LAND COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: EPA495-15
MRA496-15
MRA497-15

Applicant:	**New Acland Coal Pty Ltd ACN 081 022 380**
	AND
Respondents:	**Frank and Lynn Ashman & Ors**
	AND
Statutory Party:	**Chief Executive, Department of Environment and Science**

OUTLINE OF SUBMISSIONS FOR THE REHEARING ON BEHALF OF THE OAKEY COAL ACTION ALLIANCE INC

INTRODUCTION

[1] These submissions are made pursuant to the Court's orders and reasons delivered on 20 June 2018,[1] in the light of Bowskill J's decision on 28 May 2018 setting aside Member Smith's decisions on 31 May 2017[2] and remitting the matter for rehearing before a different member of the Court according to law.[3]

[2] The Court's task in the rehearing is to re-exercise the whole of the discretions in s 269 of the *Mineral Resources Act* 1989 (Qld) (**MRA**) and s 190 of the *Environmental Protection Act* 1994 (Qld) (**EPA**) within the constraints imposed by Bowskill J. The Court's task is *not* merely to reconsider what noise conditions ought to be imposed and then proceed – as a superficial afterthought – to decide whether to recommend approval or refusal of the applications (as the Applicant's submissions suggest). Bowskill J's orders do not have that effect and to proceed on that limited basis would be a fundamental misunderstanding of the Court's statutory functions under s 269 of the MRA and s 190 of the EPA.[4] Bowskill J indicated that the Court was to reconsider the applications "consistent with the reasons of this court and according to law".[5] The requirement that the reconsideration proceed "according to law" was not superfluous. It was a fundamental requirement.

[3] These submissions aim to assist the Court in this task.

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[1] *New Acland Coal Pty Ltd v Ashman & Ors (No 6)* [2018] QLC 17 (Kingham P).
[2] *New Acland Coal Pty Ltd v Ashman & Ors (No 4)* [2017] QLC 24 (**Member Smith's reasons**).
[3] *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 (**Bowskill J's principal reasons**); and *New Acland Coal Pty Ltd v Smith & Ors (No 2)* [2018] QSC 119 (**Bowskill J's reasons on final orders**).
[4] Such an approach would impermissibly supplant the statutory tests in s 269 of the MRA and s 190 of the EPA, as was recently criticised in a different statutory context in *Legal Services Commissioner v Nichols* [2018] QCA 158 at [11], [21], [24], [27] & [29]-[30] per Flanagan J (with whom Fraser and McMurdo JJA agreed).
[5] Bowskill J's principal reasons at [379].

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BACKGROUND

The town of Acland

[4] The proposal before this Court for rehearing cannot be divorced from the area's historical context, which is long and rich.

[5] In about the 1840's, the first European settlement occurred with the opening up of what became known as Rosalie Plains Station. Agricultural activities including cropping, dairying and beef cattle grazing have been undertaken in the area since that time.[6]

[6] A number of objectors can trace their family roots back to 1848, whilst others, although unable to trace their ancestry back to this land for almost 170 years like some, nevertheless can easily establish third, fourth and fifth generation connection to the land in this vicinity.[7]

[7] Acland had a long history with coal with the small, hand-mined underground colliery near the town, unobtrusively woven into the fabric of the community, until its closure in 1984 removed, for nearly two decades, the town's last connection with the coal industry.[8]

State's southern food bowl

[8] The land around Acland in which the mine is proposed is amongst the best 1.5% of agricultural land in Queensland and significant from an agricultural perspective.[9]

[9] In March 2012, the then Premier rejected the initial Stage 3 expansion of the mine on the basis that it "was 'inappropriate' to expand the mine in the State's southern food bowl".[10]

[10] The damage the proposed mine will cause to high value agricultural land is a crucial part of the context of the objections and reasons for refusal of the applications for the mine. In this regard, in weighing matters such as the public interest and intergenerational equity:[11]

> [325] The evidence in this case clearly shows that agricultural activities have been undertaken successfully on the land for many generations, with the real likelihood that, all things being equal, such agricultural activities will continue for many more generations. NAC's mining operations, if Stage 3 is approved, will only last for some 12 years.

The application process for expansion of the mine

[11] The applications the subject of this hearing involve the Stage 3 of a mine that has operated near Acland for approaching 20 years. This is not a new mine, but an expansion of an existing mine that has an extensive history of impacting the surrounding community.

[12] The Applicant (**NAC**) first sought approval for Stage 1 of the large open cut Acland Coal Mine in 2000,[12] approximately three kilometres from the centre of town. There were 15 objectors to this proposal, including the Plant family. The objectors sought disclosure of

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[6] Member Smith's reasons at [45].
[7] Member Smith's reasons at [46].
[8] Member Smith's reasons at [48].
[9] Member Smith's reasons at [1299].
[10] Member Smith's reasons at [58].
[11] Member Smith's reasons at [325].
[12] *Re New Acland Coal Pty Ltd (No 3)* [2001] QLRT 30 at [1].

documents and were refused with costs awarded against them.[13] These costs defeated the Plants' objections and all objections were withdrawn shortly thereafter.

[13] Mining leases for Stages 1 and 2 of the mine were granted under the MRA in 2001 and 2006 respectively.[14]

[14] NAC initially applied to expand the mine to "Stage 3", south and west of the existing mine, in 2007.

[15] As noted earlier, in March 2012, the then Premier rejected the initial Stage 3 expansion on the basis that it "was 'inappropriate' to expand the mine in the State's southern food bowl".[15]

[16] NAC submitted a revised, smaller proposal for Stage 3 in the second half of 2012.[16] The revised proposal included a second mining lease application for a rail spur to transport coal from the mine to join with the existing rail line south of the mine.

[17] The revised Stage 3 was assessed by an environmental impact statement (**EIS**) under the *State Development and Public Works Organisation Act* 1971 (Qld) (***State Development Act***) and the Coordinator-General (**CG**) issued a report recommending approval of the project, subject to stated conditions, on 19 December 2014.[17]

[18] NAC applied to amend its existing environmental authority (**EA**) for the mine under s 224 of the EPA for the revised Stage 3 in 2015. The Administering Authority for the EPA decided under s 228 of the EPA that the proposed amendment was a "major amendment", which meant that Pts 2 and 3 of Ch 5 of the EPA applied to the amendment application as if it were a site-specific application.[18]

[19] A delegate of the Statutory Party (as the Administering Authority for the EPA) issued a draft EA under s 172 of the EPA on 28 August 2015.[19]

[20] Following a public objection period for the proposed mining leases under the MRA and amendment of the environmental authority, the applications were referred to the Land Court for hearing of the objections under s 265 of the MRA and s 185 of the EPA in October 2015.[20]

[21] Ultimately, there were 27 objectors to the MRA applications and 35 objectors to the EA amendment application, with 20 objectors having both MRA and EPA objections, including Oakey Coal Action Alliance Inc (**OCAA**).[21] There were multiple grounds of objections.[22]

[22] The hearing of the objections 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

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[13] *Re New Acland Coal Pty Ltd (No 2)* [2001] QLRT 14.
[14] Member Smith's reasons at [51]-[55] and Bowskill J's principal reasons at [1].
[15] Member Smith's reasons at [58].
[16] Member Smith's reasons at [59].
[17] Member Smith's reasons at [65]. The CG report is Exhibit 16 (Document ID EHP.0016).
[18] Member Smith's reasons at [70] and EPA, s 232.
[19] Member Smith's reasons at [70] and Appendix C (Chronology), p 458. The draft EA is Exhibit 9 (EHP.0009).
[20] Member Smith's reasons, Appendix C (Chronology), p 458.
[21] Member Smith's reasons at [80].
[22] Member Smith's reasons at [84]-[86].

2,000 pages of submissions were received by the court.[23] 28 expert witnesses and 38 lay witnesses gave evidence across multiple topics.[24]

Lack of substantial royalties for the State

[23] The bulk of the tenures the subject of the mining lease applications (**MLAs**) are historic in nature, dating from the 19th century, and contain provisions which, unlike the vast majority of tenures in Queensland, provide that royalties for minerals mined on the tenures are payable to the landholder and not to the State of Queensland.[25] 93% of the land to be mined under Stage 3 was granted under pre-1910 titles, hence NAC will only pay 7% of the usual royalties to the State.[26] NAC will in effect pay the vast majority of its royalties (calculated at 7% of the value of the coal) to its related company APC.[27] Only an estimated $39.9 million will be paid in royalties over the life of this project.[28]

[24] Member Smith found:[29]

> [1051] The fact that 93% of the land to be mined in revised Stage 3 does not require royalties to be paid to the state (but rather to the land owners - primarily APC, a New Hope related company) is a relevant factor in determining on public interest grounds whether this coal mine extension should be approved or not. The loss of the normally expected royalties (estimated at approximately $436 million over the life of the project) cannot be ignored and is significant.

[25] These facts substantially reduce any public interest in granting the MLAs and EA amendment.

Stage 3 of the mine commenced in 2016 when NAC started mining "West Pit"

[26] While the applications before the Court seek approval for Stage 3 of the mine, in truth Stage 3 of the mine has already commenced and NAC has been mining it for two years.

[27] To assess the applications on the basis that they involve only future mining activities would be to fundamentally misunderstand and misconstrue the facts. Member Smith did not fall into this error and recognised NAC had already commenced mining Stage 3.

[28] During the course of the original hearing before Member Smith, in early 2016, NAC commenced mining outside the footprint of the mining pits it had applied for in 2005-2006 for Stage 2 of the mine in a new pit referred to as "West Pit".

[29] Member Smith referred to "West Pit" on a number of occasions[30] and found – as a question of fact that is binding on the parties and upon which the Court is ordered to proceed – that NAC had already commenced Stage 3:[31]

> [683] … NAC has already commenced removing overburden from the Manning Vale East Pit (referred in the evidence as the West Pit).

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[23] Member Smith's reasons at [19].
[24] Member Smith's reasons at [103]-[112].
[25] Member Smith's reasons at [23].
[26] Member Smith's reasons at [882].
[27] Member Smith's reasons at [882].
[28] Member Smith's reasons at [1040].
[29] Member Smith's reasons at [1051].
[30] Member Smith's reasons at [125], [245], [378], [389], [391], [677], [680], [683]-[685], [802] and [1392]-[1405].
[31] Member Smith's reasons at [683]-[685].

> [684] However in my view NAC has already undertaken Stage 3 mining activities in the broad sense as understood by the bulk of witnesses (lay and expert) and other evidence by mining that part of the Manning Vale East Pit located within the existing ML50216.
>
> [685] Therefore as NAC has already commenced its Stage 3 mining activities …

[30] Later in his reasons, Member Smith stated:[32]

> [802] … I believe NAC has already in a sense begun its revised Stage 3 mining activities by mining the proposed Manning Vale East Pit (West Pit) albeit under the existing ML. … In my view, as soon as the draft EA is approved and MLs are granted, then Stage 3 has begun and hence there is no need for conditions to regulate NAC's existing operations.

[31] Read in the context of Member Smith's findings at [683]-[685] and the first sentence of [802], the second sentence of [802] appears to be a finding that Stage 3 will *officially* have begun as soon as the draft EA is approved and mining leases (**MLs**) are granted but it has already, *effectively*, begun without such approvals being granted.

[32] The correctness of Member Smith's finding, at [683]-[685] and [802], that NAC has already commenced Stage 3 is apparent from comparing the map of the mining pits proposed in the Stage 2 EIS, shown in Figure 1, with the location of West Pit admitted by NAC shown in Figure 2. Three pits were shown in the 2006 EIS: North Pit, Centre Pit and South Pit. No "West Pit" was shown in the "mine footprint" as described and publicly advertised in the EIS for Stage 2.

[33] Dr Tanya Plant tendered photographs she took of West Pit while flying a plane over the mine on 26 June 2016. One of those photographs is reproduced in Figure 3.

[34] What NAC now calls "West Pit" had been part of the "Manning Vale Pit" in the original Stage 3 proposal in 2007-2012 (see Figure 4) and part of the "Manning Vale East Pit" in the revised Stage 3 proposal after 2012 (see Figure 5).

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[32] Member Smith's reasons at [802].

