
> [38] What is to be found in the many pages that follow are my conclusions on key aspects of the evidence in this case. No doubt, many will be able to say that there are huge parts of evidence that I have not specifically referred to. That must necessarily be the case, but that should not be taken as meaning that I have not fully taken into account all such evidence. I have done my best to extract the core elements that I consider are necessary to consider in order to understand the nature of the recommendations that I make under the MRA and the EPA, and to assist, I hope, the ultimate decisions of the decision makers under the MRA and EPA in determining the future of Stage 3 of New Acland. …
>
> [210] In short, what follows with respect to the analysis of each lay witness is an important snapshot to help in the understanding of why evidence on a issue given by person A is preferred over different evidence given on that same topic by person B. Specifically, the detail of the analysis of that evidence will be found by reference, insofar as it is necessary, and again, in the interests of making this unwieldly decision as comprehensible and manageable as possible, without analysing in depth all of the evidence for each key issue. To do otherwise would be to consign the reader to reading many thousands of pages of this decision; something which I have tried my best to avoid. …

163. The learned Member clearly understood and shaped his reasons to address the primary function they served within the statutory context they were made.

164. The learned Member's reasons, spanning 459 pages including attachments, were adequate in context of the primary function served by the requirement to give reasons in s 269 of the MRA and s 190 of the EPA, to inform and guide in a non-binding manner the final decisions of the MRA Minister and the Administering Authority.

165. Other factors that support the conclusion that the learned Member's reasons were adequate in the circumstances, namely the urgency in delivering his decisions and the immense volume of material involved in the hearing, are considered further below.[122]

Principles for determining relevant and irrelevant considerations

166. A number of the grounds of the Amended Application at least appear to allege that the learned Member took into account irrelevant considerations in making his decisions.

167. Mason J emphasized in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***) at 39-40 that:

(a) failing to take a relevant consideration into account can only be made out if the decision-maker failed to take into account something they were *bound* to take into account in making the decision; and conversely,

(b) an irrelevant consideration is one that the decision-maker is *bound* not to take into account.

168. Whether the decision-maker is bound to consider something, or forbidden from considering it, are questions to be answered by construing the relevant Act, including its subject matter, scope and purpose.[123] If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those

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[122] See paras [214]-[232] below.
[123] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

enumerated factors are exhaustive or merely inclusive according to its subject matter, scope and purpose.[124]

169. Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify a court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor may be so insignificant that the failure to take it into account could not have materially affected the decision.[125]

170. A failure to have regard to relevant matters or to disregard irrelevant matters may lead a decision-maker to wrongly deny the existence of its jurisdiction or to mistakenly place limits on its functions or powers.[126] Considering something irrelevant might disclose a constructive failure to exercise jurisdiction.[127]

Principles of legal reasonableness and rationality

171. A number of the grounds of the Amended Application rely on the principles of legal unreasonableness and irrationality in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***).

172. The facts in *Li* involved a refusal under the *Migration Act 1958* (Cth) by the Migration Review Tribunal to delay a decision to allow a visa applicant time to obtain further information. The High Court unanimously set aside the decision on the basis that it was legally unreasonable in the circumstances.

173. French CJ stated that "[e]very statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred" and must be exercised within the "framework of rationality imposed by the statute".[128]

174. French CJ cautioned:[129]

> [30] The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker.

175. Similarly, Hayne, Kiefel and Bell JJ recognised:[130]

> [63] … there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness.

176. Their Honour's stated the requirement for legal reasonableness was based on the presumption that the "legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably" and:[131]

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[124] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).
[125] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J).
[126] *Abebe v Commonwealth* (1999) 197 CLR 510 at 552 (Gaudron J).
[127] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 339-340 (Gaudron J).
[128] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348 [23] (footnote omitted) and 351 [30].
[129] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [30].
[130] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [63] (footnote omitted).
[131] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63], 364 [67], 366 [72] and 367 [76].

> [67] … The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. …
>
> [72] …Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.
>
> [76] … Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

177. Gageler J applied a similar test of unreasonableness before observing:[132]

> [113] Yet the stringency of the test remains. Judicial determination of *Wednesbury* unreasonableness in Australia has in practice been rare. Nothing in these reasons should be taken as encouragement to greater frequency. This is a rare case.

178. *Li* has re-enlivened considerations in judicial review based on irrationality where a decision is so unreasonable that it lacked an evident and intelligible justification when all relevant matters were considered but, clearly, the ability to challenge factual findings and the exercise of a discretion remains tightly constrained.

179. Fraser JA (with whom Morrison JA and Mullins J agreed) stated in relation to *Li* in *Francis v Crime and Corruption Commission & Anor* [2015] QCA 218 at [33] (footnotes in original):

> The ground of appeal that no reasonable tribunal would have suspended the dismissal involved a stringent test.[133] It is rarely established. It does not sanction a review on the merits.[134] It is not made out merely if an appeal court disagrees with an evaluative decision or with the weight attributed to a factor taken into account in the decision.[135] The appeal tribunal nevertheless concluded that the ground was established in this case. The appeal tribunal accurately observed that in *Flegg v Crime and Misconduct Commission*[136] the President expressed the test, with reference to *Minister for Immigration and Citizenship v Li*,[137] as being "whether the ... decision was so unreasonable that it lacked an evident and intelligible justification when all relevant matters were considered" and Gotterson JA (Margaret Wilson J agreeing) noted that the *Wednesbury* principles did not allow a challenge to a decision "on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which the [appellate tribunal] disagrees". As the appeal tribunal also observed, the case on appeal must be "overwhelming".[138] The appeal tribunal correctly stated its task as being "to examine the learned member's reasoning to determine whether it was a decision that can be justified even though '...reasonable minds could reasonably differ' or whether the decision was so unreasonable that it lacked an evident and intelligible justification".[139]

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[132] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 377-378 [113].
[133] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 376 [108] (Gageler J).
[134] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 363 [66] (Hayne, Kiefel and Bell JJ).
[135] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [30] (French CJ).
[136] [2014] QCA 42 at [3] and [16].
[137] (2013) 249 CLR 332.
[138] [2015] QCATA 15 at [8].
[139] [2015] QCATA 15 at [12], quoting Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 654 [137].

180. Three decisions of the Full Federal Court provide further important discussion of the application of the principles in *Li.*[140]

181. The first of these decisions was *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 (***Singh***). In that case the Full Court[141] held that the judgments in *Li* identified two different contexts in which the concept of legal unreasonableness was employed: reasonableness review which concentrates on the outcome of the exercise of power, and reasonableness review which concentrates on an examination of the reasoning process by which the decision-maker arrived at the exercise of power.[142]

182. The second of these decisions was *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 (***Stretton***). It involved a Minister's decision under the *Migration Act 1958* (Cth) to cancel a visa of a 52 year old man who had migrated to Australia as a child and had been convicted of sexually abusing his granddaughter. At first instance the decision was characterised as unreasonable because it was an exercise of discretion in excess of what was necessary for the purpose it served. The Full Court (Allsop CJ, Griffiths and Wigney JJ) held the Minister's decision was not unreasonable in the legal sense.

183. Allsop CJ emphasised in *Stretton* the necessarily limited nature of judicial review based on a ground of legal unreasonableness was not amenable to rigidly-defined categorisation. His Honour stated at 5-6, [8]-[12]:

> [8] The content of the concept of legal unreasonableness is derived in significant part from the necessarily limited task of judicial review. The concept does not provide a vehicle for the Court to remake the decision according to its view as to reasonableness (by implication thereby finding a contrary view unreasonable). Parliament has conferred the power on the decision-maker. The Court's function is a supervisory one as to legality: see *Li* at [30], [66] and [105]. …
>
> [10] This concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or a precise textual formulary. For instance, in argument, the submission was put that [76] of *Li* in the judgment of Hayne, Kiefel and Bell JJ contained two (different) "tests": (1) if upon the facts the result is unreasonable or plainly unjust and (2) if the decision lacks an evident and intelligible justification. The submission reflected the dangers of overly emphasising the words of judicial decisions concerning the nature of abuse of power, and of unnecessary and inappropriate categorisation. The plurality's discussion of unreasonableness at [63]-[76] in *Li* should be read as a whole —as a discussion of the sources and lineage of the concept: [64]-[65], of the limits of the concept of reasonableness given the supervisory role of the courts: [66], of the fundamental necessity to look to the scope and purpose of the statute conferring the power to find its limits: [67], of the various ways the concept has been *described*: [68]-[71], of the relationship between unreasonableness derived from specific error and unreasonableness from illogical or irrational reasoning: [72], of the place of proportionality or disproportion in the evaluation: [73]-[74] (as to which see also French CJ at [30] and see also *McCloy v New South Wales* (2015) 89 ALJR 857; 325 ALR 15 at [3] (French CJ, Kiefel, Bell and Keane JJ)), of the guidance capable of being obtained from recognising the close analogy between judicial review of administrative action and appellate review of judicial discretion: [75]-[76].
>
> [11] The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be

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[140] Including *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 per Allsop CJ, Robertson and Mortimer JJ, esp. at 437 at 445 [44] and 446 [47]; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; and

[141] Allsop CJ, Robertson and Mortimer JJ.

[142] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at 445 [44] and 446 [47].

> approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.
>
> [12] Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.

184. The third Full Court decision providing further important discussion of the principles in *Li* was *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158. There the Full Court[143] summarised the relevant principles in seven propositions at 171-172 [58]-[65]:

> [58] First, the concept of legal unreasonableness concerns the lawful exercise of power. Legal reasonableness, or an absence of legal unreasonableness, is an essential element in the lawfulness of decision-making: *Li* at [26] and [29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88] (Gageler J); *Singh* at [43]; *Stretton* at [4] (Allsop CJ) and [53] (Griffiths J).
>
> [59] Second, the Court's task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory (*Li* at [66]). It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision's reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision-maker: *Li* at [66] (Hayne, Kiefel and Bell JJ); *Stretton* at [12] (Allsop CJ) and [58] (Griffiths J); see also *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 90 ALJR 197 at [23]. Nor does it involve the Court remaking the decision according to its own view of reasonableness: *Stretton* at [8] (Allsop CJ).
>
> [60] Third, there are two contexts in which the concept of legal unreasonableness may be employed. The first involves a conclusion after the identification of a recognised species of jurisdictional error in the decision-making process, such as failing to have regard to a mandatory consideration, or having regard to an irrelevant consideration. The second involves an "outcome focused" conclusion without any specific jurisdictional error being identified: *Li* at [27]-[28] (French CJ), [72] (Hayne, Kiefel and Bell JJ); *Singh* at [44]; *Stretton* at [6] (Allsop CJ). …
>
> [62] Fourth, in assessing whether a particular outcome is unreasonable, it is necessary to bear in mind that within the boundaries of power there is an area of "decisional freedom" within which a decision-maker has a genuinely free discretion: *Li* at [29] (French CJ), [66] (Hayne, Kiefel and Bell JJ). Within that area, reasonable minds might differ as to the correct decision or outcome, but any decision or outcome within that area is within the bounds of legal reasonableness: *Li* at [66] (Hayne, Kiefel and Bell JJ); *Stretton* at [7] (Allsop CJ). Such a decision falls within the range of possible lawful outcomes of the exercise of the power: *Li* at [105] (Gageler J); *Stretton* at [11] (Allsop CJ).
>
> [63] Fifth, in order to identify or define the width and boundaries of this area of decisional freedom and the bounds of legal reasonableness, it is necessary to construe the relevant statute: *Li* at [24] (French CJ), [67]-[67] (Hayne, Kiefel and Bell JJ); *Stretton* at [55] and [62] (Griffiths J). The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law

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[143] Allsop CJ, Griffiths and Wigney JJ.

> concerning reasonableness in decision-making: *Stretton* at [7] and [11] (Allsop CJ). The evaluation is also likely to be fact dependant and to require careful attention to the evidence: *Singh* at [42].
>
> [64] Sixth, where reasons for the decision are available, the reasons are likely to provide the focus for the evaluation of whether the decision is legally unreasonable: *Singh* at [45]-[47]. Where the reasons provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered to be legally unreasonable: *Singh* at [47]. However, an inference or conclusion of legal unreasonableness may be drawn even if no error in the reasons can be identified. In such a case, the court may not be able to comprehend from the reasons how the decision was arrived at, or the justification in the reasons may not be sufficient to outweigh the inference that the decision is otherwise outside the bounds of legal reasonableness or outside the range of possible lawful outcomes: *Li* at [76] (Hayne, Kiefel and Bell JJ); Stretton at [13] (Allsop CJ).
>
> [65] Seventh, and perhaps most importantly, the evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions. The concept of legal unreasonableness is not amenable to rigidly defined categorisation or precise textural formulary: *Stretton* at [2] and [10] (Allsop CJ) and [62] (Griffiths J). That said, the consideration of whether a decision is legally unreasonable may be assisted by reference to descriptive expressions that have been used in previous cases to describe the particular qualities of decisions that exceed the limits and boundaries of statutory power. A number of those cases, and the descriptive expressions used in them, are referred to in *Li* and in the judgment of Allsop CJ in *Stretton* (at [5]). The expressions that have been utilised include decisions which are "plainly unjust", "arbitrary", "capricious", "irrational", "lacking in evident or intelligible justification", and "obviously disproportionate". It must be emphasised again, however, that the task is not an *a priori* definitional exercise. Nor does it involve a "checklist" exercise: *Singh* at [42]. Rather, it involves the Court evaluating the decision with a view to determining whether, having regard to the terms, scope and purpose of the relevant statutory power, the decision possesses one or more of those sorts of qualities such that it falls outside the range of lawful outcomes.

185. The principles of legal unreasonableness and rationality, therefore, remain tightly constrained and must be stringently applied to avoid the Court's legitimate oversight role in judicial review transforming into *de facto* merits review.

THE LAND COURT HEARING AND DECISIONS

Factual background and context of the hearing and decisions

186. Having considered the statutory context and cross-cutting principles of administrative law, prior to addressing NAC's grounds of review the factual background and context of the hearing and the decisions needs to be understood.

187. To assist the Court this background and context part is divided into four sections:

    (a) The applications for New Acland Mine Stage 3

    (b) Hearing before the Land Court

    (c) NAC's repeated requests for expedition and urgency of the hearing

    (d) Land Court's decisions and reasons

The applications for Stage 3 of the New Acland Mine

188. The history of the New Acland Coal Mine, including the applications for Stage 3 of the mine, were explained by the learned Member at [51]-[79] of his reasons.

189. His Honour included a chronology as Appendix C of the reasons, commencing at p 456 of the reasons. This was based on a chronology prepared by NAC.

190. With one exception, the explanation of these matters in the reasons makes it unnecessary to address these matters further.

191. The exception that may be added to the explanation provided in the reasons is a map of the mining lease applications, which is not included in the reasons.

192. Figure 1 below is extracted from Figure 2.1 at p 12 of the Coordinator-General's Report for the proposed mine, which was Exhibit 16 in the hearing before the learned Member. OCAA has added the text boxes to the figure to clearly show:

    (a) stage 1 and stage 2 of the existing mine (ML50170 and ML50216 respectively);

    (b) the land that is proposed to be mined in stage 3 (MLA50232); and

    (c) the land proposed to be used for a rail spur joining stage 3 to the rail line near the town of Jondaryan (MLA700002).[144]

193. The town of Acland is shown in the centre of the mining lease areas in Figure 1.

194. Figure 1 may assist the Court when reading the explanation at [51]-[79] of the reasons of the history of the mine and the application the mining lease for stage 3 of the mine (MLA50232) and the application for the mining lease for the associated rail spur (MLA700002).

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[144] The existing mine (stages 1 and 2) transports coal by truck to a Train Loading Facility (TLF) and rail line at Jondaryan. The rail spur associated with stage 3 will join the mine to the rail line (see Reasons at [59]).

195. Understanding the differences in the two applications for the mining leases avoids confusion in reading the learned Member's consideration of the criteria for s 269(4) of the MRA at [1776]-[1835], noting:

(a) the learned Member deals first with his consideration of s 269(4) of the MRA for the application the mining lease for stage 3 of the mine (MLA50232) at [1776]-[1808] of his reasons;

(b) the learned Member then deals with his consideration of the s 269(4) of the MRA for the application for the mining lease for the associated rail spur (MLA700002) at [1809]-[1835] of his reasons; and

(c) his Honour's consideration of s 269(4) of the MRA for the rail spur at [1809]-[1835] often repeats passages from his earlier consideration of s 269(4) of the MRA for the application the mining lease for stage 3 of the mine (MLA50232) at [1776]-[1808]; however, they are two separate, though inter-related applications.

196. The learned Member referred to one aspect of the existing mine, "West Pit",[145] that is not shown in Figure 1. "West Pit" is located in the southeastern corner of the existing mining lease (ML 50216) as shown in Figure 2. It was not shown in the application for Stage 2 of the mine in 2006[146] but was within the mining lease area granted for Stage 2. NAC commenced mining the "West Pit" after the objections to Stage 3 of the mine were referred to the Land Court.[147]

[145] Reasons at paragraphs 125, 245, 378, 389, 391, 683 and 1392-1405.
[146] The Stage 2 mine pit layout is shown in Exhibit 871 before the Land Court, referred to in the Reasons at [123]-[124]. Exhibit 1130 is the coverpage and index to the EIS for Stage 2 of the mine, which Exhibit 871 is Ch 2 of, and is dated January 2006.
[147] Reasons at [1402].

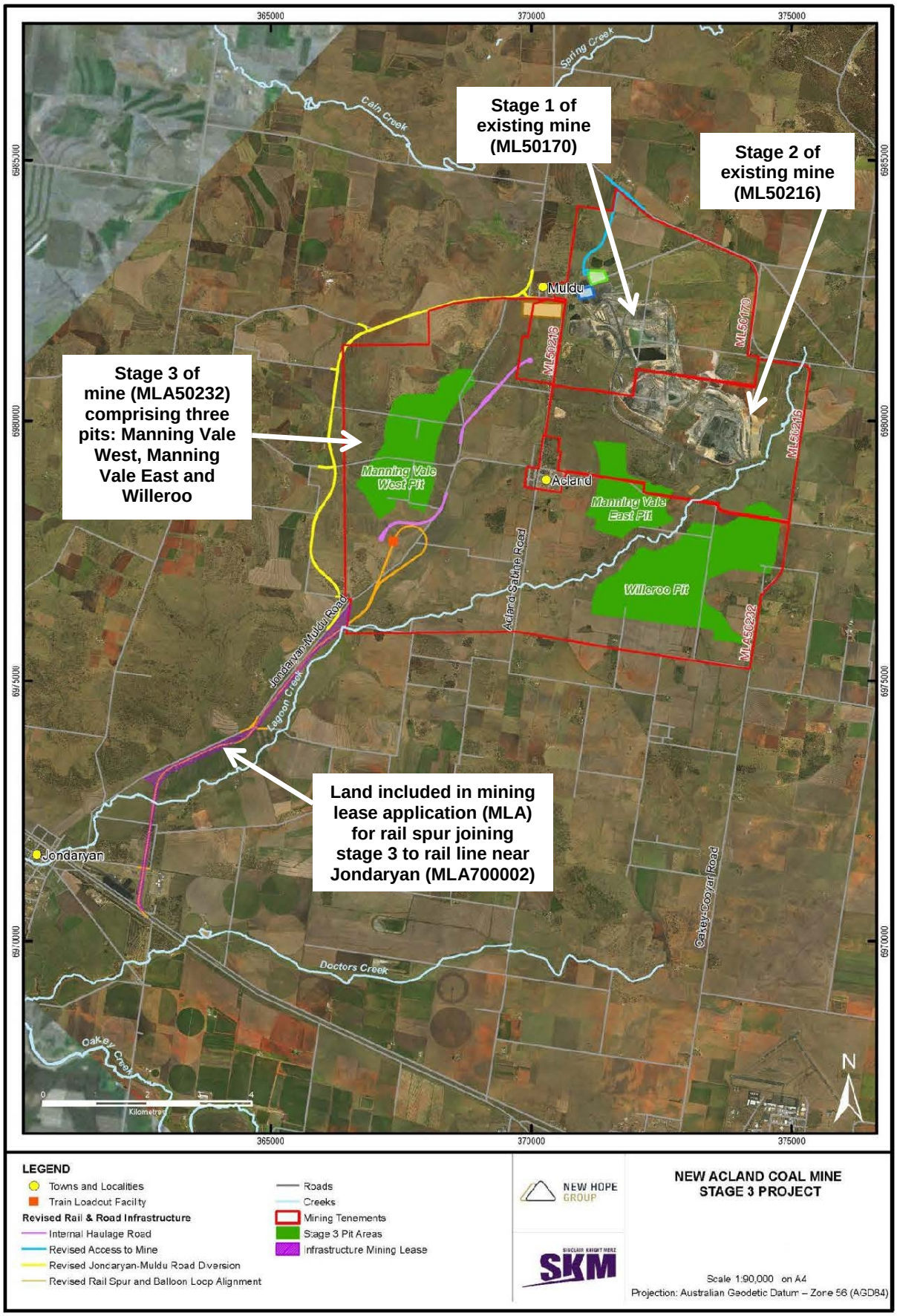

Figure 1: Map of New Acland Coal Mine Stage 3 project annotated by OCAA with text boxes to explain existing mine, Stage 3 of the mine and the land for the rail spur (adapted from p 12 of the Coordinator-General's Report on the proposed mine, which was Exhibit 16 before the Land Court).

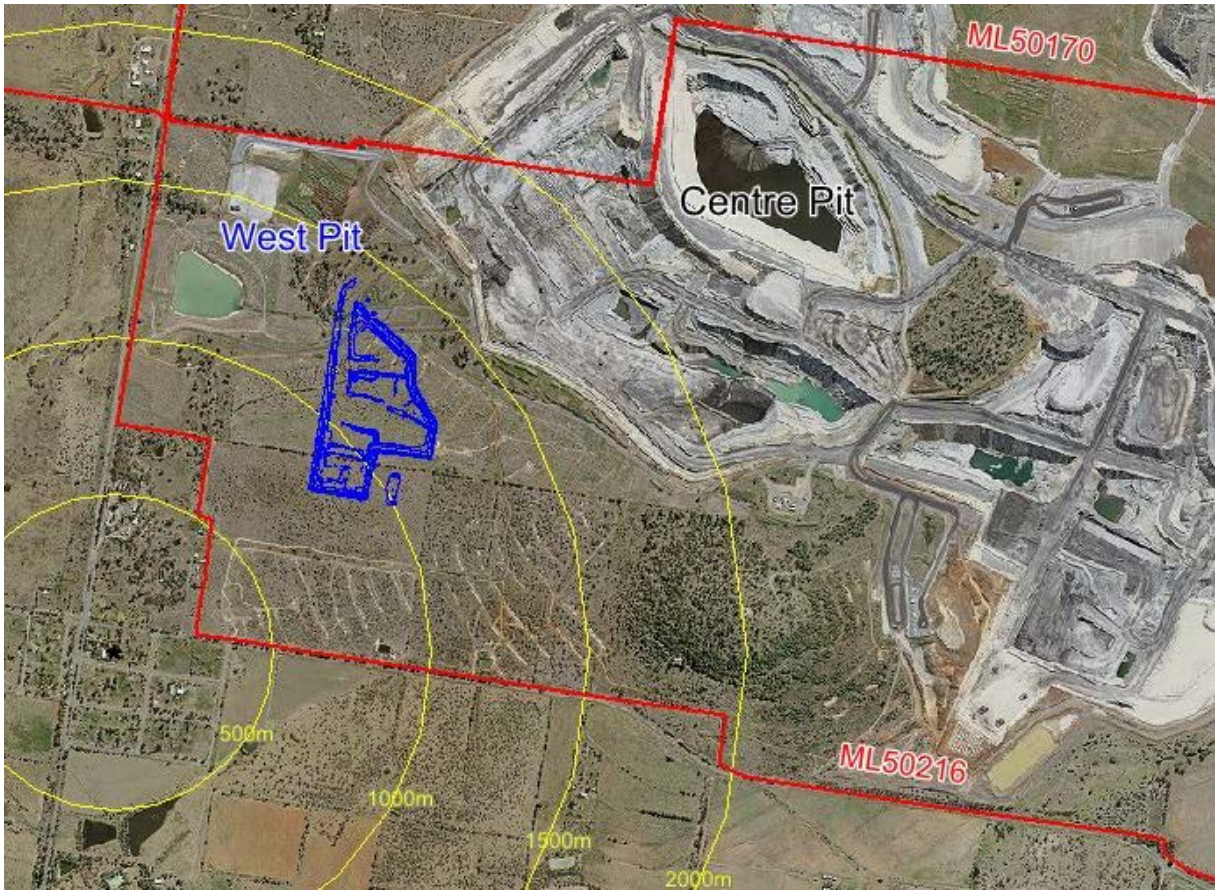

Figure 2: Location of "West Pit" in southeastern corner of the existing mining lease (ML 50216) (extracted from Exhibit 1841 tendered by NAC before the Land Court)

Submissions and objections to the applications

197. 1,421 submissions, of which 965 were properly made submissions, were made under the EPA in response to public notification of NAC's application to amend its existing environmental authority.[148] This was the highest number of submissions ever received with respect to a mining application.[149]

198. 27 objections were lodged to the mining lease applications under the MRA and 35 objections were lodged to the application to amend the environmental authority under the EPA.[150] 20 of those objections were by parties to both MRA and EPA objections.[151]

199. There were a large number of grounds of the objections, relevantly including, in summary:[152]

    (a) groundwater depletion for surrounding farms;

    (b) noise;

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[148] Reasons at [68].
[149] Reasons at [613].
[150] Reasons at [80].
[151] Reasons at [80].
[152] Reasons [84]-[87].

(c) air quality (dust);

(d) the past performance of NAC has been unsatisfactory;

(e) the mine is contrary to the public interest; and

(f) the mine is contrary to the principle of intergenerational equity.

Hearing before the Land Court

200. The objections to the mining lease applications were referred to the Land Court on 14 October 2015 and the objections to the amendment of the environmental authority were referred on 19 October 2015.[153]

201. There were 14 active parties who called evidence, engaged in cross-examination and made submissions during the hearing:

(a) NAC;

(b) the administering authority (as a statutory party); and

(c) 12 objectors.[154]

202. The hearing ultimately became the longest in the over 120 year history of the Land Court.[155]

203. The initial directions for the conduct of the hearing were made on 9 November 2015 in which the learned Member made directions:

(a) for an expedited hearing timetable; and

(b) limited the objectors to calling a single nominated expert on each issue,

in response to NAC's submissions on the urgency of the hearing being resolved and necessary case management due to the large number of objectors.[156]

204. In making those directions, in response to concerns raised by an objector the learned Member stressed the importance he placed on ensuring procedural fairness to all parties, including the applicant, NAC:[157]

> I go out of my way, some say too much, to ensure that all parties are treated with procedural fairness, and you can be as assured as I can possibly make you of procedural fairness occurring in this case, not just from you, but from the applicant as well, and I stress that it applies across the board.

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[153] Reasons at p 458 (Chronology).
[154] Reasons at [80]-[83].
[155] Reasons at [36].
[156] See T2 (the directions hearing on 9 November 2015) and directions made by the learned Member on 9 November 2015.
[157] T2-55, lines 7-10.

205. Two pre-trial disputes were resolved by the learned Member in published judgments:

    (a) On 9 May 2016 the learned Member refused an application by OCAA for disclosure from NAC of records related to noise, air and complaints. The learned Member found the Land Court did not have power to order disclosure in objection hearings under the MRA and EPA.[158]

    (b) On 18 May 2016 the learned Member refused an application by NAC for costs of OCAA's unsuccessful application for disclosure of documents. The learned Member found the Land Court did not have power to order costs in objection hearings under the MRA and EPA.[159]

206. The hearing commenced with NAC's opening on 7 March 2016.[160]

207. The hearing ultimately took almost 100 sitting days, during which:

    (a) almost 2,000 exhibits containing many tens of thousands of pages of material were tendered;[161]

    (b) well in excess of 2,000 pages of submissions were received by the court;[162] and

    (c) 28 expert and 38 lay witnesses gave evidence across multiple topics.[163]

208. Opening submissions commenced on 7 March 2016, followed by 83 days of evidence, including two site inspections, and three days of closing submissions before the hearing initially concluded on 7 October 2016.[164]

209. On 19 December 2016 NAC applied to reopen the hearing to adduce new evidence being further advice given regarding the proposed mine by the Commonwealth's Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development in 2016 (**IESC 2016 Advice**).[165]

210. NAC's application to reopen the hearing resulted in the third published judgment, delivered on 2 February 2017,[166] giving the learned Member's reasons for allowing in the evidence to be reopened subject to:

    (a) NAC providing objectors with copies of all reports provided by NAC to the IESC and referred to in the advice; and

    (b) all parties being permitted to call fresh evidence, including expert and lay evidence.

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[158] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP* [2016] QLC 29.
[159] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP (No. 2)* [2016] QLC 30.
[160] Reasons at p 458 (Chronology).
[161] Reasons at [19].
[162] Reasons at [19].
[163] Reasons at [103]-[112].
[164] Reasons at p 459 (Chronology) and T1-T83.
[165] See *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1.
[166] *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1.

211. Following delivery of the judgment allowing reopening of the evidence on 2 February 2017 (which was the 93th day of the 99 day hearing[167]) the learned Member heard submissions from the parties in relation to recent media stories which appeared to emanate from NAC and which his Honour was concerned may constitute contempt of the Land Court.[168] On 25 January 2017 his Honour had directed the registrar to communicate to the parties to raise this matter and to provide NAC with an opportunity to explain its actions prior to holding a formal contempt hearing.[169] After hearing submissions from the parties the learned Member did not proceed with a formal contempt hearing.[170] His Honour concluded by stating:[171]

> I consider the matter closed, and will not be making a directive to the registrar to issue any contempt proceedings in this matter.

212. Following the directions hearing and his Honour's concerns about possible contempt being raised on 2 February 2017, the hearing of the reopening of the evidence was held between 3 and 20 April 2017 and further closing submissions were filed on 19 May 2017.

213. The learned Member's decisions and reasons were delivered on 31 May 2017.

NAC's repeated requests for expedition and urgency of the hearing

214. An important factor in understanding the hearing and for addressing NAC's grounds of review is the repeated requests made by NAC for expedition and urgency of the hearing.

215. From the earliest stages of the proceedings in the Land Court, NAC claimed a need for expedition of the hearing and gaining approval for the mine expansion was urgent.