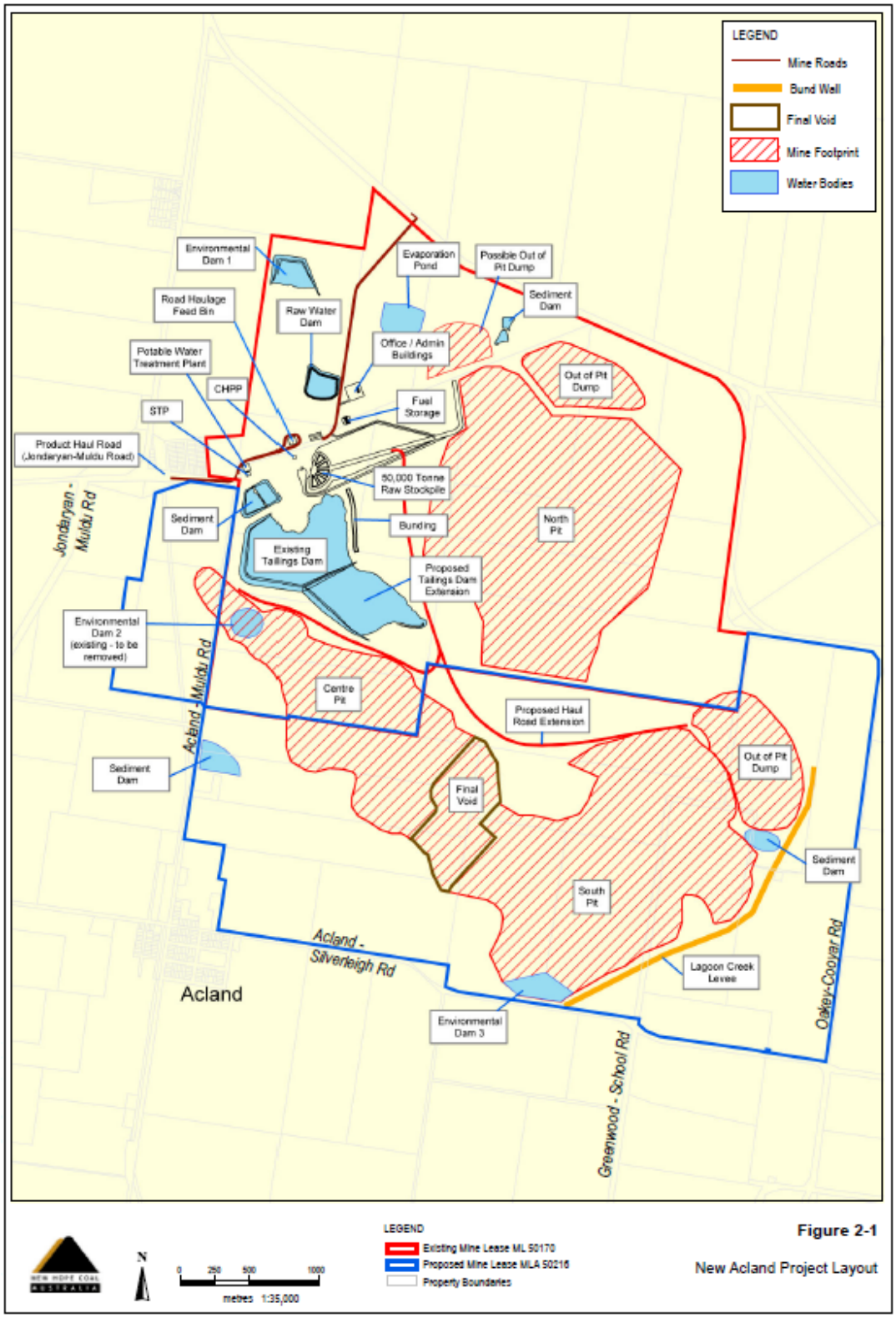

Figure 1: Mine footprint shown in the Stage 2 EIS Ch 2 (Description of Project) Fig 2-1, January 2006[33]

[33] Extracted from the *New Acland Coal Mine Stage 2 Expansion Project Environmental Impact Statement* (January 2006), Ch 2 (Project Description), p 2-2 (Exhibit 871, Document ID TMP.0827).

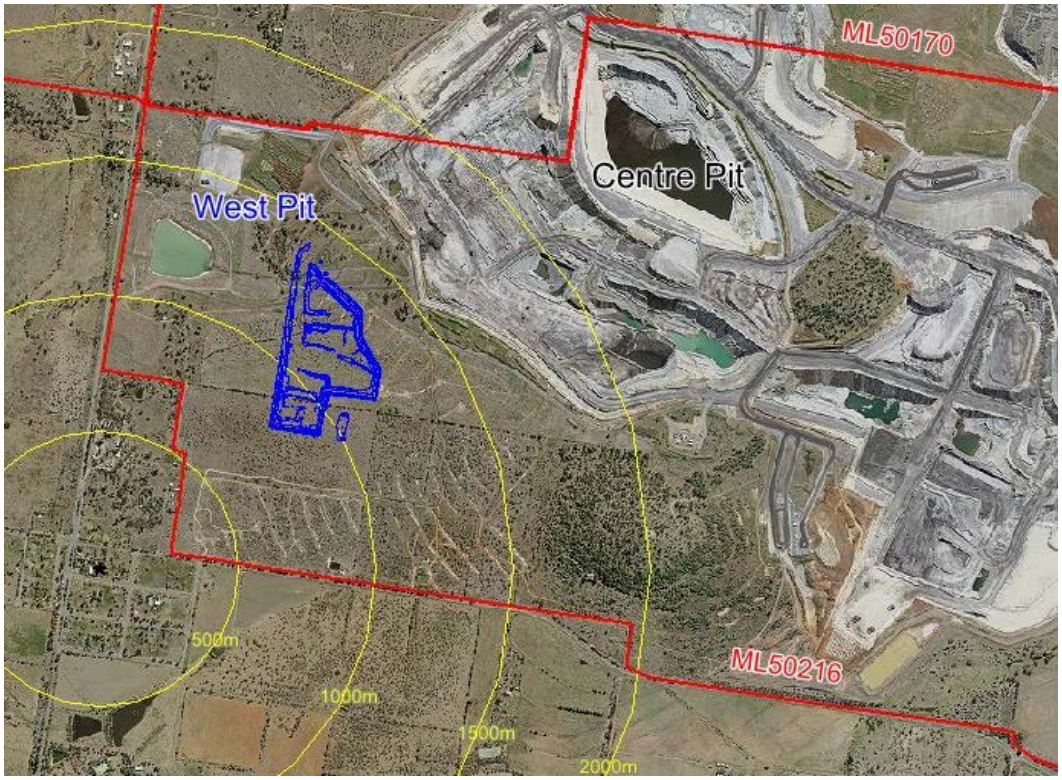

Figure 2: NAC image showing location of "West Pit" in southwestern corner of the existing Stage 2 mining lease (ML 50216) and distances from Mr Beutel's house in Acland as at 4 August 2016 [34]

Figure 3: Aerial photograph of West Pit on 26 June 2016 [35]

[34] Extracted from Exhibit 1841 (Document ID NAC.0205), as described at T77-109.
[35] Annotated from a photograph taken by Dr Tanya Plant and part of a series of 9 photographs of West Pit that became Exhibit 1153 (Document ID TMP.0934), as described at T64-37 and T64-38.

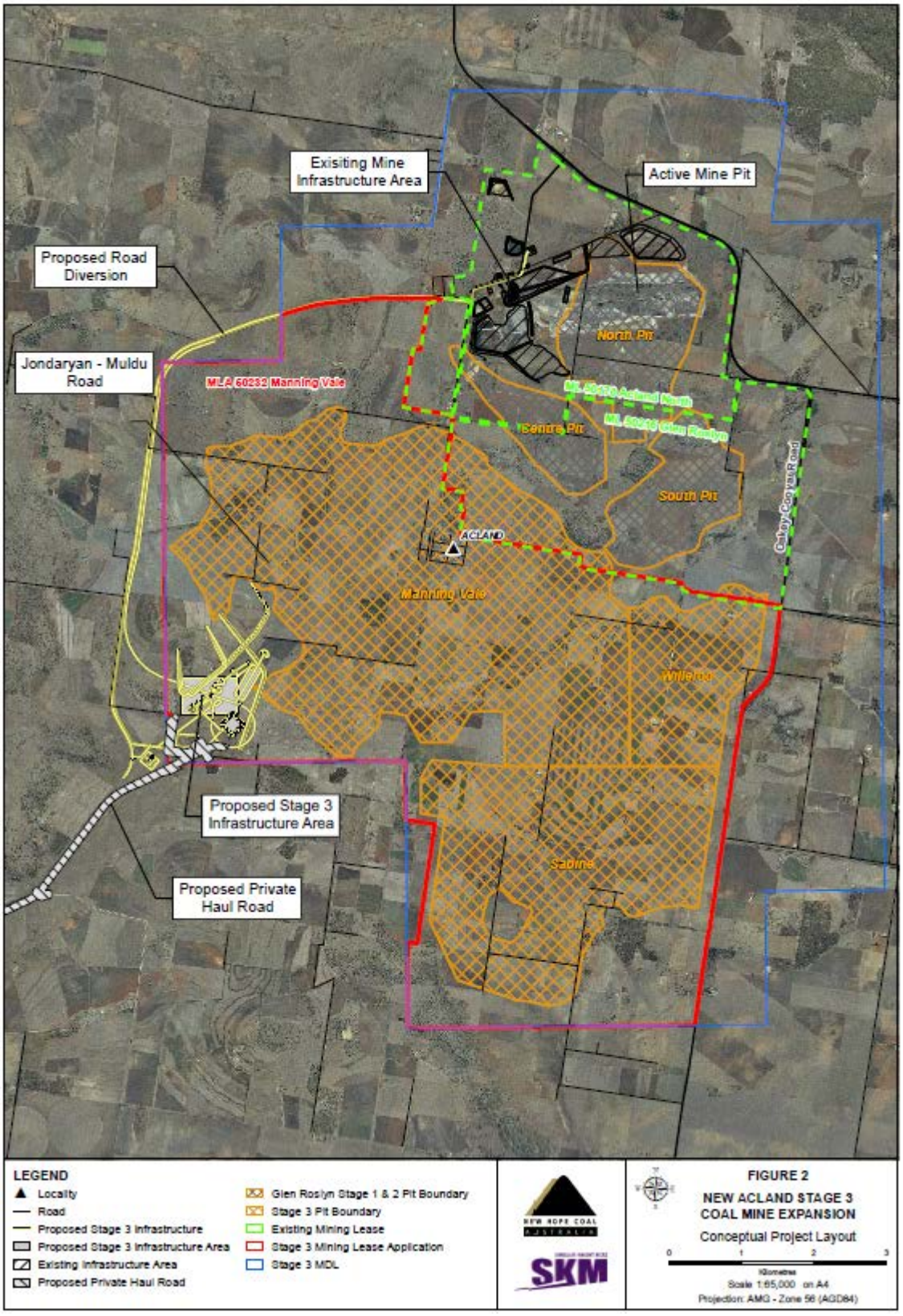

Figure 4: Original Stage 3 mining pits as shown in the 2009 EIS showing "Manning Vale" pit extending into the southwest corner of the Stage 2 ML where West Pit commenced in 2016[36]

[36] Extracted from the *New Acland Coal Mine Stage 3 Expansion Project Environmental Impact Statement* (Vol 1, December 2009) (Exhibit 1287; Document ID TMP.0954), p 5.

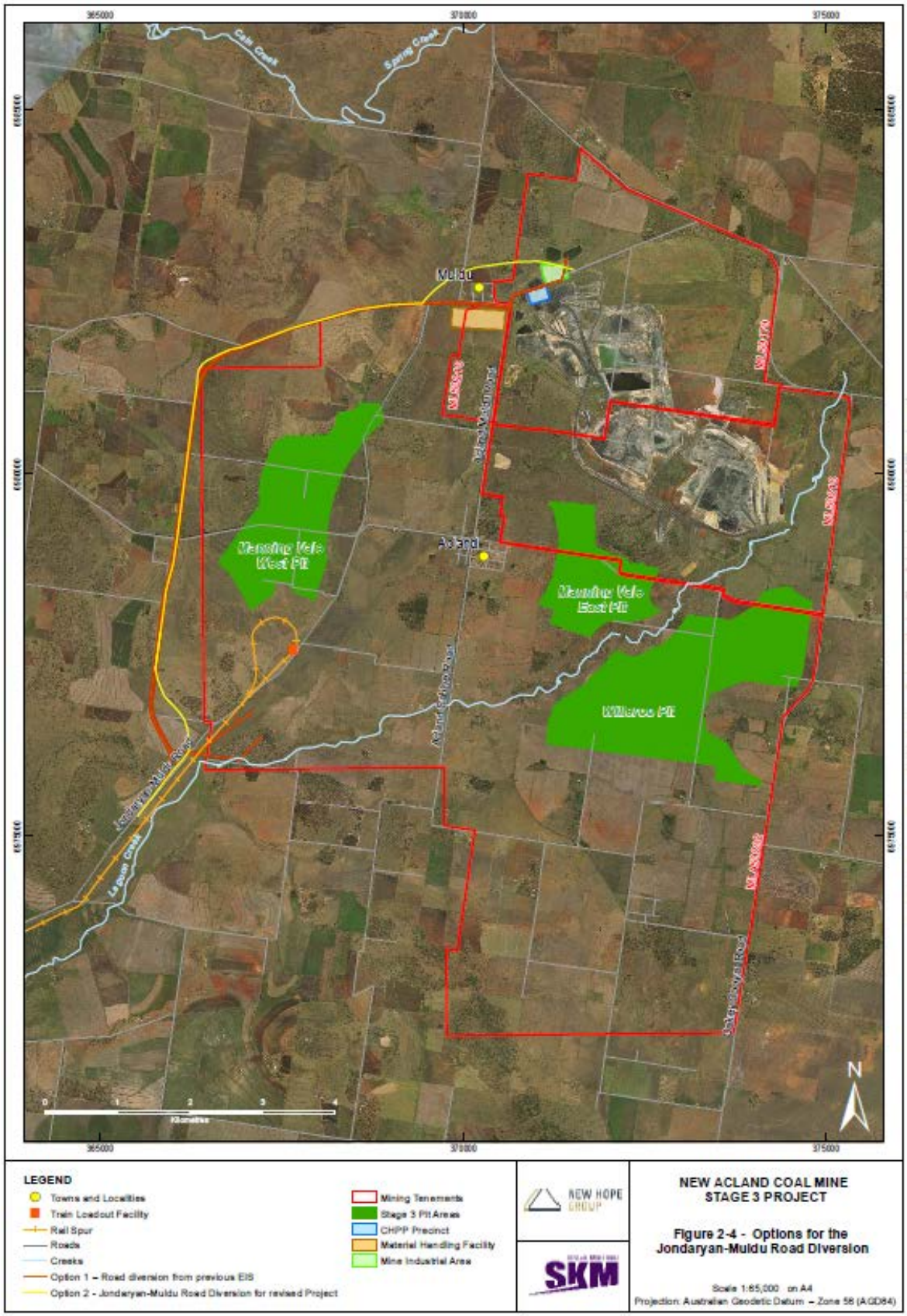

Figure 5: Revised Stage 3 mine project showing Manning Vale East Pit extending into the southwest corner of the Stage 2 ML[37]

[37] Extracted from the Revised Stage 3 EIS (Exhibit 20; Document ID EHP.0020), p 2-23.

[35] Andrew Boyd, Chief Operating Officer of New Hope Group, stated during cross-examination on 8 July 2016 that NAC made a decision to mine West Pit in early 2016 due to delays in obtaining the Stage 3 approvals. He also stated that NAC considered it was well within its rights under the existing approvals to open West Pit without consulting neighbours.

[36] Mr Boyd stated during cross-examination by Mr Holt QC, for OCAA, on 8 July 2016:[38]

MR HOLT: All right. Was there anything that you thought it was important to update the court about that might affect the matters that were raised in Mr Denney's first affidavit?

MR BOYD: ---I think some of the timing and dates expressed in Mr Denney's affidavit have moved somewhat.

MR HOLT: Right?

MR BOYD: ---We've taken some measures to – you know, given the delays in the approvals of the project, we've taken some measures to try to ensure we can still maintain continuity.

MR HOLT: Right. Those measures include accessing more coal on the existing MLAs?

MR BOYD: ---That's Manning Vale East. That's correct, yes.

MR HOLT: Yes. And when you say Manning Vale East, Manning Vale East is one of the pits that we've been referring to as part of stage 3. You understand that?

MR BOYD: ---Correct, yeah.

MR HOLT: We've got Manning Vale West, Manning Vale East and Willeroo, yes?

MR BOYD: ---Yes.

MR HOLT: And when you say Manning Vale East, are you, in fact, referring to is, I think, from a New Hope perspective, described presently as West Pit?

MR BOYD: ---Correct.

MR HOLT: Right. So when was the decision made, then, to mine some of Manning Vale East in order to create a longer period of continuity of mining?

MR BOYD: ---Look, I think it's – it's always been contemplated that that area would be mined. It's most efficiently mined as a part of the stage 3 development and consistent with the stage 3 development. We took a view early this calendar year that, given the – that the length of – or the delays in the approval process and our desire to maintain continuity of employment for our workforce and continuity of production, we took a view that – that we would re-look at that area and determine whether we could mine it as a part of stage 2, given it sat on the stage 2 mining lease.

MR HOLT: … So just to be clear, then, on some key propositions, part of Manning Vale East – the Manning Vale East Pit proposed for stage 3 sits on one of the MLAs which is part of stage 2; is that - - -?

MR BOYD: ---Correct.

MR HOLT: … when we talk about stage 3 … what do we mean? In terms of Manning Vale East what, as far as the EIS is concerned, what is stage 3 and what is stage 2, and has that changed. That's the question?

MR BOYD: ---My understanding is that stage 3 is the stage 3 mining lease application area. Stage 2 relates to the stage 2 mining lease areas.

MR HOLT: All right. So … anything that sits on a stage 2 mining lease, even if it's part of Manning Vale East or even Willaroo, because I think part of Willaroo is also on a stage 2 mining lease from memory, they – we should exclude all of that from stage 3. That's a stage 2 operation from your perspective?

MR BOYD: ---It's on a stage 2 mining lease so it can be mined as a part of stage 2 activities.

MR HOLT: Yep. And you made a decision to mine it as part of a stage 2 – to mine that northern part of the Manning Vale East Pit as part of stage 2?

MR BOYD: ---We've taken that decision. Yes.

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[38] T64-8, line 38 to T64-11, line 20.

MR HOLT: All right. Thank you. And you took that at the beginning of this year, you say?

MR BOYD: ---Yes.

[37] Mr Boyd stated during cross-examination by Dr Tanya Plant on 8 July 2016:[39]

DR PLANT: Thank you, your Honour. Mr Boyd, I have a couple of questions for you. It seemed, from your evidence to Mr Holt just before, that New Hope can mine anywhere it likes on the existing mining lease without further approvals; is that correct?

MR BOYD: ---As long as we comply with our environmental – our EA conditions, our current EA conditions, my understanding is we're able to mine within the stage 2 mining lease areas.

DR PLANT: Interesting. So, Deputy Registrar, can we please bring up the stage 2 EIS. Perhaps if we first go to the description of the project, chapter 2. Mr Boyd, do you understand that prior to the existing mining leases being granted, that the stage 2 project went through an EIS process?

MR BOYD: ---Yes.

DR PLANT: And what do you understand to be the purpose of an EIS process?

MR BOYD: ---To establish the environmental impacts of the development.

DR PLANT: Right. Okay. So can we please go to page 2 of that chapter, please, Deputy Registrar. Thank you. So here we see a map – perhaps we can scroll down so that Mr Boyd can see what we're actually looking at. It says the New Acland Project Layer Figure 2-1. And – so, Mr Boyd, do you think it would have been a reasonable assumption for people that stage 2 would have been as proposed in the stage 2 EIS?

MR BOYD: ---At that time, yes.

[38] Mr Boyd went on to say under cross-examination:[40]

DR PLANT: So it's your evidence that you can mine pretty – that New Hope can mine pretty much wherever it likes on existing mining leases without further approvals. That's correct?

MR BOYD: ---As long as we're within our consent conditions, yes.

[39] Mr Boyd stated later in cross-examination by Dr Plant about the coal expected from West Pit and indicated that extraction from it would continue until early 2019:[41]

DR PLANT: Okay. So what does that plan tell you in terms of how much coal you're going to get out of West Pit?

MR BOYD: ---Well, I can't give you that figure. What it tells us is we'll be able to sustain around 5 million tonnes per annum out of stage 2 mining lease areas until early 2019, at which point stage 2 is exhausted.

[40] It is clear from comparing the figures shown earlier that West Pit is outside the footprint of the mining pits applied for in Stage 2.

[41] The existing EA for the mine annexed Map 1 (Surface water monitoring points) in Schedule K. It shows the boundaries of Central Pit and South Pit in pink but no "West Pit" is shown.[42]

[42] The CG's stated conditions for the EA included:[43]

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[39] T64-31, line 30, to T64-32, line 10.
[40] T64-38, lines 34-38.
[41] T64-44, lines 25-30.
[42] The legibility of Map 1 in the existing EA is quite poor. A higher quality version of the same map can be found in the stage 2 EIS (Exhibit 1135, p 4-14).
[43] Exhibit 16 (EHP.0016), p 170.

A2 In carrying out the mining activity authorised by this environmental authority, the holder of this environmental authority must comply with Figure 1 (Revised Project Overview – Mine Area)

[43] An extract of Figure 1 (Revised Project Overview – Mine Area) from the CG's stated conditions is shown in Figure 6 .[44]

[44] Condition A2 and Figure 1 of the CG's stated conditions was included as condition A2 and Figure 1 of the draft EA (an extract of which is shown below as Figure 6).

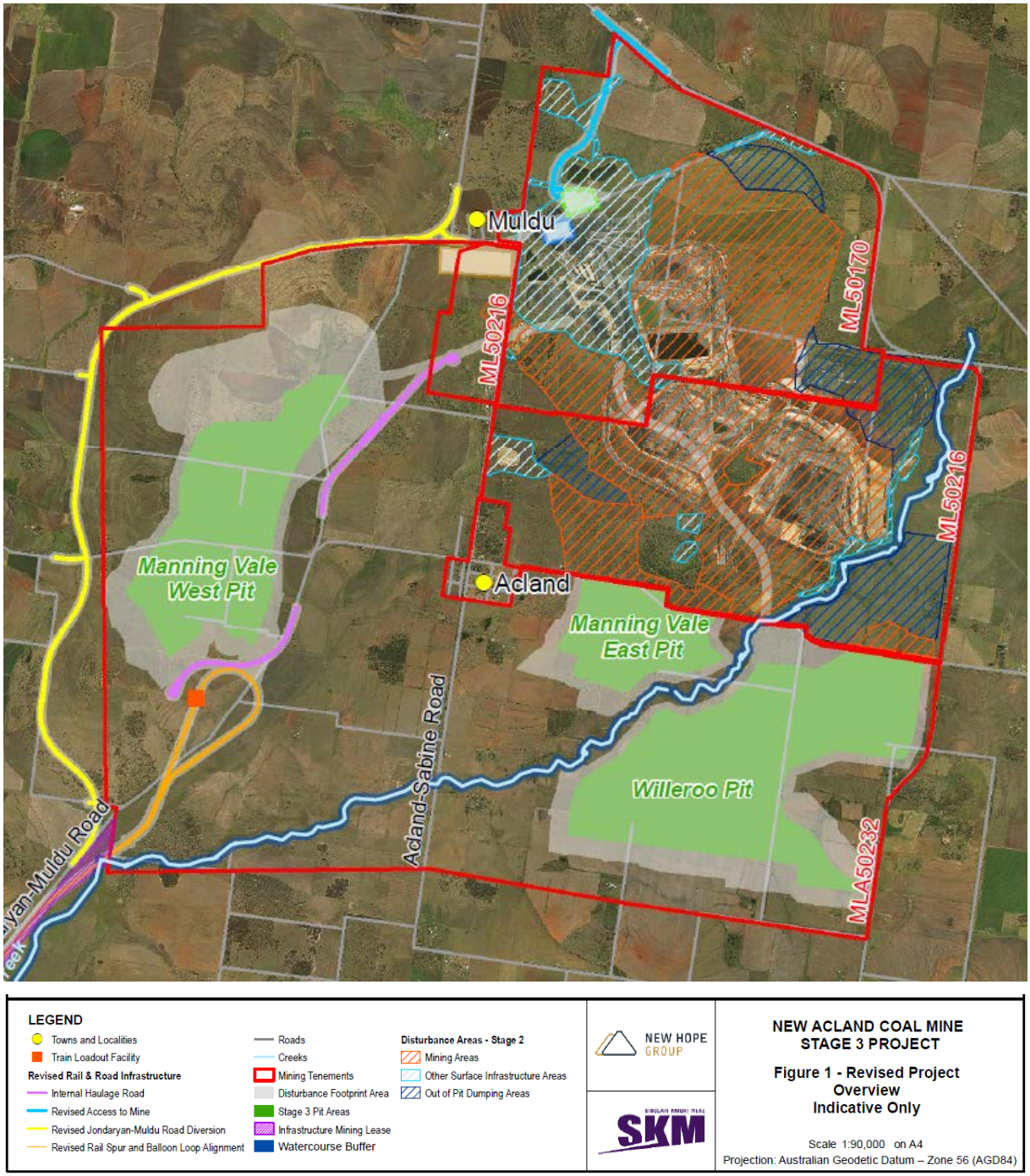

Figure 6: Extract of Figure 1 in the CG stated conditions and draft EA[45]

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[44] Exhibit 16 (EHP.0016).

[45] Exhibit 16 (EHP.0016), p 170 and Exhibit 9 (EHP.0009), p 63. The quality of the images in Exhibits 16 and 9 is poor so the image included here is taken from an better quality, but otherwise identical, image in the *Information Clarification to the AEIS*, December 2014, p 30 (Exhibit 368; EHP.0368).

[45] NAC's mining of "West Pit" is relevant to the Court's consideration of the public interest and the Court's recommendations on more precisely defining the limits of the mine pit areas in condition A2 of the draft EA, discussed below.

Member Smith's decision

[46] Member Smith delivered his decisions and reasons on 31 May 2017 to:

(a) recommend to the MRA Minister under s 269 of the MRA that NAC's two applications for mining leases (one for Stage 3 of the mine and one for an associated rail spur) be rejected; and

(b) recommend to the Administering Authority under s 190 of the EPA that NAC's application to amend its EA for Stage 3 be refused.

[47] Member Smith's recommendations were based on five of the statutory criteria stated in s 269(4) of the MRA and s 191 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:[46]

(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 that the mining leases not be granted as he was unable to recommend conditions inconsistent with the CG conditions due to s 190(2) of the EPA.

(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)(i).[47]

(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.[48] 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.[49]

(d) Under s 269(4)(l) of the MRA, good reason has been shown for refusal of both mining leases.[50]

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[46] Member Smith's reasons at [1799]-[1800].
[47] Member Smith's reasons at [1802] and [1803].
[48] Member Smith's reasons at [1804]-[1806].
[49] Member Smith's reasons at [1806].
[50] Member Smith's reasons at [1807] and [1834].