216. The learned Member accepted NAC's request for an urgent hearing and made directions for what his Honour later noted was "extraordinarily truncated timetable" and "a truncated process … put in place to have the hearing commence as quickly as possible."[172]

217. Some of the earliest evidence adduced by NAC in the Land Court and which was relied upon by NAC in seeking directions from the learned Member for an urgent hearing was the affidavit of Bruce Douglas Denney, sworn on 21 October 2015 (**Denney Affidavit**).[173] Mr Denney was the then Chief Operating Officer for the New Hope Group.

218. The Denney Affidavit predominantly addressed the need for an expeditious hearing and decision in respect of the Draft EA and the MLs, including the following:

> 7. If the revised Project is to proceed, it is critical that these proceedings are progressed expeditiously to enable the MLAs and the application to amend Environmental Authority number EPML00335713 (EA Amendment Application) to be granted without delay. I set out the reasons for this below. …

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[167] Noting the minor anomalies in the numbering of days in the transcript identified at [98] of the reasons.
[168] Commencing at T90-21, line 44.
[169] See T90-21, line 44 – T90-22, line 40.
[170] See T90-21, line 44 – T90-36, line 47.
[171] T90-36, lines 46-47.
[172] T64-11, line 43 and T64-75, line 14.
[173] Exhibit 374 in the Land Court.

9. The New Acland Mine's coal reserves on the Approved MLs are forecast to be depleted by 2018 with a ramp-down of operations from April 2017 based on the current mine schedule because of a lack of accessible coal. The revised Project will enable the New Acland Mine to maintain continuity of operation post 2017.

Workforce

10. If the MLAs and EA Amendment Application are not granted by August 2016, the necessary infrastructure required for the revised Project will not be able to be constructed in sufficient time for mining at the New Acland Mine to continue beyond 2017. …

11. If the MLAs and EA Amendment Application are not granted by August 2016, the Applicant will have no option but to start to stand down its existing workforce (employees and contractors) at the New Acland Mine from early 201 7 and this will result in redundancies at the mine and at the head office of New Hope. …

Commercial

16. If the MLAs are not granted by August 2016, the delays in commencement of the revised Project will have significant adverse commercial consequences for the Applicant…

219. The learned Member explicitly noted at an early directions hearing on 9 November 2015 that the Land Court took the need for urgency seriously, and sought to ensure that was communicated to the NAC: [174]

> HIS HONOUR: But I just wanted the legal representatives for the applicant to make sure the applicant is advised, but the court really is taking seriously its obligation to deal with this as quickly as it can. … And I would just hope that it would be noted that the court is going out of its way to accommodate the urgency that has been indicated by the applicant, whilst at the same time taking into account the very human issues that we're dealing with in the objectors.
>
> So there will be times, I'm sure, when objectors will think I'm being too kind to the applicant, and when the applicant is thinking I'm being too accommodating to the objectors. I'm simply attempting to balance as best as I can all rights, whilst still moving the matter ahead. And I'd just appreciate, Mr Ambrose, if that could be passed on.
>
> MR AMBROSE: It will be. Thank you, your Honour.

220. The learned Member noted later in the hearing that some further evidence with respect to urgency may be required, since Mr Denney had given evidence that NAC had not made an application for a parallel approval, that Mr Denney believed NAC would require:[175]

> HIS HONOUR: And at some point when the rubber really hits the road in this matter, I may require additional affidavit evidence from your client, updating the question of urgency for when the matter's to be – needs to be determined by, particularly in light of the evidence from Mr Denney that no application has been made yet in relation to the strategic cropping aspect of the legislation.
>
> MR JOB: Understood, your Honour.

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[174] T2-62, line 39 to T2-63, line 10.
[175] T18-45, lines 1-12.

> HIS HONOUR: I don't want to literally kill myself rushing to get a decision – that in any other court in the land would take some period of time – in a very short period of time, only to find out that it then just sits for 12 months while another legal process is gone through.

221. NAC subsequently foreshadowed such evidence a number of times in the hearing,[176] and was ultimately produced in the form of a two-page affidavit sworn on 20 May 2016 by Andrew Lachlan Boyd (**First Boyd Affidavit**),[177] who replaced Mr Denney as Chief Operating Officer of New Hope Group. The First Boyd Affidavit essentially affirmed the evidence of Mr Denney, including the following:

> 4. The affidavit of Bruce Douglas Denney sworn on 21 October 2015 (Denney First Affidavit), outlined at paragraphs 8 to 17 the need for these proceedings to be progressed expeditiously if the Revised Expansion Project is to proceed. …
>
> 6. For the reasons set out at paragraphs 8 to 17 of the Denney First Affidavit, the Applicant's position remains that, if the Revised Expansion Project is to proceed, it is critical that these proceedings are progressed expeditiously. In the event that the MLAs and the EA Amendment Application are granted and the approval under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) issues, the Applicant intends to commence activities as soon as possible after the grant, to develop the Revised Expansion Project including construction of the rail spur on MLA 700002, so that it can maintain continuity of operation post-2017 and avoid having to stand down its existing workforce.

222. Under cross-examination on 7 August 2016 Mr Boyd amended the date Mr Denney had provided for when the mining leases and environmental authority needed to be granted by, in the following exchange:[178]

> MR HOLT: Does it remain the position, as Mr Denney put it in his affidavit, that if the MLAs and EA amendment application are not granted by August 2016, the applicant will have no option but to start to stand down its existing workforce. Does that remain the position?
>
> MR BOYD: Our current position is that the MLAs and EA amendment need to be granted by October 2016.

223. The learned Member and Mr Boyd had the following detailed exchange on the question of urgency on 7 August 2016:[179]

> HIS HONOUR: Yes. Thank you. I just want a piece of clarification. Firstly, Mr Boyd, in answering a question from Mr Plant, you said that this approvals process is taking so long. Now, I took it from the context of what you were saying that the court approval process was taking so long?
>
> MR BOYD: It's taking longer than expected.
>
> HIS HONOUR: Do you know when the matter was referred to the court?
>
> MR BOYD: No, I don't.
>
> HIS HONOUR: If I mentioned dates of 16th of October and 20th of October 2015, would you accept those?

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[176] T20-5, lines 17-27; T21-3, line 4 to T21-4, T22-84, line 44 to T22-85, line 6; line 25; T23-2, lines 24-27; T30-56, lines 10-17;
[177] Exhibit 877.
[178] T64-17, lines 12-17.
[179] T64-75 to T64-79.

MR BOYD: Yes.

HIS HONOUR: And that the first directions hearing was heard in Dalby under three weeks later, two and a-half weeks later, on the 4th of November?

MR BOYD: Yes, I recall that.

HIS HONOUR: And that a truncated process was put in place to have the hearing commence as quickly as possible?

MR BOYD: Yes.

HIS HONOUR: This is where I'm – there's a lot of questions I want to ask and – but as I'm in an administrative process but still firmly believe I'm wearing a judicial hat as part of the Queensland judiciary, I caution myself on what's appropriate for me to ask and not ask, but it's hard to remove the human element from the process element in dealing with this, particularly when it comes to the timelines required for dealing with a decision in this matter. That's for context in which I'm carefully choosing my words as I proceed further. On – my maths is having difficulty with your evidence. You mentioned that there was an extra six months of production as a result of the opening of the West Pit Manning Vale East?

MR BOYD: From a – in terms of the amount of coal produced from that pit, I think it's around six months, yes.

HIS HONOUR: But your current program has only taken into account a two month time line extension from what was set out in Mr Denney's affidavit as the critical time line for the continuation of employment was concerned from August to October?

MR BOYD: Correct.

HIS HONOUR: I don't understand why an extra six months of production only leads to an extra two months of critical time line?

MR BOYD: That's the program as it currently stands. The mine plan is continuously revised. The production – the construction schedule for the project is continuously revised as well, and we're trying to do whatever we can to compress that construction time frame and to extend the life of stage 2. In a stage – stage 2 now has three pits in operation. As you exhaust stage 2, you get to a point where you can no longer devote the earthmoving equipment resources. You run out of room, effectively, to put those resources, and you need stage 3 in order to progress those resources to another area. At this point on our schedule, that occurs in around October 2017. That's the point where the first initial fleet of equipment, effectively, runs out of room to move overburden material in stage 2 and is scheduled to go to stage 3 subject to approvals. The other piece in the timing puzzle is the construction time line, specifically the rail – construction of the rail. The – our total construction time line at this point runs for about 21 to 22 months, so I think it's slightly under Mr Denney's up to 26 month statement in his affidavit; however, we require the first coal from stage 3 in July 2018. Without that coal in stage 3 in July 2018, it means that the total production from the mine will start to reduce because we will be tapering off stage 2, so effectively we have a 21 month period to build the rail. We have a condition that says that no stage 3 coal can be exported from site other than through the new rail facility, and, in order to achieve that, we need to commence construction of that rail in December of this year, so I guess, effectively, our schedule says mining lease grant in October of this year, board approval and contract award in November of this year, construction commencement in December of this year, and that's what drives that schedule.

HIS HONOUR: Were you informed of the time line that I gave in this court for the likely hearing of submissions and delivery of a decision?

MR BOYD: From last week?

HIS HONOUR: It was about a week ago, yes?

MR BOYD: Yes. Yes.

HIS HONOUR: So what are you telling me? That that time line has to be changed to be – have a recommendation from this court by the end of September so the Governor and Council has time – so the Minister has – each minister has time to make an approval by October?

MR BOYD: I – I guess what I'm saying is if – if we're not in a position to commence construction by the end of this calendar year, so in December of this calendar year, we will be faced with either having a gap between stage 2 and stage 3 or reducing the production level of stage 2 in order for it to carry us through for a period of time; both of those have implications on the level of employment at the site.

HIS HONOUR: Yes. I'm not completely sure that answered my question because it is a matter of deep personal concern to me how much personal resources I put into completing this matter, which is the reason why I asked the question in the first place that led to you giving your evidence today, and I find some inconsistencies regarding your knowledge that a highly compressed decision making time of December is inconsistent with your evidence as approval's needed by October?

MR BOYD: Well, if that's – if that's the case, then we need to review our – our current mine plan and determine what the optimal approach is with respect to production levels and staffing levels.

HIS HONOUR: See, that was the reason why I made the comment last week, to give you an opportunity to have some guidance by the court which is special to be given and given because of the – my knowledge of the perceived urgency of the matter is why I gave that very guidance and that hasn't made any difference at this stage?

MR BOYD: We don't have a clear plan for – for an approvals timing which is other than what I spoke about, which is an approvals timing that gives us the ability to commence construction in December. If that – if that's not December – if it's – if it's sometime in 2017, we need to go and develop that plan from a mining perspective and – and take whatever action we need to as a result of that plan, but we haven't done that work at this point.

HIS HONOUR: It's like this, Mr Boyd, living in the real world: for the last four months, I've been working between one and two nights a week till between 10 pm and 1.30 am to get work done, and my estimation of December was based on two days a week working till about midnight, 1 am per day to fit in to that time line. I'll take some convincing to turn that into – plus weekends of course; that's just a given – I need some convincing as to why I need to accelerate that to five days a week working till midnight or 1 am, as well as weekends, for myself, let alone the office, the public servants who work for the court, and I'm just not getting it?

MR BOYD: I'm not sure how else I can put it. The - - -

HIS HONOUR: Well, it seems that my comments last time didn't lead to any revision of the plans from the company leading up to you giving evidence today?

MR BOYD: With respect, that was a week ago, and in order to, you know, fully develop those options and look at the plans and come up with what we believe to be the – the best option for us, it will take us significantly longer than a week to do that work.

HIS HONOUR: But you could have given that right at the fore, but I'll move on. The comment regarding the approvals process taking so long is another that I – as I've already referred to, which I have difficulty understanding. When was stage 3 first proposed in this matter?

MR BOYD: First – when was stage 3 first proposed?

HIS HONOUR: The first stage 3 first proposed?

MR BOYD: I think it was 2007.

HIS HONOUR: Well, when was – when were the first houses removed in Acland in preparation for stage 3?

MR BOYD: I – I – I don't know the answer to that question.

HIS HONOUR: I think it's – I think you – would you accept 2006 or thereabouts or purchased in probably 2005 or thereabouts?

MR BOYD: Yeah, sure.

HIS HONOUR: When was the first application put in for the mining lease?

MR BOYD: I believe it was around that same time, 2007.

HIS HONOUR: And how long did the Coordinator-General's process take?

MR BOYD: Many years.

HIS HONOUR: And how long does the EPBC process take?

MR BOYD: Years also.

HIS HONOUR: Can you see why it becomes galling for this court, and I'm speaking personally now and certainly not on behalf of the present or other members of this court, why this court receives indirect criticism from your evidence as to the time that the process is taking and particular criticism from other areas, not just even under print media, but also it would seem in other area of Government, that it's the Land Court that is the holder of these approval processes when we come at the end of the chain after over 12 years and move heaven and earth to get a process through as quickly as possible with hundreds of thousands of pages of documents and working long hours, to be told it is the court, not the process, but the Land Court and these proceedings which is the cause of the delay and the cause of a loss of jobs potentially because of this court process. Can you see why personally when I've had to keep a bucket below the bench here so I could sit for a week when I was sick in the stomach to throw up in, why it becomes personally calling to receive that criticism?

MR BOYD: Yes. I can, and forgive me, I wasn't criticising the court. My comments around timing were around the process, not specifically the Land Court process.

HIS HONOUR: Well, you see, my comments that have been no doubt referred to you regarding the process were all about – of course were reported incorrectly through the media – were all about improving the legislative processes that bring these matters to the court and in a way in which the court gets the matters, not about the administrative and judicial process of the court, that that seems to have been lost on everyone, but I only raise all of this, and I want to make this clear on the record, because I am in the position with 571 pages of judicial notes and to make it quicker on what pages are relevant, I have put parts that I need to refer to in the decision. I'm doing as much as I can to assess this as quickly as I can, but just 571 pages of judicial notes, let alone the tens of thousands of pages of transcript. It's not something that can be done in a couple of weeks. You see relatively simple matters, including those that receive a lot of public attention, that are before the courts for years, and quite properly so. Having a decision in this matter out in three months would be an incredible period of time, in my view, from my 30 or 40 years' experience in the law and having dealt with matters of this stage before. Does your company wish me to accelerate the process personally to an extent of having a decision made in September?

MR BOYD: Not if you're not capable of doing that.

HIS HONOUR: That wasn't the question. I'm – a human being is capable of doing amazing things. We see that in the case of war, what can be done when it's absolutely necessary. If the answer to this project is yes, but because of delays hundreds of workers lose their jobs, that's a tragedy, and I understand that, but if the answer no, it's – well, actually there's other approval processes that haven't been applied for which are going to hold the matter up for years, potentially, anyway, and we'll just make arrangements for that, while a member of the Land Court has killed himself trying to rush something through at this stage, that's for life and death instances that I feel as if I'm dealing with, in trying to deal with this matter urgently, and so I did not raise the issue of urgency as a flippant remark a number of months ago. I really wanted to know what was happening with the RPI application. I still have no clue. I really wanted to know drop dead dates from New Hope's point of view. I still don't know. So I almost wonder if I should just take next week off as leave and refresh myself, because one week here or there really

> won't make any difference. Is that the appropriate way to do and give everybody in this case a break so that we can actually be quicker rather than rushing it through? I don't know, and I'd be welcome, while you're in the witness box, for any guidance you can give. I'll probably get shot for the comments that I've made. I hate appearing in the newspaper and I believe in separation between the State and Judiciary, but in all my years, including one half decade in the Mabo case, which doesn't get much more publicity and comment than any other case. Working at the heart of that matter, I have never before felt the internal pressure to perform miracles in delivering a decision in an extremely difficult case that I felt in this matter and in those circumstances I felt compelled, despite wise counsel to the contrary, to ask you these questions so I could hear directly from the application as to what the applicant requires of this court in circumstances where all and sundry seem to be taking an opportunity to kick the court for taking too long and then obstructing the process?
>
> MR BOYD: If we're not in a position a commence construction by the end of this calendar year, we will face a situation where we have to – sometime during 2017 – where we have to reduce our production levels and reduce our employee numbers, because we simply won't be able to build the infrastructure that we need to to progress to stage 3. How many people have to lose their job or how much we have to reduce our production by, is really something that we can't fully determine until we know exactly what the scenario is around when we commence.

224. The learned Member continued to consider the urgency of the matter in the timetabling of the proceedings.[180]

225. Following his cross examination, NAC filed a further affidavit from Mr Boyd, sworn on 15 July 2016 (**Second Boyd Affidavit**),[181] including the following:

> 23. During my cross-examination, I was also asked questions by His Honour Member Smith in relation to the urgency of the matter and whether I had been informed of the Court's comments that a decision in this matter is not likely until approximately December. His Honour asked whether any revision of the current mine plans had been undertaken as a result of these comments. [footnote omitted] His Honour also commented "I really wanted to know drop dead dates from New Hope's point of view. I still don't know".[footnote omitted]
>
> 24. I can only re-iterate that the Applicant has already undertaken significant changes to the mine plan and construction schedule to ensure continuity of operations and employment and that, if the mining leases and amendment to the environmental authority are not granted by October 2016, any further changes to the mine plan such as to reduce production, will also involve redundancies or at best significantly reduced hours for existing workers. A reduction in the production rate will also have a negative impact on New Hope's financial performance and its ability to meet coal supply contracts with customers. Because of the above reasons, October 2016 is the "drop dead" date for the Applicant.

226. NAC maintained its reliance on Mr Boyd's urgency evidence in it closing submissions on 26 August 2016[182] and reply submissions on 30 September 2016.[183]

Land Court's decisions and reasons

227. The learned Member recommended under s 269 of the MRA that two applications for mining leases be rejected and recommended under s 190 of the EPA that the application for an amendment to NAC's existing environmental authority be refused for Stage 3 of the New Acland Coal Mine.

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[180] See, for example, T72-27, lines 33-39.
[181] Exhibit 1209.
[182] NAC Closing Submissions, paragraphs 55.1 to 55.4 page 371.
[183] NAC Reply Submissions, paragraphs 5.21 page 118.

228. The learned Member's reasons for the decisions were 459 pages in length.

229. Three aspects of the learned Member's reasons that are important to note in terms of the overall nature of his reasons are:

(a) the urgency of the decisions being delivered;

(b) the immense amount of material he considered; and

(c) the extensive process he adopted to determine the credit of witnesses and assess their evidence.

Urgency of the decisions

230. The learned Member noted in his reasons the urgency in deciding the applications that had been pressed on him by NAC:[184]

> **Urgency**
>
> [114] Since the very first directions hearing in this matter, NAC has sought to have these matters progress through the Court as a matter of urgency.
>
> [115] Accepting on face value (and without any contra evidence at that stage) the material put forward by NAC in support of its claim for urgency, this Court expedited the pre-hearing processes so as to enable the hearing to commence in early March 2016. It is noteworthy that, generally speaking, despite the time constraints placed on them by the Court, the objectors have met the expedited time frame sought by NAC both before and throughout the hearing.
>
> [116] At no time has NAC moved from its position that this matter is urgent. During the hearing, NAC relied upon evidence by Mr Denney and Mr Boyd to establish the grounds for urgency.
>
> [117] As NAC put it in its submissions,[185] if the MLAs and the EA amendment application were not granted by October 2016, any further changes to the mine plan, such as to reduce production, would involve redundancies or at best significantly reduced hours for existing workers. Issues relating to a failure to meet coal supply contracts with customers and a negative impact on New Hope's financial performance were also raised. In short, Mr Boyd confirmed that October 2016 was the 'drop dead' date for NAC to receive the grant of the MLAs and the EA amendment application.

Consideration of immense amount of material

231. The learned Member described the great length of the hearing, the immense amount of material he had been required to consider, and that he had in fact considered the whole of the evidence and submissions in reaching his decisions at numerous points throughout his reasons (emphasis added):[186]

> [19] [The hearing involved] almost 100 hearing days before this Court, almost 2,000 exhibits containing many tens of thousands of pages of material, and well in excess of 2,000 pages of submissions. …
>
> [36] … This hearing has been the longest in the over 120 year history of the Land Court. The amount of material before the Court can only be described as immense. To consider every element of every aspect of this matter in detail would result in a decision running into many thousands of pages. That is clearly an impractical and intolerable proposition. Although this decision will of necessity be very lengthy, it will not run into many thousands of pages, for to do

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[184] Reasons at [114]-[117] (footnote at [117] in original). See also [118]-[130], [1655]-[1657] and [1878].
[185] At para 55.3 and 55.4.
[186] Reasons at [19], [36], [37], [38], [97], [113], [202], 203], and [205].

so would be of little utility to those tasked with the job of reading this decision and making their own decisions in light of my recommendations.

[37] I can only say this: I am the only person who has physically been present for every moment of every piece of evidence throughout this entire hearing. **I have taken into account all of the evidence that has been placed before me. I have considered all of the submissions. I have done my best to assess all of the evidence provided to the Court by the myriad of witnesses, both lay and expert.**

[38] What is to be found in the many pages that follow are my conclusions on key aspects of the evidence in this case. No doubt, many will be able to say that there are **huge parts of evidence that I have not specifically referred to. That must necessarily be the case, but that should not be taken as meaning that I have not fully taken into account all such evidence.** I have done my best to extract the core elements that I consider are necessary to consider in order to understand the nature of the recommendations that I make under the MRA and the EPA, and to assist, I hope, the ultimate decisions of the decision makers under the MRA and EPA in determining the future of Stage 3 of New Acland. …

[97] … The simple fact that there are 1,951 exhibits does not of itself properly identify the immense volume of material placed before the Court. While of course some exhibits are only one or two pages in length, others are many hundreds of pages long. I am in little doubt that the total number of pages made up by the exhibits would be many tens of thousands. …

[103] There were a large number of witnesses called during the hearing and the reopening. Overall, there were 38 lay witnesses called to give evidence, and 28 expert witnesses assisted the Court with their evidence, making a total of 65 overall. …

[113] **In making these recommendations, I have taken into account all of the evidence presented in this case including all evidence from expert witnesses and lay witnesses and all exhibits tendered. I have also considered and taken into account all of the objections and submissions of each party.** These recommendations refer to the salient points, but not all of the material, which I have considered. As previously indicated, the sheer size of the evidence in these matters prevent a more fulsome analysis of all of the evidence in these written recommendations. …

[202] My attempt to analyse the evidence of the various witnesses, both expert and non-expert, highlights the difficulty of producing the decision in this matter in anywhere near the timeframes sought by the applicant. I will not repeat what I have already said under the heading of "urgency", but it is important to note the continuing dilemma that a matter of this size and complexity brings to the writing of a decision. Also, as already indicated, not only has this been the longest case heard in the 120 plus year history of the Land Court of Queensland, but it has also involved the largest number of witnesses in any matter ever heard by this Court. The evidence, in both written statement form, report form or oral form, of some witnesses was extremely extensive, while other witnesses were much shorter in either statement or report.

[203] … there are 38 lay witnesses and 38 areas of expert evidence that require analysis, resulting in a total of 76.

[204] When reference is made to the well over 2,000 pages of written submissions received from the parties in this matter, there are literally hundreds and hundreds of pages of material dealing with aspects of the credit of both lay and expert witnesses on a myriad of topics. For example, the lay witness, Mr Denney, provided, very large affidavits, including the annexures to those affidavits, and was subject to very extensive cross-examination over many days. Exactly the same comment applies to many of the expert witnesses, particularly those relating to groundwater, noise, air quality etc.

[205] If I were to do a comprehensive analysis of the credit of each witness based on their written and oral evidence, this decision would be unbearably long for those tasked with the job of reading and comprehending the recommendations arising out of this decision to consider. I could easily spend 20 or 40 pages referring to issues of credit relating to Mr Denney alone. Even witnesses who gave only very short statements and oral evidence would warrant a page or two pages of consideration of the findings relating to their credit. To put all that into perspective, if I was to do a relatively comprehensive analysis of each witness and that analysis averaged out at about five pages per witness or area of expert expertise, then this part of the decision would amount to over 350 pages by itself. That level of detail is simply impossible in the time I have available.

> However, the clear risk arises that in providing a much shorter form analysis of the credit of each witness, I run the grave risk of appearing to not properly consider, in sufficient detail, my views as to the credit of each witness and, in particular, not drawing on the specific examples that I have to support my views as to the credit of each witness. …

Extensive process adopted to assess credit of witnesses

232. A further point of note in relation to understanding the overall nature of the learned Member's reasons and his decisions is the extensive process he described undertaking in respect of hearing the evidence and assessing the credit of each witness:[187]

> [206] To explain further, I have in my judicial notebook approximately 800 pages of handwritten notes relevant to the hearing of this matter. For each and every witness, be they a lay or expert witness, I make running notes to myself with respect to my immediate impressions of the witnesses as they give their evidence in the witness box. I then review those comments when each witness concludes their oral evidence so that the total impression of their written material and oral evidence can be recorded on paper whilst it is freshest in my mind.
>
> [207] Of course, following the receipt of written and oral submissions from all of the parties, I review my initial impressions of each witness against the submissions made by each party and then come to a concluded decision as to my view of the creditworthiness of the evidence of each expert and lay witness.
>
> [208] I have given this explanation to explain the judicial thinking process that I put in place with respect to each witness in this matter. It is, to say the least, extensive. However, in the assessments that follow for each witness, in order to keep this part of the decision as brief as possible, I will give but a snapshot of the reasons why I have come to the conclusions I have come to with respect to the creditworthiness of each witness. I must stress though that this reasoning is backed by a very detailed analysis undertaken both when the evidence was fresh before me, and reviewed after submissions were made.
>
> [209] As can be seen from the structure of this decision, as well as my examination of the credit of each witness, I am also setting aside specific parts of this decision to the key issues which require resolution, such as noise, air quality, dust, light pollution and so on for a total of 20 key issues, not including the general key issue of other objections made. I will of course refer as necessary to the myriad of evidence with respect to each of those key issues, with such evidence of course being viewed through the glasses of my findings as to the credit of the respective witnesses.
>
> [210] In short, what follows with respect to the analysis of each lay witness is an important snapshot to help in the understanding of why evidence on a issue given by person A is preferred over different evidence given on that same topic by person B. Specifically, the detail of the analysis of that evidence will be found by reference, insofar as it is necessary, and again, in the interests of making this unwieldly decision as comprehensible and manageable as possible, without analysing in depth all of the evidence for each key issue. To do otherwise would be to consign the reader to reading many thousands of pages of this decision; something which I have tried my best to avoid.

233. Further aspects of the learned Member's reasons are addressed below in responding to NAC's grounds of review.

NAC misstates the basis of the learned Member's decisions

234. Before turning to NAC's grounds of review a further issue that should be noted is that NAC's outline misstates the basis of the learned Member's decisions to recommend

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[187] Reasons at [206]-[209].

rejection of the mining leases under the MRA and refusal of the amendment of the environmental authority under the EPA. NAC states (footnotes in original):

> [4] … the Decision to recommend refusal was based on 3 matters.
>
> [5] *First*, the Member concluded that noise limits in the EA for Stage 3 should be set at 35 dB(A) for evening and night time. However, the Member concluded that a condition to that effect would be inconsistent with a condition for the EA for Stage 3 stated by the CG under s.47C of the *SDPWOA*. In consequence, the Member found that s.190(2) of the *EPA* prevented him from making a recommendation giving effect to his conclusion and the *"only option"* was to recommend refusal of the EA amendment application[188].
>
> [6] *Secondly*, the Member found as a matter of construction of the *MRA* and the *EPA* that it was necessary to *"fully consider"* groundwater issues at the hearing and acted upon that view. The Member concluded that there were substantial concerns about the state of NAC's predictive numerical groundwater model at the time of the hearing. The Member concluded that his concerns were such that Stage 3 should not be permitted to proceed given risks to surrounding landowners[189].
>
> [7] *Thirdly*, the Member concluded that the principle of intergenerational equity, which is a consideration under the *EPA*, was *"breached"* by Stage 3 with the potential for groundwater impacts to adversely affect surrounding landowners *"for hundreds of years to come"* and *"indefinitely"*. The Member found the *"breach"* was sufficient to warrant the rejection of the MLAs and the EA amendment application[190].

235. The three matters identified by NAC involve factual findings the learned Member made; however, the actual basis of his recommendations for refusal were five of the statutory criteria stated in s 269(4) of the MRA and s191 of the EPA, namely:

    (a) under s 269(4)(i) of the MRA, the operations to be carried out under the authority of the proposed mining lease for Stage 3 did not conform with sound land use management due to:[191]

        (i) groundwater impacts;

        (ii) failing to meet all the principles of intergenerational equity; and

        (iii) the noise limits proposed by the CG for evening and night time operations are not appropriate, causing the learned Member to recommend (as an exercise of his discretion rather than being legally bound) that the mining leases not be granted as he was unable to recommend conditions inconsistent with the CG conditions; and

    (b) under s 269(4)(j) of the MRA, the extent of the adverse environmental impacts caused by Stage 3, reflecting the learned Member's concerns under s 269(4)(j);[192]

    (c) under s 269(4)(k) of the MRA, the public right and interest will be prejudiced by Stage 3 weighing the economic benefits of the mine against non-compliance with one of the principles of intergenerational equity, and the unknown level of impact on

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[188] [3], [713]-[816], [1799], [1803], [1808] & [1838].
[189] [16], [163]-[172], [1436]-[1682], [1799], [1803], [1804], [1808] & [1839].
[190] [14], [1303]-[1344], [1799], [1804], [1808] & [1839].
[191] Reasons at [1799]-[1800] and discussion below of the weight attributed to this matter.
[192] Reasons at [1802] and [1803].

groundwater supplies in the Acland area [and] if noise limits are not set at levels in the evening and night in accordance with the learned Member's findings which are inconsistent with the stated conditions of the CG.[193] Taken as a whole the learned Member concluded as an exercise of his discretion and the weight he attributed to his matter, he was left with "no alternative but to find that the public right and interest will not be satisfied" by the grant of the mining leases.[194]

(d) under s 269(4)(l) of the MRA, good reason has been shown for refusal of both mining leases;[195]

(e) under s 269(4)(m) of the MRA, the learned Member considered he had "no option" in the exercise of his discretion but to determine that the proposed mining operation is not an appropriate land use taking into consideration the current and prospective uses of the land, primarily for the reasons of: [196]

(i) the inconsistency of his findings regarding noise limits with those stated conditions by the CG;

(ii) unknown impact on groundwater in the Acland area; and

(iii) the breach of at least one principle of intergenerational equity; and

(f) under the considerations in s 191 of the EPA the learned Member recommended refusal of the application to amend the environmental authority due to:[197]

(i) the appropriate evening and night time noise levels being inconsistent with stated CG conditions and therefore the learned Member has "no option" but to recommend refusal of the draft EA in the exercise of his discretion;

(ii) "at least one of the principles of intergenerational equity being breached to such an extent as to warrant refusal to grant the draft EA"; and

(iii) "concerns regarding the state of groundwater modelling and predictions … are such as to warrant refusal of the draft EA."