(e) Under s 269(4)(m) of the MRA, Member Smith 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: [51]

(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.

(f) Under the considerations in s 191 of the EPA Member Smith recommended refusal of the application to amend the environmental authority due to:[52]

(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."

Refusal of the EPA application

[48] On 14 February 2018, a delegate of the Statutory Party (**the delegate**) made a final decision under s 194 of the EPA to refuse NAC's application to amend the EA, substantially relying upon Member Smith's findings in relation to noise limits, intergenerational equity and groundwater.[53]

Bowskill J's decision

[49] NAC applied for judicial review of the Land Court member's decisions under s 269 of the MRA and s 190 of the EPA.

[50] Bowskill J heard NAC's application for judicial review and rejected the majority of NAC's grounds but allowed the application on the basis of:[54]

(a) Ground 10, in relation to groundwater;

(b) Ground 7, in relation to intergenerational equity, consequent upon the conclusion in relation to ground 10; and

(c) Ground 1(aii) (by reference to particulars (i), (iiA) and (ii)), in relation to noise.

[51] Had Bowskill J reached a different view in respect of ground 10, her Honour would have formed the view that ground 15 was established, on the basis that Member Smith failed

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[51] Member Smith's reasons at [1808] and [1835].
[52] Member Smith's reasons at [1838] and [1839].
[53] Bowskill J's principal reasons at [63] and Bowskill J's reasons on final orders at [7].
[54] Bowskill J's principal reasons, summarised at [378].

to address in his reasons the operation of the associated water licence provisions of the *Water Act* 2000 (Qld) (***Water Act***) and failed to adequately address a substantial case advanced by NAC concerning the operation and effect of the combined role of the various other approvals and conditions.[55]

[52] After Bowskill J's principal reasons were delivered, NAC was granted leave to amend its application for review to include two further grounds alleging errors in the delegate's decision to refuse NAC's application to amend the EA and her Honour set aside the delegate's decision on that basis.[56]

Appeal to Court of Appeal

[53] OCAA has appealed Bowskill J's decision and subsequent decision on final orders to the Court of Appeal on seven grounds, including that her Honour erred in finding the Land Court lacked jurisdiction to consider groundwater quantity.[57]

[54] The appeal is expected to be heard in early 2019 but no date has yet been set.

LEGAL FRAMEWORK FOR REHEARING

Statutory framework

[55] OCAA made extensive submissions on the statutory framework in its closing submissions before Member Smith[58] but, noting the Court's indication that it will not be assisted by lengthy submissions that do not add anything to the submissions already made,[59] OCAA will not repeat that analysis here.

[56] OCAA notes, with respect, its agreement with Member Smith's analysis of the statutory context of the relevant provisions of the MRA, EPA and *State Development Act*, including inconsistency with CG conditions,[60] to the extent that it has not been overturned by Bowskill J's decision.

[57] The only substantive point that OCAA would add to Member Smith's analysis of the statutory context is President MacDonald's recognition of the importance of s 5 of the EPA in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 at [58]. There, after discussing the statutory context and general principles of construction, her Honour stated:

> [58] In light of those general principles, and the terms of s 5 of the EPA, I accept that the Court must exercise its powers in the way that best achieves the object of that Act. That is, the Court must recognize that the object of that Act is to protect Queensland's environment while allowing for development that is ecologically sustainable. The relevant development here is the operation of the mine and associated activities, which will be enabled if the mining leases are granted. The first question for the Court to determine is whether the mine can be developed in an ecologically sustainable way.

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[55] Bowskill J's principal reasons at [255].
[56] Bowskill J's reasons on final orders at [8]-[9].
[57] OCAA's Notice of Appeal is exhibit KG-1 to the affidavit of Kate Emily Grudzinskas, affirmed 1 June 2018.
[58] OCAA's closing submissions, dated 13 September 2016, including [165]-[281], pp 65-87.
[59] *New Acland Coal Pty Ltd v Ashman & Ors (No 6)* [2018] QLC 17 (Kingham P) at [53].
[60] Member Smith's reasons at [131]-[162] and [173]-[201].

[58] President MacDonald's view on the effect of s 5 of the EPA was not doubted on judicial review, which discussed the relevance of s 5 for the final decision by the Administering Authority under s 194 of the EPA.[61]

Effect of Bowskill J's orders

[59] Bowskill J's decision overturns Member Smith's analysis of the MRA, EPA and *State Development Act* in two main ways by holding that:

(a) while the Court can consider groundwater *quality* issues, it was not within the Court's jurisdiction to consider the potential impact of the activity of taking or interfering with underground water in the course of or as a result of carrying out authorised activities under the proposed mining lease;[62] and

(b) even if the Court decides that the appropriate noise levels that should be imposed as conditions on approval of the EA are lower than, and inconsistent with, the CG's stated conditions, the Court may, but is not obliged to, recommend refusal of the EA and can comply with the requirements not to recommend conditions that are inconsistent with the CG's conditions by making a recommendation subject to a condition that it not take effect unless and until the CG's conditions are changed to be consistent with the Court's recommendation on the appropriate noise limits.[63]

[60] The effects of Bowskill J's orders of 28 May 2018 remitting the matter for rehearing before a different member of the Court are, the Court must re-exercise the *whole* of the discretions in s 269 of the MRA and s 190 of the EPA, according to Bowskill J's reasons and according to law, within the constraints that:

(a) The parties are bound by, and the Court is directed to proceed on the basis of, the findings and conclusions reached by Member Smith in relation to all issues apart from those relating to the key issues of groundwater, intergenerational equity (as it relates to groundwater) and noise;[64]

(b) The Court is directed to exclude from further consideration, on the basis that it is not within the Court's jurisdiction, in this proceeding, to address the potential impacts of taking or interfering with groundwater *quantity* in the area of the proposed mining lease;[65] and

(c) In relation to the key issue of noise:

(i) The parties before the Court are bound by the factual findings made by Member Smith in relation to noise; and

(ii) The Court is directed to further consider the key issue of noise on the basis of the undisturbed factual findings as to noise stand, but on the basis of such

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[61] *Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor* [2016] QSC 272 (Bond J) at [15]-[21].
[62] Bowskill J's principal reasons at [227]-[236] and reasons on final orders at [40].
[63] Bowskill J"s principal reasons at [337].
[64] Order 5 made by Bowskill J on 28 May 2018.
[65] Order 6 made by Bowskill J on 28 May 2018, read in the context of her Honour's principal reasons at [227]-[236] and her Honour's reasons for final orders at [40].

> further consideration of the evidence before Member Smith, and any submissions, as the Court considers appropriate.[66]

[61] As OCAA understands Bowskill J's intention, "findings" are generally findings of fact while "conclusions" are ultimate decisions on the application of the statutory criteria to the facts and the recommendations that ought to be made, including the form and substance of any conditions to be included in any amended EA.[67] "Factual findings", includes conclusions of Member Smith in weighing evidence brought by different parties, ultimately preferring one set of evidence over another.

[62] For example, OCAA understands Member Smith's reasons at [721] to contain (binding) *factual findings*, rather than (non-binding) *conclusions*, in relation to noise:

> [721] … The objectors on the other hand have provided the literal 'truck load' of evidence and material detailing what they say to be unacceptable levels of noise generated by NAC's operation of Stages 1 and 2. Looking at all of the evidence before me in its entirety, in my view the objectors who have made noise complaints have not been well served in the past by either NAC or the statutory party. My independent, considered view on what I have before me is consistent with the evidence given by the objectors that they have actually been treated very poorly by both NAC and the statutory party.

[63] NAC appears to (at least broadly) agree with OCAA's approach. For instance, NAC's submissions on paragraph [721] of Member Smith's reasons list the part quoted above in its Attachment 1 (Binding findings and conclusions), and gives a precis of this paragraph (and [727]) that "These findings relate to the objectors' lived experience."[68] In essence, NAC:

(a) regards paragraphs such as the part of [721] quoted above as binding *factual findings*; and

(b) does not regard paragraphs such as the part of [721] quoted above as non-binding *conclusions*.

[64] However, either NAC's understanding of the effect of Bowskill J's orders, or its application to Member Smith's reasons, differs somewhat to OCAA's approach. For instance, NAC states in Attachment 1 (Binding findings and conclusions) that Member Smith's reasons at [807] contain a binding finding or conclusion.[69] Paragraph [807] of Member Smith's reasons state:

> [807] I support the inclusion of F8 as proposed by NAC for noise monitoring to be undertaken at Acland and at points east, west and north of the mine. …

[65] In contrast to NAC, OCAA regards Member Smith's statement at [807] to be a *conclusion* regarding the conditions for noise that is, therefore, non-binding under para 7(b) of Bowskill J's orders.

[66] OCAA considers that, at this point, it will not assist the Court to examine further examples of differences between OCAA and NAC's understanding of the effect of Bowskill J's orders. OCAA simply notes that there are differences.

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[66] Order 7 made by Bowskill J on 28 May 2018.
[67] Noting Bowskill J's reasons on final orders at [39](3).
[68] NAC's outline of submissions for the remitted hearing, 17 July 2018, p 28.
[69] NAC's outline of submissions for the remitted hearing, 17 July 2018, p 29.

[67] Acknowledging that there are differences between it and NAC on this issue, OCAA submits that the effect of its understanding of the effect of Bowskill J's orders, in the context where Member Smith based his decisions to:

(a) recommend rejection of the MLAs on the basis of s 269(4)(i), (j), (k), (l) and (m) of the MRA; and

(b) recommend refusal of the EA application on s 191 of the EPA generally,

due to his concerns about groundwater, intergenerational equity and noise, it is only the conclusions in relation to those provisions and, the overall issue of what recommendations ought to be made, including amendments to conditions, that are open to reconsideration; however, within the constraints imposed by Bowskill J, the Court must re-exercise the whole of the discretion in s269 of the MRA and s 190 of the EPA.

[68] To be clear, the Court's task is *not* merely to reconsider what noise conditions ought to be imposed. Bowskill J's orders do not have that effect and to proceed on that limited basis would be a fundamental misunderstanding of the Court's statutory function under s 269 of the MRA and s 190 of the EPA.[70]

Effect of lack of jurisdiction to consider groundwater quantity

[69] As a consequence of Bowskill J's decisions and orders, difficult issues arise for the Court's jurisdiction and ability of making recommendations in the rehearing in circumstances where:

(a) the CG imposed conditions E4 and E5 for the draft EA,[71] require consideration of groundwater monitoring locations and groundwater trigger change thresholds;

(b) should the Court recommend approval of the application to amend the EA under the EPA, the Court is bound, by s 190(2) of the EPA, to include the CG's stated conditions for the draft EA and not to recommend conditions that are inconsistent with the CG's stated conditions;[72]

(c) conditions D4-D12 of the draft EA[73] require monitoring of, and regulating, the impacts of the mine on groundwater quantity, including prescribing "groundwater level trigger change thresholds" that must not be exceeded at 38 specified monitoring points on and around the proposed mine;

(d) the Court is bound by ss 190 and 191(d) of the EPA to consider the conditions of the draft EA;

(e) while the Court can consider groundwater *quality* issues, Bowskill J found that it was not within the Court's jurisdiction to consider the potential impact of the

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[70] Such an approach would impermissibly supplant the statutory tests in the MRA and EPA, as was recently criticised in a different statutory context in *Legal Services Commissioner v Nichols* [2018] QCA 158 at [11], [21], [24], [27] & [29]-[30] per Flanagan J (with whom Fraser and McMurdo JJA agreed).
[71] Exhibit 16 (EHP.0016).
[72] EPA, s 190(2).
[73] Exhibit 9 (EHP.0009).

activity of taking or interfering with underground water in the course of or as a result of carrying out authorised activities under the proposed mining leases;[74]

(f) as the Land Court has no power to consider groundwater quantity issues, while these issues were not litigated by Bowskill J, it would appear to be a logical consequence of her Honour's decision regarding groundwater quantity that:

(i) the CG's decision was *ultra vires* to the extent it imposed stated conditions E4 and E5;

(ii) the Administering Authority's decision under s 172 of the EPA to approve the draft EA was *ultra vires* to the extent it imposed conditions D4-D12; and

(iii) the Administering Authority has no power under s 194 of the EPA to impose conditions D4-D12 of the draft EA,

as groundwater quantity cannot be considered or regulated under the EPA for the purposes of the EA application.

[70] In response to concerns raised by OCAA in the formulation of final orders on 28 May 2018,[75] Bowskill J held that the Land Court can consider at least the groundwater quality aspects of Sch D of the draft EA and was not prevented from considering the conditions of the draft EA.[76] The extent to which the Court can consider the groundwater *quantity* conditions of the draft EA, and the extent to which the Administering Authority can impose such conditions under s 194 of the EPA, remain unclear. OCAA could not raise those issues with Bowskill J on 28 May 2018, or the apparent conflict with conditions D4-D12 of the draft EA, as her Honour had already ruled that groundwater quantity could not be considered by the Land Court. OCAA's concern on 28 May 2018 was to ensure at least the groundwater quality conditions of the draft EA could be considered.

[71] The Court, therefore, is caught between the apparently conflicting orders of Bowskill J and the obligations imposed by ss 190 and 191(d) of the EPA in circumstances where the CG stated conditions and conditions of the draft EA address groundwater quantity issues, which Bowskill J has ruled are not within the jurisdiction of the Court to consider.