236. The learned Member's reasons make it clear that his factual findings regarding groundwater, noise and intergenerational equity were considered within the correct statutory context of s 269(4) of the MRA and s 191 of the EPA and his decisions to recommend rejection of the mining leases and refusal of the proposed amendment of the environmental authority was based on the weight he gave to criteria in those sections in the context of the evidence and his factual findings.

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[193] Reasons at [1804] and [1806].
[194] Reasons at [1806].
[195] Reasons at [1807] and [1834].
[196] Reasons at [1808] and [1835].
[197] Reasons at [1838] and [1839].

SUMMARY OF NAC'S GROUNDS OF REVIEW

Summary of NAC's grounds

237. As noted earlier, NAC's Amended Application presents the grounds of review in an illogical order that is not followed by NAC's outline of argument. The grounds themselves are also, with respect, confusingly structured and cross-referenced.

238. Within the confusing structure of the Amended Application, in summary NAC's grounds of the Amended Application are:[198]

Ground	Summary of ground
1.	Noise – CG conditions
2.	Consideration of possible breaches of NAC's current environmental authority in relation to air quality and noise limits
3.	Inquiry into past performance of DEHP
4.	Noise EPP – appropriate noise level for evening and night operations
6.	Xstrata case[199] [this ground is not particularised but based on NAC's outline it appears to be directed at noise & groundwater issues]
7.	Intergenerational equity – mandatory requirement
9.	Intergenerational equity – MRA considerations
10.	Groundwater regulated under Water Act 2000 – irrelevant under MRA & EPA
12.	Breach of natural justice – failure to give notice of adverse material and concerns regarding Mr Denney and Mr Beutel's evidence
13.	Apprehended bias
14.	Unreasonableness & irrationality – ambit claim [the only particular remaining in this ground "repeats and relies upon" grounds 1 to 13 and 15]
15.	Sufficiency of Reasons [particularised principally regarding groundwater]

239. Notably, NAC's new ground 15 (sufficiency of reasons) is particularised principally regarding groundwater but is also spread across NAC's outline of argument regarding other issues.

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[198] Noting that grounds 5, 8 and 11 were abandoned.
[199] *Xstrata Coal Queensland Pty Ltd v FoE & DERM* [2012] QLC 13; (2012) 33 QLCR 79 (***Xstrata***).

Sections of OCAA's outline addressing NAC's grounds

240. The following sections of OCAA's outline address NAC's grounds in the following groups:

Section of OCAA outline	Grounds of NAC Amended Application principally considered
Apprehended bias	13
Inquiring into DEHP and the current EA	3
Noise and air	1-4 and 6
Groundwater	6, 10 and 15
Intergenerational equity	7 and 9
Procedural fairness	12
Legal reasonableness and rationality	14
Sufficiency of Reasons	15

APPREHENDED BIAS

Ground 13 of the Amended Application

241. Ground 13 of the Amended Application alleges the learned Member's decision was affected by apprehended bias. The particulars of this allegation are, in summary:

(a) Particular (i): "a fair minded lay observer might reasonably apprehend that the Member might not have brought an impartial mind to the Decisions."

(b) Particular (ii): the conduct of the learned Member at a hearing called by him on 2 February 2017 for NAC to explain its actions in relation to two press reports that the learned Member considered may amount to contempt of the Land Court.

(c) Particular (iii): the learned Member's reasons "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."

(d) Particular (iv): the learned Member's reasons "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. These statements were made without consideration or analysis of relevant evidence and submissions and without adequate reasons."

(e) Particular (vi): the learned Member "unreasonably and/or irrationally assessed the character, motivations and/or conduct (current and previous) of the Applicant" by reference to "particulars (iii) and (iv) above".

(f) Particular (xii): the learned Member "drew adverse conclusions from 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" by reference to the "particulars in paragraphs (iii) and (iv) above".

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

242. While ground 13 is, on its face, directed at apprehended bias, subsidiary aspects of it appearing in the particulars involve allegations of "unreasonable and irrational" conduct and insufficient reasons and the allegations in grounds 2, 7, 12, 14 and 15. The structure of ground 13 indicates that these are alleged to contribute to apprehended bias.

243. NAC's outline addresses its claims of apprehended bias in summary at [13]-[17], regarding relevant principles to be applied at [92]-[100], and in the body of its submissions at [130]-[195]. NAC's submissions ignore the principles of waiver and ignore much of the context that a fair-minded observer is assumed to be aware of.

NAC alleges both actual and apprehended bias in substance

244. The principles regarding apprehended bias are not in dispute but their application in the circumstances of this case very much are in dispute.

245. The rule against bias requires that decision-makers approach a matter with an open mind so that they may consider each case fairly rather than by reason of any preconceptions, interests or other influences that may affect a fair consideration of the case or decision at hand.[200]

246. Bias may take two forms – actual or apprehended:

(a) A claim of actual bias involves an allegation that a judge or other decision-maker was influenced in some way by a pre-existing state of mind and was unwilling or unable to undertake a proper consideration of the evidence or other material that might be offered for the case at hand.

(b) A claim of apprehended bias involves an allegation that a fair-minded lay observer who was informed of the facts alleged "might reasonably apprehend that the judge [or other decision-maker] might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide."[201]

247. NAC's grounds and arguments on bias in this case in substance involve both actual and apprehended bias.

248. The rule against bias in an administrative decision-maker prohibits prejudgment but not predispositions.[202]

249. An unfavourable result cannot, itself, justify the decisions being set aside on the basis of apprehended bias. As Martin J observed in a recent decision when summarising the requirements of procedural fairness:[203]

> What is required by procedural fairness is a fair hearing, not a fair outcome. The relevant question is about the process, not the decision.

250. Where circumstances of apprehended bias arise it is incumbent on a party to object to the hearing proceeding before the decision-maker. Particularly where a party is legally represented as NAC was before the learned Member, where no objection is raised a party is generally taken to waive a later claim to have a decision set aside on the basis of apprehended bias.

Waiver of apprehended bias

251. Dawson J in *Vakauta v Kelly* (1989) 167 CLR 568, while finding no waiver had occurred in the circumstance in that case, stated at 577-579:

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[200] A useful examination of relevant principles is Groves M, "Waiver of the Rule Against Bias" (2009) 35(2) *Monash University Law Review* 315-347.
[201] *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point; and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 335 at 344 [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.
[202] See *MIMA; ex parte Jia* (2001) 205 CLR 507 at 531 where Gleeson CJ and Gummow J stated, "[N]atural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion."
[203] *ERO Georgetown Gold Operations Pty Ltd v Cripps, Minister for Natural Resources & Mines & Anor* [2015] QSC 1 at [20].

> It cannot be the position that a party can wait to see whether the outcome of a case is favourable to him before raising an objection, the availability of which he was previously aware, on the ground of bias. …
>
> There can, I think, be no doubt that an objection upon the ground of bias can be waived. Even where it is a question of the public apprehension of bias, the parties themselves must be competent to waive the objection. Although justice must manifestly be seen to be done, where a party, being aware of his right to object, waives that right, there will be little danger of the appearance of injustice. …
>
> In my view, where a party in civil litigation, being aware of the circumstances giving rise to a right to object, allows the case to continue for a sufficient time to show that he does not presently intend to exercise that right, he may be held to have waived it.

252. Gummow A-CJ, Hayne, Crennan and Bell JJ reiterated the potential for waiver of a claim of apprehended bias in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 449 [76] (footnotes in original):[204]

> It is well established[205] that a party to civil proceedings may waive an objection to a judge who would otherwise be disqualified on the ground of actual bias or reasonable apprehension of bias. … If a party to civil proceedings, or the legal representative of that party, knows of the circumstances that give rise to the disqualification but acquiesces in the proceedings by not taking objection, it will likely be held[206] that the party has waived the objection.

NAC's clear and unequivocal waiver of apprehended bias

253. The highwater mark of NAC's claim of apprehended bias and focus of its submissions regarding it was the threatened contempt proceedings on 2 February 2017.

254. This occurred on day 93 of the 99-day hearing, yet at that very point NAC, through its counsel, Mr Ambrose QC, expressly and repeatedly declined an invitation by the learned Member to make an application that he excuse himself due to apprehended bias:[207]

> HIS HONOUR: How – I thought I had a thick skin, and for the last 17 years I've had to have a very thick skin a lot of times, but maybe I've just got too thin, I'm too old, and I should just retire, say that I'm biased in this matter and let you start again with a new member. Is that what you want?
>
> MR AMBROSE: It's a matter for your Honour's decision about that,
>
> HIS HONOUR: No, no, it's a matter - - -
>
> MR AMBROSE: I'm not making an application - - -
>
> HIS HONOUR: It's a matter that can be an application by a party.
>
> MR AMBROSE: I am not making an application.
>
> HIS HONOUR: Well, it sounded like it.
>
> MR AMBROSE: Well, again, with the greatest respect it's very difficult for me to understand how you can draw that imputation.
>
> …

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[204] See *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 449 [76] per Gummow A-CJ, Hayne, Crennan and Bell JJ; and M Groves, "Waiver of the Rule Against Bias" (2009) 29 Monash ULR 315 at 336.
[205] See *Vakauta v Kelly* (1989) 167 CLR 568 at 577-579 per Dawson J and the cases cited there.
[206] See, eg, *Smits v Roach* (2006) 227 CLR 423 at 439-440 [43] per Gleeson CJ, Heydon and Crennan JJ; at 445 [61] per Gummow and Hayne JJ.
[207] T 90-33, lines 11-29; and 90-34, lines 5-8 and 23-30. This was the 93rd day of the hearing noting the anomalies in the order of transcript days identified in the reasons at [98].

> HIS HONOUR: Because, you see, that's when I am trying so hard not to look at the personal side but at the court disrepute side so that there cannot be an application that I am biased. That is so to show the elephant in the room that's what I'm concerned about, and that's what I raised without saying it to Mr Ambrose earlier this evening.
>
> …
>
> HIS HONOUR: I am not going to delay dealing with this until after the recommendation is made so that you can then judicially review me on the basis of bias if a recommendation is against your client. I'm not going to do that. And that is a legal tactic which I know is open to you. You can frown as much as you want. I practised for a long time and I have pulled all the tricks that were in the book, as well. I'm not playing that game.
>
> MR AMBROSE: I'm not pulling any tricks. I'm simply responding. …

255. Shortly after these exchanges took place, NAC offered an apology for the offending material that had triggered the threatened contempt proceedings and the learned Member indicated that he accepted the apology, he considered the matter closed and would not be making a directive to the registrar to issue any contempt proceedings.[208]

256. NAC was represented by experienced Queens Counsel and junior counsel instructed by a large solicitors firm, Clayton Utz, throughout the hearing before the learned Member. Its decision on 2 February 2017 not to apply for the learned Member to stand aside from the hearing on the ground of apprehended bias in the circumstances was clearly an informed, tactical decision.

257. NAC's legal representatives clearly knew of the circumstances that gave rise to the potential disqualification but acquiesced and made an informed, tactical decision by not taking objection. This is an archetypal example of waiver.

NAC bound by tactical decisions of its counsel

258. The adversarial system proceeds upon the assumption that parties are bound by the conduct of their legal representatives and the tactical decisions made by trial counsel.[209] While the hearing before the learned Member was administrative rather than judicial in nature, it was conducted by the learned Member and the parties as adversarial in many ways, including calling evidence and cross-examination of witnesses.

259. The decision made by Mr Ambrose QC as NAC's counsel not to apply for the learned Member to step aside from hearing the applications under the MRA and EPA due to apprehended bias "was the kind of tactical decision routinely made by trial counsel, by which their clients are bound."[210] As Gleeson CJ said in *TKWJ v The Queen* (2012) 212 CLR 124 at 131:

> Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks.

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[208] T 90-35, lines 35-47.
[209] *TKWJ v The Queen* (2012) 212 CLR 124 at 128 [8] per Gleeson CJ.
[210] *TKWJ v The Queen* (2012) 212 CLR 124 at 128 [8] per Gleeson CJ.

260. The obvious tactical reason why NAC's counsel did not to apply for the learned Member to step aside on day 93 of the hearing due to apprehended bias when possible contempt by NAC was raised by the learned Member was to avoid the delay involved of another member of the Land Court rehearing the evidence. NAC had claimed the resources at the existing mine were depleted and sought the hearing to be resolved urgently to allow its mining operations to continue in the expanded mine area.[211] By 2 February 2017 the hearing was in its concluding stages and restarting the hearing afresh before another member of the Land Court would have involved very considerable delay. A decision not to apply for the learned Member to stand aside due to apprehended bias was a reasonable choice for a competent counsel to make in the circumstances.

261. In these circumstances NAC made a clear and unequivocal waiver of a future claim for the learned Member's decisions to be set aside due to apprehended bias at least in relation to the threatened contempt proceedings on day 93 of the hearing and this was a tactical decision made by its counsel at the time.

262. No other aspect of the hearing or the learned Member's decision so clearly raised the possibility of apprehended bias. While the learned Member ultimately rejected large parts of NAC's submissions and the evidence of NAC's witnesses and recommended the MRA and EPA applications be rejected, his Honour was at pains to allow all parties a fair hearing.

Overall conduct of the hearing and the decision demonstrate no bias or apprehended bias

263. Leaving aside this archetypal example of waiver, contrary to NAC's submissions the overall conduct of the hearing and the decision demonstrate no actual bias or apprehended bias.

264. Context is significant here and a fair-minded lay observer is taken to understand the context in which issues regarding apprehended bias may arise. When the learned Member's statements at the potential contempt hearing on 2 February 2017 and in his reasons are seen in context, a fair-minded lay observer would not reasonably apprehend that he might not bring an impartial and unprejudiced mind to making his recommendations under s 269(1) of the MRA and s 190 of the EPA.

In previous cases the learned Member has approved NAC's applications

265. A fair-minded observer would be aware that the learned Member has approved past applications by NAC associated with the New Acland Mine.

266. The learned Member noted in the epilogue to his reasons:[212]

> [1870] I have known of the New Hope group for many many decades. As I indicated at the time of seeing the list of shareholders of New Hope, I know one of those shareholders. No party took any objection to my knowing that person. I was the Member of the Land and Resources Tribunal responsible for the original recommendation for the Stage 1 New Acland Mine. I also presided over the Land and Resources Tribunal matter that involved a significant cultural heritage dispute in the development stages of Stage 1. I also gave the recommendations for the expansion of the New Oakley Mine, part of the New Hope group, near Rosewood.

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[211] See the evidence discussed earlier at [214]-[226]
[212] Reasons at [1870]-[1871].

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

267. The learned Member's past decisions involving NAC and related companies were:

(a) In *Re New Acland Coal Pty Ltd [No 3]* [2001] QLRT 30 the learned Member (then a member of the Land and Resources Tribunal) recommended under s 269 of the MRA that the mining lease for Stage 1 of the New Acland Mine (ML50170) be granted over the entire application area, for the purpose and the term sought by NAC, provided that an environmental management overview strategy (EMOS) was changed by requiring NAC to develop a Cultural Heritage Management Plan after appropriate consultation with relevant traditional owners, and that a process be agreed should any items of cultural significance be located during mining. Amongst other favourable findings for NAC, the learned Member found in relation to the criteria under s 269(4) of the MRA:

(i) "… there is no material before me to indicate any unsatisfactory past performance" of NAC and it's "past performance has been satisfactory";[213]

(ii) "… it is my view that the proposed mining lease would conform with sound land use management";[214]

(iii) "Although … there will virtually inevitably be environmental impacts in any mining operation, I am satisfied that the extent of those impacts is not sufficient to, nor to such an extent to, prevent me from making a recommendation … that the mining lease be granted;"[215] and

(iv) "The materials shows that the project is of economic benefit to the State of Queensland. The mine will increase jobs, training opportunities and infrastructure in the region."[216]

(b) In *Jarowair People v New Acland Coal Pty Ltd* [2002] QLRT 13 the learned Member granted an urgent interlocutory injunction to protect cultural heritage against NAC and in two later decisions[217] the learned Member refused applications by the cultural heritage claimants to vary the terms of the injunction against NAC.

(c) In *Re New Oakleigh Coal Pty Ltd v Hardy & Ors and EPA* [2003] QLRT 24 the learned Member recommended the grant of a mining lease under the MRA and an environmental authority under the EPA for a coal mine at Rosewood applied for by another subsidiary of New Hope Group, NAC's parent company. The objection hearing involved 112 objectors and the issues raised included the impacts of the mine on groundwater and cultural heritage.

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[213] *Re New Acland Coal Pty Ltd [No 3]* [2001] QLRT 30 at [21]-[22].
[214] *Re New Acland Coal Pty Ltd [No 3]* [2001] QLRT 30 at [25].
[215] *Re New Acland Coal Pty Ltd [No 3]* [2001] QLRT 30 at [25].
[216] *Re New Acland Coal Pty Ltd [No 3]* [2001] QLRT 30 at [38].
[217] *Lillian Colonel, for and on behalf of the Jarowair People v New Acland Coal Pty Ltd (No 2)* [2002] QLRT 14; and *Lillian Colonel, for and on behalf of the Jarowair People v New Acland Coal Pty Ltd (No 3)* [2002] QLRT 16.

268. The learned Member's past favourable findings and decisions for NAC and related companies in the past, particularly his decision to recommend approval of Stage 1 of the New Acland Mine in 2001, would suggest to a fair-minded observer that he was not biased against NAC.

The learned Member has recommended approval of many mines in the past

269. In addition to making decisions favourable to NAC in the past, a fair-minded observer would also be aware that the learned Member has approved many mines in the past.

270. Examples of the mines the learned Member has approved in the past, in addition to decisions involving NAC noted in the preceding section, include:

    (a) *De Lacey v Kagara Pty Ltd* (2009) 30 QLCR 57; [2009] QLC 77 where the learned Member recommended approval of a mining lease and environmental authority for mining a range of minerals including gold, silver ore and lead ore, over objection from a competing miner;

    (b) *Burtenshaw & Ors v Dunn* (2010) 31 QLCR 93; [2010] QLC 70 where the learned Member recommended approval of two mining leases, subject to addressing native title issues, despite objection by occupiers of the land affected by the mine; and

    (c) *Endocoal Limited v Glencore Coal Queensland Pty Ltd and Department of Environment and Heritage Protection* (2014) 35 QLCR 462; [2014] QLC 54 where the learned Member recommended approval of a thermal coal mine despite objection from a neighbouring coal mine.

271. In *Hancock*, a decision referred to extensively earlier, the learned Member made recommendations under the MRA and EPA that the proposed mine be refused or, alternatively, approved subject to addressing his concerns about groundwater impacts in its later water licence application.[218] The decision displayed a fair and careful treatment of all parties. No allegation of bias was made by the applicant miner in that case.

The learned Member's conduct from the outset of the hearing was fair to all parties

272. As noted earlier in discussing the conduct of the hearing, at the earliest directions the learned Member accepted NAC's request for an urgent hearing and made directions for what his Honour later noted was an "extraordinarily truncated timetable" and "a truncated process … put in place to have the hearing commence as quickly as possible."[219]

273. As noted earlier, in response to concerns raised by an objector at the initial directions hearing the learned Member stressed the importance he placed on ensuring procedural fairness to all parties, including the applicant, NAC:[220]

> I go out of my way, some say too much, to ensure that all parties are treated with procedural fairness, and you can be as assured as I can possibly make you of procedural fairness occurring in this case, not just from you, but from the applicant as well, and I stress that it applies across the board.

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[218] *Hancock Hancock Coal Pty Ltd v Kelley & Ors & DEHP (No 4)* (2014) 35 QLCR 56; [2014] QLC 12.
[219] T64-11, line 43 and T64-75, line 14.
[220] T2-55, lines 7-10.

274. The learned Member also resolved two major pre-trial disputes in interlocutory decisions in NAC's favour:

(a) On 9 May 2016 the learned Member refused an application by OCAA for disclosure from NAC of records related to noise, air and complaints. The learned Member found the Land Court did not have power to order disclosure in objection hearings under the MRA and EPA.[221]

(b) On 18 May 2016 the learned Member refused an application by NAC for costs of OCAA's unsuccessful application for disclosure of documents. The learned Member found the Land Court did not have power to order costs in objection hearings under the MRA and EPA.[222]

275. The learned Member's third interlocutory decision in the hearing, delivered on 2 February 2017,[223] granted NAC's application to reopen the evidence subject to:

(a) NAC providing objectors with copies of all reports provided by NAC to the IESC and referred to in the advice; and

(b) all parties being permitted to call fresh evidence, including expert and lay evidence.

276. His Honour's reasons for this third interlocutory decision set out relevant principles and case law regarding the requirements on the Land Court to act on the basis of equity, good conscience, natural justice and the interests of justice.

277. A fair-minded observer would take into account the even-handedness shown by the learned Member from the outset of the hearing and in his interlocutory decisions to all parties, including NAC. A fair-minded observer would also take into account the learned Member's public statements of the importance he placed on procedural fairness.

The learned Member repeatedly stated his independence and impartiality

278. As he had done at the outset of the hearing, the learned Member stated his independence and impartiality and the process he was engaged in at a number of points in his reasons:

(a) The learned Member emphasised his independence and impartiality in responding to criticisms of Mr Wieck, a neighbour of the mine and an objector (emphasis added):[224]

> [456] … Mr Wieck was in effect accusing myself of not bringing an independent, impartial mind to this process. That is highly regrettable. He simply fails to understand **the duties and responsibilities placed on myself, particularly in an administrative enquiry such as this, to test the evidence and look for alternatives. Such statements go with the territory, but they do not in any way show or represent a concluded view or opinion on the evidence. It is nothing more than exploring issues as I am required to do; I must take everything before me into account**, and, after all, it was the objectors, including Mr Wieck, who object to the grant of the rail loading facility. He, by his very objection, has brought into question the very thing that he complains about me enquiring

[221] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP* [2016] QLC 29.
[222] *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, DEHP (No. 2)* [2016] QLC 30.
[223] *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1.
[224] Reasons at [456].

> about. He simply does not understand the process, although I am sure that in his mind he thinks that he does.

(b) The learned Member stated his conclusions on groundwater were a product of his independence:[225]

> [1678] Given the totality of all of the groundwater evidence before me, both at the original hearing the resumed hearing, and my findings with respect thereto, I have come to a conclusion that I am sure that will please few in this matter. That, however, is a product of my independence. It is not my role to please any party. It is my role to act in accordance with my oath, independently, fearlessly, and all-be-it in an administrative fashion in these matters, judicially to properly consider all of the evidence before me and make my honest, reasoned recommendations with respect thereto to the relevant state authorities.

(c) The learned Member reiterated his independence in an epilogue to his reasons (emphasis added):[226]

> [1865] It is of course at times a necessary function for someone in my position to be robust. It comes with the territory of fierce independence. Allow me, however, to provide just a little insight about myself.
>
> [1866] Just as I do with every matter that I hear, **when I was allocated this matter I had no idea of the issues involved or any preconceptions with respect thereto. Just like it always is, it was no more and no less than having the evidence speak for itself and applying the law to the best of my ability to my findings of evidence, and let the result sit wherever it fell, without fear or favour to anyone**. …
>
> [1872] Just as I know countless objectors have been disappointed with decisions of mine in mining matters in the past, so do I accept and realise that NAC and its workforce will be disappointed in my decision in this matter. I cannot however be influenced by the feelings of any parties.
>
> [1873] **I have simply done the best that I could with the evidence I had, applying my understanding of the law, in fearless independence without fear or favour for any party, issue or cause.** …
>
> [1878] I can only reiterate that I have carefully and, I trust, thoroughly considered all of the evidence before me, and provided my reasoned and honest recommendations in accordance with that work. Even if not worded as eloquently as I would have liked, and bearing in mind that these reasons only touch upon a fraction of the evidence compared to the huge amount of material that was placed before me, it is my belief that, even if I had taken an additional 6 months to provide my decision, the outcome would not have changed.

279. A beneficial construction of the learned Member's reasons would be simply that he was telling the truth in making repeated statements that his decision was made independently and impartially.

280. A fair-minded lay observer would take this into account in considering whether the learned Member brought an independent and impartial mind to making his decisions under s 269 of the MRA and s 190 of the EPA.

281. NAC's argues the epilogue "presents as an anticipatory defence of the Member's independence."[227] This can only mean that the Member is – according to NAC – not

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[225] Reasons at [1678].
[226] Reasons at [1865]-[1878].
[227] NAC outline at [189].

accurately describing his own impartiality. This court would not, in the absence of very good reasons, proceed on that basis.

282. Giving a beneficial interpretation to the learned Member's reasons, including the epilogue, a fair-minded lay observer would not reasonably reach the conclusions urged by NAC.

The learned Member displayed even-handedness to all parties and both praised and criticised NAC and its witnesses in his reasons

283. In addition to stating repeatedly in his reasons that he was acting impartially and independently, the learned Member's reasons display even-handedness to all parties.

284. NAC's claims of apprehended bias also ignore or downplay the many, many rulings and findings made by the learned Member that favour NAC and/or criticise objectors or their experts during the hearing and in his reasons.

285. A fair-minded observer would be aware that, rather than bias against NAC, the reasons display even-handed criticisms all parties and experts. While many NAC lay-witnesses and experts were criticised in the reasons, many were also praised.

286. The learned Member's reasons contain around:[228]

(a) 183 (48%) rulings/findings in favour of NAC;[229] and

(b) 196 (52%) rulings/findings against NAC.[230]

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[228] These figures are not presented as definitive or exact. They are presented merely to quantify in a broad way that the reasons were not one-sided or clearly biased against NAC. The learned Member made many, many findings in NAC's favour.

[229] Favourable findings for NAC and its witnesses included the following 183 paragraphs of the reasons: 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 76, 89, 188, 261, 263, 264, 270, 329, 337, 338, 339, 341, 353, 356, 382, 390, 391, 392, 397, 400, 403, 409, 415, 422, 428, 429, 430, 453, 454, 455, 456, 458, 459, 465, 467, 474, 488, 492, 494, 499, 541, 542,543, 544, 558, 575, 700, 701, 762, 766, 795, 797, 798, 801, 806, 807, 808, 811, 815, 823, 824, 829, 832, 834, 841, 848, 849, 850, 852, 853, 863, 864, 865, 882, 885, 890, 914, 949, 953, 956, 957, 958, 968, 977, 979, 980, 981, 983, 984, 985, 990, 996, 997, 998, 1004, 1009, 1016, 1018, 1019, 1020, 1021, 1039, 1052, 1055, 1072, 1075, 1077, 1078, 1079, 1082, 1093, 1094, 1122, 1126, 1128, 1130, 1134, 1138, 1147, 1150, 1153, 1156, 1189, 1193, 1203, 1206, 1208, 1211, 1256, 1264, 1265, 1267, 1280, 1281, 1282, 1283, 1284, 1285, 1288, 1330, 1645, 1651, 1666, 1675, 1676, 1687, 1696, 1715, 1720, 1728, 1729, 1733, 1734, 1736, 1738, 1740, 1745, 1747, 1748, 1750, 1752, 1754, 1758, 1760, 1761, 1763, 1768, 1777, 1778, 1779, 1780, 1781, 1782, 1785,1786, 1787, 1788, 1790, 1792, 1793, 1794, 1797, 1804, 1810, 1812, 1813, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1829, 1830, 1832, 1833, 1842, 1846, 1851 & 1852.

[230] Unfavourable findings for NAC and its witnesses included the following 196 paragraphs of the reasons: 3, 14, 16, 75, 119, 123, 126, 130, 200, 217, 219, 228, 229, 231, 236, 240, 246, 247, 250, 352, 389, 507, 523, 532, 587, 599, 610, 614, 621, 624, 635, 641, 642, 685, 721, 727, 771, 773, 785, 786, 805, 810, 813, 814, 816, 862, 866, 868, 1051, 1076, 1185, 1194, 1196, 1198, 1199, 1245, 1247, 1248, 1249, 1252, 1254, 1255, 1259, 1260, 1262, 1302, 1318, 1319, 1321, 1322, 1323, 1329, 1331, 1337, 1338, 1340, 1341, 1342, 1344, 1353, 1355, 1356, 1357, 1360, 1368, 1369, 1370, 1385, 1386, 1387, 1389, 1390, 1395, 1402, 1405, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1424, 1425, 1432, 1435, 1448,1480, 1491, 1492, 1505, 1511, 1512, 1515, 1535, 1537, 1538, 1550, 1552, 1553, 1557, 1560, 1561, 1567, 1571, 1572, 1573, 1578, 1581, 1582, 1583, 1584, 1591, 1592, 1593, 1596, 1597, 1598, 1599, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1616, 1618, 1627, 1629, 1630, 1633, 1634, 1644, 1647, 1649, 1653, 1661, 1662, 1663, 1669, 1673, 1674, 1677, 1679, 1680, 1681, 1722, 1743, 1785, 1791, 1792, 1799, 1800, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1816, 1822, 1823, 1834, 1835, 1838, 1839, 1841, 1858 & 1859.

287. A good example of the learned Member's praise for NAC witnesses and positive findings on their credit is the praise and thanks he gave to Mr Boyd, the current Chief Operating Office of NAC's parent company, New Hope, for his evidence. The learned Member said:[231]

> [390] Mr Boyd presented as someone with a good detailed knowledge of what was going on at NAC, which he was able to express clearly. In my opinion, he was not deceptive or misleading to the Court.
>
> [391] I was particularly impressed by Mr Boyd's evidence about NAC opening west pit and not telling its neighbours because it was acting within its legal requirements. …
>
> [392] I thank Mr Boyd for the clarity of his evidence and the honest way in which it was delivered.

288. A good example of the learned Member's praise for NAC's expert witnesses and acceptance of their evidence was his praise for NAC's traffic expert, Mr McClurg:[232]

> [848] I was impressed by Mr McClurg as an expert witness. He took his duties as an expert called to assist the Court in this matter very seriously. This was not only demonstrated by his careful approach to answering questions in order to ensure that he was as correct as possible with his understanding of the questions and the clarity of his answers, but also demonstrated through his concern about wrong references in his report, including references to named roads in the vicinity of the New Acland Mine. … In short Mr McClurg did the best that he could to provide the Court with accurate information. …
>
> [853] I accept the evidence of Mr McClurg and the opinions and conclusions he reached.

289. These two examples are by no means exhaustive and further examples of the learned Member's praise for NAC and its witnesses are collated in Appendix 1, commencing at p 139 of these submissions.