[72] In the circumstances, OCAA's submission is that the Court lacks jurisdiction to proceed as there is no valid referral by the Administering Authority to the Court under s 185 of the EPA. The matter should be referred back to the Administering Authority to consult with the CG on removing the offending conditions and re-exercising its discretion under s 172 of the EPA.

[73] OCAA raises these matters for the Court's consideration and the consideration of the other parties.

[74] For the purposes of the remainder of these submissions, OCAA assumes that the Court will proceed on the basis that it has jurisdiction and will address this issue in its reasons.

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[74] Bowskill J's principal reasons at [227]-[236] and reasons on final orders at [40].
[75] See T 1-10, line 15, to T 1-11, line 20, of the transcript exhibited as MG7-12, pp 168-169, to the affidavit of Mark Andrew Geritz, sworn 5 June 2018.
[76] Bowskill J's reasons on final orders at [40].

Jurisdiction to consider wider economic benefits and jobs from the mine

[75] Bowskill J held that consideration of the "public right and interest" and whether "any good reason" had been shown for refusal of the MRAs, in s 269(4)(k) and (l), was to be construed harmoniously, not inconsistently, with s 269(4)(i) and (j), such that they cannot be relied upon to expand the Court's jurisdiction.[77]

[76] The financial viability of the mining operation is relevant to considering whether there will be an acceptable level of development and utilisation of the mineral resources within the area for the purposes of s 269(4)(c) and whether the applicant has the necessary financial capabilities for the purposes of s 269(4)(f) of the MRA.[78] As such, applying Bowskill J's reasoning, these matters may be considered in the balancing exercise under s 269(4)(k) of the MRA and public interest under the standard criteria of the EPA.

[77] Employment and wider economic benefits of a mine have previously been considered as relevant in assessing a mine under the MRA and EPA.[79]

[78] However, it appears a logical consequence of her Honour's reasons, that any wider economic benefits to the State and employment generated by the mine, which are not authorised under the MRA or EPA and go beyond what is relevant to s 269(4)(c) and (f), are not relevant to consider in assessing the MLAs and the EA amendment.

[79] As examples of jobs and wider economic benefits of the mine that appear inconsistent with Bowskill J's reasons, Member Smith considered matters such as:[80]

> [1039] … 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. …
>
> [1053] With respect to revised Stage 3, approximately $40 million will be paid in royalties over the life of the project. Also the economic benefits flowing from revised Stage 3 as modelled by Dr Fahrer (even allowing for concerns raised regarding his modelling in this decision) are significant and will benefit all Australians, not just Queenslanders.
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> [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 [Queensland Rail] of $938 million over the life of the project is also a significant figure.

[80] Member Smith's consideration of wider economic benefits and jobs logically conflicts with the reasons of Bowskill J. The mine cannot proceed without an associated water licence under the *Water Act* and, therefore, any wider economic benefits or employment from the mine depends on subsequent approval. Any wider economic benefits or employment from the mine are not authorised by the grant of the MLAs under the MRA or the EA amendment under the EPA. This is particularly important for considering

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[77] Bowskill J's reasons, particularly at [34]. See also at [48], [65], [67] and [72]-[74].
[78] *Salmon v Armstrong* [2001] QLRT 72 (Kingham DP); *Armstrong v Brown* [2004] 2 Qd R 345 at [14], [15] per McMurdo J (with whom McPherson and Jerrard JJA agreed); and *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 (MacDonald P) at [501]-[503].
[79] See, e.g. *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 (MacDonald P) at [501]-[504], [508], [585]-[586] and [618]-[620].
[80] Member Smith's reasons at [1039] and [1053]-[1055].

whether the "public right or interest is prejudiced" in s 269(4)(k) of the MRA and the "public interest" in the standard criteria under s 191(g) of the EPA.

[81] Excluding wider economic benefits and/or employment generated from an activity in assessing the public interest is contrary to past decisions of the Court,[81] but appears to be a logical consequence of Bowskill J's reasons.

[82] In the context of the damage to high quality agricultural land, dust and noise impacts on neighbouring properties and lack of royalties payable to the State for the bulk of the mine, excluding wider economic benefits and/or employment from the mine tilts the consideration of the public interest dramatically against granting approval.

Requirement for legal reasonableness and rationality

[83] The principles of legal unreasonableness and irrationality in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) are an important aspect of the rehearing.

[84] 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.

[85] 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".[82]

[86] Similarly, Hayne, Kiefel and Bell JJ recognised:[83]

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

[87] 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:[84]

> [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.
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> [76] … Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

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[81] See, e.g. *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 (MacDonald P) at [501]-[504], [508], [585]-[586] and [618]-[620].
[82] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348 [23] (footnote omitted) and 351 [30].
[83] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [63] (footnote omitted).
[84] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63], 364 [67], 366 [72] and 367 [76].

[88] 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):

> [33] The ground of appeal that no reasonable tribunal would have suspended the dismissal involved a stringent test.[85] It is rarely established. It does not sanction a review on the merits.[86] 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.[87] 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*[88] the President expressed the test, with reference to *Minister for Immigration and Citizenship v Li*,[89] 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".[90] 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".[91]

[89] Three decisions of the Full Federal Court provide further important discussion of the application of the principles in *Li.*[92]

[90] 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[93] 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.[94]

[91] 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.

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[85] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 376 [108] (Gageler J).
[86] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 363 [66] (Hayne, Kiefel and Bell JJ).
[87] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [30] (French CJ).
[88] [2014] QCA 42 at [3] and [16].
[89] (2013) 249 CLR 332.
[90] [2015] QCATA 15 at [8].
[91] [2015] QCATA 15 at [12], quoting Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 654 [137].
[92] 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.
[93] Allsop CJ, Robertson and Mortimer JJ.
[94] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at 445 [44] and 446 [47].

[92] 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].
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> [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 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.
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> [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.

[93] 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[95] 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).

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[95] Allsop CJ, Griffiths and Wigney JJ.

> [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). …
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> [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 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.

[94] The principles of legal unreasonableness and rationality form an important component of the legal framework for this rehearing.

[95] In the unusual context of the rehearing, where the Court is bound by Member Smith's factual findings but not his conclusions on noise, and has not heard the evidence directly, nor conducted a site visit and heard concurrent evidence from the noise experts that the Member Smith found "was extremely beneficial to my final determinations with respect to this key issue [of noise]",[96] the area of "decisional freedom" – in the sense of *Li* – in relation to noise is very constrained.

NO WAIVER

[96] OCAA accepts the Land Court is bound to apply Bowskill J's orders in the rehearing, however, OCAA does not waive its argument that her Honour's decision and orders were wrongly made.

[97] In particular, OCAA submits that:

(a) Bowskill J erred by ruling that the Court has no jurisdiction to fully consider groundwater; and

(b) the Court is failing to exercise jurisdiction[97] and misunderstanding its statutory function[98] by not considering the objections and evidence in relation to the impacts of the mine on groundwater of surrounding farms.

[98] Pending the outcome of its appeal against Bowskill J's decision, OCAA's submissions here proceed on the basis of Bowskill J's reasons and the directions made by the Court.[99]

BINDING FACTUAL FINDINGS AND CONCLUSIONS

OCAA's marked up version of Member Smith's reasons

[99] Member Smith's factual findings and conclusions need to be considered in their context within his reasons.

[100] NAC has provided a table in Attachment 1 to its submissions listing the paragraphs of Member Smith's reasons it says contain the binding findings and conclusions, and a precis of those paragraphs.

[101] The first point to note in relation to NAC's table in Attachment 1 is that, while it is reasonably accurate and comprehensive, it is not a full list of binding findings and conclusions relevant to the matters that the Court must consider. For example, it omits the findings at paragraphs [75] and [325] of Member Smith's reasons, which are relevant to weighing the public interest:[100]

> [75] The fact that Acland as a town in effect no longer exists cannot be dismissed, in my view, as a simple sideline to the matters in dispute. …

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[96] Member Smith's reasons at [733], in the context of the [731]-[743].
[97] *Abebe v Commonwealth* (1999) 197 CLR 510 at 552 (Gaudron J); & *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 339-340 (Gaudron J).
[98] See, e.g., *Legal Services Commissioner v Nichols* [2018] QCA 158 at [11], [21], [24], [27] & [29]-[30] per Flanagan J (with whom Fraser and McMurdo JJA agreed).
[99] *New Acland Coal Pty Ltd v Ashman & Ors (No 6)* [2018] QLC 17 (Kingham P).
[100] Other important findings that NAC omits entirely include [611] (regarding real time online monitoring).

> [325] The evidence in this case clearly shows that agricultural activities have been undertaken successfully on the land for many generations, with the real likelihood that, all things being equal, such agricultural activities will continue for many more generations. NAC's mining operations, if Stage 3 is approved, will only last for some 12 years.

[102] There are three further difficulties with NAC's approach:[101]

(a) *First*, the table in Attachment 1 must be cross-referenced and read in the context of Member Smith's reasons, which is cumbersome;

(b) *Second*, in addition to not being comprehensive,[102] it does not reflect the finer details of important paragraphs, such as [809] of Member Smith's reasons, where factual findings and conclusions regarding noise appear within the same paragraph and even within the same sentence; and

(c) *Third*, NAC's precis is inaccurate in important regards, such as its precis of [795], [796] and [798] of Member Smith's reasons and should not be relied upon as an adequate summary of his Honour's reasons.

[103] As to the third of these matters, an example of how NAC's precis is inaccurate and should not be relied upon is the precis of Member Smith's reasons at [684]-[685]. At that point in his Honour's reasons he made a binding factual finding that "… NAC has already commenced its Stage 3 mining operations …". NAC's precis of these paragraphs is that "These findings and conclusions deal with the alleged commencement of Stage 3 activities and resulting amendments to Draft EA conditions B1 and B5-B12." NAC's precis is inaccurate as Member Smith found Stage 3 mining operations *had already commenced*, not that it was *alleged* State 3 had commenced.

[104] To overcome the difficulty of reading the binding, non-binding and irrelevant findings and conclusions within their proper context, and to assist the Court and the other parties, OCAA has prepared a marked-up version of Member Smith's reasons colour coding different categories of findings and conclusions in accordance with Table 1.

[105] OCAA's marked-up version of Member Smith's reasons will be filed and served as a separate PDF file with the file name, "OCAA's marked-up version of Member Smith's reasons (draft v1)."

[106] To avoid confusion, OCAA has inserted the following stamp at the top of the attached PDF document:

Member Smith's reasons colour-coded to show binding, non-binding and irrelevant findings and conclusions according to Bowskill J's orders (OCAA version 1) – 7 August 2018 – see colour key inserted on page 8

[107] As noted in the stamp on page 1 of the marked-up version, OCAA has inserted the key to the colour coding in a previously blank space on page 8 of Member Smith's reasons. The key was inserted here to make the document stand-alone. For ease of printing, should the

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[101] There are also referencing errors in NAC's attachment, such as the reference to para [16] should be a reference to para [17].

[102] And, in some cases, including references to paragraphs of Member Smith's reasons (e.g. [326](part)) as binding findings and conclusions paragraphs, when those paragraphs do not appear to represent a finding or conclusion.

Court or any party wish to print the key for reference when viewing the electronic version, OCAA will also provide the key as a separate PDF file on a single A4 page.

[108] OCCA notes that a small amount of yellow highlighting was present in Member Smith's reasons at pp 172-174, which set out noise conditions. This yellow highlighting has not been removed from OCAA's marked-up version. It is unlikely to be material but, to avoid any confusion, note that OCAA did not add or remove it.

Table 1: Key to colour coding of Member Smith's reasons pursuant to Bowskill J's orders

Colour	**Category**
Yellow	Member Smith's findings and conclusions, that are binding on the parties, and the Court is directed to proceed on the basis of, apart from those relating to the key issues of groundwater, intergenerational equity (as it relates to groundwater) and noise (pursuant to Order 5).
Pink	Member Smith's findings and conclusions in relation to the key issues of groundwater and intergenerational equity (as it relates to groundwater) the Court is directed to exclude from the further consideration, on the basis that it is not within the Court's jurisdiction, in this proceeding, to address the potential impacts of taking or interfering with groundwater in the area of the proposed mining lease (pursuant to Order 6). While not specifically ordered, paragraphs forming part of the background or discussion of groundwater and intergenerational equity that should be regarded as irrelevant are also coloured with this colour for ease of reference. These parts of the decision are irrelevant to the rehearing.
Yellow	Member Smith's factual findings in relation to the key issue of noise the parties are bound by and the Court is directed to consider (pursuant to Order 7).
Blue	Member Smith's conclusions relating to the key issue of noise OCAA submits are not binding pursuant to Bowskill J's orders 5 and 7 (e.g. para [1800]). To the extent that these paragraphs may involve consideration of groundwater or intergenerational equity in combination with noise issues and it is not possible to identify the consideration of groundwater or intergenerational separately (e.g. para [1800), they are coloured blue to show they are relevant to reconsider.
No colour	Any part of the decision not falling into one of the categories above, including background discussion (e.g. [81]-[86] listing the names of objectors and grounds of objection) and analysis of the statutory context ([134]-[201]) not specifically making a factual finding or a conclusion but not specifically excluded by orders 6 or 7.