290. A fair-minded observer would consider the praise the learned Member gave to NAC and its witnesses, particularly New Hope's CEO, Mr Boyd, in deciding there was no reasonable apprehension that the learned Member was biased against NAC.

291. Similarly, a fair-minded observer would consider the criticisms the learned Member made of objectors and their witnesses. Examples of those criticisms are set out in Appendix 1, commencing at p 145 of these submissions. One of those examples is the learned Member's criticisms of Dr Jeremijenko, who was called by an objector in relation to mental health issues. The learned Member preferred the evidence of NAC's expert, Dr Chalk:[233]

> [1211] I have concerns as to the manner in which Dr Jeremijenko gave what I consider evasive and unconvincing evidence at times during cross-examination. Given Dr Chalk's greater experience and specialist knowledge in this area, and the clear, concise way he approached his answers to questions, I prefer the evidence of Dr Chalk to that of Dr Jeremijenko where they conflict.

292. Applying commonsense, ordinary human experience and logic a fair-minded lay observer would wonder, if the learned Member was biased against NAC:

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[231] Reasons at [390] and [392].
[232] Reasons at [848] and [853].
[233] Reasons at [1211].

(a) why would he praise a company and its witnesses in many parts of his reasons; and

(b) why would he criticise the objectors and their witnesses in parts of his reasons?

293. In the context of the learned Member's even-handed treatment of NAC and objectors, a fair-minded observer would reject a claim of apprehended bias out of hand.

The learned Member decided many s 269(4) criteria in NAC's favour

294. In addition to the praise the learned Member gave to NAC's witnesses, he also made many favourable findings for NAC regarding the s 269(4) criteria under s 269(4) at [1776]-[1835]. NAC ignores these favourable findings in its submissions on apprehended bias.

295. These findings included, notably, that NAC's past performance *did not* justify refusal of the mining leases:[234]

> [1793] Weighing all of the evidence before me and bearing in mind the previous authorities relevant to this criteria, I am not satisfied that NAC's past performance has been so poor as to warrant rejection of the MLA on this basis.

296. NAC itself emphasises to the Court the positive findings made by the learned Member in its favour. NAC's outline notes in its introduction at [4] (footnotes in original):

> [4] … The Member concluded that Stage 3 is likely to provide significant economic benefit to the local region, the State and the nation[235], that Stage 3 will not result in some alleged impacts[236] and that many other potential impacts can be appropriately managed[237].

297. A fair-minded lay observer would wonder, if the learned Member was biased against NAC, why would he make findings favouring NAC, including in relation to the s 269(4) criteria? In particular, why would he find NAC's past performance has not been so poor as to warrant rejection of the mining lease applications?

298. A fair-minded lay observer would think these findings make no sense if the learned Member was biased against NAC.

299. They refute NAC's claims of apprehended bias.

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[234] Reasons at [1973] concerning MLA 50232. An identical finding was made at [1824] for MLA 700002.
[235] [7] & [871]-[1083].
[236] In the case of climate change ([9] & [1084]-[1094]), impact on land values ([12] & [1266]-[1275]) and many other matters ([18] & [1732]-[1734], [1735]-1736], [1737]-[1740], [1744]-[1745], [1749]-[1750], [1751]-[1752], [1756]-[1758] & [1759]-[1761].
[237] In the case of air quality and dust ([2] & [576]-[712]), lighting ([4] & [817]-[828]), visual amenity ([5] & [830]-[844]), traffic ([6] & [845]-[870]), biodiversity/flora and fauna ([10] & [1095]-[1131]), mental and physical health ([11] & [1132]-[1265]), livestock, rehabilitation, land use and soils ([13] & [1276]-[1302]), surface water ([17] & [1683]-[1729]) and vibration [1762]-[1764].

Use of plain language and a personal epilogue do not display apprehended bias

300. NAC alleges part of the context from which apprehended bias can be inferred is the learned Member's "emotive statements" in his reasons and an explanation of the learned Member's personal history in the epilogue of the reasons.[238]

301. Read in context and giving them a beneficial interpretation the language used by the learned Member throughout his reasons reflect merely his attempt to:

    (a) communicate his reasons to the MRA Minister and the Administering Authority; and

    (b) explain his reasons to the parties and to the public, including workers at the mine whose jobs would be affected by his decision.

    in plain, ordinary language in terms it would be understood by those readers.

302. As noted earlier, the Court should not be concerned with looseness in language nor with unhappy phrasing in the learned Member's reasons.[239] What NAC claims are "emotive statements" are, at worst, looseness of language that would not give rise to a fair-minded lay observer concluding there was a reasonable apprehension the learned Member was biased against NAC.

303. A decision-maker is not expected to be a robot. Nor are the MRA Minister, the Administering Authority, the parties or the general public who read the published reasons for the decisions expected to be. Nor is the fair-minded lay observer assumed to be.

304. Section 7 of the LCA and s 268(2) of the MRA indicate that the Land Court is intended to be a relatively informal, practical decision-maker that is not bound by the rules of evidence or legal technicalities. The learned Member's language reflects this down-to-earth, practical function.

305. The learned Member chose language to fulfil his functions to communicate his reasons to the MRA Minister, the Administering Authority, the parties and to the public. Those choices were within his discretion under s 269 of the MRA and s 190 of the EPA.

306. A fair-minded observer would not conclude this language suggested bias against NAC when the whole of the reasons are considered in context, including the learned Member's praise for NAC in parts of his reasons discussed above.

Actual or apprehend bias is not established

307. Viewed in context of the overall hearing and the learned Member's reasons, a fair-minded lay observer who was informed of the facts alleged would not "reasonably apprehend that

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[238] Ground 13, particular (iv); and NAC's outline at [157]-[189].
[239] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

the [learned Member] might not bring an impartial and unprejudiced mind to the resolution of the questions" [240] in making his decisions under the MRA and EPA.

308. NAC has failed to establish ground 13 of the Amended Application.

INQUIRING INTO THE DEHP AND THE CURRENT EA

Ground 3 of the Amended Application

309. Ground 3 of the Amended Application alleges that in making the decisions the learned Member "made errors of law by inquiring into and making findings about the past performance of [the Department of Environment and Heritage Protection (**DEHP**)]".

310. The particulars of Ground 3 provide:

> (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 [which alleged errors regarding the learned Member's construction of NAC's current EA and likely breaches of it in relation to air and noise].

311. NAC's outline addresses these allegations in summary at [18]-[22] and in the body of its outline at [196]-[223].

312. The simple answer to this ground is a point made earlier that NAC confuses the difference between *relevant* considerations and *irrelevant* considerations. In the circumstances of the hearing:

(a) DEHP's past actions were relevant to matters the learned Member was *bound* to consider such as:

(i) NAC's past performance (including whether it had breached the conditions of its existing environmental authority (**EA**)); and

(ii) the conditions that were necessary or desirable for the draft EA; and

(b) DEHP's past actions were not matters that the learned Member was *bound* not to consider in making his decisions and recommendations under s 269 of the MRA and s 190 of the EPA.

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[240] *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, Callinan J agreeing on this point).

313. NAC's confusion on this fundamental administrative law concept is evident at [22] of its outline where it attempts to change consideration of these relevant factual issues for the decision under s 190 of the EPA into an irregularity. It asserts at [22] that the learned Member's consideration of DEHP's past actions and breaches of the current EA were errors that:

> … had a significant effect on both the hearing and the Decision. It can be seen that they affected the Member's views about appropriate noise and other conditions for the Draft EA.

314. Given that noise and dust conditions were included in the draft EA and, therefore, part of a relevant consideration, the learned Member's consideration of issues relevant to deciding whether these conditions were appropriate was a matter within his jurisdiction.

Statutory context of ground 3

315. The overall statutory context of the learned Member's decisions under the MRA and EPA was set out above at [11]-[129].

316. Within that overall statutory context, the learned Member was bound to consider a large number of matters, relevantly including:

(a) under s 268 of the MRA, "the application and objections thereto";

(b) under s 269(2) of the MRA, whether to make a recommendation to the Minister that the application be granted or rejected in whole or in part;

(c) under s 269(3) of the MRA, whether to recommend "such conditions as the Land Court considers appropriate";

(d) under s 269(4) of the MRA, amongst other things, whether:

(i) the past performance of the applicant has been satisfactory;[241]

(ii) the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management;[242]

(iii) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof;[243]

(iv) the public right and interest will be prejudiced;[244]

(v) any good reason has been shown for a refusal to grant the mining lease;[245] and

(e) under s 191 of the EPA:

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[241] MRA, s 269(4)(g).
[242] MRA, s 269(4)(i).
[243] MRA, s 269(4)(j).
[244] MRA, s 269(4)(k).
[245] MRA, s 269(4)(l).

(i) the application;[246]

(ii) any draft EA for the application,[247] which inherently includes the conditions of the draft EA but is constrained by:

(A) what conditions are "necessary or desirable";[248]

(B) must include the Coordinator-General's conditions;[249]

(C) can not be inconsistent with a Coordinator-General's condition;[250]

(iii) any objection notice for the application;[251]

(iv) any relevant regulatory requirement[252] including, e.g., the *Environmental Protection (Noise) Policy 2008*;

(v) the standard criteria,[253] including:

(A) the following principles of environmental policy as set out in the Intergovernmental Agreement on the Environment—

(a) the precautionary principle;

(b) intergenerational equity;

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

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

(C) any relevant environmental impact study, assessment or report;

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

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

(F) the public interest; and

(G) any other matter prescribed under a regulation.

317. As noted earlier, the only matter that the Land Court is expressly *bound* not to consider is under s 263(3) of the MRA. Under that provision when assessing a mining lease under

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[246] EPA, s 190(a).
[247] EPA, s 190(d).
[248] EPA, s 203. This constraint is imposed on the administering authority's ultimate decision rather than the Land Court's recommendation.
[249] EPA, s 190(2)(a).
[250] EPA, s 190(2)(b).
[251] EPA, s 190(e).
[252] EPA, s 190(f).
[253] EPA, s 190(g). The standard criteria are defined in Sch 4 (Dictionary) to the EPA.

the MRA the Land Court is precluded from entertaining an objection or submission by an objector to an application or any ground thereof, or any evidence in relation to a ground, where there has not been an objection duly lodged in respect of a matter which an objector subsequently wishes to agitate.[254] The learned Member applied s 263(3) of the MRA to exclude evidence of adverse health impacts on coal mine workers as this issue had not been raised in any objection.[255]

318. As noted earlier, the Court of Appeal recently stated in relation to the Land Court's decisions under s 269 of the MRA and the earlier equivalent of s 190 of the EPA:[256]

> [46] … The word "consider", like expressions such as "have regard to" and "take into account", leaves it to the Land Court to decide what, if any, weight should be given to each of the matters set out in [s 191].[257] The same analysis is applicable in relation to the requirement in s 269(4) of the *Mineral Resources Act* that the Land Court "shall take into account and consider" the identified matters.
>
> [47] Accepting that the concept of "environmental harm" is of great significance in other aspects of the operation of the *Environmental Protection Act*, the relevant function of the Land Court is not qualified by any requirement about the manner in which it must consider the identified matters or about the weight to be given to any of the relevant considerations. I am unable to accept the appellant's argument that any such qualification is implied in that Act.

319. The Court of Appeal applied this reasoning to dismiss a challenge to the earlier decision of the learned Member in *Hancock*, where he had taken into account of, but then given zero weight to, the burning of coal from coal mines other than the mine the subject of the applications before him.

320. Applying the Court of Appeal's reasoning, the Land Court has jurisdiction under s 269 of the MRA and s 190 of the EPA to consider:

(b) all matters raised by the objectors in properly made objections; and

(c) any matter *relevant* to any mandatory consideration, and.

the Land Court may give these matters the weight it considers appropriate, including giving a matter no weight.

321. A matter may be *relevant* to a mandatory consideration if it logically affects it. For instance, while noise and dust generated by a mine are not specifically referred to in the mandatory considerations, in the circumstances of an application they may be relevant to considering the "adverse environmental impact" of the mining operations.

322. Without limiting these points, as noted at earlier, at [32], the language of the criteria in s 269(4) indicates a clear legislative intent to permit the Land Court a very wide scope

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[254] See *ACI Operations P/L v Quandamooka Lands Council Aboriginal Corp* [2002] 1 Qd R 347 at [6]-[7] per Davies JA and [57]-[62] per Mullins J (with whom Mackenzie J agreed); and *Lee v Kokstad Mining Pty Ltd* [2008] 1 Qd R 68 at [9] per Jerrard JA and [47] per Wilson J with whom Douglas J agreed. These decisions involved the Land and Resources Tribunal (**LRT**), from which the Land Court inherited its jurisdiction under the MRA and EPA in 2007 after the LRT was disbanded.

[255] Reasons at [1851].

[256] *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).

[257] See *Rathborne v Abel* (1964) 38 ALJR 293 at 295, 301; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

and discretion to investigate proposed mining leases as appropriate to the facts and circumstances of each application and any objections made by the public.

323. Of particular relevance in this context is the mandatory requirement in s 269(4)(g) of the MRA to consider whether "the past performance of the applicant has been satisfactory" is not limited to the applicant's criminal history or any enforcement action taken by a regulator any may include consideration of any "past performance of the applicant" such as its conduct in operating an existing mine. To limit this criterion to only considering an applicant's criminal history would be to add words that are not found in the Act and not required by the scope or purpose of the statute.

324. Also of particular relevance in this context is the requirement in the context of the decision under s 190 of the EPA to consider whether the conditions of the draft EA are appropriate. The difficulties that DEHP has had in administering and enforcing the conditions of existing EA for the mine were clearly relevant to the task of considering the conditions of the draft EA. For instance, the difficulties of enforcing the existing conditions offers potential lessons for improving the conditions of the draft EA.

NAC's opening made its past performance and lack of enforcement action by DEHP against it positive parts of its case

325. Another aspect of considering this ground of the Amended Application is that NAC in its opening address to the learned Member relied heavily on a DEHP Assessment Report to claim a positive history of past performance by the existing mine. NAC stated in its opening (emphasis added):[258]

> The EA assessment report – EAP.0012 – relevantly records that the applicant has a good record of compliance during the period 2010 to 2015, which are the dates between which the report was assessed. Your Honour, the administering authority carried out a total of 48 inspections, both proactive and reactive, during those five years. There was no enforcement action taken as a result of any of those inspections. There were 38 reactive site inspections and, of these, 36 were observations of the blast monitoring. All 36 inspections required no further action with the activity being in compliance. The remaining two reactive site inspections also required no further action.
>
> The assessment report also notes that between those years – 2010 and 2015 – the administering authority – DEHP at that time – received 19 complaints. Only one episode of non-compliance was identified and the result was a negotiated outcome. **What this means is that New Acland's compliance has been good**.

326. Many objectors challenged NAC's claims it had a positive past compliance history and that the lack of enforcement action taken against it by DEHP proved this. These matters became significant components of the hearing before the learned Member.

NAC submitted that the Land Court should assume conditions will be complied with

327. NAC submitted that the learned Member should assume it would comply with the conditions of its mining approvals (footnote in original):[259]

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[258] T1-23, lines 33-46.

[259] NAC's Written Submissions, 26 August 2016 at [23.11]. This claim was repeated in NAC's Submissions in Reply, 30 September 2016 at [2.28].

> 23.21 There is a long line of established authority that requires an assumption that a ML holder will comply with the conditions of its tenement.[260]

328. The learned Member noted this submission in the context of assessing agricultural economics and the evidence of OCAA's Professor Quiggin and NAC's experts Mr Perkins and Dr Fahrer regarding "worst case" assumptions of the lost agricultural production due to groundwater drawdown in surrounding agricultural areas:[261]

> [1065] NAC submits these assumptions [of the experts on "worst case" impacts] are not facts. NAC submits that the court should assume they will comply with their mining conditions and hence the surrounding land will not be adversely effected by drawdown impacts and if it was to happen, their mitigation measures would rectify the situation.

329. The twin of this assumption is an assumption that the responsible government regulator will enforce compliance with conditions of approval.

330. These submissions by NAC, the circumstances of the history of the mine and the evidence presented by objectors of impacts they had experienced in the past due to the mine made considering DEHP's past actions in administering the existing EA and NAC's conduct under it clearly relevant to the matters under s 269(4) of the MRA and s 191 of the EPA.

NAC's grounds of review are not made out

331. DEHP's past actions in administering the existing EA and NAC's conduct under it were clearly relevant to several of the matters the learned Member was required to consider under s 269(4) of the MRA and s 191 of the EPA.

332. The learned Member's consideration of these issues and findings in relation to them were, therefore, made within jurisdiction and are not amenable to judicial review. The weight that he gave these issues was for him to decide under s 269(4) of the MRA and ss 190 and 191 of the EPA.

333. Ground 3 is not made out and should be dismissed.

No material error

334. While ground 3 is not made out, if it had been it is difficult to see how the matters raised by it could be said to have materially contributed to the decision that was actually made.

335. The learned Member's consideration of the difficulties of DEHP's past administration of the existing EA and of NAC's past performance did not materially affect the learned Member's decisions regarding noise limits in the draft EA, groundwater or intergenerational equity.

336. This adds a further reason why ground 3 should be dismissed.

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[260] Hancock Case, paragraphs [304]-[305]; *Gregcarbil Pty Ltd v Backus & Ors (No. 2)* [2013] QLC 46, paragraphs[136]-[137]; *Elliot v Hicks & Hicks* (2001) QLRT 38, paragraphs [124] - [125].
[261] Reasons at [1065].

NOISE AND AIR

Grounds 1-4 and 6 of the Amended Application

337. Grounds 1-4 and 6 of the Amended Application raise numerous complaints in relation to the learned Member's consideration of noise and ground 1 also complains about his consideration of air quality. In summary:

(a) Ground 1 of the Amended Application alleges the learned Member erred regarding his jurisdiction and consideration of imposing evening and night noise limits that are lower than the limits stated in the Coordinator-General's conditions.

(b) Ground 2 of the Amended Application alleges the learned Member erred in finding that air quality and noise limits in NAC's current EA may have been or had been exceeded. The particulars allege that the learned Member:

(i) did not have jurisdiction to inquire into breaches of the current EA;

(ii) acted unreasonably, inconsistently and irrationally;

(iii) erroneously construed NAC's current EA as imposing strict limits;

(iv) failed to consider NAC's evidence and submissions;

(v) failed to provide adequate reasons.

(c) Ground 3 of the Amended Application alleges that the learned Member erred by inquiring into and making findings about the past performance of DEHP and particular (iii) of Ground 3 "repeats and relies on" Ground 2, thereby raising the learned Member's consideration of air quality and noise limits in NAC's current EA.

(d) Ground 4 of the Amended Application alleges the learned Member erred in construing the *Environmental Protection (Noise) Policy 2008* (Qld) and the *Environmental Protection Regulation 2008* (Qld) to determine the appropriate noise limits to recommend in the conditions of the draft EA.

(e) Ground 6 of the Amended Application alleges the learned Member incorrectly applied the decision in *Xstrata*. The ground itself does not particularise the nature of the error but NAC's outline at [250] and [266]-[270] alleges that the learned Member "erred in deciding that the decision in *Xstrata* supported setting the [noise] levels at 35db [in conditions of the draft EA]".

338. NAC's outline addresses noise issues in summary at [23]-[28] and generally at [224]-[290].

Statutory context for noise and air quality

339. The overall statutory context was set out above at [11]-[129], and a summary of the principal relevant mandatory considerations was set out at [316].

340. The impact of noise from mining operations is relevant to several criteria in s 269(4) of the MRA, including "adverse environmental impact" in s 269(4)(j) and "the public right and interest" in s 269(4)(k).

341. Similarly, under s 191 and the standard criteria of the EPA, considering matters such as "the character, resilience and values of the receiving environment" affected by a proposed mine and "the public interest" allows a very wide scope of matters to be considered, including noise.

342. Section 191(f) of the EPA required the learned Member to consider "any relevant regulatory requirement" and the standard criteria include "any other matter prescribed under a regulation".

343. As noted earlier, the manner in the learned Member considered the criteria in s 269(4) of the MRA and s 191 of the EPA, and the weight that he gave them, was a matter for him.[262] Even relevant regulatory requirements and matters prescribed under a regulation were not binding on him in making his decisions and he had a wide scope to make recommendations as he saw appropriate.

344. Within this broader context, two statutory instruments made under the EPA provide relevant regulatory requirements in relation to noise:

    (a) the *Environmental Protection Regulation 2008* (Qld) (**Regulations**):

        (i) Ch 4 of which prescribes the regulatory requirements with which the administering authority is required to comply for making environmental management decisions, including:

            (A) under s 51, carry out an environmental objective assessment against the environmental objective and performance outcomes mentioned in Sch 5, Pt 3, Tables 1 and 2; and

            (B) under s52, considering conditions in relation to matters such as "ensuring an adequate distance between any sensitive receptors and the relevant site for the activity to which the decision relates", e.g. noise buffers; and

        (ii) Ch 5, Pt 3 of which prescribes standards for measuring noise; and

    (b) the *Environmental Protection (Noise) Policy 2008* (Qld) (**EPP (Noise)**), made under Ch 2 of the EPA.

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[262] *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).

345. Section 51 of the Regulations provides, relevantly:[263]

> **51 Matters to be complied with for environmental management decisions**
>
> (1) The administering authority must, for making an environmental management decision relating to an environmentally relevant activity, other than a prescribed ERA—
>
> (a) carry out an environmental objective assessment against the environmental objective and performance outcomes mentioned in schedule 5, part 3, tables 1 and 2; and
>
> (b) consider the environmental values declared under this regulation; and
>
> ...
>
> (c) consider each of the following under any relevant environmental protection policies—
>
> (i) the management hierarchy;
>
> (ii) environmental values;
>
> (iii) quality objectives;
>
> (iv) the management intent; and
>
> ...
>
> (2) For an environmental management decision relating to a prescribed ERA, the administering authority making the decision must—
>
> (a) carry out an environmental objective assessment against the environmental objective and performance outcomes mentioned in schedule 5, part 3, table 1; and
>
> (b) consider the matters mentioned in subsection (1)(b), (ba) and (c).

346. The environmental objective and performance outcomes mentioned in Sch 5, Pt 3, Table 1 (Operational Assessment) of the Regulations include in relation to noise:

Noise	
Environmental Objective	
	The activity will be operated in a way that protects the environmental values of the acoustic environment.
Performance Outcomes	
1	Sound from the activity is not audible at a sensitive receptor.
2	The release of sound to the environment from the activity is managed so that adverse effects on environmental values including health and wellbeing and sensitive ecosystems are prevented or minimised.

347. Sch 12 (Dictionary) of the Regulations defines "sensitive receptor" to mean "a sensitive receptor under any relevant environmental protection policies".

348. While in its terms s 51 of the Regulations applies to the administering authority rather than the learned Member's decision under s 190 of the EPA, it is a matter that may be taken into account under s 191. The environmental objective and performance outcomes

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[263] Daubney J considered the application of this section in dismissing a judicial review application against a decision of the administering authority under s 176 of the EPA to grant an environmental authority for a coal export terminal in *Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection & Anor* [2017] QSC 121.

stated in Sch 5, Pt 3, Table 1, while qualitative in nature, may also be considered alongside more quantitative objectives for noise in the EPP (Noise).

349. Section 7 of the EPP (Noise) states the environmental values to be enhanced or protected under it, e.g., "the qualities of the acoustic environment that are conducive to human health and wellbeing, including by ensuring a suitable acoustic environment for individuals to … sleep".

350. Section 8 of the EPP (Noise) provides for acoustic quality objectives for sensitive receptors stated in Sch 1, relevantly:

> **8 Acoustic quality objectives for sensitive receptors**
>
> (1) An acoustic quality objective stated in schedule 1, column 3 for a sensitive receptor stated in column 1 and for a time of day stated in column 2, is prescribed for enhancing or protecting the environmental value stated in column 4 of the schedule for the objective.
>
> (2) An acoustic quality objective stated in schedule 1 is expressed as a measurement of an acoustic descriptor.
>
> (3) It is intended that the acoustic quality objectives be progressively achieved as part of achieving the purpose of this policy over the long term.

351. Section 9 of the EPP (Noise) states a management hierarchy for noise: avoid; minimise; manage.

352. Section 10 of the EPP (Noise) states the management intent for managing noise under s 51 of the Regulations:

> **10 Controlling background creep**
>
> (1) This section states the management intent for an activity involving noise.
>
> *Note—*
>
> See section 51 of the *Environmental Protection Regulation 2008*.
>
> (2) To the extent that it is reasonable to do so, noise from an activity must not be—
>
> (a) for noise that is continuous noise measured by $L_{A90,T}$—more than nil dB(A) greater than the existing acoustic environment measured by $L_{A90,T}$; or
>
> (b) for noise that varies over time measured by $L_{Aeq,adj,T}$—more than 5dB(A) greater than the existing acoustic environment measured by $L_{A90,T}$.

353. Pursuant to s 8, Sch 1 of the EPP (Noise) relevantly provides the following acoustic quality objectives for dwellings:

Column 1	Column 2	Column 3			Column 4
Sensitive receptor	**Time of day**	**Acoustic quality objectives (measured at the receptor) *dB(A)***			**Environmental value**
		$L_{Aeq,adj,1hr}$	$L_{A10,adj,1hr}$	$L_{A1,adj,1hr}$	
dwelling (for outdoors)	daytime and evening	50	55	65	health and wellbeing
dwelling (for indoors)	daytime and evening	35	40	45	health and wellbeing
	night-time	30	35	40	health and wellbeing, in relation to the ability to sleep

354. Sch 2 (Dictionary) of the EPP (Noise) defines "sensitive receptor" to mean "an area or place where noise is measured" and, read in the context of Sch 1, relevantly includes the outdoors and indoors of a dwelling.

355. In considering the differences between the Regulations and the EPP (Noise), it may be noted that:

(a) the Regulations state only qualitative outcomes for noise, rather than quantitative limits, and provide for flexibility in managing noise so that its adverse effects on environmental values are "prevented or minimised" (under s 51 and Sch 5, Pt 3, Table 1).

(b) the EPP (Noise) states quantitative limits for noise at sensitive receptors such as dwellings but also provides flexibility:

(i) under s 8(3) of the EPP (Noise) the quantitative "acoustic quality objectives" stated in Sch 1 for a sensitive receptor are "intended [to] be progressively achieved … over the long term"; and

(ii) under s 10(2) the quantitative limits on noise are to be achieved to "the extent that it is reasonable to do so".

356. The flexibility built into the management of noise and the limits stated in the Regulations and the EPP (Noise) mean that, ultimately:

(a) their application depends on the facts and circumstances of each individual case; and

(b) a degree of administrative discretion is inherent in their application (e.g. in deciding to what extent it is "reasonable" to meet the limits in s 10(2) of the EPP (Noise)).

The learned Member's findings on the appropriate limits for noise conditions

357. The fundamental problem in NAC's grounds 1-4 and 6 challenging the learned Member's consideration of noise and air quality and the associated arguments in NAC's outline is that they seek to challenge his findings of fact based on the evidence and the exercise of his discretion acting within jurisdiction.

358. Section 269(3) of the MRA provides that the learned Member's recommendation to the Minister on an application for a mining lease (emphasis added):[264]

> … may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers **appropriate** …

359. Reflecting the statutory language of s 269(3) of the MRA and the fact that both ss 269(4) of the MRA and s 191 of the EPA leave "it to the Land Court to decide what, if any, weight should be given to each of the matters set out" in them,[265] the learned Member asked himself the right question regarding noise (emphasis added):[266]

> [757] A crucial aspect of determining the issue of **appropriate** noise levels in this case is a determination of what source should best be used to determine **appropriate** noise limits.

360. In relation to noise, after considering the evidence from surrounding landholders of having been severely affected by noise from the mine in the past, the evidence of the noise experts, his own observations during a nighttime site visit, and the submissions from the parties, the learned Member made his conclusions on what noise conditions were "appropriate" in the exercise of his discretion under the MRA and EPA (emphasis added):

> [773] Having read and carefully considered **all of the evidence and all of the submissions** on this topic, **on balance I prefer the evidence of Mr Savery**. That means that, in my view, the **appropriate** noise level for evening and night operations should be set at 35 dB for each and not at 42 dB and 37 dB as contended for by Mr Elkin.
>
> [774] In making this finding, I acknowledge that Mr Savery does agree with Mr Elkin that levels of 42 dB for the evening and 37 dB in the night are achievable in accordance with the EPP (Noise) under schedule 1. His differences of course arise when consideration is had of s 10.
>
> [775] In my view, a proper reading of the EPP (Noise) is consistent with Mr Savery's conclusions, and the submissions of OCAA. In short, that means that the specific noise that the mining activity itself should be allowed to make at a maximum is 35 dB in the evening in night in accordance with s 10, and that, when total noise is taken into account for the purposes of schedule 1, the **appropriate** schedule 1 levels are 42dB and 37 dB accordingly as Mr Savery agreed with Mr Elkin in the JER.
>
> [776] In my view it is entirely **appropriate** that the EPP noise s 10 levels should apply in this matter.
>
> [777] There is a further reason that these levels are **appropriate**. That is because they are consistent with President MacDonald's conclusions in *Xstrata*.

361. It is apparent from these reasons that NAC's summary of the learned Member's reasons for his conclusions on the appropriate noise limits is wrong. NAC's outline states at [25]-[26] (footnote in original):

> [25] The Member gave two reasons for his conclusion that the appropriate noise limits for Stage 3 were 35 dB(A) for evening and night time. They involved: the purported application of a statutory instrument, the EPP Noise; and consistency with the conclusion of McDonald P in the *Xstrata* decision.[267]

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[264] The Land Court is given a discretion to consider what is "appropriate" in s 188(1) of the EPA and ss 268(2), 269(3), 269(4)(b), (d) and (m).

[265] *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).

[266] Reasons at [757].

[267] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth - Brisbane Co-op Ltd & Ors, and Department of the Environment and Resource Management* (2012) 33 QLCR 79.

> [26] In NAC's submission, the Member erred in reaching this conclusion by:
>
> (a) *First*, asking the wrong question. The Member asked which of 2 provisions of the EPP Noise he should apply and reached a conclusion about that by choosing between the evidence of the 2 noise experts. The inquiry required by the applicable statutory regime was much broader than that.
>
> (b) *Secondly*, as a corollary of the first error, not considering a range of evidence relevant to the proper inquiry, including (for example) evidence that the 2 dB(A) difference for night time limits would be imperceptible to the human ear.
>
> (c) *Thirdly*, treating the decision in *Xstrata*, being a decision in a different matter by reference to the different evidence in that matter, as relevant to his conclusion.

362. Similar, NAC's more detailed argument in the body of its outline at [242] asserts "The Member approached the determination of noise issues in the case on a very narrow basis." NAC makes a similar argument as at [25]-[26] in the body of its outline at [241]-[246].

363. NAC's submissions misunderstand the learned Member's reasons quite fundamentally. He engaged in a broad inquiry concerning the appropriate noise limits to recommend rather than the narrow, mechanical process NAC suggests he did.

364. Contradicting NAC's submissions at [25]-[26] and [241]-[246] of its outline, it is apparent from the learned Member's reasons that he gave more than "two reasons" for his conclusions on the appropriate noise limits. His conclusions regarding the appropriate level of noise conditions were not simply based on a mechanical application of quantitative numbers stated in either the Regulation or the EPP (Noise), but involve the experts' views, measurements about the background noise and other evidence presented in the hearing.

365. The learned Member's reasons indicate his conclusions about the appropriate noise conditions did not involve a purely legal error in his construction of s 51 of the Regulation or Sch 1 of the EPP (Noise). His actual conclusions about the appropriate noise conditions (as opposed to NAC's characterisation of those conclusions) involved factual findings and the exercise of his discretion.

366. Also, as noted in the preceding section on the legislative context, the flexibility built into the management of noise and the limits stated in the Regulations and the EPP (Noise) mean that, ultimately their application depends on the facts and circumstances of each individual case and a degree of administrative discretion is inherent in their application. For example, administrative discretion rather than a mechanical application of noise limits stated in quantitative terms is inherent in deciding:

    (a) what extent it is "reasonable" to meet the limits in s 10(2) of the EPP (Noise); and

    (b) what adverse noise effects can be "prevented or minimised" to comply with s 51 and Sch 5, Pt 3, Table 1.

367. The learned Member's findings on the appropriate noise levels for conditions reflected the considerations in ss 269(3) and 269(4) of the MRA, s 191 of the EPA, s 51 of the Regulations, s 10 of the EPP (Noise) in the facts and circumstances of the case and the exercise of his administrative discretion.

368. When the learned Member's reasons are read fairly in context[268] NAC's four alleged errors in his decision on noise issues[269] are not made out.

369. In relation to the first three of NAC's four errors regarding noise, the learned Member:

(a) did not ask himself the wrong question;

(b) correctly interpreted and applied the legislative scheme and took relevant material into account; and

(c) was entitled to consider the noise limits recommended in *Xstrata* as they were relevant to considerations he was *bound to consider* and he was not *bound not to consider* a past decision of the Land Court.

370. NAC's fourth alleged error involved the learned Member's reasoning on the inconsistency between the noise levels he considered were appropriate and the levels imposed by the CG conditions. This is addressed in the next section.

The learned Member's reasoning on inconsistency with CG conditions on noise

371. Regarding inconsistency with CG stated conditions the learned Member generally adopted the reasoning of President MacDonald in *Xstrata*.[270] President MacDonald stated in that case the Land Court had power under the EPA to: [271]

> [47] … recommend conditions for the draft EA dealing with the same subject matter as conditions imposed by the Coordinator-General, provided that the Court's recommended conditions do not contradict or lack harmony with the Coordinator-General's conditions.

372. The learned Member stated his view that this means:[272]

> [186] … The Court must not recommend conditions that lack harmony with, or are incompatible with, contradict, or are directly inconsistent with CG stated conditions.

373. The learned Member noted NAC's support for the test in *Xstrata* on inconsistency but disagreement with its application to a more comprehensive monitoring program:[273]

> [183] NAC accepts the test for inconsistency outlined by the President in *Xstrata* but suggest that the President was in error in determining that a more comprehensive monitoring program could not be recommended just because there was an existing monitoring program provided by the CG. NAC supports the Court's position adopted in Hancock, that additional monitoring can be complimentary to an existing CG monitoring regime not inconsistent with it. NAC submits that a condition that compliments or adds to a CG condition is not inconsistent with that condition.

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[268] As discussed earlier, as the reasons of an administrative decision-maker, if there was any ambiguity the reasons should be given a beneficial interpretation.
[269] Stated in NAC's outline at [28] and [247]-[290].
[270] Reasons at [173]-[189].
[271] *Xstrata* (2012) 33 QLCR 79 at [47], cited in the reasons at [177].
[272] Reasons at [186].
[273] Reasons at [183].

374. The learned Member agreed with NAC's submissions on this point:[274]

> [187] I disagree with the President's application of that test in the *Xstrata* case to the extent she believed that to recommend a more comprehensive monitoring regime is inconsistent with an existing monitoring regime conditioned by the CG. As I stated in *Hancock*, a more comprehensive monitoring regime is complementary with, rather than inconsistent with, an existing monitoring regime conditioned by the CG. Every case however will need to be determined on its own facts and merits.

375. The learned Member also stated he adopted a very narrow definition of inconsistency:[275]

> [188] I am minded to accept a very narrow definition of what is inconsistent because this will allow for a proper conditioning of projects after hearing all the relevant evidence, rather than not recommending conditions the Court believes are relevant or refusing the EA altogether because a relevant condition cannot be recommended due to inconsistency with a CG condition.

376. The learned Member later noted submissions from NAC's counsel, Mr Ambrose QC, when appearing for an objector in *Xstrata* and addressed the consequence for his recommendation in this hearing based on his findings regarding the appropriate noise limits in the draft EA conditions:

> [782] Important consequences, as contemplated by President MacDonald in *Xstrata*, flow as a consequence of my considering of the noise limits should be properly set using s 10 of the EPP (Noise). At [418] of *Xstrata*, President MacDonald quoted from the submissions of Mr Ambrose QC who acted for an objector in that case:
>
> > "Further, if the conditions proposed in the draft EA cannot be challenged because they are set by the Coordinator-General, the MLAs ought to be refused while such conditions remain."
>
> [783] In this regard, President MacDonald had this to say at [425] of *Xstrata*:
>
> > "In any event, the limits set in the draft EA cannot be altered because they were imposed by the Coordinator-General."
>
> [784] I agree with both the submissions by Mr Ambrose QC in Xstrata as quoted above and the conclusions of President MacDonald. This is a clear case of inconsistency between what I consider should be recommended by this Court and the CG's conditions.
>
> [785] I am compelled to comply with the legislation in this regard. This is not an area in which there can be any question of a Land Court recommendation simply clarifying or enhancing that of the CG; to recommend a different noise limit to that as determined by the CG is directly inconsistent.
>
> [786] As a consequence I am compelled to recommend that the MLs and EPA not be granted and the draft EA not be granted because my recommendation would be inconsistent with the CG's stated conditions.
>
> [787] I find this a most unsatisfactory position to be placed in, but the legislation leaves me no option. One could be forgiven for thinking the position that I find myself in is absurd, given that this Court has heard in such extensive detail from two highly regarded experts in the acoustic field, as well as all of the material that was before the CG. In simple terms, this Court has had the benefit of much more information placed before it than the CG, and that information and evidence has been subject to intense scrutiny, yet I am precluded from recommending the result of that evidence to either the MRA Minister or the administering authority for the EPA.

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[274] Reasons at [187].
[275] Reasons at [188].

NAC's grounds of review are not made out

Ground 1 seeks to challenge the weight given to matters within jurisdiction

Ground 1, particular (i)(A)

377. Ground 1, particular (i)(A) of the Amended Application alleges that:

> (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.

378. This novel construction argument was not raised by NAC before the learned Member. Given the breadth of topics dealt with by the Coordinator-General's conditions, if NAC's construction were correct it would invalidate objectors raising and the Land Court considering a great swath of topics, not only noise and groundwater related matters.

379. Nothing in the SDPWOA, MRA or EPA prevents the Land Court recommending an application for a mining lease under the s 269 of the MRA or an environmental authority under s 190 of the EPA be *refused* despite a recommendation to approve the mine by the Coordinator-General under the SDPWOA.

380. Amongst many wide considerations, the Land Court must also consider whether granting the applications would be in the "public interest", which is a consideration of particularly wide scope.[276]

381. Because the Land Court is entitled to recommend refusal of an application that the Coordinator-General has recommended be approved on conditions and must consider wide-ranging matters such as the "public interest", the learned Member had jurisdiction to consider all of the Coordinator-General's conditions in that context.

382. The weight that the learned Member gave to the evidence about matters addressed under the Coordinator-General's conditions is a matter for the learned Member.[277]

383. Ground 1, particular (i)(A), therefore, seeks to challenge the weight given to something within jurisdiction. It should be dismissed on that basis.

Ground 1, particular (i)(B)

384. Ground 1, particular (i)(B) alleges:

> (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.

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[276] *ERO Georgetown Gold Operations Pty Ltd v Cripps, Minister for Natural Resources & Mines & Anor* [2015] QSC 1 at [15]-[18] and [39] per Martin J and cases therein.
[277] *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47].

385. As set out above, even applying "a very narrow definition of what is inconsistent"[278] the learned Member found the noise limits he considered appropriate to specify in the draft EA were "directly inconsistent" with the CG conditions:[279]

> [785] … This is not an area in which there can be any question of a Land Court recommendation simply clarifying or enhancing that of the CG; to recommend a different noise limit to that as determined by the CG is directly inconsistent.

386. This was ultimately a finding of fact: the learned Member compared the CG stated conditions for noise and the levels he considered were appropriate to recommend in the draft EA and found they were directly inconsistent. He was not concerned with the legal drafting of the conditions but with the noise levels specified in them. No legal issue truly arose in determining the inconsistency. It was a factual question.

387. As a finding of fact within jurisdiction it was a matter for the learned Member to determine.

388. In any event, it is difficult to see how the Member was anything other than plainly correct. A condition specifying a noise limit of X is obviously and directly inconsistent with a condition specifying a noise limit of Y. Indeed, it is difficult to imagine a more obviously inconsistent pair of conditions in respect of a proposed coal mine.

389. Ground 1, particular (i)(B) should fail on these bases.

<u>Ground 1, particulars (i), (iiA) and (ii)</u>

390. Ground 1, particulars (i), (iiA) and (ii) may be dealt with together. They allege:

> (i) Alternatively, the First Respondent erred by interpreting the *EPA* as mandating, in the event of the First Respondent reaching a conclusion that lower noise limits amounted to an inconsistency with the 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 the above reasons.

391. NAC alleges that statements in the reasons such as "I am compelled to recommend"[280] and "my only option"[281] suggest the learned Member incorrectly viewed himself as *legally* bound to reach that conclusion.

392. NAC ignores the beneficial construction that these were expressions reflecting the weight the learned Member attached to particular findings that led him to feel compelled (as a question of weight and an exercise of discretion rather than law) to make a particular recommendation.

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[278] Reasons at [188].
[279] Reasons at [785].
[280] Reasons at [786] regarding the learned Member's inability to recommend noise conditions inconsistent with CG stated conditions.
[281] Reasons at [3] and [1196] regarding noise conditions inconsistent with CG stated conditions.

393. Such a beneficial interpretation, that such statements reflected the weight the learned Member gave to particular issues and the valid exercise of his discretion to make recommendations rather than being (wrongly) compelled by law is consistent with the facts that the learned Member:

(a) is a highly experienced member of the Land Court who has made numerous recommendations regarding mining applications under the MRA and EPA,[282] several of which have survived strong judicial review challenges in the past,[283] and which the learned Member referred to in the reasons;[284]

(b) correctly identified the legal tests he was required to apply in making his recommendations under the MRA and EPA at numerous places in the reasons;[285]

(c) cited in the reasons past decisions of the Land Court making recommendations regarding mining applications under the MRA and EPA in which the correct tests were applied in exercising the Land Court's administrative discretion[286] or important principles were established on judicial review of the Land Court;[287] and

(d) used a variety of terms to describe the weight he attached to particular issues and the exercise of his discretion to make recommendations.

394. The variety of terms the learned Member used in making findings attributing the weigh he attached to particular issues and the exercise of his discretion to make recommendations included:

(a) "appropriately managed";[288]

(b) "adequately dealt with";[289]

(c) "appropriate";[290]

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[282] e.g. *Re New Acland Coal Pty Ltd [No 3]* [2001] QLRT 30 (recommending approval of Stage 1 of the New Acland Mine); *Re New Oakleigh Coal Pty Ltd v Hardy & Ors and EPA* [2003] QLRT 24; *De Lacey v Kagara Pty Ltd* (2009) 30 QLCR 57; [2009] QLC 77; *Donovan v Struber* (2011) 32 QLRC 226; [2011] QLC 45; *Hancock Coal Pty Ltd v Kelley & Ors & DEHP (No 4)* (2014) 35 QLCR 56; [2014] QLC 12; and *Endocoal Ltd v Glencore Coal Queensland Pty Ltd* (2014) 35 QLCR 462; [2014] QLC 54.

[283] e.g. *Hancock*, review of which was dismissed in *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260 (Douglas J); *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 (McMurdo P, Fraser and Morrison JJA); and *Coast and Country Association of Queensland Inc v Smith* [2017] HCATrans 074 (Kiefel CJ and Keane J).

[284] e.g. reasons at [155], [1085], [1091] and [1093].

[285] e.g. reasons at [136], [146], [198] and applied at [1776]-[1839].

[286] e.g. reasons at [177]-[179], [183]-[187], [196], [198], [781]-[784], [1196] (*Xstrata* case); [181]-[182] (*Adani* case)

[287] e.g. reasons at [194]-[195] (*BHP Billiton*).

[288] Reasons at [2] regarding air quality and dust and at [13] regarding livestock and rehabilitation issues.

[289] Reasons at [4] regarding lighting.

[290] Reasons at [5] regarding visual amenity; [757] regarding noise conditions; and [1799] regarding noise limits. Note also this reflects the language of s 269(3) of the MRA, which states that the Land Court's "recommendation may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers **appropriate** …" (emphasis added), and ss 268(2) and 269(4)(b), (d) and (m) of the MRA.

(d) "appropriately conditioned";[291]

(e) "acceptable";[292]

(f) "not … unacceptable";[293]

(g) "concerns satisfied";[294]

(h) "not satisfied";[295]

(i) "highly concerned";[296]

(j) "sufficient";[297]

(k) "sufficiently critical";[298]

(l) "sufficiently serious";[299]

(m) "what I consider should be recommended;"[300]

(n) "risks too great";[301]

(o) "properly addressed";[302]

(p) "I am compelled to recommend";[303]

(q) "my only option";[304]

(r) "I have no option but to …";[305] and

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[291] Reasons at [10] regarding biodiversity/flora and fauna.
[292] Reasons at [6] regarding disruption to traffic.
[293] Reasons at [1128] regarding the risk to flora and fauna.
[294] Reasons at [11]: "all aspects of concerns regarding mental and physical health are able to be satisfied".
[295] Reasons at [1799] regarding meeting principles of intergenerational equity and noise limits; and at [1800] regarding conforming with sound land use management.
[296] Reasons at [16] regarding groundwater modelling.
[297] Reasons at [14] regarding breach of the principles of intergenerational equity being "sufficient" to warrant rejection of the applications for the mining leases and the amendment of the environmental authority; at [1745] regarding inconvenience to the school bus route not being "sufficient reason" to recommend refusal; and [1763] regarding conditions offering "sufficient protection against interference from vibrations".
[298] Reasons at [1056] regarding royalties.
[299] Reasons at [1265] regarding social disruption and community division no enough to recommend refusal.
[300] Reasons at [784] regarding recommendations when clear inconsistency with CG's conditions.
[301] Reasons at [1679] regarding groundwater.
[302] Reasons at [1680] recommending refusal based on not being satisfied groundwater concerns properly addressed.
[303] Reasons at [786] regarding the learned Member's inability to recommend noise conditions inconsistent with CG stated conditions.
[304] Reasons at [3], [1196], and [1838] generally regarding noise conditions inconsistent with CG stated conditions and at [1808] regarding the mine not being an appropriate land use, primarily due to noise limits.
[305] Reasons at [1838] regarding recommending refusal due to inconsistency of findings on appropriate noise conditions with CG conditions.

(s) "I am left with no option but to …".[306]

395. The reasons make it clear the learned Member weighed all of the evidence before him and the relevant considerations as an exercise of discretion rather than being legally bound to recommend refusal on any particular consideration. He identified the correct statutory provisions he was required to apply, s 269(4) of the MRA[307] and s 191 of the EPA[308] before going on to state, at [198]:

> [198] … The Court must balance all of the relevant considerations and make recommendations as provided by the MRA and the EPA, and, in so doing, the Court is to take into account and consider the applicants; the objectors; the relevant legislation; and, of course, the evidence in the hearing.

396. The learned Member applied the relevant criteria under s 269(4) of the MRA and s 191 of the EPA at [1776]-[1839] of his reasons and concluded with his determination (emphasis added):

> [1858] **Taking all of the reasoning in this decision into account, I am left with no option** but to recommend to the Honourable the Minister responsible for the MRA that MLA 50232 be rejected. It follows that, as I have recommended that MLA 50232 not be granted, it is appropriate to recommend to the Honourable the Minister responsible for the MRA that MLA 700002 be rejected.
>
> [1859] **Taking all of the reasoning in this decision into account, I am left with no option** but to recommend to the administering authority responsible for the EPA that Draft EA Number EPML 00335713 be refused.

397. The learned Member's reasons make it clear that he used expressions such as "I am left with no option but …" as expressions reflecting the weight he attached to particular findings that led him to feel compelled (as a question of weight and an exercise of discretion rather than law) to make a particular recommendation.

398. Read in context, he clearly did not use these expressions to suggest he was compelled by law to make such a conclusion.

399. The weight that he gave to the evidence about matters addressed under the Coordinator-General's conditions was a matter for the learned Member.[309]

400. Ground 1, particulars (i), (iiA), and (ii), therefore, seek to challenge the weight given to something within jurisdiction. They should be dismissed for this reason.

Ground 2 seeks to challenge findings of fact made within jurisdiction

401. Ground 2 of the Amended Application seeks to challenge findings of fact made within jurisdiction by alleging the learned Member erred in finding that air quality and noise limits in NAC's current EA may have been or had been exceeded. The particulars allege:

> (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,

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[306] Reasons at [1858] and [1859] regarding overall determinations to recommend refusal of the applications.
[307] Reasons at [136].
[308] Reasons at [146].
[309] *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47].

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.

402. While the hearing of the applications for the mining leases under the MRA and for the amended EA under the EPA were not held to determine whether NAC had breached its current EA, that question was relevant to a number of matters the learned Member was required to consider, including:

(a) under s 269(4) of the MRA, amongst other things, whether:

(i) the past performance of the applicant has been satisfactory;[310]

(ii) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof;[311]

(iii) the public right and interest will be prejudiced;[312] and

(iv) any good reason has been shown for a refusal to grant the mining lease;[313] and

(b) under s 191 of the EPA:

(i) what conditions to recommend in the draft EA for the application,[314]

(ii) the standard criteria,[315] including:

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

(B) the public interest.

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[310] MRA, s 269(4)(g).
[311] MRA, s 269(4)(j).
[312] MRA, s 269(4)(k).
[313] MRA, s 269(4)(l).
[314] EPA, s 190(d).
[315] EPA, s 190(g). The standard criteria are defined in Sch 4 (Dictionary) to the EPA.

403. The plain meaning of whether the "the past performance of the applicant has been satisfactory" is not limited to criminal conduct. To limit it to only criminal conduct would place words in s 269(4)(g) that are not there and do not serve any object of the MRA.

404. Clearly, a consideration of NAC's past performance in operating its existing mine and compliance with its existing conditions were relevant under s 269(4)(g) of the MRA.

405. The experience and lessons learnt from poor drafting of the noise conditions of the existing EA were also relevant to improving the drafting of the conditions of the draft amended EA to avoid similar problems occurring again in the future. This was reflected in the learned Member's findings regarding improved drafting of the current EA:[316]

> [1791] As is clear from my reasons, there are certainly aspects of the mining activities undertaken by NAC at Stages 1 and 2 which give rise to concerns regarding the past performance of NAC. I also note, however, that the drafting of the current EA is such as to render NAC more accountable for its actions.

406. The learned Member's reasons on this issue, including at [571], [1792] and [1823], involved findings that were within jurisdiction.

407. The evidence of objectors and NAC's own records gave a legally reasonable and legally rational basis[317] for the learned Member's findings on this matter.

408. The learned Member stated he considered the whole of the evidence and submissions and he discussed NAC's evidence and submissions in many parts of his reasons. This included referring to NAC's "submissions at paragraph 20.96" regarding decisions on past performance when considering NAC's past performance under s 269(4)(f) of the MRA.[318] There is no basis for the allegation that he "failed to consider the Applicant's evidence and submissions" on any topic or that he "failed to provide adequate reasons". The learned Member's reasons were legally sufficient, legally reasonable and legally rational. A decision-maker is not required to respond to every detail of a party's evidence and submissions in stating legally valid reasons for a decision. To do so would impose an impossible burden on decision-makers facing an immense application and volume of material as in this matter.

409. Further, any error in relation to the learned Member's consideration of NAC's past performance did not materially affect his decision. The learned Member ultimately held:[319]

> [1793] Weighing all of the evidence before me and bearing in mind the previous authorities relevant to this criteria, I am not satisfied that NAC's past performance has been so poor as to warrant rejection of the MLA on this basis.

410. Ground 2 seeks to challenge findings of fact within jurisdiction. Any errors of law in the findings could not have materially affected the decision. Ground 2 should be dismissed.

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[316] Reasons at [1791] concerning MLA 50232. The same conclusion was reached at [1822] for MLA 700002. It is a little unclear whether the reference to the "current EA" was a typographical error and the learned Member meant to refer to the "draft EA" but, either way, he was clearly considering how to improve the drafting of conditions in this context, which was relevant to his recommendations under s 269 of the MRA and s 190 of the EPA.
[317] In the sense of *Wednesbury* unreasonableness and *Li* rationality discussed at [171]-[185] above.
[318] Reasons at [1789] and [1820].
[319] Reasons at [1793] concerning MLA 50232. The same conclusion was reached at [1824] for MLA 700002.

Ground 3 seeks to challenge findings of fact made within jurisdiction

411. Ground 3 of the Amended Application alleges that the learned Member erred by inquiring into and making findings about the past performance of DEHP and particular (iii) of Ground 3 "repeats and relies on" Ground 2, thereby raising the learned Member's consideration of air quality and noise limits in NAC's current EA.

412. Ground 3 is considered in detail in a separate section of these submissions[320] where it is submitted Ground 3 seeks to challenge findings of fact made within jurisdiction. It should be dismissed on this basis.

Ground 4 seeks to challenge findings of fact and exercises of discretion made within jurisdiction

413. Ground 4 of the Amended Application alleges the learned Member erred in construing the *Environmental Protection (Noise) Policy 2008* (Qld) and the *Environmental Protection Regulation 2008* (Qld) to determine the appropriate noise limits to recommend in the conditions of the draft EA.

414. As discussed above, challenging the learned Member's conclusions about the appropriate noise conditions cannot involve a purely legal error in his construction of s 51 of the Regulation or Sch 1 of the EPP (Noise) as his conclusions about the appropriate noise conditions involved factual findings and the exercise of his discretion.

415. Also, the flexibility built into the management of noise and the limits stated in the Regulations and the EPP (Noise) mean that, ultimately their application depends on the facts and circumstances of each individual case and a degree of administrative discretion is inherent in their application. For example, administrative discretion rather than a mechanical application of noise limits stated in quantitative terms is inherent in deciding:

    (a) what extent it is "reasonable" to meet the limits in s 10(2) of the EPP (Noise); and

    (b) what adverse noise effects can be "prevented or minimised" to comply with s 51 and Sch 5, Pt 3, Table 1.

416. The learned Member's findings on the appropriate noise levels for conditions reflected the considerations in ss 269(3) and 269(4) of the MRA, s 191 of the EPA, s 51 of the Regulations, s 10 of the EPP (Noise) in the facts and circumstances of the case and the exercise of his administrative discretion.

417. Ground 4 seeks to challenge the learned Member's findings of fact on the appropriate level of noise to allow under the conditions of the draft EA. These were findings of fact and an exercise of discretion made within his jurisdiction. Ground 4 should be dismissed on this basis

Ground 6 seeks to challenge an exercise of discretion made within jurisdiction

418. Ground 6 of the Amended Application alleges the learned Member incorrectly applied the decision in *Xstrata*. The ground itself does not particularise the nature of the error but NAC's outline at [250] and [266]-[270] alleges that the learned Member "erred in

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[320] Commencing at [309] above.

deciding that the decision in *Xstrata* supported setting the [noise] levels at 35db [in conditions of the draft EA]".

419. As discussed earlier, s 269(4) of the MRA and s 191 of the EPA give a very wide scope for the Land Court to consider mining applications.

420. Within this wide scope, the learned Member was entitled to consider the conditions imposed in past decisions of the Land Court in similar cases, including *Xstrata*.

421. NAC's outline at [266]-[270], under the sub-heading "Noise error no 3", seek to identify mistakes in the learned Member's consideration of the noise limits recommended in *Xstrata* and how (according to NAC) the learned Member misapplied them to the circumstances of the New Acland Coal Mine.

422. NAC's submissions are patently directed at merits issues. NAC's argument amounts to nothing more than "the learned Member got the facts wrong". That is not a matter that can be properly raised in judicial review proceedings.

423. NAC's submissions appear to go as far, at [270], of inviting this Court to review the merits of the learned Member's factual findings on the appropriate noise limits to recommend in conditions for Stage 3 of the New Acland Mine based on expert evidence presented in the *Xstrata* case. The suggestion to do so is an invitation into error.

424. Ground 6 seeks to challenge an exercise of the learned Member's discretion made within jurisdiction. It should be dismissed on this basis.

No material error

425. In any event, grounds 1-4 and 6 contain no error that could have materially affected the decision.

GROUNDWATER

Grounds 6, 10 and 15 of the Amended Application

426. Ground 6 does not particularise how the learned Member is alleged to have erred in applying the *Xstrata* case but NAC's outline suggests two errors: one involving the consideration of noise and the other in relation to groundwater. NAC's groundwater arguments are considered in this section.

427. Ground 10 of the Amended Application alleges that the learned Member erred at [172] of his reasons by finding it was necessary to "fully consider" water issues when raised as grounds of objection under the MRA and EPA objection process and:

> … 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*.

428. Based on the particulars of ground 15 of the Amended Application, it is primarily focused on alleged insufficiency of reasons regarding groundwater. Where sufficiency of reasons is raised in relation to other grounds it is also addressed in considering those grounds.

429. NAC's outline addresses its groundwater issues at [29]-[36] and [291]-[395].

Ground 10 is inconsistent with NAC's submissions before the Land Court

430. The legal proposition that underlies ground 10 was not raised before the learned Member. Indeed, NAC accepted before the learned Member that groundwater issues were relevant to consider in addressing both s 269(4) of the MRA and s 191 of the EPA:

    (a) NAC's original closing submissions of 26 August 2016 at pp 77-81 (paras 11.1-11.18) discussed the WROLA and did not argue the Land Court hearing objections under the MRA and EPA did not have jurisdiction to consider "the potential impacts of taking and interfering with groundwater on the quantity of groundwater available to surrounding landowners" as ground 10(a) of the Amended Application now raises.

    (b) Further, at the close of evidence on 20 April 2017, the learned Member requested that the parties provide, in a separate document to the closing submissions, a short summary of how the *Water Act 2000* interacts with the mining lease applications under the MRA and environmental authority applications under the EPA. NAC's (12 page) submissions on this issue were dated 28 April 2017. NAC did not argue the Land Court had no jurisdiction to consider groundwater when assessing mining lease applications under the MRA or environmental authority applications under the EPA. Rather, NAC submitted at [9] of these submissions as the Applicant for the mining leases and environmental authority amendment before the Land Court, it:

> … remains committed to the groundwater conditions proposed in these proceedings including a make good condition on ML 50232. As the Court would be aware, the Applicant's position has consistently been that it will make good any impaired capacity to landowner bores whether that be through a statutory obligation, through a condition to ML 50232 or both. The Application's position on this issue remains unchanged.

431. The argument now raised by NAC in Ground 10(a) of the Amended Application was not raised before the learned Member and is fundamentally inconsistent with the submissions that NAC made to the learned Member.

432. NAC should be bound by the submissions its representatives made before the learned Member and not allowed to raise this new matter on judicial review.[321]

433. At the very least, NAC should not be permitted to complain that the learned Member's *reasons* are inadequate for failing to address issues or controversies that it did not raise before him.

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[321] *TKWJ v The Queen* (2012) 212 CLR 124 at 128 [8] per Gleeson CJ.

434. While OCAA submits NAC should not be permitted to raise arguments contrary to its submissions before the learned Member, the following submissions address NAC's arguments, which are wrong in addition to being new.

Statutory context

435. The statutory context in which the learned Member addressed groundwater issues under s 269 of the MRA and s 191 of the EPA, and related legislation, is set out above at [11]-[129].

436. A summary of the principal relevant mandatory considerations under the MRA and EPA was set out at [316].

437. As noted at [32], the language of the criteria in s 269(4) of the MRA indicate a clear legislative intent to permit the Land Court a very wide scope and discretion to investigate proposed mining leases as is appropriate to the facts and circumstances of each application and any objections made by the public.

438. Of particular relevance for the consideration of the impacts of a proposed mine on the groundwater used by surrounding farms:

    (a) The mandatory requirement in s 269(4)(i) to consider whether "the operations … will conform with sound land use management" creates a wide discretionary criterion that logically allows consideration of the sustainability of the proposed operations and its effect on current and future land use management. Issues such as land rehabilitation and the effects of the proposed operations on land use management on neighbouring properties are also logically within the scope that may be considered under it. Given the importance of groundwater for agriculture there is no reason why the impacts of mining operations on the availability and quality of groundwater on surrounding farms could not be considered under this criterion in an appropriate case.

    (b) The mandatory requirement in s 269(4)(j) to consider whether "there will be any adverse environmental impact caused by [the proposed mining] operations and, if so, the extent thereof" is limited only by the existence of a causal connection between the mining operations and the adverse environmental impact.[322] "Environment" is defined very widely in the MRA and includes "ecosystems and their constituent parts, including people and communities … all natural and physical resources … [and] economic, aesthetic and cultural conditions …".[323] The type of adverse

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[322] e.g. s 269(4)(j) does not extend when assessing an application for a mining lease for a coal mine to considering greenhouse gas emissions contributing to climate change from a third party burning the coal from the mine: *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [23]-[33] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).