[109] Different parts of the same sentence or same paragraph may fall into different categories. As an example, OCAA has marked up paragraphs [3] of Member Smith's reasons in the following way in the attached marked-up version, showing aspects that are (binding) factual findings in yellow and aspects that are (non-binding) conclusions in blue in relation to noise:

> [3] As regards noise, I have found noise levels should be set at 35 dB for evening and night time, consistent with then President MacDonald's finding in *Xstrata*. My findings are inconsistent with CG stated conditions so the only option for me is to recommend refusal of the draft EA.

[110] Using this as an example, the first sentence of paragraph [3] of Member Smith's reasons contains factual findings, while the first half of the second sentence contains a mixed finding of fact and law. The second half of the second sentence is a conclusion that is not binding. In contrast, NAC's Attachment 1 does not even list paragraph [3] as containing any binding findings. That is clearly wrong and misses the complexity of the findings and conclusions contained in the paragraph.

[111] OCAA refers the Court and the parties to the marked-up version of Member Smith's reasons provided with these submissions.

[112] OCAA submits that the evidence referred to in the paragraphs highlighted in the above categories, other than regarding groundwater and intergenerational equity (as it related to groundwater), is relevant for the Court to consider on the rehearing. Evidence regarding groundwater quantity and intergenerational equity (as it relates to groundwater), is irrelevant to consider.

[113] The consideration of the statutory criteria in s 269(4) of the MRA and s 191 of the EPA from this point proceed on the basis of the factual findings and conclusions identified in the marked-up version of Member Smith's reasons, and evidence before Member Smith, where relevant.

Proposal for all parties to agree on marked-up version of Member Smith's reasons

[114] To assist the parties to reach common ground on what parts of Member Smith's reasons are binding findings and conclusions, and to avoid confusion, OCAA proposes that the parties agree on a single, combined marked-up version of Member Smith's reasons.

[115] Subject to it becoming too great a task for OCAA's limited resources due to major disagreements between the parties and the process becoming unwieldy, OCAA can produce that combined version if other parties provide a document listing any changes they propose to OCAA's marked up version. Any further versions can be clearly identified by changing the file name and the stamp at the top of the first page.

[116] OCAA's marked up version of Member Smith's reasons has been created using Adobe Acrobat Professional. The document has been left unsecured to allow any party with that software to edit it directly, should they wish to do so.

FUNDAMENTAL ERRORS IN NAC'S SUBMISSIONS

[117] Having considered the effect of Bowskill J's orders, before turning to consider the application of the statutory criteria in the MRA and EPA in the context of the constraints ordered by Bowskill J, it is relevant to address NAC's submissions. This is because, NAC submissions proceed on a fundamentally different way to that ordered by Bowskill J.

Summary of NAC's errors

[118] NAC's submissions appear to assume that the basis that Court's task for the rehearing is merely to reconsider what noise conditions ought to be imposed and then proceed – as a

superficial afterthought – to decide whether to recommend approval or refusal of the applications.

[119] For the reasons given earlier, OCAA submits NAC's submissions fundamentally misunderstand the Court's task for the rehearing.

[120] Within this overall context, NAC's submissions attempt to re-litigate, through reconsideration of selective parts of the evidence, Member Smith's factual findings on the issue of the appropriate noise limits that ought to be recommended for the EA.

[121] OCAA submits NAC's attempt to re-litigate Member Smith's factual findings on the appropriate noise limits for the mine:

(a) is impermissible as it directly conflicts with Bowskill J's reasons and orders;

(b) poses grave difficulty for the Court, should the Court attempt to reconsider the appropriate noise levels that ought to be imposed without the benefit of hearing the evidence directly and in its full context; and

(c) does not properly reflect the evidence before Member Smith.

NAC's submissions on noise conditions conflict with Bowskill J's reasons and orders

[122] NAC's submissions on what noise limits should be conditioned[103] attempt to relitigate the factual finding made by Member Smith that 35 dB is the appropriate noise level for evening and night operations. Member Smith made factual findings that 35 dB was the appropriate noise limit *and* was sufficient to address his concerns about health impacts at [773] and [1196] of his reasons:

> [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. …
>
> [1196] I am concerned about the health impacts of the noise levels set in the draft EA. As I set out in my consideration of the key issue noise, and particularly for the reasons expressed there, and accepting the evidence of Mr Savery over that of Mr Elkin, I have decided that noise levels should be reduced. That is also consistent with the outcome on noise in *Xstrata*. Given the inconsistency of my determination on noise with the stated conditions of the CG, my only option is to recommend refusal of the draft EA. I find that the noise limits as proposed by me of 35db for evening and night are sufficient to protect human health and wellbeing.

[123] Bowskill J rejected NAC's submission that Member Smith erred, as a matter of law, in applying the *Environmental Protection (Noise) Policy* 2008 (**EPP (Noise)**) to find 35 dB was the appropriate noise limit for the conditions of the draft EA and, after considering his Honour's reasons and consideration of the evidence before him, held:[104]

> [304] … In that context, in my view, the Land Court member can be seen to have had regard to the EPP Noise, and to the evidence before him, and formed a view about that evidence, in the context of the EPP Noise provisions. The Land Court member, on my reading of this part of the Reasons, did not impermissibly conclude that the noise levels in s 10 should apply. He reasoned to that

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[103] NAC's outline of submissions for the remitted hearing, 17 July 2018, [22]-[41].

[104] Bowskill J's principal reasons at [304]-[305], read in the context of [297]-[305]. Bowskill J found, at [300], that NAC's argument at [262] of its written submissions "has the appearance of a challenge to the merits of the decision."

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

[124] NAC's written submissions to Bowskill J, at [262], contained similar arguments to those now made by NAC on rehearing. For example, NAC submitted at [262] of its written submissions to Bowskill J that:[105]

> … the Draft EA noise limits are consistent with the AQOs and the EPP Noise, because:
>
> (i) The AQO levels in Schedule 1 of the EPP Noise relate to the inside of a dwelling;
>
> (ii) The experts agreed that 7dB(A) is the appropriate façade noise correction to apply[106];
>
> (iii) When the 7dB(A) correction is added to the AQO levels, the resulting outdoor noise limits (42dB(A)) for daytime and evening, and 37dB(A) for night are consistent with the Draft EA noise limits; …

[125] Bowskill J's reasons make it clear that the only reason her Honour considered it was necessary to set aside Member Smith's decision on the basis of his reasoning in relation to noise was that he misconstrued the effect of s 190(2) of the EPA. Her Honour held that "s 190(2) does not have the effect of *compelling* the decision-maker to make a particular decision, in the exercise of the discretionary power under s 190(1)."[107]

[126] Her Honour described, at [334]-[339], how, if Member Smith's error in construing s 190(2) was corrected, a different recommendation might be made.

[127] Her Honour also offered, at [337], a simple solution to avoid recommending refusal where the Land Court confronted circumstances in which it considered a condition that was necessary and appropriate was inconsistent with a CG condition:

> [337] Even where the inconsistent condition is considered sufficiently important by the Land Court that, in its absence, the approval ought to be refused, there may be other options available, including making any recommendation for approval subject to a condition that it not take effect unless and until an application is made by the proponent to the Coordinator-General to change the condition, and on the basis of that application, or otherwise (for example, on the Coordinator-General's own initiative) the condition being changed, consistent with the Land Court's recommendation.

[128] In framing the final orders, Bowskill J made it clear that she had power, and her intention was, to make orders to limit the rehearing to "what is necessary in order to do justice between the parties and which will avoid unnecessary re-litigation, or re-examination of issues."[108] Her Honour stated:[109]

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[105] NAC's outline of argument before Bowskill J, 17 October 2017.
[106] Joint Expert Report of Shane Elkin and John Savery (Noise and Vibration) dated 22 February 2016 (Land Court exhibit 406) (Document ID: NAC.0034) paragraph 190.
[107] Bowskill J's principal reasons at [339].
[108] Bowskill J's reasons on final orders at [34].
[109] Bowskill J's reasons on final orders at [36]-[37].

> [36] … The conclusions I reached in relation to the grounds of review relating to noise, groundwater and, relatedly, intergenerational equity, are discrete, and do not affect, or infect, the findings in relation to the other issues dealt with by the first respondent. …
>
> [37] … It would be entirely inimical to the interests of justice to permit the parties to avoid the binding effect of the findings and conclusions already reached by the Land Court, after a full hearing, which are not tainted in any way by the outcome of this judicial review proceeding.

[129] After setting out her orders, Bowskill J went on to explain the intended effect of order 7 in relation to noise and stated:[110]

> [39] … However, to be clear, the intention of orders 5 and 7 is that the Land Court, upon its further consideration and making of new recommendation decisions, is not bound by the first respondent's conclusions in relation to the issue of noise (including as to the form and substance of any conditions to be included in any amended environmental authority). That will be a matter for the Land Court to address, upon its further consideration of the matter, as directed by order 7(b), in accordance with this court's decision and according to law, on the basis that the undisturbed factual findings as to noise stand, but on the basis of such further consideration of the evidence before the first respondent, and any submissions, as the new Land Court member considers appropriate.

[130] In response to questions raised by OCAA about the effect of order 5 on groundwater quality issues being considered by the Land Court during the rehearing, Bowskill J stated: "Order 5 must be read in conjunction with this court's decision."[111]

[131] During oral submissions on the form of the final orders, Bowskill J stated in relation to order 7, her Honour's intention was that:[112]

> … the starting point is there have been factual findings made by [Member Smith] in respect to – in relation to what his Honour regarded as the appropriate noise limits … and the point is you don't get to reagitate that, that's a factual finding that's made and - … That you're bound by, but the Land Court is not otherwise constrained, it can consider the evidence otherwise before the court and the submissions and then make its – form its own conclusion on that issue.

[132] Bowskill J stated in the course of oral argument in response to a statement made by OCAA's counsel:[113]

> DR McGRATH: … there's factual findings in relation to noise that if there's not going to be any further evidence and the new Land Court isn't going to hear from the experts and have the – also one of the big bits of evidence about noise was the landholder complaints, so the first - - -
>
> HER HONOUR: But that's built in to the factual findings made by [Member Smith] in relation to noise limits because his Honour's conclusions were based on his assessment of the lay witnesses.

[133] Bowskill J also confirmed during oral argument that Member Smith's statement at [773] of his reasons was a *factual finding*, rather than a conclusion, in response to a question by the Statutory Party's Queen's Counsel, Mr Barlow QC, following submissions by NAC's Queen's Counsel, Mr Clothier QC:

> MR BARLOW: Your Honour, just on – just something arose out of my learned friend Mr Clothier's submissions I thought might be worth clarifying for your Honour. He distinguished between the Land Court being bound by factual findings, but not being bound by the conclusions in relation to [indistinct] and I wanted to raise whether paragraph 773 of the Land Court's reasons is a factual finding or a conclusion. This is that the appropriate noise level for evening and night operation should be set 35 decibels each and not at 42 and 37 decibels as contended for by NAC's expert.

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[110] Bowskill J's reasons on final orders at [39].
[111] Bowskill J's reasons on final orders at [40].
[112] Transcript, 28/5/18, p 1-7 (Exhibit MG7-12 to the affidavit of Mark Andrew Geritz, sworn 5/6/18, p 165).
[113] Transcript, 28/5/18, pp 1-8 to 1-9 (Exhibit MG7-12 to the affidavit of Mark Andrew Geritz, sworn 5/6/18, pp 166-7)

> Now, I have read that as a factual finding and I just want to – but the conclusion that might come from that is whether or not to rec – what recommendations to make. …
>
> HER HONOUR: I was viewing that as a factual finding.
>
> HER HONOUR: That that's the view formed by the Land Court member as to what the appropriate noise limits are.
>
> MR BARLOW: Yes.
>
> HER HONOUR: And then it's a matter of what you do with that.

[134] When order 7 is read in the context of Bowskill J's principal reasons[114] and reasons for the final orders, and her Honour's statements during oral submissions, it is clear that:

(a) The question Bowskill J posed for the Land Court on rehearing in relation to noise was: all things being equal factually, but freed of the misconception that s190 does not allow the Court to recommend approval when an appropriate condition for noise limits is inconsistent with a CG condition, how should the Court exercise its discretion?

(b) The Land Court is not permitted to go behind the factual findings made by Member Smith.

(c) The evidence before Member Smith can be used during the rehearing to understand, not to undermine, Member Smith's factual findings, and inform the exercise of the Court's discretion on what recommendations to make.

[135] Indeed, for the Land Court at the rehearing to go behind the factual findings made by Member Smith in relation to the appropriate noise levels, as NAC seeks the Court to do "would be entirely inimical to the interests of justice" by permitting NAC "to avoid the binding effect of the findings and conclusions already reached by the Land Court, after a full hearing, which are not tainted in any way by the outcome of this judicial review proceeding."[115]

[136] NAC's submissions seeking to undermine Member Smith's factual findings that 35 dB is the appropriate noise level for evening and night operation and sufficient to address his concerns about health impacts should be rejected.

[137] A further reason to reject NAC's submissions is that the constraints imposed on the rehearing by Bowskill J's orders mean there is very little "decisional freedom" for making recommendations that do not incorporate Member Smith's noise limits of 35 dB. To do so has a high risk of the decision being open to judicial review for lacking "an evident and intelligible justification when all relevant matters were considered".