[323] Sch 2 (Dictionary) of the MRA states "***environment*** has the meaning given by the Environmental Protection Act" and s 8 of the EPA states "***Environment*** includes—

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

environmental impact that may be considered under s 269(4)(j) is not limited and may logically extend to matters such as pollution, land degradation, noise, dust, and impacts to biodiversity or groundwater. The adverse environmental impact is not limited to the land the subject of the mining operations[324] and may extend to adverse environmental impacts on neighbouring land. There is no reason why the impacts of mining operations on the availability and quality of groundwater on surrounding farms could not be considered under this criterion.

(c) The mandatory requirement in s 269(4)(k) to consider whether "the public right and interest will be prejudiced" involves a discretionary balancing exercise of the widest import confined only so far as the subject matter and the scope and purpose of the statute may enable.[325] The benefits of a proposed mine in creating jobs and generating royalties for the State are relevant to consider under this criterion, as are negative consequences on the environment and community conflict generated by a mining operation. The burning of coal by third parties contributing to climate change has been held to be relevant under this criterion of the MRA when assessing a coal mine even though such a matter is not relevant under s 269(4)(j).[326] There is no reason why the impacts of a mine on groundwater of surrounding farms cannot be considered under this criterion also.

(d) The mandatory requirement in s 269(4)(l) to consider whether "any good reason has been shown for a refusal to grant the mining lease" is extremely wide and limited only by the subject matter, scope and purposes of the Act.[327] Clearly, there must be a *good* reason, as opposed to a reason that is extraneous to the purposes of the Act.[328] The question of whether good reason has been shown must depend on all the circumstances of the particular case.[329] Again, there is no reason why the impacts of a mine on groundwater of surrounding farms cannot be considered under this criterion also.

439. Similarly, under s 191 and the standard criteria of the EPA, considering matters such as "intergenerational equity", "the character, resilience and values of the receiving environment" affected by a proposed mine and "the public interest" allows a very wide scope of matters to be considered. There is no reason why the impacts of a mine on groundwater of surrounding farms cannot be considered under these criteria.

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[324] Contrast the language of s 269(4)(m).
[325] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 (MacDonald P) at [43] citing *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-5 (Dixon J); *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [55]. Cf. *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 487 (Taylor J) and *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [8]-[12] (Tamberlin J).
[326] *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [36]-[41] (Douglas J); *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [39]-[43] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).
[327] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).
[328] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).
[329] See *Campbell v United Pacific Transport* [1966] Qd R 465, at 472 (Gibbs J) in the context of considering whether "good reason" had been shown by an applicant plaintiff for leave to proceed after six years without a step in the proceedings.

The learned Member correctly considered that he had jurisdiction to consider groundwater

440. The learned Member considered his jurisdiction in relation to the impact of the mine on groundwater under MRA and EPA at [163]-[172] of his reasons.

441. In summary, the learned Member held that further approval requirements to take or interfere with groundwater under the *Water Act* did not mean that the impacts of the proposed mine on groundwater used by surrounding farms were irrelevant when considering the criteria in s 269(4) of the MRA and s 191 of the EPA.

442. The following submissions address some of the subtleties of his Honour's reasons.

443. The learned Member's reasons in this case concerning the relevance of impacts on groundwater under the MRA and EPA need to be read with his earlier reasons concerning the Alpha Coal Mine in *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12; (2014) 35 QLCR 56 (***Hancock***) at [81]-[129].[330]

444. The learned Member in this case referred at [163] of his reasons to the finding in the *Hancock* decision that "… it was relevant for water issues to be considered under the MRA and EPA objection process" but did not discuss the reasoning in detail (presumably because it was not in issue before the parties in the hearing in this case).

445. The learned Member in *Hancock* disagreed with the earlier reasoning of President MacDonald in *Xstrata*, in which her Honour had held that:[331]

    (a) water diversions and extractions are not activities that are authorised by the MRA or the EPA and they are, therefore outside the scope of the assessment of mining applications under the MRA and EPA; however,

    (b) the impacts of the mining operations, in terms of any drawdown in the aquifers and variation in groundwater quality for surrounding landholders are within the scope of the assessment of mining applications under the MRA and EPA.

446. Despite the limits that President MacDonald applied to the consideration of groundwater in *Xstrata*, she considered the impacts of mining activities on groundwater aquifers used by surrounding farmers and the community. For example, after considering the groundwater evidence at [223]-[259], her Honour found at [260]:

> Accordingly, I cannot be satisfied that there will be no impacts on the deep aquifers. Although the weight of the evidence suggests that there is a low threat of environmental damage, I consider that the high environmental values associated with the groundwater in the deep aquifers, as

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[330] The learned Member affirmed and expanded upon his reasons to consider groundwater in assessing a mine under the MRA and EPA in *Endocoal Limited v Glencore Coal Queensland Pty Ltd and Department of Environment and Heritage Protection* (2014) 35 QLCR 462; [2014] QLC 54 at [68]-[101].

[331] *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 13; (2012) 33 QLCR 79 (MacDonald P) (***Xstrata***) at [205]-[215].

> demonstrated by the high level of dependence of the objectors and the Wandoan community on the deep aquifers as their primary source of water, justifies a precautionary approach to the issue.

447. With respect to President MacDonald, the distinction her Honour made in *Xstrata* in relation to the consideration of groundwater under the MRA and EPA is confusing. The learned Member in *Hancock* referred to it as "nonsensical"[332] and this aspect of the decision in *Xstrata* has not been followed in later decisions of the Land Court where groundwater was raised in objections under the MRA and EPA.[333]

448. Following extensive, competing submissions from the parties in *Hancock* the learned Member adopted the view that the EPA, the MRA and the Water Act (as in force at that time) form a series of multiple controls, all of which must be complied with in order for the taking of groundwater to lawfully occur.[334] Such controls operate in parallel, rather than to the exclusion of one another.[335]

449. His Honour applied the Privy Council's reasoning in *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 2 NSWLR 681 (***Wyong***) and the High Court's reasoning in *South Australia v Tanner* (1988-89) 161 CLR 166 (***Tanner***).[336]

450. In *Wyong*, the Privy Council considered whether planning permission was required for mining where a mining lease had been granted under the *Mining Act 1906* (NSW). Their Lordships concluded that planning permission was required:[337]

> Both Acts apply, or are capable of being applied, with complete generality to land in the State of New South Wales. Can they, in relation to a given piece of land, coexist? In their Lordships' opinion they clearly can, and do. The Acts have different purposes, each of which is capable of being fulfilled.

451. Similarly, in *Tanner*, the High Court rejected an argument that a prohibition on zoos contained in regulations under the *Waterworks Act 1932* (SA) was inconsistent with the provisions of the *Planning Act 1982* (SA), which, it was said, provided a complete code for development. In rejecting this argument, the plurality accepted a submission by the Attorney-General for South Australia that:[338]

> Both pieces of legislation can stand together and operate cumulatively. They can do this because each Act has a distinct purpose, different from the other.

452. Reflecting the approach taken in *Wyong* and *Tanner* where multiple approvals were required, the learned Member held in *Hancock* that "it is appropriate to consider the impact that the authorised mining activities will have on the interference with

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[332] *Hancock* at [121].
[333] Even President MacDonald did not follow it (without expressly rejecting it) in her Honour's later decision regarding the Carmichael Coal Mine, in which she considered the impact of the mine on surrounding groundwater springs and farms: *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 at [59]-[233].
[334] See *Hancock* at [124]-[130] and [135].
[335] *Hancock* at [89] (CCAQ submissions), accepted by the learned Member at [124]-[130].
[336] See also *Endocoal Limited v Glencore Coal Queensland Pty Ltd and Department of Environment and Heritage Protection* (2014) 35 QLCR 462; [2014] QLC 54
[337] *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 2 NSWLR 681 at 686 per Lord Wilberforce delivering the judgment of the Privy Council.
[338] *South Australia v Tanner* (1988-89) 161 CLR 166 at 170-171 per Wilson, Dawson, Toohey and Gaudron JJ.

groundwater" when assessing the mining lease application under s 269(4) of the MRA and (then) ss 222 and 223 of the EPA.[339]

453. The learned Member affirmed his reasoning in *Hancock* regarding the relevance of groundwater in assessing mining applications under the MRA and EPA in *Endocoal Limited v Glencore Coal Queensland Pty Ltd and Department of Environment and Heritage Protection* (2014) 35 QLCR 462; [2014] QLC 54 at [68]-[101].

NAC's argument conflicts with the statutory framework and, in fact, with *Xstrata*

454. NAC's outline at [291]-[300] relies heavily on President MacDonald's decision in *Xstrata* to argue that "groundwater issues of the kind on which the Member based the Decision are issues intended to be addressed under the *WA* rather than the *MRA* and the *EPA*."[340]

455. NAC's argument conflicts even with President MacDonald's decision in *Xstrata*. As noted earlier, at [446], even in that case President MacDonald considered the impacts of mining activities on groundwater aquifers used by surrounding farmers and the community.[341]

456. NAC does not cite *Wyong* or *Tanner*, or address the learned Member's reasoning in *Hancock* on the relationship between the MRA, EPA and *Water Act*.

457. NAC relies on *Walker v Noosa Shire Council* [1983] 2 Qd R 86 (***Walker***) but that reliance is misplaced.

458. In *Walker* the Court of Appeal overturned a decision of the Local Government Court refusing to give approval under a by-law of the Noosa Shire Council to erect buildings on land declared in a sand dune problem area. The Local Government Court was satisfied based on expert evidence that the proposed developments could be carried out without any adverse effect on the integrity of the slope and without any loss of stability to the sand dune; however, it refused to grant approval under the by-law because the proponents had not at the time of hearing obtained a permission of the appropriate authority to erect proposed ramps and structures for access across an adjoining road reserve. Thomas J (whom DM Campbell and McPherson JJ agreed) stated at 88-89 (emphasis added):

> It is difficult to see why His Honour did not allow the appeals upon the condition that the consent of the appropriate authorities be obtained in respect to the proposed structures on the road reserve area. Whilst one may suspect that there would be a considerable difficulty in obtaining the necessary approvals, that issue was not fully litigated. The ownership and control of the road was not established by evidence, and this of course would be the starting point for any examination of the question whether such approvals are impossible to obtain. …
>
> The fact that a particular application is a clear futility, or is tainted with illegality that cannot be cured may be a ground for refusing an application. But in my opinion the council did not establish such a ground. **Under the present decision, this issue has been prejudged instead of being allowed to take its course and abide the decision of the appropriate authority or authorities**. There may be many conditions precedent to the successful erection of these structures. One is the Council's consent under the dune problem ordinance; another is the Council's consent under

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[339] These sections were materially identical to ss 190 and 191 of the current version of the EPA. The EPA underwent substantial amendments in 2013, including renumbering of sections. The decision in *Hancock* was made under the previous version of the EPA.
[340] NAC outline at [300].
[341] See *Xstrata* at [223]-[260].

> the *Building Act*; another will be the consent of the relevant road authority or authorities to the erection of the proposed structures external to the appellants' land; another will be the financial capacity of the appellants to see the projects through. If these other matters are not fulfilled, then the buildings simply will not be able to go ahead. **But in the present case it is not appropriate to decide the order in which the approvals must be obtained, or to pre-empt other applications by assuming that they will fail.**

459. The decision in *Walker* clearly has no application the learned Member's decision concerning the mining applications under the MRA and EPA here:

    (a) His Honour did not pre-judge the outcome of the approval process under the *Water Act* and use that pre-judgment as a basis to recommend refusal under the MRA and EPA.

    (b) His Honour did not recommend refusal under the MRA and EPA because relevant approvals under the *Water Act* had not been obtained (a situation akin to what occurred in *Walker*).

460. Rather, here, the learned Member was faced with objections based on (amongst other grounds) groundwater issues to the grant of two mining lease applications under the MRA and an amendment of an environmental authority under the EPA. His Honour recommended refusal of those applications under the MRA and EPA based on the evidence presented at the hearing regarding groundwater and the criteria in s 269(4) of the MRA and s 191 of the EPA.

461. *Walker* is not authority for a proposition that where multiple approvals are required for a development to proceed, the various approvals may not consider issues relevant to other approvals. Such an approach would be contrary to *Wyong* and *Tanner* that multiple approval requirements can stand together and operate cumulatively where each Act has a distinct purpose, different from the other.

462. *Walker* is authority for the principle that, with the exceptions where an application is a clear futility or is tainted with illegality that cannot be cured, it is generally desirable that such applications be considered on their merits one at a time, and without undue speculation on the fate of other necessary applications.

463. Neither is *Walker* authority for narrowing the matters required to be considered (e.g. the public interest) or relevant to those matters (e.g. how the benefits of royalties may outweigh the environmental harm in considering the public interest) by a statutory scheme simply because those matters are also relevant to a separate approval process.

464. It would have been wrong for the learned Member to ignore matters that are relevant to assessing mandatory considerations like the standard criteria simply because they are also relevant for a separate statutory approval that has already been obtained or must be obtained in the future. Indeed, the only requirement relating to a separate approval the learned Member was required to consider under the EPA was the status of a relevant mining lease application.[342]

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[342] EPA, s 191(h). Similarly, there is no requirement for the administering authority to consider other approvals in ss 176 and 235 of the EPA in deciding a site-specific EA amendment application.

465. Had the learned Member adopted the approach argued for by NAC he would have fallen into jurisdictional error through a constructive failure to exercise jurisdiction by wrongly refusing to consider matters relevant to mandatory considerations under the MRA and EPA.[343]

466. The learned Member did not commit such an error.

467. The learned Member's reasons did not conflict with *Walker* and were consistent with the approach in *Wyong* and *Tanner*, together with his Honour's reasons in *Hancock*.

NAC challenge to factual findings on groundwater

468. NAC attempts to challenge the learned Member's factual findings regarding groundwater under the façade of inadequacy of reasons.

469. The learned Member stated that he considered the "totality of all of the groundwater evidence before" him, including the IESC advices and went on to find that "the risks to the very valuable underground water resources in the Acland area are simply too great" for the approach proposed in the draft EA "of further reporting and research … post approval".[344]

470. These were factual findings and exercises of his discretion that cannot be challenged in the normal limits of judicial review.[345]

471. NAC goes well beyond the normal limits of judicial review. It goes so far as to attach a lengthy Schedule 2 to its outline setting out what are described at [369] of the outline as:

> [369] ... Schedule 2 sets out the various groundwater issues from the original hearing referred to by the Member in the Decision (as well as the submissions apparently considered by the Member in respect of those issues from the original hearing) and the evidence from the resumed hearing that was relevant to those issues and not considered by the Member.

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[343] See *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 338-340 [37]-[41] per Gaudron J, and 346 [69], 348-349 [75] and 351-352 [82]-[84] per McHugh, Gummow and Hayne JJ; *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1; [2014] HCA 26 at [25] and [42] per Hayne J and [90] per Crennan and Bell JJ .

[344] Reasons at [1678]-[1679].

[345] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 340-341 per Mason CJ.

472. Schedule 2 of NAC's outline has 17 items, the first three of which are:

GROUNDWATER ISSUES FROM DECISION

	Key Issue	Para ref	Findings	Evidence from submissions in original hearing apparently considered by Member	Contrary evidence from submissions that the Member failed to consider
1.	Faulting	1491 - 1492	The Member refers to the evidence Mr Barnett gave regarding the placement of faults in the model that did not reflect site data. The Member notes that he could "scarcely believe" some of Mr Barnett's evidence in this regard.	While not specifically cited, the Member appeared to accept OCAA's closing submissions from the original hearing regarding the F5 fault at paragraphs 1061, 1069 - 1073 and 1109.	The Member failed to consider submissions by NAC in the resumed hearing regarding faulting, including evidence regarding the "sensitivity" and "uncertainty" analyses done regarding faulting (where faults were removed from the model entirely). See section 8 (commencing at page 40) and 9 (commencing at page 48) of NACs closing submissions dated 28.04.17. Also see paragraphs 4.37, 4.54 - 4.59 of NAC's submissions in reply dated 19.05.17.
2.	Faulting	1521-1523	The Member purports to summarise the submissions of the parties regarding faulting.	Submissions referred to are those filed in the original hearing.	The Member failed to consider submissions by NAC in the resumed hearing regarding the additional evidence about faulting. See section 8 (commencing at page 40) and 9 (commencing at page 48) of NACs closing submissions dated 28.04.17. Also see paragraphs 4.37, 4.54 - 4.59 of NAC's submissions in reply dated 19.05.17.
3.	On site data/aquifer properties	1524 - 1528	The Member purports to summarise the submissions of the parties regarding on site data, including issues regarding aquifer parameter data and conductivity and storage properties.	Submissions referred to are those filed in the original hearing.	The Member failed to consider submissions in resumed hearing regarding aquifer properties: • section 10 (commencing at page 54) of NAC's closing submissions dated 28.04.17 • section 3.3 (commencing at page 46) of OCAA's closing submissions dated 5.05.17 • paragraph 4.9 and the response to section 3.3 (commencing at page 65) of NAC's submissions in reply dated 19.05.17.

473. It takes only a cursory glance at Schedule 2 of NAC's outline and the reasoning in the outline related to it at [369], [370] and [382]-[395] to see they raise a range of merits issues involving disputes over the learned Member's findings of fact. Such findings cannot be challenged in judicial review.[346]

474. NAC bravely attempts to avoid the problem by suggesting that the learned Member's "conclusions were affected by a lack of consideration of material evidence and submissions".[347] Again, a cursory review of the Table is enough to demonstrates that NAC proposes a standard for reason giving that is unrealistic and, more importantly, not required as a matter of law.

475. The learned Member explained that he considered all submissions and all of the evidence. There is no reason – given how comprehensive his reasons in fact are – to go behind that statement.

NAC's grounds 6, 10 and 15 are not made out

476. The learned Member was correct to find based on his earlier decision in *Hancock* that the impacts of the proposed mine on groundwater used by surrounding farms were relevant when considering the criteria in s 269(4) of the MRA and s 191 of the EPA.

477. As the impacts of the mine on groundwater of surrounding farms was within his jurisdiction to consider, the extent that he considered it and the weight, if any, he gave to

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[346] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 340-341 per Mason CJ.
[347] NAC outline at [382].

it in making his decisions under s 269 of the MRA and s 190 of the EPA were matters for him.

478. His decisions on groundwater were legally reasonable and rational within the principles stated in *Li* and the reasons he gave regarding groundwater were legally adequate.

479. Grounds 6 and 10 must fail on this basis.

480. NAC's claims in grounds 6, 10 and 15 that the learned Member's reasons were inadequate are blatant merits claims that conflict with the requirements for reasons in the statutory context of the decisions.

481. The learned Member clearly understood and shaped his reasons to address the primary function they served within the statutory context they were made. This included his reasons in relation to groundwater. His reasons were legally adequate in the circumstances of the hearing of the applications before him, including the urgency urged by NAC and other parties.

482. Ground 6, 10 and 15 are not made out and should be dismissed.

INTERGENERATIONAL EQUITY

Grounds 7 and 9 of the Amended Application

483. Ground 7 of the Amended Application are, again, on proper analysis either challenges to factual findings made by the learned Member that were for him to make, or, complaints about the weight that the Member gave to certain factors within his consideration of intergenerational equity. The particulars of these allegations are, in summary:

(a) Particular (i): the learned Member incorrectly applied the principle of intergenerational equity as a mandatory requirement which should be assessed by reference to whether it or its sub-principles are complied with or breached, rather than correctly applying the principle as one consideration to be balanced against others including the economic benefits.

(b) Particular (ii): the learned Member incorrectly applied intergenerational equity in the manner in which he applied the following sub-principles: the "conservation of quality principle"; and the "conservation of options principle".

(c) Particular (iii): the learned Member's reasoning was unreasonable, inconsistent and irrational and he took into account matters irrelevant to the application of intergenerational equity, including at [1342] of his reasons where he considered potential future ways the coal might be used without producing greenhouse gases.

(d) Particular (iv): the learned Member failed to take into account relevant matters outlined below.

(e) Particulars (v) and (vi): the learned Member accepted submissions by OCAA concerning mine voids and loss of good quality agricultural land but failed to consider other relevant matters.

(f) Particular (vii): the learned Member misunderstood the effects of a make good agreement and failed to assume NAC would comply with its legal obligations in respect of the Stage 3 Project.

484. Ground 9 of the Amended Application alleges the learned Member incorrectly applied the principle of intergenerational equity as a ground of refusal of the mining lease applications and by considering it to be relevant under s 269(4)(i), (k) and (m) of the MRA.

485. NAC's outline addresses its allegations regarding intergenerational equity at [37]-[43] and at [396]-[420]. Reflecting the particulars, it also descends into many merit issues.

Statutory context for intergenerational equity

486. The overall statutory context relevant to learned Member consideration of intergenerational equity was set out above at [11]-[129].

487. A summary of the principal relevant mandatory considerations under the MRA and EPA was set out at [316], where it was noted that the mandatory considerations include a large number of matters.

488. Intergenerational equity is a mandatory consideration under s 191 of the EPA as one of the standard criteria listed in Sch 4 (Dictionary) of the Act.

489. While intergenerational equity is not specifically listed in s 269(4) of the MRA, as noted above at [32], the language of the criteria in s 269(4) of the MRA indicate a clear legislative intent to permit the Land Court a very wide scope and discretion to investigate proposed mining leases as appropriate to the facts and circumstances of each application and any objections made by the public.

490. Of particular relevance for the consideration of intergenerational equity under s 269(4) of the MRA:

(a) The mandatory requirement in s 269(4)(i) to consider whether "the operations … will conform with sound land use management" creates a wide discretionary criterion that logically allows consideration of the sustainability of the proposed operations and its effect on current and future land use management. Issues such as land rehabilitation and the effects of the proposed operations on land use management on neighbouring properties are also logically within the scope that may be considered under it. Given the importance of groundwater for agriculture there is no reason why the impacts of mining operations on the availability and quality of groundwater on surrounding farms could not be considered under this criterion in an appropriate case. Intergenerational equity is relevant in these circumstances.

(b) The mandatory requirement in s 269(4)(j) to consider whether "there will be any adverse environmental impact caused by [the proposed mining] operations and, if so, the extent thereof" is limited only by the existence of a causal connection between the mining operations and the adverse environmental impact.[348] The type of adverse

[348] E.g. s 269(4)(j) does not extend when assessing an application for a mining lease for a coal mine to considering greenhouse gas emissions contributing to climate change from a third party burning the coal from the mine: *Coast*

environmental impact that may be considered under s 269(4)(j) is not limited and may logically extend to matters such as pollution, land degradation, noise, dust, and impacts to biodiversity or groundwater. The adverse environmental impact is not limited to the land the subject of the mining operations[349] and may extend to adverse environmental impacts on neighbouring land. There is no reason why the impacts of mining operations on the availability and quality of groundwater on surrounding farms could not be considered under this criterion. Intergenerational equity is relevant in these circumstances.

(c) The mandatory requirement in s 269(4)(k) to consider whether "the public right and interest will be prejudiced" involves a discretionary balancing exercise of the widest import confined only so far as the subject matter and the scope and purpose of the statute may enable.[350] The benefits of a proposed mine in creating jobs and generating royalties for the State are relevant to consider under this criterion, as are negative consequences on the environment and community conflict generated by a mining operation. There is no reason why the impacts of a mine on groundwater of surrounding farms and intergenerational equity cannot be considered under this criterion also.

(d) The mandatory requirement in s 269(4)(l) to consider whether "any good reason has been shown for a refusal to grant the mining lease" is extremely wide and limited only by the subject matter, scope and purposes of the Act.[351] Clearly, there must be a *good* reason, as opposed to a reason that is extraneous to the purposes of the Act.[352] The question of whether good reason has been shown must depend on all the circumstances of the particular case.[353] Again, there is no reason why the impacts of a mine on groundwater of surrounding farms and intergenerational equity cannot be considered under this criterion also.

491. Further, it was noted above at [11(e)], Douglas J held in *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [11][354] that, as a matter of statutory construction the MRA and EPA should be read so as to achieve a harmonious operation for both.

492. Considering intergenerational equity under relevant criteria in s 269(4) of the MRA is consistent with Douglas J's approach of construing the MRA and EPA so as to achieve a harmonious operation for both.

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and Country Association of Queensland Inc v Smith & Anor [2016] QCA 242 at [23]-[33] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).

[349] Contrast the language of s 269(4)(m).

[350] *Adani Mining Pty Ltd v LSCC & Ors* [2015] QLC 48 (MacDonald P) at [43] citing *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-5 (Dixon J); *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [55]. Cf. *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 487 (Taylor J) and *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [8]-[12] (Tamberlin J).

[351] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

[352] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

[353] See *Campbell v United Pacific Transport* [1966] Qd R 465, at 472 (Gibbs J) in the context of considering whether "good reason" had been shown by an applicant plaintiff for leave to proceed after six years without a step in the proceedings.

[354] Citing *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 146 at [49].

493. The corollary of this is that taking the opposite approach of construing the MRA on the basis that decision-makers under s 269 of the MRA are *bound* not to consider relevant concepts in the EPA such as intergenerational equity would be inimical to achieving a harmonious operation of both Acts. What could be more calculated to achieve disharmony between the MRA and EPA than construing related concepts as *irrelevant* under each other?

494. Intergenerational equity is clearly relevant to, and overlapping with, matters listed in s 269(4) of the MRA such as whether "the operations … will conform with sound land use management".

495. There is no reason as a matter of statutory construction or the application of the ordinary principles of administrative law[355] why considering intergenerational equity should not be permitted when assessing related matters under s 269(4) of the MRA.

Learned Member's consideration of intergenerational equity

496. The learned Member set out the statutory context for intergenerational equity at [148]-[151] of his reasons and considered its meaning and the evidence concerning it at [1303]-[1344].

497. The learned Member noted the definition of intergenerational equity is:[356]

> The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

498. His Honour considered previous decisions of the Land Court[357] and New South Wales Land and Environment Court (**NSWLEC**),[358] together with an academic publication by Preston CJ, the Chief Judge of the NSWLEC, concerning intergenerational equity.[359]

499. After considering past cases and academic literature on intergenerational equity, the learned Member considered the evidence in submissions in relation to it before ultimately holding:[360]

> [1337] The key question, therefore, is whether or not there is a real possibility of the groundwater available to landholders surrounding and in the vicinity of Stage 3 both during operations and for generations to come being effected. That question is of course answered as can be seen by my analysis of the key issue groundwater. I am satisfied, given the totality of the groundwater evidence before me in this case, that there is a real possibility of landholders proximate to Stage 3 suffering a loss or depletion of groundwater supplies because of the interaction between the revised Stage 3 mining operations and the aquifers. I am also convinced that the potential for that loss or interference with water continues at least hundreds of years into the future, if not indefinitely.

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[355] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).
[356] Reasons at [151] and [1303].
[357] *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 at [38].
[358] *Gray v The Minister for Planning & Or* [2006] NSWLEC 720; (2006) 152 LGERA 258 at [118]-[123] per Payne J; and *Taralga Landscape Guardians Inc v Minister for Planning RES Southern Cross Pty Ltd* [2007] NSWLEC 59; (2007) 161 LGERA 1 at [73]-[74] per Preston CJ.
[359] Preston B, "*The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific*" (Asia Pacific Journal of Environmental Law, Vol 9, Issues 2 & 3, p 109), section 5.2.
[360] Reasons at [1337]-[1344].

> [1338] Given my comments above, I am of the opinion 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. However, as quoted from the learned work of Justice Preston outlined in full earlier in this part, "using non-renewable natural resources and causing some pollution may be permissible provided higher levels of capital and knowledge are passed on to future generations to find substitutes and solutions".
>
> [1339] I consider the observations of Preston CJ particularly appropriate when applied to 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.
>
> [1340] The principle of intergenerational equity is part of the law of this state. It must have some meaning. It cannot simply be that every mining or other project can dismiss the principle on the basis that the economic benefit derived from the project will allow future generations to clean up any residual problems that are left by the project. There must be occasions in which the intergenerational equity principle will apply so that the risk to future generations is either minimised or removed. This case is one of those occasions.
>
> [1341] Not only is there real risk of breach of the principle of conservation of quality as part of intergenerational equity, but there is also real risk of a breach of the principle of conservation of options.
>
> [1342] Not allowing the revised Stage 3 to proceed as contemplated by the current applications on the basis of an infringement of the principle of intergenerational equity has a number of consequences. Firstly, of course, it removes the real possibility of depletion or loss of groundwater to properties in the vicinity of the mine. But there is another, less mentioned option that is also conserved. If the revised Stage 3 does not proceed, the coal contained within the MLAs of the revised Stage 3 will remain in the ground. They will not be depleted or lost; they will be available for future generations who perhaps find ways to mine the coal in the future in ways that either completely remove or at least lessened the extent of risk to local landholder groundwater supplies, as well as, perhaps, finding processes of burning or using the energy produced by coal in such ways that no GHG or pollutant effect is caused by the use of the coal mined, thus potentially increasing the value of that coal as a resource in the future.
>
> [1343] It is very easy to look at this issue simply through the timeframe of this year or the next ten years and look at short term economic benefits. It is much harder to step back and take a more holistic view as to whether or not it is in breach of intergenerational equity for the revised Stage 3 project to proceed at this time.
>
> [1344] In my view, the answer clearly is that the principles of intergenerational equity mean that the revised Stage 3 operations should not be approved

The mine's groundwater impacts were relevant to intergenerational equity

500. NAC's outline at [37]-[43] and [405]-[420] asserts the learned Member's consideration of the principle of intergenerational equity was wrong for four reasons.

501. NAC asserts first:[361]

> … the Member's consideration of the principle of intergenerational equity stemmed from his other conclusions about the groundwater issues. This included his conclusion that the groundwater issues fell to be fully considered under the *MRA* and *EPA* objections processes. That conclusion was wrong and failed to recognise that the principle was not a consideration in connection with the associated water licence provisions of the *WA.*

502. As noted earlier in relation to groundwater, this is a new argument by NAC that was not advanced before the learned Member. Before the learned Member, NAC did not allege

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[361] NAC outline at [406]. This argument was summarised at [38] of NAC's outline.

the Land Court lacked jurisdiction to consider groundwater issues when hearing objections to mining applications under the MRA and EPA.

503. NAC's new argument is wrong for the reasons given earlier and the learned Member's consideration of intergenerational equity was not in error for this reason.

NAC misstates the learned Member's reasons

504. A precursor for NAC's second argument for why the learned Member's consideration of intergenerational equity was in error was discussed at [403] of its outline. NAC stated at [403] by reference to a direct quote from [1331] of the learned Member's reasons (footnote in NAC outline):

> The Member agreed with a submission by OCAA *"that the key issue of intergenerational equity must be decided separately from the economic analysis"*[362].