[138] In this context, Bowskill J provided, at [337], a simple path for the Court to both reflect Member Smith's factual findings on the appropriate noise limits for the mine while also complying with the requirements not to recommend conditions that are inconsistent with the CG's conditions by making a recommendation subject to a condition that it not take effect unless and until the CG's conditions are changed to be consistent with the Court's recommendation on the appropriate noise limits of 35 dB.

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[114] That is, Bowskill J's principal reasons at [297]-[305].

[115] Applying Bowskill J's reasons for final orders at [37] to what NAC now attempts to do in its submissions on noise.

Proceeding as NAC submits poses grave difficulty for the Court

[139] If, contrary to OCAA's submissions above, the Court determines that Bowskill J's orders allow the parties to re-litigate the factual finding of the appropriate noise levels to recommend, proceeding as NAC submits poses grave difficulty for the Court should the Court attempt to reconsider the appropriate noise levels that ought to be imposed without the benefit of hearing the evidence directly and in its full context.

[140] The full context of the noise evidence includes the evidence of many neighbours of the mine, such as Mr Beutel, whose evidence of noise impacts on his residence in Acland Member Smith accepted.[116] Mr Beutel, for instance, was recorded in a file note by a staff member of the then Department of Environment and Heritage Protection as having called at 4:58 am on 20 January 2014 "in a very distressed state and was screaming for the noise to stop".[117] When asked during cross-examination whether this particular instance demonstrates how he would often feel about the mining noise, and whether this is the point at in which he felt the need to complain, Mr Beutel replied:

> Yes. It was an awful experience. It's an intrusive thing.[118]

[141] The full context of the noise evidence that the Court will not have the benefit of hearing directly also includes the site visit during which the noise experts gave concurrent evidence that Member Smith found "was extremely beneficial to my final determinations" with respect to the key issue of noise.[119]

[142] The difficulty of not having the benefit of hearing the evidence directly and in its full context is readily apparent when some of the complexity of the noise evidence is considered in the following section.

NAC's submissions do not properly reflect the evidence before Member Smith

[143] If, contrary to OCAA's submissions on the effect of Bowskill J's orders for the reconsideration of noise, NAC is permitted to re-litigate the factual finding of the appropriate noise levels to recommend, OCAA notes that NAC's submissions do not properly reflect the evidence before Member Smith.

[144] While submissions now cannot overcome the difficulty of the Court not having heard the evidence directly and in its full context, to attempt to provide as full a context as it can to assist the Court, OCAA repeats and relies upon its closing submissions before Member Smith in relation to noise, save submissions that are contrary to Bowskill J's decision on the proper construction of s 190(2) of the EPA.[120]

[145] The following submissions respond to NAC's submissions within the context of OCAA's closing submissions before Member Smith.

[146] NAC's submissions, at [23] and [27]-[41], identify a range of matters that it argues the Court should consider as context for not recommending to impose the 35 dB noise limit

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[116] Member Smith's reasons at [739].
[117] Exhibit 1195, TMP.0296 (EHP File note of 20 January 2014).
[118] T71-20, Line 40-45.
[119] Member Smith's reasons at [733], read in the context of the discussion of the site visit at [733]-[743].
[120] OCAA's closing submissions before Member Smith, 13 September 2016, section 6, pp 108-172.

for the evening and night periods. It says these matters were not the subject of findings or conclusions by Member Smith.

[147] However, for the reasons given below, NAC has over-simplified, inaccurately stated and/or omitted both technical concepts, and the evidence, in making its submissions on those matters.

That 35dB is the appropriate noise limit is a binding factual finding

[148] NAC, at [23] of its submissions, attempts to shift Member Smith's (binding) *factual finding* at [773] of his reasons that 35 dB was the appropriate noise level for evening and night operations into a (non-binding) *conclusion*. For the reasons given earlier, including Bowskill J's agreement that this was a factual finding, this is both inaccurate and impermissible.

[149] NAC's submissions at [23], are also inaccurate in submitting that "the conclusion that the appropriate noise levels should be set at 35dB for the evening and night operations was based solely on a determination of the '*contest*' between Mr Elkin's support for Schedule 1 of the EPP (Noise), and Mr Savery's support for s 10[121]".

[150] Member Smith's factual finding accepting Mr Savery's evidence over Mr Elkin, while a key issue,[122] was not based solely on the contest between the experts. It was also based on Member Smith's interpretation of the EPP (Noise),[123] a matter in which Bowskill J found no legal error. Bowskill J held:[124]

> [304] …The Land Court member, on my reading of this part of the Reasons, did not impermissibly conclude that the noise levels in s 10 should apply. He reasoned to that conclusion, upon a consideration of the EPP Noise more broadly, and the expert evidence before the Court.
>
> [305] On a fair reading of the Land Court member's consideration of the key issue of noise in the Reasons, I do not accept that any error, as a matter of law, in the interpretation or application of the EPP Noise has been demonstrated; nor that it has been demonstrated that his Honour failed to take into account something he was required to.

[151] Member Smith's factual findings on the appropriate noise levels and his conclusions on the recommendations he should make should also be seen in the context of the totality of the evidence before him on noise, including:

(a) Expert evidence that was complex with a lot of detail and complicated concepts behind the technical information.[125]

(b) The joint expert report, in which the experts agreed that:

> The historical performance of NAC in responding to and investigating noise complaints prior to the TARP (an installation of the "real time" Sentinex monitor) was not satisfactory.[126]

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[121] [Member Smith's reasons at] [762].
[122] Member Smith's reasons at [772]-[773].
[123] Member Smith's reasons at [771] and [775].
[124] Bowskill J's principal reasons at [304]-[305].
[125] Member Smith's reasons at [714].
[126] Member Smith's reasons at [722]. See also, the summary of the areas of agreement in the JER at [717].

(c) The amount of agreement reached between NAC's noise expert, Mr Elkin, and OCAA's noise expert, Mr Savery, not only in their JER, but also in their evidence and, in particular, in their concurrent evidence on site on 1 September 2016.[127]

(d) Concessions from NAC's noise expert, Mr Elkin, that:

(i) if preconditions concerning the historic handling of noise complaints by NAC were established, which Member Smith accepted were established, his confidence in NAC's past performance in relation to noise would be shaken;[128] and

(ii) he had made an incorrect reading of the EPP (Noise).[129]

(e) Evidence of lay witnesses, which led Member Smith to find that the "objectors that they have actually been treated very poorly by both NAC and the statutory party" in responding to noise complaints.[130]

(f) Acceptance of Mr Beutel's evidence of noise impacts at his residence, which was consistent with the technical evidence given by both noise experts.[131]

(g) A site visit during which the experts gave "extremely beneficial" concurrent evidence[132] and based on which Member Smith observed:

(i) There was "telling evidence that there were elevated noise levels at Mr Beutel's residence on both occasion" during the site visit.[133]

(ii) "It is a matter of some concern that the elevated levels were measured at a time when NAC should have been actively undertaking its TARP process and therefore actively preventing excess noise."[134]

(iii) The "noise impacts of the mining operations on sensitive receptors is wind and atmospheric dependent."[135]

(h) It was "common ground between the parties that the EPP (Noise) is applicable."[136]

An appropriate noise limit is not the AQO plus the 7 dB(A) façade reduction

[152] NAC, at [27] of its submissions, argues that an appropriate noise limit is the Acoustic Quality Objective (**AQO**) plus the 7 dB(A) façade reduction. In advancing this argument, NAC appears to ignore (as it did in hearing before Member Smith) that the EPP (Noise) definitions that establish that the AQOs in Schedule 1 are for the total amount of noise at a receptor (and not just from an activity). The Court is now bound by Member Smith's

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[127] Member Smith's reasons at [731]. See also, [732]-[743].
[128] Member Smith's reasons at [726]-[727].
[129] Member Smith's reasons at [771].
[130] Member Smith's reasons at [721]-[722].
[131] Member Smith's reasons at [739].
[132] Member Smith's reasons at [733], read in the context of the discussion of the site visit at [733]-[743].
[133] Member Smith's reasons at [737].
[134] Member Smith's reasons at [738].
[135] Member Smith's reasons at [740]-[742].
[136] Member Smith's reasons at [751].

finding in that regard[137] and, as noted earlier, Bowskill J found no legal error in Member Smith's interpretation of the EPP (Noise).[138]

[153] As such, the AQOs cannot be used to justify the argument NAC again contends – i.e. that mining noise at a receptor can be at the draft EA limit of 37 dB (night), but minus the 7 dB façade reduction, then the AQO of 30 dB indoors will be achieved. Instead, the receptor is to experience a maximum 30 dB as a "total amount of noise" from all noise sources. The total amount of noise experienced at receptors such as dwellings around the mine includes, for example, noise from wind, insects, traffic, aeroplanes, etc, and *not only* noise from the mine.

[154] NAC is, therefore, wrong to suggest the night and evening AQOs can simply have the 7 dB façade adjustment added to arrive at an appropriate noise limit for the EA conditions, when the EA conditions apply to mining noise only.[139] That approach ignores the contribution that other noise sources will have at the receptor. Member Smith specifically cautioned against that in a binding finding for this Court.[140]

[155] Further, if NAC was correct and Schedule 1 applied to noise from a particular activity under consideration only then there would be no need for s 10, which would be rendered otiose. However, it is trite that all sections and words in a statute or regulation must be given work to do.[141]

AQOs are not the sole means in determining noise limits

[156] NAC, at [29] of its submissions, describes the key provisions of the EPP (Noise). However, it omits that the EPP also states in s 6(c) that its purpose is to be achieved by "providing a framework for making consistent, equitable and informed decisions about the acoustic environment". Importantly, part of that framework is the management intent to control background creep as part of the mix of mandatory matters in making an 'environmental management decision' under s 51(c) of the *Environmental Protection Regulation* 2008 (**EP Regulation**). Despite NAC's arguments, the AQOs are simply another one of those matters that must be considered and are not somehow to be automatically promoted above either the s 10 background creep management intent or the management hierarchy in s 9. Instead, as Member Smith did in considering all the evidence before him, the facts of a particular case must be assessed against the various approach for setting the noise limits.

[157] This is particularly sensible when one considers that the AQOs are to be achieved over the long term – i.e. for noise environments that, by way of s 8, the EPP (Noise) is targeting to become quieter over time. There is no indication in the EPP (Noise) that the AQOs protect the health and wellbeing of the community in very quiet (low background noise) environments, such as that surrounding this mine, where the AQOs instead represent an increase in noise levels. It is in those instances that the EPP (Noise) framework also provides for the consideration and application of the s 10 background creep approach in setting appropriate noise limits to protect the EPP (Noise) environmental values.

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[137] Member Smith's reasons at [766]-[767] and [775].
[138] Bowskill J's principal reasons at [304]-[305].
[139] Condition F1 (Noise Limits) of the draft EA states, "The holder of this environmental authority must ensure that noise *generated by the mining activities* does not cause the [noise limits in the tables] to be exceeded at a sensitive place or commercial place" (emphasis added).
[140] Member Smith's reasons at [781].
[141] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382.

NAC uses the wrong goal posts regarding a perceptible difference

[158] NAC, at [30] of its submissions, apparently cites evidence of OCAA's noise expert, Mr Savery, stating that differences between existing mining noise and that required under the draft EA limit "would be somewhere between a clearly perceptible difference, and noise levels which are half as loud".

[159] However, this quotation is misleading for current purposes for two reasons. Firstly, NAC misstates Mr Savery's evidence regarding the level of perceptible difference; Mr Savery did not say the difference would be "clearly perceptible" at all. The exchange with NAC's counsel was:[142]

> And if there had been higher than 40 – let's say mid-40s – take 44 for an example – the difference between that and the draft EA will be a noticeable difference?---Well, a perceivable difference, yes.
>
> Perceivable. Noticeable. All the same thing, aren't they?---Yeah.

[160] While claiming that Mr Elkin's evidence was "to similar effect" to that of Mr Savery, NAC's transcript references do not support that claim. The references appear to either wrongly refer to cross-examination of Mr Savery, or to completely irrelevant evidence of Mr Elkin.

[161] In terms of noise reduction, the difference between "perceptible" and "clearly perceptible" is, in this case, an all-important 2 dB (which separates the separately-proposed 35 dB and 37 dB night limits).[143]

[162] Secondly, to get that statement, and that differences would be "half as loud", NAC's counsel was asking Mr Savery to compare the draft EA limits with *non-compliant past mine noise* well in excess of NAC's existing authorised EA limits. It is mischievous of NAC to make the submission it now does, without providing that context. NAC has used the wrong goal posts in an attempt to strengthen the appearance of its argument in this regard. The more appropriate comparison of noise levels for this Court to consider is, of course, between proposed noise levels and what should have been the lawful noise level of past activities *had NAC actually complied with its EA limits.* Mr Elkin also stated that any such benefits would need to be with a "well-policed 37 [dB]".[144] This is particularly the case given the Court's finding that landholder objectors who had made noise complaints had been treated "very poorly by both NAC and the statutory party"[145] and who therefore were subjected to unauthorised noise.[146]

[163] If that fair and appropriate comparison is made, then a reduction of:

(a) 3 dB from 40 (existing EA night limit) to 37 (draft EA) is "just perceptible" and what Mr Elkin described as not being a vast change[147]; and

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[142] T47-15 lines 1-5.
[143] Noise and Vibration JER – Ex.406 (Document ID: NAC.0034), para 46, p.7.
[144] T42-58 lines 4-8.
[145] At [721].
[146] Member Smith found, at [1792], that NAC had exceeded EA conditions "from time to time" but that at Mrs Mason's premises that had occurred frequently (at [1194]).
[147] T41-14 lines 45-46, T41-93 line 31, T41-94 lines 7-8.