505. NAC then went on to assert at [406] of its outline (footnotes in NAC outline):[363]

> … to the extent the principle [of intergenerational equity] applied, the Member erred in his understanding of it. It was wrong to decide the issue *"separately from the economic analysis"*. The Courts have already specifically recognised that none of the principles of ESD (including the principle of intergenerational equity) *"should…be viewed in isolation, but rather as part of the package"*, and that such principles should not *"override"* or *"outweigh"* all other considerations[364].

506. NAC's argument is a straw-man argument based on a partial quote from the learned Member's reasons. The learned Member stated at [1331] (footnote in original):

> [1331] That finding however with respect to agricultural economics is also not of itself sufficient to be determinative of the question of intergenerational equity. I agree with OCAA's submissions that the key issue of intergenerational equity must be decided separately from the economic analysis.[365] Economic analysis is just one of the factors that needs to be taken into account when considering intergenerational equity.

507. After the learned Member stated at [1331], "… the key issue of intergenerational equity must be decided separately from the economic analysis" he went on immediately to state, "Economic analysis is just one of the factors that needs to be taken into account when considering intergenerational equity."

508. Read in context, it is clear that his Honour did not mean at [1331] that economic analysis had no part in intergenerational equity, simply intergenerational equity is not the same issue and raises difference considerations than economic analysis by itself.

509. This meaning is confirmed at [1340] of the learned Member's reasons where his Honour considered "the economic benefit derived from the project" in the context of intergenerational equity. His Honour stated at [1340]:

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[362] [1331].
[363] A summary of this argument was made at [41] of NAC's outline.
[364] *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGERA 143, 154*; Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 274-275 at [154]-[155]*; Gray v Minister for Planning* (2006) 152 LGERA 258, 297 at [136].
[365] OCAA Submissions, para 2097.

> [1340] The principle of intergenerational equity is part of the law of this state. It must have some meaning. It cannot simply be that every mining or other project can dismiss the principle on the basis that the economic benefit derived from the project will allow future generations to clean up any residual problems that are left by the project. There must be occasions in which the intergenerational equity principle will apply so that the risk to future generations is either minimised or removed. This case is one of those occasions.

510. Reading the reasons fairly, there is nothing in NAC's second attack on the learned Member's consideration of intergenerational equity. NAC relies on a straw-man argument by taking one sentence of the learned Member's reasons out of context.

The weight, if any, given to intergenerational equity was for the learned Member to decide

511. NAC's outline states the third alleged error in relation to the consideration of intergenerational equity (footnotes in original):[366]

> [408] For similar reasons, it was wrong to consider the principle in isolation from other issues in the case. The requirement under s.191 of the *EPA* to *"consider"* a range of considerations (including the standard criteria) required the Member to bring his mind to bear upon all the issues raised, and to determine the appropriate weight to be given to them[367]. This involves the carrying out of a balancing exercise, or an evaluative process, to determine what the final decision should be.[368] …
>
> [412] [The Member appears to have openly refused to take economics] into account in deciding the issue of intergenerational equity[369], contrary to the authority mentioned above. That authority contemplates a weighing of all relevant considerations, and the carrying out of an ultimate balancing exercise. On any view of the Decision, the Member did not carry out these tasks. …

512. Based on the cases cited by NAC in its outline and its statement that s 191 requires a "balancing exercise" at [408] and an "ultimate balancing exercise" at [412], it has not cited *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47]:[370]

> [46] … The word "consider", like expressions such as "have regard to" and "take into account", leaves it to the Land Court to decide what, if any, weight should be given to each of the matters set out in [s 191].[371] The same analysis is applicable in relation to the requirement in s 269(4) of the *Mineral Resources Act* that the Land Court "shall take into account and consider" the identified matters.
>
> [47] Accepting that the concept of "environmental harm" is of great significance in other aspects of the operation of the *Environmental Protection Act*, the relevant function of the Land Court is not qualified by any requirement about the manner in which it must consider the identified

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[366] NAC outline at [408] and [412]. A summary was given at [42].
[367] Cf *Tickner v Chapman (*1995) 57 FCR 451, 495*; Bulga Milbrodale Progress Association Inc v Minister for Planning & Infrastructure (*2013) 194 LGERA 347, 361 at [36].
[368] Cf *Stockland Development Pty Ltd v Townsville CC (*2010) 195 LGERA 317 at [30]; *Bulga Milbrodale Progress Association Inc v Minister for Planning & Infrastructure* (2013) 194 LGERA 347, 361 at [36]; see also *Degee v BCC* [1998] QPELR 287, 289H-J.
[369] [1331].
[370] Per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue). Note: the Court of Appeal in that case was considering an earlier version of the EPA where the considerations of the Land Court were stated in s 223. To reflect the current legislation, s 191 has been substituted for the reference to s 223 as denoted by square brackets in the extracted quoted.
[371] See *Rathborne v Abel* (1964) 38 ALJR 293 at 295, 301; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

> matters or about the weight to be given to any of the relevant considerations. I am unable to accept the appellant's argument that any such qualification is implied in that Act.

513. There is no "ultimate balancing exercise" required by s 269(4) of the MRA or s 191 of the EPA. A similar superadded test requiring the Land Court to decide whether there was a "net benefit" before recommending approval under s 269 of the MRA and the previous equivalent of s 191 of the EPA was rejected by Douglas J in *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [18]-[24].

514. The learned Member was, therefore, not *bound* to engage in a superadded "balancing exercise" of the matters in s 191 of the EPA, although he could do so if he chose to.

515. NAC argues at [413] of its outline that intergenerational equity is not a "stand-alone requirement" that is capable of being breached and "it is not a prescriptive requirement, but is more in the nature of a '*motherhood statement*'". These and the other arguments in [413] criticise the weight the learned Member chose to give to intergenerational equity based on the evidence and in the circumstances of the hearing.

516. Under s 191 of the EPA the learned Member could lawfully recommend refusal based on intergenerational equity alone if he chose to. The weight given to the matters in s 191 was a matter for him.

517. In fact, under the considerations in s 191 of the EPA the learned Member recommended refusal of the application to amend the environmental authority due to three considerations:[372]

    (a) the appropriate evening and night time noise levels being inconsistent with stated CG conditions and therefore the learned Member has "no option" but to recommend refusal of the draft EA in the exercise of his discretion;

    (b) "at least one of the principles of intergenerational equity being breached to such an extent as to warrant refusal to grant the draft EA"; and

    (c) "concerns regarding the state of groundwater modelling and predictions … are such as to warrant refusal of the draft EA."

518. These were valid exercises of the learned Member's discretion under s 190 of the EPA in consideration of the matters he was bound to consider. The weight was a matter for him.

NAC descends repeatedly to challenging merits issues and factual findings

519. The third alleged error is stated by NAC in summary at [42] and in more detail at [414]-[416] of its outline, relevantly:

> [414] *Thirdly*, the Member's focus on make good agreements distracted him from a consideration of much broader evidence and submissions from NAC as to how any concern about long term impacts would be addressed by the legal framework applicable to Stage 3 as a whole. This included evidence and submissions concerning how the maximum extent of any impact would be known by the end of mining and be addressed for the future.

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[372] Reasons at [1838] and [1839].

> [415] In any event, the Member's consideration of make good agreements itself reveals error. …

520. These arguments raise merits issues and factual findings. These were matters for the learned Member and are not properly challenged on judicial review.

NAC misstates the learned Member's reasons on greenhouse issues

521. NAC's fourth alleged error regarding intergenerational equity was summarised at [43] of its outline and considered in more detail at [417]-[420]. It is sufficient to set out [43] here:

> [43] *Fourthly,* the Member's reasons are inconsistent and irrational. The Member reasoned that the coal will remain in the ground to be mined at a time when that can occur without impacting groundwater resources. This involved a purely speculative hypothesis about which no evidence was presented and no submissions were made by any party. The Member considered the fact that the coal will remain in the ground to be mined at a time when it can be burned without producing (or with less) GHG emissions thus potentially increasing the value of that coal as a resource in the future. Apart from also being speculative, the Member elsewhere concluded that Stage 3 will not contribute to additional harmful climate change because the same amount of coal will be burned whether or not Stage 3 proceeds (and indeed other coal will likely result in greater GHG emissions).

522. NAC's submissions fail to read the learned Member's reasons fairly in context and beneficially.

523. Fairly read in context the learned Member's principal concern regarding intergenerational equity was the "real possibility" of surrounding landholders suffering a loss of groundwater supplies due to the mine with the "potential for that loss or interference with water [to continue] at least hundreds of years into the future, if not indefinitely.[373]

524. Having made his finding that intergenerational equity would be breached by the mine proceeding in relation to the "principle of conservation of quality", the learned Member then went on to address the "principle of conservation of options". This principle was explained at [1308] in a quote from Preston CJ (writing extra-judicially):

> [1308] … the "conservation of options" principle requires each generation to conserve the diversity of the natural and cultural resource base in order to ensure that options are available to future generations for solving their problems and satisfying their needs. …

525. The conservation of options necessarily involves consideration of options available to future generations for solving their problems and satisfying their needs.

526. The learned Member returned after making his principal findings regarding groundwater impacts breaching the principle of conservation of quality to consider the conservation of options in the context of approval of the mine at [1341]-[1342]:

> [1341] Not only is there real risk of breach of the principle of conservation of quality as part of intergenerational equity, but there is also real risk of a breach of the principle of conservation of options.
>
> [1342] Not allowing the revised Stage 3 to proceed as contemplated by the current applications on the basis of an infringement of the principle of intergenerational equity has a number of consequences. Firstly, of course, it removes the real possibility of depletion or loss of groundwater to properties in the vicinity of the mine. But there is another, less mentioned option that is also conserved. If the revised Stage 3 does not proceed, the coal contained within the

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[373] Reasons at [1137] and subsequent consideration at [1338]-[1341].

> MLAs of the revised Stage 3 will remain in the ground. They will not be depleted or lost; they will be available for future generations who perhaps find ways to mine the coal in the future in ways that either completely remove or at least lessened the extent of risk to local landholder groundwater supplies, as well as, perhaps, finding processes of burning or using the energy produced by coal in such ways that no GHG or pollutant effect is caused by the use of the coal mined, thus potentially increasing the value of that coal as a resource in the future.

527. Read in context, the final part of this paragraph is nothing more than the learned Member's consideration of possible options for future generations for solving their problems and satisfying their needs.

528. The options are qualified by the words "perhaps" and "potentially". They are clearly not findings of fact that future generations *will* find processes of burning or using the energy produced by coal in such ways that no GHG or pollutant effect is caused by the use of the coal mined.

529. NAC, however, removes the qualifications and states the learned Member:

> [43] …The Member reasoned that the coal will remain in the ground to be mined at a time when that can occur without impacting groundwater resources. … The Member considered the fact that the coal will remain in the ground to be mined at a time when it can be burned without producing (or with less) GHG emissions …

530. This is another straw-man argument that inaccurately refers to the learned Member's reasons by removing the qualifying words of "perhaps" and "potentially" and changing the meaning from possible future options into unqualified statements of future facts.

531. The "purely speculative hypothesis" as NAC hyperbolically puts[374] it is a creation of NAC.

532. What the learned Member actually said at the end of [1342] of his reasons was to simply raise possible future options as contemplated by the principle of intergenerational equity he was analysing.

533. The principle of intergenerational equity was raised by a number of objectors[375] and the parties had made submissions in relation to it. In the circumstances the learned Member's consideration of possible future options if the mine did not proceed was not surprising or a cause of any practical unfairness to NAC.

534. NAC also asserts that the learned Member's consideration of GHGs in [1342] regarding intergenerational equity is inconsistent with findings he made at [232] that "there will be no reduction of greenhouse gas if the … mine is refused …"

535. NAC is comparing two different things and it is the different considerations involved in each that gives a rational basis for reaching different conclusions.

536. The finding at [232] that "there will be no reduction of greenhouse gas if the … mine is refused …" is based on the physical and economic factors involved in proceeding with the mine now.

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[374] NAC outline at [43].
[375] Reasons at [1304].

537. In contrast, the finding at [1342] involves physical and economic factors involved in possible future options *and* ethical considerations.

538. Intergenerational equity is, after all, an ethical concept, not merely a physical and economic one.

539. It is hardly surprising, unreasonable or irrational that the learned Member came to different conclusions at [262] and [1342] given the different factors involved in his consideration at those points.

540. In the circumstances the learned Member's reasons met the standards of legal reasonableness and rationality as discussed above at [171]-[185].

Intergenerational equity may be considered under the MRA

541. Turning to ground 9, NAC alleges that the learned Member incorrectly applied the principle of intergenerational equity as a ground of refusal of the mining lease applications and by considering it to be relevant under s 269(4)(i), (k) and (m) of the MRA.

542. Ground 9 involves the learned Member's findings:

(a) under s 269(4)(i) of the MRA, the operations to be carried out under the authority of the proposed mining lease for Stage 3 did not conform with sound land use management due to:[376]

(i) groundwater impacts;

(ii) failing to meet all the principles of intergenerational equity; and

(iii) the noise limits proposed by the CG for evening and night time operations are not appropriate, causing the learned Member to recommend (as an exercise of his discretion rather than being legally bound) that the mining leases not be granted as he was unable to recommend conditions inconsistent with the CG conditions; and

(b) under s 269(4)(j) of the MRA, the extent of the adverse environmental impacts caused by Stage 3, reflecting the learned Member's concerns under s 269(4)(j) (including, it would appear, intergenerational equity although NAC does not particularise this section for ground 9);[377]

(c) under s 269(4)(k) of the MRA, the public right and interest will be prejudiced by Stage 3, weighing the economic benefits of the mine against non-compliance with one of the principles of intergenerational equity, and the unknown level of impact on groundwater supplies in the Acland area [and] if noise limits are not set at levels in the evening and night in accordance with the learned Member's findings which are inconsistent with the stated conditions of the CG.[378] Taken as a whole the learned

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[376] Reasons at [1799]-[1800] and discussion below of the weight attributed to this matter.
[377] Reasons at [1802] and [1803].
[378] Reasons at [1804] and [1806].

Member concluded as an exercise of his discretion and the weight he attributed to his matter, he was left with "no alternative but to find that the public right and interest will not be satisfied" by the grant of the mining leases.[379]

(d) under s 269(4)(m) of the MRA, the learned Member considered he had "no option" in the exercise of his discretion but to determine that the proposed mining operation is not an appropriate land use taking into consideration the current and prospective uses of the land, primarily for the reasons of: [380]

(i) the inconsistency of his findings regarding noise limits with those stated conditions by the CG;

(ii) unknown impact on groundwater in the Acland area; and

(iii) the breach of at least one principle of intergenerational equity; and

543. The simple answer to this ground is that, while intergenerational equity is not listed as a relevant consideration in s 269(4) of the MRA,[381] in the circumstances of the hearing it:

(a) was directly relevant to determining matters the learned Member was *bound* to consider under s 269(4) of the MRA, such as whether the mine "will conform with sound land use management";[382]

(b) is not a matter his Honour was *bound not to consider* when addressing relevant considerations in s 269(4) of the MRA (i.e. it was not an irrelevant consideration for s 269(4) of the MRA); and

(c) was relevant to consider under both the MRA and EPA so as to achieve a harmonious operation for both Acts.[383]

544. Consequently, the learned Member's consideration of intergenerational equity when addressing s 269(4) of the MRA[384] does not demonstrate a legal error in the decision-making process.

NAC's grounds 7 and 9 are not made out

545. NAC's alleged errors in the learned Member's consideration of intergenerational equity are simply not made out.

546. Grounds 7 and 9 should be dismissed.

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[379] Reasons at [1806].
[380] Reasons at [1808] and [1835].
[381] It is part of the "standard criteria" under s 191 of the EPA.
[382] MRA, s 269(4)(i).
[383] Applying *Coast and Country Association of Queensland Inc v Smith & Anor* [2015] QSC 260 at [11] (Douglas J); and *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 146 at [49].
[384] Reasons at [1799] (concerning sound land use management), [1802] (adopting the reasons in [1799] for adverse impacts on the environment), [1804] (concerning the public right and interest) and [1808] (concerning appropriate land use).

PROCEDURAL FAIRNESS

Ground 12 of the Amended Application

547. Ground 12 of the Amended Application alleges that the learned Member "made adverse conclusions in circumstances where he failed to properly put to [NAC] and [NAC's] witnesses relevant concerns and the conclusions were unreasonable and irrational …".

548. Two matters are particularised in ground 12 of the Amended Application:

(a) First, in relation to Mr Denney.

(b) Second, in relation to Mr Beutel.

549. The allegation in particular (ii) that the conclusion was "not accompanied by adequate reasons" would seem to be an additional ground rather than a particular.

550. The focus in this section will be on the procedural fairness aspects of ground 12, which have not been examined in other sections of these submissions.

551. NAC's outline addresses procedural fairness issues at [44]-[47] and [421]-[427].

Statutory context

552. The relevant statutory context relevant to ground 12 in which the requirements for procedural fairness, legal reasonableness, legal rationality and to provide reasons arose was:

(a) the statutory process for applying for a mining lease in Ch 5 of the MRA, particularly ss 268 and 269;

(b) the statutory process for amending an environmental authority in circumstances where it is subject to a similar process as an application for a site-specific authority, particularly ss 185-191 of the EPA; and

(c) the obligations on the Land Court to act according to equity and good conscience in the context of s 7 of the LCA.

553. These provisions were discussed earlier.

Principles of procedural fairness

554. Martin J recently provided a helpful summary of procedural fairness in dismissing an application under the JR Act to a decision of the Minister under the MRA:[385]

> [20] … The principles which should be applied have been the subject of attention in a number of cases. For the purposes of this proceeding, the relevant principles may be summarised in this way:

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[385] *ERO Georgetown Gold Operations Pty Ltd v Cripps, Minister for Natural Resources & Mines & Anor* [2015] QSC 1 at [20]-[22] (footnotes in original).

(a) The content of the obligation is shaped by:

(i) the statute pursuant to which the decision has been made,

(ii) the interests of the individual,

(iii) the interests and purposes (public or private) which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.[386]

(b) What is required by procedural fairness is a fair hearing, not a fair outcome. The relevant question is about the process, not the decision. The statutory framework within which the decision is made is critical when considering what procedural fairness requires.[387]

(c) The process will ordinarily require that a person liable to be directly affected by the decision be given the opportunity to ascertain the relevant issues and be informed of the nature and content of adverse material.[388]

(d) In the ordinary case, a person should be given an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made.[389]

(e) It follows from the two principles set out above that a person is not entitled to see and respond to any and every "adverse" submission sent to a decision maker.[390]

(f) An adequate opportunity to be heard may be satisfied in some cases if the gist of any adverse information is disclosed without the entire text or document in which that information is contained necessarily also being disclosed.[391]

(g) Whether the obligation has been discharged is a "practical" matter that is "not to be evaluated minutely".[392]

[21] The principles set out above make it clear that the assessment of whether procedural fairness has been observed is not to be examined as if the various pieces of information and submissions received by and relied upon by the decision maker were pleadings in an ordinary civil suit.

[22] A person asserting a failure to provide procedural fairness must establish it at a practical and not a theoretical level. As Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex p. Lam*[393]:

> "[37] A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations. *Attorney-General (Hong Kong) v Ng Yuen Shiu* ... was such a case. So, according to the majority, was *Haoucher v Minister for Immigration and Ethnic Affairs*. A particular example of such detriment is a case where the statement of intention has been relied upon and, acting on the faith of it, a person has refrained from putting material before a decision-maker. In a case of that particular kind, it is the existence of a subjective expectation, and reliance, that results in unfairness. **Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.**
>
> [38] No practical injustice has been shown. The applicant lost no opportunity to advance his case. He did not rely to his disadvantage on the statement of intention. It has not been shown that there was procedural unfairness." (emphasis added, citations omitted)

555. The case before Martin J involved a mining company complaining about a decision of the Minister administering the MRA attaching a condition to renewal of a mining lease

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[386] *Kioa v West* (1985) 159 CLR 550 *per* Mason J at 584-585.
[387] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [25]-[26].
[388] Ibid at [32].
[389] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.
[390] *Minister for Local Government v South Sydney CC* (2002) 55 NSWLR 381 *per* Mason P at [245].
[391] *Director-General, Department of Trade and Investment, Regional Infrastructure and Services v Lewis* [2012] NSWCA 436 *per* McColl JA at [71].
[392] *Habib v Director-General of Security* (2009) 175 FCR 411 at [77].
[393] (2003) 214 CLR 1.

requiring public access to a road across the lease. The company alleged it had not been afforded procedural fairness because the Minister was provided with a briefing note concerning the renewal of the mining lease that contained material which was not provided to it. Martin J dismissed this ground of the complaint on the basis that no practical injustice was shown and the company lost no opportunity to advance its case.

556. The point that fairness is not an abstract concept, it is essentially practical, is particularly apposite here.

The learned Member gave NAC procedural fairness

557. The learned Member afforded NAC procedural fairness

558. As noted earlier, viewed within the statutory context of the MRA, EPA and LCA, the primary function served by the Land Court giving reasons is to inform and guide the MRA Minister and the Administering Authority in making their respective decisions under the MRA and EPA.

559. The learned Member correctly identified this function on several occasions in his reasons and this clearly guided the extent that he provided reasons. He noted:[394]

> [36] … Although this decision will of necessity be very lengthy, it will not run into many thousands of pages, for to do so would be of little utility to those tasked with the job of reading this decision and making their own decisions in light of my recommendations. …

560. The learned Member clearly understood and shaped his reasons to address the primary function they served within the statutory context they were made.

NAC mischaracterises why Mr Denney's credit was adversely assessed

561. The first particular of ground 12 mischaracterises the learned Member's reasons for adversely assessing Mr Denney's credit:

> (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.

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[394] Reasons at [36]. The learned Member made similar statements at [38] and [210] of his reasons. These were quoted above at [162].

562. Reading the learned Member's consideration of Mr Denney's evidence at [212]-[231] of his reasons, however, reveals a very different basis for his Honour's adverse findings against Mr Denney's credit.

563. The learned Member noted the concerns he had regarding Mr Denney being coached and that this had been raised with the lawyers representing the parties in a private session.[395]

564. His Honour then explained that other significant factors affected his views on Mr Denney's credit and it was all of these factors together that led to his adverse assessment of Mr Denney's credit:[396]

> [217] At any rate, even though I consider on the balance of probabilities that what I observed as coaching may have only been exuberance, that still does not excuse Mr Denney. Even if he was not looking to the gallery for assistance as part of a prearranged coaching exercise, at the very least Mr Denney looked to the gallery to employees of NAC and observed their responses to questions before giving his own response, which invariably followed precisely the indication that he had seen. It was entirely inappropriate of Mr Denney to do this, and this factor must be taken into account in my assessment of Mr Denney as a witness.
>
> [218] In this regard, I am surprised that NAC in its submissions did not touch upon the issue of coaching or any impact that viewing answers from the gallery may have had on Mr Denney's credit, despite being aware of my concerns in this regard raised at the private session.
>
> [219] There is another significant factor which is linked to the above. I have provided my observations as to Mr Denney's evidence up to the time that I became concerned about issues of coaching. After that time, the nature of Mr Denney's evidence changed. He was much more uncomfortable in answering questions. He hesitated and corrected himself, particularly when shown documentary evidence to show that answers he had given were not factually correct. In short, Mr Denney presented quite differently as a witness after he was unable to take any assistance from the gallery.
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> [220] Another source of concern regarding Mr Denney's credit related to the bulk of his affidavit being written in the first person and, of course, that affidavit concluding with the words:
>
> > "All the facts and circumstances above deposed to are within my own knowledge, save such as are deposed to from information only, and my means of knowledge and sources of information, appear on the face of this my affidavit."
>
> …
>
> [228] When I consider Mr Denney's evidence as a whole, it becomes abundantly clear that much of what is contained within his affidavit material and quoted in the first person is in fact the opinions of others which have been passed on to him. In my view, on too many occasions it is not Mr Denney's own, independent knowledge.
>
> [229] I do not accept the submissions of NAC in this regard. It is an extremely simple matter for an affidavit to be written in such a way as to make it abundantly clear when someone such as Mr Denney is relying upon the views of subordinates when expressing an opinion. Given that the rules of evidence do not apply in the Land Court, there was no danger of Mr Denney having his affidavit excluded on the basis of hearsay had it honestly and truthfully stated the position as it really was, instead of being drafted in a way to deceive the reader into thinking that all of the statements expressed were Mr Denney's own opinion, at least in all those circumstances where he used the word "I" or the like. …
>
> [231] When I put all the factors outlined above together, I am extremely troubled by Mr Denney's evidence, to such an extent that I afford it little or no weight. Of course, documents annexed to Mr Denney's affidavits speak for themselves, and in the majority of circumstances the truth or otherwise

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[395] Reasons at [214].
[396] Reasons at [217]-[231].

> of those documents has not been challenged, so I am able to rely upon those documents. That, however, does not include documents such as "BD27"

565. In the context of the learned Member's reasons as a whole regarding Mr Denney, NAC's particulars do not accurately reflect his Honour's reasons for making adverse findings against Mr Denney's credit in saying:

> … 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).

566. Paragraphs [214] and [218] of the learned Member's reasons need to be read in the context of the learned Member's consideration of Mr Denney's evidence at [212]-[231] as a whole. A number of factors, including the change in Mr Denney's demeanour after the issue of possible coaching was raised,[397] affected the learned Member's assessment of his credit and it was "Mr Denney's evidence as a whole" that led to the learned Member's adverse findings on his credit.[398]

567. The learned Member said he was "surprised that NAC in its submissions did not touch upon the issue of coaching or any impact that viewing answers from the gallery may have had on Mr Denney's credit, despite being aware of my concerns in this regard raised at the private session" but that is hardly a criticism of NAC. His Honour was expressing his surprise at this.

568. Given that the learned Member had already raised the issue of coaching with NAC's representatives, the rules of natural justice did not require him to raise it further with NAC's representatives.

569. Further, in the circumstances it was obvious that Mr Denney's credit was at issue in the hearing, not merely due to the question of coaching. In such circumstances, the learned Member did not need to alert NAC to Mr Denney's credit being at issue or that he would form his views on Mr Denney's credit based on Mr Denny's demeanour as a witness and his evidence as a whole.

570. To afford a party natural justice, an administrative decision-maker is not obliged to give a party an opportunity to present information or argument on a matter that is already obviously at issue or open on the known material.[399]

571. While no breach of natural justice or procedural fairness occurred in the circumstances, even if it had occurred in the manner alleged by NAC it is difficult to see how NAC suffered practical injustice in the circumstances, particularly as:

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[397] Reasons at [219].
[398] Reasons at [228] and [231].
[399] *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104 at [30] per Jerrard JA with whom McMurdo P and Davies JA agreed; *Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors* [2007] QCA 338; (2007) 155 LGERA 322 at [46] per McMurdo P with whom Holmes JA and Mackenzie J agreed.

(a) Beyond exhibiting relevant documents to his affidavit, which the learned Member accepted in any event,[400] Mr Denney had a relatively limited role to play as a witness in the hearing.

(b) The learned Member accepted Mr Denney's evidence that NAC has sufficient financial capacity to carry out the proposed mining operations and found that NAC has the necessary financial capacity to do so.[401]

(c) The learned Member ultimately found "I am not satisfied that NAC's past performance has been so poor as to warrant rejection" of the mining leases.[402]

572. The learned Member afforded NAC procedural fairness in relation to Mr Denney's evidence and NAC has not suffered any practical unfairness in the circumstances.

Mr Beutel

573. In relation to Mr Beutel, NAC alleges in its particulars:

> (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.

574. The learned Member stated in his reasons:[403]

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

575. There was no breach of procedural fairness at [1370] of the learned Member's reasons.

576. In circumstances such as this, procedural fairness requires the "giving an opportunity to present information or argument on a matter not already obvious but in fact regarded as important by the decision maker."[404]

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[400] Reasons at [231].
[401] Reasons at [890].
[402] Reasons at [1793] and [1824].
[403] Reasons at [1369] and [1370].
[404] *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104 at [30] per Jerrard JA with whom McMurdo P and Davies JA agreed. See also *Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors* [2007] QCA 338; (2007) 155 LGERA 322 at [46] per McMurdo P with whom Holmes JA and Mackenzie J agreed.

577. The question of whether "the removal of the buildings in Acland has been a deliberate ploy by NAC to pressure [Mr Beutel] to leave" was obvious in the circumstances of the hearing, including NAC's actions in "removing most of the buildings in the town" noted at [1369].

578. Further, this question was mentioned only in passing and no firm finding was made. In the circumstances, it was clearly a minor matter and not "in fact regarded as important"[405] by the learned Member.

579. In any event, ultimately the learned Member found "I am not satisfied that NAC's past performance has been so poor as to warrant rejection" of the mining leases.[406]

580. The learned Member afforded NAC procedural fairness in relation to Mr Beutel's evidence and NAC has not suffered any practical unfairness in the circumstances.

581. Further, in the circumstances the learned Member's reasons regarding Mr Beutel met the standards of legal reasonableness and rationality. As discussed earlier, *Li* and subsequent case law emphasise the strict limits to these grounds of judicial review and caution against their use as *de facto* merits review.

NAC's ground 12 is not made out

582. Ground 12 of the Amended Application is not made out.

583. NAC suffered no practical injustice in the learned Member's consideration of Mr Denney's credit and Mr Beutel given his ultimate findings that "I am not satisfied that NAC's past performance has been so poor as to warrant rejection" of the mining leases.[407]

584. Ground 12 should be dismissed.

LEGAL REASONABLENESS AND RATIONALITY

Ground 14 of the Amended Application

585. Ground 14 of the Amended Application alleges the making of the decisions involved an exercise of power "in a manner that was so unreasonable that no reasonable person could so exercise the power and/ or involved irrational reasoning and/or conclusions."

586. The only particulars remaining in this ground are to "repeat and rely on paragraphs 1 to 13 above and 15 below".

587. This ground, therefore, appears to be an ambit claim of *Wednesbury* unreasonableness and *Li* irrationality based on all of the other grounds.

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[405] Ibid.
[406] Reasons at [1793] and [1824].
[407] Reasons at [1793] and [1824].

Statutory context and relevant principles

588. The overall statutory context was set out above at [11]-[129] and need not be repeated.

589. The principles of legal reasonableness and rationality were also set out above at [171]-[185] and need not be repeated, save to note the emphasis given in *Li* and subsequent cases to:

(a) applying the concepts within the statutory context in which a decision is made; and

(b) not permitting this ground to turn judicial review proceedings into *de facto* merits review.

590. French CJ stated in *Li*: "[e]very statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred" and must be exercised within the "framework of rationality imposed by the statute".[408]

591. Similarly, Hayne, Kiefel and Bell JJ stated the requirement for legal reasonableness was based on the presumption that the "legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably" and:[409]

> [67] … The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. …

592. The requirements for legal reasonableness and rationality are similar in this sense to the requirements for adequate reasons for a decision given that, as discussed earlier at [144]-[165], the "extent of the duty to give reasons is affected by the function that is served by the giving of reasons".[410]

593. Several aspects of the statutory context of the learned Member's decision and reasons that are material to consider in determining their legal reasonableness and rationality are:[411]

(a) Under s 7 of the LCA the Land Court is intended to be a relatively informal, practical decision-maker that is not bound by the rules of evidence or legal technicalities.

(b) Under the MRA and EPA, the learned Member's decision and reasons are not finally determinative of the parties' rights but resulted merely in non-binding recommendations to the MRA Minister and the Administering Authority.

(c) The Administering Authority was itself a party to the hearing before the learned Member under s 186(a) of the EPA. Representatives of the Administering Authority, therefore, were already directly informed of all of the evidence and submissions heard by the learned Member.

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[408] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348 [23] (footnote omitted) and 351 [30].
[409] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63] and 364 [67].
[410] *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 483, lines 25-26 per McPherson and Davies JJA.
[411] These provisions were noted earlier at [160] in addressing the adequacy of the reasons.

(d) In making their final decisions under the MRA and EPA, the MRA Minister and the Administering Authority have access to the application, all of the material before the Land Court, and can be informed by experts within their departments.

594. In relation to the emphasis in *Li* given to not allowing claims of legal unreasonableness and rationality turn judicial review into *de facto* merits review, French CJ cautioned:[412]

> [30] The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker.

595. Similarly, Hayne, Kiefel and Bell JJ recognised:[413]

> [63] … there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness.

596. As noted earlier, in the statutory context of the learned Member's decisions, he had a very wide scope to consider relevant facts and circumstances and it was a matter for him to decide what, if any, weight should be given to each of the matters set out in s 269(4) of the MRA and s 191 of the EPA.[414]

The reasons meet the requirements for legal reasonableness and rationality

597. Applying the principles stated in *Li* and subsequent cases in the statutory context of the learned Member's decisions under the MRA and the EPA, his decisions and reasons clearly met the standards for legal reasonableness and rationality.

598. Viewed within the statutory context of the MRA, EPA and LCA, the primary function served by the Land Court giving reasons is to inform and guide the MRA Minister and the Administering Authority in making their respective decisions under the MRA and EPA.

599. The learned Member correctly identified this function on several occasions in his reasons and this clearly guided the extent that he provided reasons. He noted:[415]

> [36] … Although this decision will of necessity be very lengthy, it will not run into many thousands of pages, for to do so would be of little utility to those tasked with the job of reading this decision and making their own decisions in light of my recommendations. …

600. The learned Member clearly understood and shaped his reasons to address the primary function they served within the statutory context they were made.

601. The learned Member's reasons, spanning 459 pages including attachments, were legally reasonable and rational in context of the primary function served by the requirement to

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[412] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [30].
[413] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [63] (footnote omitted).
[414] *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47] per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).
[415] Reasons at [36]. The learned Member made similar statements at [38] and [210] of his reasons. These were quoted above at [162].

give reasons in s 269 of the MRA and s 190 of the EPA, to inform and guide in a non-binding manner the final decisions of the MRA Minister and the Administering Authority.

NAC's ground 14 is not made out

602. The ambit claim of legal unreasonableness and irrationality in ground 14 is not made out. It should be dismissed.

SUFFICIENCY OF REASONS

Ground 15 of the Amended Application

603. Ground 15 of the Amended Application alleges 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 explain the reasons for the Decisions …"

604. Particulars (i)-(viii) of ground 15 allege a number of failures of the learned Member to provide adequate reasons regarding groundwater issues.

605. Particular (ix) of ground 15 makes an ambit claim in which "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."

606. Ground 15 was addressed above regarding the sufficiency of reasons concerning groundwater but is included here in a short, separate section to confirm that all aspects of it have been addressed.

607. NAC's outline sets out what it says are the relevant principles for the adequacy of reasons at [101]-[129].

Statutory context and relevant principles

608. The statutory context and relevant principles for determining the adequacy of reasons in the context of the statutory functions served by reasons under s 269(5) of the MRA and s 190 of the EPA were set out above at [144]-[165], including:

    (a) Even for a judge it is "plainly unnecessary" to refer to all the evidence led in the proceedings, or to indicate which of it is accepted or rejected, and the obligation of doing so does not exist in respect of every matter, of fact or law, which was or might have been raised in the proceedings.[416]

    (b) The learned Member was not exercising a judicial function and principles for the adequacy of judicial reasons are not applicable.

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[416] *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 484, lines 1-21 per McPherson and Davies JJA and cases cited therein.

(c) The requirements for the learned Member's reasons must be determined from the statutory function that they serve.

(d) The primary function of his reasons within the statutory context of the MRA, EPA and LCA was to inform and guide the MRA Minister and the Administering Authority in making their respective decisions under the MRA and EPA.

(e) The learned Member correctly identified this function on several occasions in his reasons and this clearly guided the extent that he provided reasons.[417]

The learned Member's reasons were sufficient

609. NAC's criticisms of the sufficiency of the learned Member's reasons are a surprising part of its grounds of review.

610. It is a brave argument in the context of reasons stretching over 459 pages, which followed a hearing of almost 100 sitting days, during which almost 2,000 exhibits containing many tens of thousands of pages of material, and well in excess of 2,000 pages of submissions were received by the court.[418] 28 expert and 38 lay witnesses gave evidence across multiple topics.[419]

611. NAC's arguments that the reasons were insufficient rely upon isolating small parts of the evidence and submissions that the learned Member did not identify individually in his reasons. The table of groundwater issues included in Schedule 2 of NAC's outline epitomises this.

612. Strangely, NAC's proposed Index to the Record has only 75 documents, including transcript extracts.[420] Excluding transcripts, NAC proposes to include in the Record less than 2% of the nearly 2,000 exhibits tendered in evidence.

613. NAC's arguments that the reasons were insufficient ignore the elephant in the room, which was the enormity of the evidence and the submissions his Honour was required to address in the reasons.

614. NAC's arguments set an impossible standard in this context: that the reasons are insufficient because they do not identify and resolve each and every contention raised by NAC or its experts, even though NAC was one of many parties and there were many experts other than those called by NAC.

615. NAC's arguments are wrong to ignore the fact that the learned Member was faced with an enormous volume of documents and oral evidence in the hearing, not just the parts now selectively identified by NAC.

616. The entirety of the evidence and submissions before the learned Member is relevant to addressing ground 15 and other grounds that allege insufficiency of reasons as the learned

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[417] See, e.g. reasons at [30].
[418] Reasons at [19].
[419] Reasons at [103]-[112].
[420] Index to the Applicant's Record, filed 17 October 2017.

Member had to consider the whole of the evidence and submissions, not merely the parts selected by NAC to support its grounds of review.

617. While this creates an almost impossible task for the Court in reviewing the learned Member's decision, it brings home the reality that the learned Member was faced with an almost impossible task of seeking to deal with an enormous amount of material and submissions and the reasons should be viewed in this light.

618. In reviewing the learned Member's decision, the Court should not attempt to pass judgment on the sufficiency of the learned Member's reasons without itself grappling with the enormous amount of material before his Honour.

Ground 15 is not made out

619. For the reasons given earlier, ground 15 is simply not made out.

620. NAC's asserts at [107] of its outline that the "standard of reasons required in the Decision was the same as that applicable to a judge in civil proceedings".

621. As noted above at [149]-[150], NAC's submissions as to the relevant principles to be applied in considering the adequacy of reasons is fundamentally mistaken as it fails to consider the statutory function served by the provision of reasons for decisions under s 269 of the MRA and s 190 of the EPA.

622. The learned Member correctly identified the function that his reasons served is to inform and guide the MRA Minister and the Administering Authority in making their respective decisions under the MRA and EPA.[421]

623. The learned Member clearly understood and shaped his reasons to address the primary function they served within the statutory context they were made.

624. Within this statutory context and the circumstances of this case, including the enormity of the material faced by the learned Member, his reasons were clearly legally sufficient and adequate.

CONCLUSION

625. A common feature of many of the grounds of the Amended Application and the arguments in NAC's outline is they seek to exceed the limited nature of judicial review and to engage in merits review. Many of the grounds: [422]

> … seek a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case and a relitigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power.

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[421] Reasons at [36]. The learned Member made similar statements at [38] and [210] of his reasons. These were quoted above at [162].

[422] *ERO Georgetown Gold Operations Pty Ltd v Cripps, Minister for Natural Resources & Mines & Anor* [2015] QSC 1 at [19] per Martin J.

626. Many grounds of the Amended Application disguise merits review in claims of legal unreasonableness and legal irrationality but the High Court's decision in *Li* and subsequent case law emphasise the strict limits to these grounds of judicial review and caution against their use as *de facto* merits review.

627. A second common feature of many of the grounds of the Amended Application and the arguments in NAC's outline is that they collide head-on with the reasoning of the Court of Appeal in *Coast and Country Association of Queensland Inc v Smith & Anor* [2016] QCA 242 at [46]-[47][423] by seeking to challenge the weight given by the learned Member to relevant considerations under the MRA and EPA. Questions of weight were entirely a matter for him.

628. A third common feature of many of the grounds of the Amended Application and the arguments in NAC's outline is that they ignore basic principles of administrative law such as:

    (a) the principles for giving the reasons of an administrative decision-maker a beneficial construction; and

    (b) the principles of waiver of a claim of apprehended bias.

629. These common features of the grounds of the Amended Application are all set within the context of NAC's mistaken understanding of the requirements for determining the adequacy of the learned Member's reasons.

630. Viewed within the statutory context of the decisions under s 269 of the MRA and s 190 of the EPA, the primary function served by the Land Court giving reasons is to inform and guide the MRA Minister and the Administering Authority in making their respective decisions under the MRA and EPA.

631. The learned Member clearly understood and shaped his reasons to address the primary function they served within the statutory context they were made. His reasons were adequate in this context.

632. Viewed individually and collectively, the grounds of the Amended Application have not been established.

633. The Amended Application should be dismissed.

Saul Holt QC and Dr Chris McGrath
Counsel for the Second Respondent
23 November 2017

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[423] Per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).

APPENDIX 1: PRAISE FOR NAC AND CRITICISMS OF OBJECTORS

634. The learned Member praised NAC and NAC's witnesses, and accepted NAC's submissions in many parts of his reasons. His Honour also criticised objectors and their witnesses.

635. Given the length of his Honour's reasons, for ease of reference this Appendix collates examples of such praise for NAC and criticisms of objectors.

636. This appendix is not intended to be a comprehensive list and, of course, must be understood in the context of the full reasons, including his criticisms and rejection of NAC's witnesses and submissions. The point that this appendix is intended to convey is that the learned Member was not simply dismissive of NAC's witnesses or submissions, nor did he simply accept objectors uncritically. Overall, the reasons display even-handedness to NAC and its witnesses and to objectors rather than a prejudiced or closed mind in making the decision.

Examples of praise for NAC and NAC's witnesses

637. The learned Member's thanks to NAC, praise for NAC witnesses, positive findings on the credit of NAC witnesses, and acceptance of NAC's submissions included (but are not limited to) the following examples:

638. The learned Member publicly thanked NAC for its help in an aspect of the hearing:[424]

> [89] NAC helpfully provided the Court and the other parties with a chronology of events relating to its mining operations at Acland …

639. The learned Member praised Mr Charles, a lay witness called by NAC:[425]

> [329] Overall, I was impressed with Mr Charles as a witness. He was clearly passionate about his region and for jobs and growth in that region, covering both mining and agriculture and all businesses. Although at times during his cross-examination by OCAA Mr Charles showed some hesitancy in his answer to questions, overall he was very comfortable in giving evidence to this Court.

640. The learned Member praised Mr Wells, a lay witness called by NAC regarding explosives used at the mine, and rejected OCAA's criticisms of his credit for having a financial interest in the outcome of the case:[426]

> [336] Mr Wells gave impressive evidence …
>
> [339] Mr Wells was a very impressive witness. His answers were clear and to the point. Importantly, he was careful to always stay within his area of knowledge and would clearly indicate if a question or topic was outside of his knowledge. …
>
> [341] I was impressed by Mr Wells as a witness and accept his evidence in its entirety.

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[424] Reasons at [89].
[425] Reasons at [329].
[426] Reasons at [336], [339]-[341]. OCAA's challenge to Mr Well's credit was rejected at [340].

641. The learned Member noted he found Mr Hartin, a lay witness called by NAC who was employed fulltime by NAC as a production mine worker:[427]

> [356] Throughout Mr Hartin's cross-examination, he impressed me as being a very fair witness who was careful to stay within his own knowledge and experience. …

642. The learned Member praised and thanked Mr Boyd, the current Chief Operating Office of NAC's parent company, New Hope, for his evidence, saying:[428]

> [390] Mr Boyd presented as someone with a good detailed knowledge of what was going on at NAC, which he was able to express clearly. In my opinion, he was not deceptive or misleading to the Court.
>
> [391] I was particularly impressed by Mr Boyd's evidence about NAC opening west pit and not telling its neighbours because it was acting within its legal requirements. …
>
> [392] I thank Mr Boyd for the clarity of his evidence and the honest way in which it was delivered.

643. The learned Member praised Mr McKeiver, a lay witness called by NAC regarding jobs related to rail haulage of coal from the mine:[429]

> [422] Mr McKeiver gave his evidence in a highly professional, courteous manner. He was clear and concise with his answers, and I have every reason to accept all of his evidence.

644. The learned Member praised Mr Sheppard, an NAC officer who operated noise monitoring equipment:

> [575] I found Mr Sheppard's evidence to be freely and honestly given and to be sufficiently detailed and precise so as to assist the noise experts and the court. I have no reason to doubt any of Mr Sheppard's evidence in this regard. …

645. The learned Member praised Mr Elkin, NAC's noise expert:[430]

> [729] Turning first to Mr Elkin, I found him to be a highly credible expert witness. He clearly understood his obligations to the Court. He was honest, frank and truthful throughout his evidence in providing his considered opinion as to the appropriateness of various aspects of evidence relating to noise and vibration. He was prepared to concede points when a contra positon (sic) was put to him, even when that position would clearly not assist NAC.

646. The learned Member accepted NAC's submissions, and rejected OCAA's submissions on the source of appropriate noise guidelines and in relation to noise monitoring equipment used by NAC:[431]

> [762] NAC contends that MMCG [Model Mining Conditions Guideline] is not appropriate to use as it does not have the requisite statutory underpinning. Despite OCAA's best attempts to argue to the contrary, I agree with NAC. …
>
> [797] I essentially agree with submissions of NAC [and reject the submissions of OCAA regarding NAC's use of noise monitoring equipment]. …

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[427] Reasons at [356].
[428] Reasons at [390]-[392].
[429] Reasons at [442].
[430] Reasons at [729].
[431] Reasons at [762] and [797].

647. The learned Member praised NAC's lighting expert, Dr Al-Khalidy:[432]

> [823] Dr Al-Khalidy has impressive qualifications and detailed experience covering in excess of 20 years in his field of expertise. He provided a report and a supplementary report to the Court.
>
> [824] I was impressed by Mr Al-Khalidy's evidence, which was clear, confident and competent. Although Mr King sought to challenge Mr Al-Khalidy's expertise during cross examination, Mr Al-Khalidy emerged virtually unscathed.

648. The learned Member praised NAC's visual amenity expert, Mr Alan Chenoweth, and accepted his evidence:[433]

> [832] I was highly impressed by Mr Chenoweth as an expert witness. His evidence was at all times open, his honestly held belief, carefully given, and respectful, not only to the Court, but also to all of the parties asking him questions. In my view, he clearly understood his role as an expert is to assist the Court. …
>
> [835] Not only was Mr Chenoweth's written report of benefit to the Court; his testimony was also particularly helpful. …
>
> [841] I am satisfied by Mr Chenoweth's evidence that measures can be put in place by NAC to ensure that visual amenity impacts can be minimised. …

649. The learned Member praised NAC's traffic expert, Mr McClurg, and accepted his evidence:[434]

> [848] I was impressed by Mr McClurg as an expert witness. He took his duties as an expert called to assist the Court in this matter very seriously. This was not only demonstrated by his careful approach to answering questions in order to ensure that he was as correct as possible with his understanding of the questions and the clarity of his answers, but also demonstrated through his concern about wrong references in his report, including references to named roads in the vicinity of the New Acland Mine. … In short Mr McClurg did the best that he could to provide the Court with accurate information. …
>
> [853] I accept the evidence of Mr McClurg and the opinions and conclusions he reached. …

650. The learned Member accepted NAC's evidence and submissions on the mine's viability and profitability and NAC's financial capacity:[435]

> [885] Having regard to the evidence provided by NAC and its submissions as outlined above, Stage 3 is likely to be economically (financially) viable and profitable. …
>
> [890] … I find that NAC has the necessary financial capacity to carry out its proposed mining operations in revised Stage 3.

651. The learned Member considered the dispute between the economic experts before, ultimately accepting NAC's expert, Dr Fahrer, that the mine would have significant positive economic impacts for the local region, state and the nation:[436]

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[432] Reasons at [823]-[824] (footnotes omitted).
[433] Reasons at [832] and [835].
[434] Reasons at [848] and [853].
[435] Reasons at [885].
[436] Reasons at [985] and [1021]. See also the acceptance of Dr Fahrer's evidence at [1078] and [1079] regarding "the value of the output of the mine far exceeds the value of any plausibly displaced agricultural output going on forever."

> [985] In my view Dr Fahrer's CBA [Cost Benefit Analysis] correctly shows a positive economic impact of revised Stage 3. …
>
> [1021] Overall the CGE model (at the 2.5% discount rate preferred by Dr Fahrer and Professor Quiggin) indicates significant positive economic impacts of Stage 3 for the local region, state and the nation.

652. The learned Member accepted Dr Fahrer's evidence and reject the evidence of OCAA's experts, Professor Quiggin and Mr Campbell, regarding the effect of the mine increasing the supply of thermal coal and, thereby, shifting the supply curve and reducing world coal prices:[437]

> [1004] I have reviewed this matter and with the greatest of respect to Professor Quiggin (and Mr Campbell) I fully accept Dr Fahrer's reasoning and assumption with respect to the supply curve. NAC has existing customers, whether long term contracts have been signed or not, they have been successfully operating for 15 years. So if revised Stage 3 is not approved and they do not supply any further coal to their customers, it is very likely those customers will source the coal they need from other suppliers. Demand for NAC coal already exists and is being supplied. The only increase in coal to be supplied by revised Stage 3 will be the extra 1.5Mt and this small amount as indicated by Dr Fahrer is likely to have a negligible effect on world prices and therefore have no real effect on his CGE [Computable General Equilibrium economic] analysis.

653. The learned Member accepted Dr Fahrer's evidence over OCAA's experts in relation to jobs created by the mine:[438]

> [1039] I cannot but accept Dr Fahrer's evidence with respect to jobs but I do not necessarily accept his reasoning that the employment effect of this project should be de-emphasised and is of little importance. Jobs both direct and indirect will be created by this project and are particularly important to the people who already work for NAC and may obtain direct or indirect jobs with them in the future. Jobs created is an important issue. There are obvious employment benefits from revised Stage 3 but they are not critical in terms of whether the project should or should not be approved.

654. The learned Member resolved the dispute over the jobs and royalties generated by the mine and lost agricultural production in NAC's favour:[439]

> [1054] Jobs preserved and created (both direct and indirect) as discussed previously in this decision also should be factored in a consideration as to the economic benefits of this project.
>
> [1055] Dr Fahrer's estimate of revenue to be earnt by QR of $938 million over the life of the project is also a significant figure. OCAA's submission that QR would earn this income in addition to the normal royalties if they were payable, misses the point that QR will not earn this income if revised Stage 3 is not approved. I accept Mr McKeiver's evidence that Aurizon (who provide the rail service) and hence QR (who provide the railway tracks) will lose 50% of their southwest corridor business should revised Stage 3 not be approved, and this business is unlikely to be replaced by other customers.
>
> [1056] In summary the reduction in royalties one would normally expect from a coal mine is a significant factor in any consideration of economic issues but it is not of itself sufficiently critical to lead me to recommend that revised Stage 3 should not proceed on economic grounds. The other economic benefits which will flow from revised Stage 3 must also be considered in this decision. …
>
> [1082] In summary, the lost agricultural production in the proposed mining lease area is not significant at a regional level, however it is significant locally with respect to the land surrounding the mine. But agricultural production will only be adversely affected in the land

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[437] Reasons at [1004].
[438] Reasons at [1039].
[439] Reasons at [1054]-[1056] and [1082].

> surrounding the mine if drawdown impacts occur and are not fully mitigated by NAC. Also compared with the loss of mining income if revised Stage 3 is not approved, the potential agricultural production losses in the surrounding land will take a very long time, perhaps thousands of years, before they will overtake mining income. Therefore based on agricultural economics alone, I believe revised Stage 3 should proceed.

655. The learned Member praised NAC's flora and fauna experts, Dr Daniel and Mr Caneris, and rejected the concerns of objectors in relation to biodiversity impacts of the mine:[440]

> [1099] … Both experts [Dr Daniel and Mr Caneris] were impressive witnesses who were well acquainted with their areas of expertise. …
>
> [1122] Many objectors have expressed concern regarding the impact mining revised Stage 3 will have on local flora and fauna. Their concern is genuine but according to the expert evidence it is misplaced, as significant flora and fauna will be protected via mapping, pre-clearance assessment, conservation zones, offsets and management plans. …
>
> [1126] I have no reason not to accept the expert evidence of Dr Daniel and Mr Caneris and do so accept it. I note both experts in their individual reports have answered the biodiversity concerns of all objectors. …
>
> [1128] In line with the evidence of Dr Daniel and Mr Caneris and having regard to the ecological conditions imposed by the CG and the draft EA, I find that the revised Stage 3 does not pose an unacceptable risk to flora and fauna.

656. The learned Member preferred the evidence of NAC's health expert, Dr McKenzie, over an expert called by an objector, Dr Jeremijenko:[441]

> [1134] Given Dr McKenzie's greater experience and specialist knowledge in this area; and my concerns with Dr Jeremijenko's sometimes evasive and unconvincing evidence in cross examination, I prefer the evidence of Dr McKenzie where they directly conflict.

657. The learned Member agreed with NAC's submissions regarding drinking contaminated water and that coal dust from NAC's coal trains was not causing unacceptable adverse health impacts:

> [1206] It would appear from [NAC's] submissions that NAC is prepared to install "first flush" systems were necessary. I support NAC's commitment in this regard which would resolve concerns regarding drinking contaminated water. I recommend that this commitment by NAC be conditioned in the draft EA. …
>
> [1208] … I find that NAC's veneered coal wagons have not caused and are not causing unacceptable adverse health impacts to people who live near the railway tracks used by trains carrying NAC coal.

658. The learned Member accepted NAC's expert on mental health, Dr Chalk, over an expert called by an objector, Dr Jeremijenko:[442]

> [1211] I have concerns as to the manner in which Dr Jeremijenko gave what I consider evasive and unconvincing evidence at times during cross-examination. Given Dr Chalk's greater experience and specialist knowledge in this area, and the clear, concise way he approached his

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[440] Reasons at [1099], [1126] and [1128].
[441] Reasons at [1134]. Note, however, the learned Member accepted the direct evidence of objectors in some regards over Dr McKenzie's belief as to what he expect to happen at [1185].
[442] Reasons at [1211].

> answers to questions, I prefer the evidence of Dr Chalk to that of Dr Jeremijenko where they conflict.

659. The learned Member praised NAC's land valuer, Mr Rabbitt and accepted his evidence:[443]

> [1267] I was highly impressed by Mr Rabbitt as an expert witness. He clearly understood his duty to assist the court. He gave appropriate, polite and considered answers to all questions he received. …
>
> [1275] I accept the evidence of Mr Rabbitt.

660. The learned Member praised and accepted NAC's livestock and rehabilitation expert, Mr Newsome:[444]

> [1281] Mr Newsome presented as a very clear, down to earth expert witness. In my view, he was very careful not to stray outside of his level or field of expertise. I accept his evidence.

661. The learned Member praised NAC's land use and soil expert, Mr Thompson:[445]

> [1288] … Overall, I was impressed with Mr Thompson as a witness. He was clearly prepared to be critical of his profession when such criticism was warranted. He was also not hesitant in any way in answering questions or making statements where those answers or statements were clearly contrary to answers or statements that would assist the case put by NAC. This clearly showed Mr Thompson has not only a working knowledge of the requirements placed on an expert appearing before this Court; he actively puts those requirements into practice.

662. The learned Member praised one of NAC's groundwater modellers, Mr Durick:[446]

> [1486] Mr Durick gave what I would classify as very measured, comfortable evidence. He was careful to properly consider each question and then willing to give his true opinion with respect to the question asked, irrespective of whether or not his answer assisted one side or the other.
>
> [1487] I have been a member of the Queensland Judiciary for over seventeen years, and during that time I have heard expert evidence from a myriad of experts over many diverse fields of expertise. I can say with absolute certainty that never before in my experience on the bench have I heard an expert witness called by one party give evidence so telling against that party. I have no doubt that Mr Durick gave truthful testimony. I have no doubt that he understood absolutely his responsibility to assist the Court and not the party who called him.

663. The learned Member praised NAC's surface water expert, Mr Roads, and preferred his evidence over that of Dr Standley, an objector and expert on surface water:[447]

> [1687] Mr Roads impressed me as an expert witness. He gave very clear, concise answers to questions during cross examination. He was not hesitant or apprehensive in any part of his evidence, including the concurrent evidence. Overall, he was clearly highly knowledgeable and confident. …
>
> [1720] In respect of Dr Standley's preferences for more information, I prefer Mr Roads' evidence over that of Dr Standley. Indeed, as noted, Dr Standley has previously agreed that he would defer to Mr Roads given his qualifications and relevant experience. Mr Roads clearly has a practical appreciation of how the Draft EA conditions operate.

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[443] Reasons at [1267].
[444] Reasons at [1281].
[445] Reasons at [1288].
[446] Reasons at [1486]-[1487].
[447] Reasons at [1687].

Criticisms of objectors and their witnesses

664. In addition to praising NAC and its witnesses in parts of his reasons the learned Member also criticised and made adverse findings against the objectors in parts of the reasons. Examples of these criticisms of objectors and their witnesses included the following:

665. The learned Member criticised and did not accept the evidence of Mr Cook, an objector who gave evidence for OCAA as a lay witness:[448]

> [403] In my view, Mr Cook's evidence is tainted by the negative experience he had at Wandoan. He is prepared to repeat what others have told him without checking the truth or otherwise of those comments. His evidence is of little if any assistance to the court.

666. The learned Member criticised and did not accept the evidence of Mr Ashman, a lay witness called by OCAA who was then president of OCAA and an objector:[449]

> [409] Because of Mr Ashman's strong anti-mine stance, and his reliance on hearsay without fully knowing the facts, I find his evidence to be of little or no weight.

667. The learned Member strongly criticised and did not accept the evidence of Mr Sholefield, a neighbour of the mine called as a lay witness by OCAA and an objector:[450]

> [428] Mr Scholefield's credit came undone when he was asked questions by Mr Ambrose QC about his view that NAC caused his bank to close. …
>
> [430] … It is highly disappointing that he would give untruthful evidence to the court in this regard. Accordingly, I do not rely upon his evidence.

668. The learned Member agreed with NAC's and the statutory party's criticisms of Mr Noel Wieck, a neighbour of the mine and an objector who gave evidence on his own behalf. The learned Member referred to parts of his evidences as "misguided and ill informed":[451]

> [454] I agree with much of the criticisms of Mr Wieck contained in NAC's submissions. …
>
> [455] … I agree with the statutory party's submissions at paragraph 164 which sets out details from Mr Wieck's submissions indicating his belief that revised Stage 3 was approved because of corruption, bribery or money paid. I agree with the statutory party that such submissions are scandalous and unsupported by any evidence or foundation. The allegations made in those submissions are serious and categorically denied by the statutory party and Mr Loveday. I agree with the statutory party that there is no basis whatsoever for this court to make any such findings….
>
> [456] … The difficulty, of course, is that he is misguided and ill-informed in making his comments. Mr Wieck's comments in paragraph 23 border on being in contempt of court where he says that the project is "being supported all the way along the approval process". Given the close reference of that statement to his disparaging comments about myself, it is no stretch of the imagination to conclude that Mr Wieck was in effect accusing myself of not bringing an independent, impartial mind to this process. That is highly regrettable. …
>
> [458] As consequence of the manner in which Mr Wieck gave much of his evidence, a great deal of it must be disregarded. …

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[448] Reasons at [403].
[449] Reasons at [409].
[450] Reasons at [428]-[430].
[451] Reasons at [454]-[459].

> [459] There are a couple of aspects of Mr Wieck's evidence that survive all elements of attack, even though he did his best to discredit himself. …

669. The learned Member agreed with NAC's submissions regarding Mr Grant Wieck, a neighbouring farmer and objector who opposed the mine:[452]

> [467] His evidence of course suffers because he is a level 1 objector and because, by his own admission, he is philosophically opposed to new thermal coal mining, and he considered revised Stage 3 to be a new project.

670. The learned Member agreed with NAC and dismissed the evidence of Ms Munro, a lay witness called by an objector:[453]

> [492] I agree with the submissions of NAC that Ms Munro's political views taints her evidence. …
>
> [494] Ms Munro has clearly written book about Acland to support her political views and her activist position. Her evidence can be given little, if any weight. At any rate, it is clearly more preferable to hear evidence directly from witnesses with firsthand knowledge rather than second or third hand knowledge as relayed by Ms Munro.

671. As noted above, the learned Member criticised Dr Jeremijenko, who was called by an objector in relation to mental health issues, and preferred the evidence of NAC's expert, Dr Chalk. The learned Member considered Dr Jeremijenko "evasive and unconvincing at times".[454]

672. The learned Member also made many favourable findings for NAC regarding the s 269(4) criteria under s 269(4) at [1776]-[1835] including, notably, that NAC's past performance *did not* justify refusal of the mining leases:[455]

> [1793] Weighing all of the evidence before me and bearing in mind the previous authorities relevant to this criteria, I am not satisfied that NAC's past performance has been so poor as to warrant rejection of the MLA on this basis.

[End of OCAA's outline of argument]

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[452] Reasons at [467].
[453] Reasons at [492] and [494].
[454] Reasons at [1211].
[455] Reasons at [1973] concerning MLA 50232. An identical finding was made at [1824] for MLA 700002.