(b) 5 dB from 40 to 35 (Member Smith's finding) is "clearly perceptible", to which Mr Elkin agreed.[148]

[164] Member Smith's finding of a 35 dB limit thus has clear benefits in noise reduction to the surrounding community who have been adversely affected by mine noise for years.

Doubt remains over whether NAC can meet the draft EA noise limits

[165] NAC, at [31] of its submissions, cites expert agreement that "with the benefit of that monitoring, and with proper management, attenuation and adaptive measures, the noise limits in the draft EA could be complied with."

[166] What NAC does not highlight from the evidence, is that Mr Savery only agreed that the draft EA noise limit of 37 dB could be met:

(a) if NAC could find a further 2 dB of attenuation, which would be onerous and about which there was no evidence as to how it could be done;[149] and

(b) by accepting NAC's counsel's suggestion that it might mean there is only "backpackers with shovels and wheel-barrows on the site", or somewhere in between that and NAC's proposed operating methods.[150]

[167] It is critical to understand that, in demonstrating the draft EA noise limits could be met, NAC's noise modellers considered that the modelled results were as good as NAC could hope to achieve. Even then, predictions at several receptors showed levels literally at the cusp of non-compliance.[151] As NAC's modellers said in the EIS:[152]

> Reasonable measures to minimise noise for mining operations have been incorporated into the development of the revised project. The predicted noise levels are considered the lowest noise levels that can be reasonably achieved through a feasible and viable mining operation.

[168] This comment puts in context the claim regularly made by NAC that it can continue to adjust its operations to reduce noise. Its own modellers did not think so.

[169] Further, in the initial hearing OCAA identified numerous problems in the EIS modelling that cast further and significant doubt over whether NAC could achieve the draft EA noise limits and still have a 'feasible and viable' operation. They included that:

(a) in an apparent first in noise modelling, the modellers reduced every output of the model by 2 dB (the "utilisation rule");

(b) the modellers failed to adjust the model for tonality or impulsiveness, which can result in a penalty of at least 2 dB, but up to 10 dB;

(c) the modellers failed to illustrate the margin of error of +/- 3 dB for the modelling algorithm used;

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[148] Noise and Vibration JER – Ex.406 (Document ID: NAC.0034), para 46, p.7; T42-59 lines 16-23.
[149] Given Mr Savery's rejection of the 2 dB utilisation rule used in the modelling. Mr Elkin also ultimately abandoned the rule, and Member Smith made a finding to that effect at [792].
[150] T47-13 lines 21-41.
[151] EIS Noise, Chapter 11, Exhibit 29, EHP.0029 (EIS - Chapter 11 Noise and vibration), Table 11-14, SP31.
[152] EIS Noise, Chapter 11, Exhibit 29, EHP.0029 (EIS - Chapter 11 Noise and vibration) SP23.

(d) the modellers' choice of 2019 as the first output year ignores the construction period of the mine and assumes the existence of noise attenuating overburden dumps; and

(e) rather than providing a realistic worst case prediction of noise levels, the modellers aimed the model at the proposed noise limits thus assuring that is what it would predict.[153]

[170] Member Smith expressly rejected the 2 dB utilisation rule,[154] but did not make specific rulings or findings with respect to the other matters raised. However, those problems provide critical context for the Court in considering the appropriate recommendations to make on rehearing, and have not been raised by NAC. OCAA has detailed discussion of the relevant evidence in OCAA's closing submissions referenced above.

[171] In addition, NAC has consistently sought to draw a distinction between its past performance on noise and its new approach represented by the Trigger Action Response Plan (**TARP**) plus adaptive management, which it argues will see it comply with the draft EA limits. However, evidence from the hearing is that the TARP has been unsuccessful in doing so regarding the existing higher EA limits. Member Smith's only finding was that, for the receptors in Acland, NAC's performance had improved significantly since the TARP was introduced.[155] However, his Honour did not find that exceedances had effectively ceased at Acland, nor did it find that the TARP had seen improvements for anywhere other than at Acland. On the contrary, up until evidence was given, NAC's own expert Mr Elkin had continued to document nights of regular exceedances. In fact, he listed some 131 nights (not hours per night, as the EA limit is measured) where the night limit was exceeded at Acland from January 2014.[156] On the face of the table it painted a poor, but improving, picture. However, it was also revealed that Mr Elkin agreed:

(a) these failures occurred when NAC was in fact aiming to keep noise below 39 dB;[157] and

(b) the significant reduction in exceedances from October 2014 was not due to performance improvement, but a change in monitoring equipment to unvalidated equipment.[158]

[172] Again, while OCAA's closing submissions provide greater detail and analysis on these issues,[159] consideration of these issues and the related evidence provide important further context to the Court's consideration of appropriate recommendations. This is particularly the case where NAC expresses much confidence in its ability to adapt its operations to achieve compliance, in a way that is very similar to the failed TARP.

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[153] For a detailed discussion of the evidence, see s6.3 of OCAA's closing submissions dated 13/9/16.
[154] Member Smith's reasons at [792].
[155] Member Smith's reasons at [722] and [724].
[156] Exhibit 939, NAC.0106 (Amended Table 1 Mr Elkins SoE, Exhibit 1114, NAC.0060 at SP30).
[157] T41-25, Lines 6-17.
[158] T41-30, Line 40 to T41-32, Line 14.
[159] See s 6.4 of OCAA's closing submissions dated 13/9/16.

Any notion of "anti-creep" must be given historical context of the mine's operations

[173] NAC cites, at [32] of its submissions, Mr Elkin's concept of "anti-creep" in arguing that noise levels will be reduced from the existing acoustic environment. Again, it is necessary to consider the full context of Mr Elkin's statement:[160]

> …let's just assume that you're at 40 or you're sitting at the limit. The noise levels are going to go down. So it depends on where you want to take your starting point for for creep. If you want to take your starting point right now, and assuming that those people are exposed to the existing conditions, it's anti-creep, in essence. Taking your starting position as – as a background level without the mine in place is something different.

[174] This highlights the problem with the AQOs in a very quiet background noise environment and also the "high" noise limits in the existing EA that were conditioned for the earlier stages of the mine. Those limits paid insufficient attention to the low background noise levels, particularly where monitoring was conducted using simple instruments with no accounting for insects or other factors (such as done by Mr Moore) which may have artificially inflated the background noise levels to influence the initial setting of higher limits.

[175] As such, the only reason there could be any "essence" of anti-creep is as an historical artefact where noise limits were too high to properly protect the community, and which in any event Member Smith has found NAC exceeded and the statutory party largely failed to enforce. This context cannot be ignored in the Court's recommendation, together with the associated need for the community to have a clearly perceptible improvement in noise over the existing EA limits – which the 35 dB limits do.

[176] In any event, at the northern part of the mine the expanded mine is proposed to include additional processing and product storage areas, including stacking and reclaiming and a conveyor to the train loading facility. However, the existing plant and operations have caused complaints and noise exceedances to sensitive places to the north-northwest of the site, for example at Mrs Mason's residence.[161] In this instance, background creep is a real concern.

A background creep limit of 35dB is an extent reasonable to achieve

[177] NAC, at [33] of its submissions, contends that it would not be reasonable for it to achieve a background creep limit of 35 dB, when the community is protected at 37 db anyway and the 2 dB difference is "imperceptible".

[178] The problem for NAC is that it did not put a basis forward for why it is reasonable to exceed 35 dB. The only potential candidates are a misreading or misunderstanding of the AQOs in Schedule 1, or the simple fact that NAC cannot comply with a limit lower than that proposed in the draft EA.

[179] The proposition that an inability to comply with 35 dB at night is a basis to say that it is unreasonable to comply with 35 dB at night should be immediately rejected. An inability to comply with s 10 is better conceived of as a good reason for the Court to recommend refusal of this mine expansion, rather than as a reason to be allowed not to comply. Again,

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[160] T40-20 lines 1-6.
[161] Member Smith's reasons at [1194].

such an approach is reasonable when the Applicant's past performance has meant some 15 years of landholder objectors being unreasonably adversely affected.

[180] In Mr Elkin's evidence-in-chief it was emphasised that the 2 dB difference between the night time limit proposed by Mr Savery (35 dBA) and Mr Elkin (37 dBA) was imperceptible.[162] However, as described above, that is not what is required. What is required is a standard that those in the community have to live with. None of the relevant standards say set the level and add 2 dB because it will be barely perceptible to those that have to live with it.

AQOs are not determinative of appropriate evening noise limits

[181] NAC, at [34] of its submissions, contends that because the evening and night periods have the same AQOs in the EPP (Noise), then that should also be the case here. However, as stated above, AQOs are not the sole determinative factor in assessing noise impacts and any applicable limits.

[182] The evening period deserves protection that the draft EA does not give it. The evidence demonstrates that the first part of the night is critical to good sleep[163] and for family, homework and socialising. It is also important for young children to sleep. The Court's finding of a 35 dB limit for evening is consistent with the WHO community health guidelines that provide both the evening and night periods should be 5 to 10 dBA lower than the 12 hour daytime period.[164] It was concern about these health impacts of the noise levels in the draft EA that led Member Smith to finding the 35 dB limits should be applied in the evening.[165]

[183] Again, in making an environmental management decision under s 51 of the EP Regulation, the AQOs are just one factor that must be considered. Member Smith was right in considering all the evidence before him about protecting the environmental values and finding, on balance, the 35dB evening limit as appropriate.

Deemed background does not make for "artificial" constraints on limits; instead, it allows the mine to operate

[184] NAC, at [36] of its submissions, alleges that Mr Savery's use of a "deemed background" noise level were artificial constraints on his derived limits. Again, this claim requires further explanation.

[185] Given that Mr Elkin agreed that the background level for the environment surrounding the mine sits as low as 20 or 25 dB,[166] an assumed background of 30 dB is extremely generous to NAC. Without such a concession to that "deemed background" level, Mr Elkin agreed there is no way the mine could achieve limits based on the true, lower, background levels because of its proximity to sensitive receptors.[167]

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[162] T40-18, Lines 38-40.
[163] T42-16, Lines 16-20.
[164] T42-16, Line 30 to T42-18, Line 43.
[165] Member Smith's reasons at [1196].
[166] T41-90, Lines 11-22.
[167] T41-91, lines 30-36.

[186] Therefore, rather than an artificial constraint on the approach to setting limits, the deemed background actually provides a basis for reasonable limits on which NAC could operate the mine.

Misconstrued contention that noise limits lower than 37 dB are not reasonable nor practical

[187] NAC, at [37] of its submissions, contends that a limit lower than the draft EA night limit of 37 dB is not reasonable or practical given the AQO is met. This argument is wrong for two reasons:

(a) *first*, it misunderstands and misconstrues the nature of AQOs, which provide adequate *total* noise levels in various circumstances, not limits for noise generated by a particular activity viewed in isolation from the *total* noise environment (as discussed above); and

(b) *second*, it misconstrues the application of the concept of what is to be reasonable and practicable in Schedule 5 of the EP Reg.

[188] Regarding the second point, paragraphs 6 and 7 of Part 2 of Schedule 5 allow an assessment decision-maker to be satisfied that adverse effects have been minimised (thus satisfying the environmental objective) if all reasonable and practicable measures been taken. NAC's submissions alter that test.

[189] What this Court would have to be satisfied of to assess whether the EA application has minimised adverse effects, on the evidence, is that NAC has taken all reasonable and practicable measures in light of the various matters in paragraph 7. However, NAC did not bring any comprehensive evidence of, for example, proposals for completely shutting down mining operations during the night, the financial implications of different measures, or the feasibility of carrying out activities at different locations, times or weather conditions, that would ultimately enable the Court to make such an assessment.

[190] As such, the Court should place reject NAC's contention in considering its recommendations.

Balancing exercise context

[191] NAC, at [38] of its submissions, raises additional matters it says must be considered for context in the balancing exercise for the Court's recommendations.

[192] In briefly addressing these matters:

(a) regarding NAC's proposed definition of "noise sensitive place", see OCAA's comment in Appendix 1 to these submissions;

(b) regarding an acoustic fence at Mr Beutel's property, Mr Savery had concerns about the technical feasibility of achieving the required noise attenuation from any such fence;[168]

(c) regarding compliance being readily achieved in favourable weather conditions, there are a range of conditions on the continuum from worst case to favourable,

[168] T47-51, lines 31-40.

Mr Elkin admitted the modelling did not in fact reflect worst case operating conditions due to the absence of construction activities in the modelling (as discussed earlier), and different weather conditions meant different impacts for receptors around the mine;[169]

(d) regarding the application of background creep to "only" some receptors, such application is entirely appropriate given these are the receptors that have been significantly adversely impacted both in the past and currently with the commencement of stage 3 activities, and are also the most susceptible in the future to adverse effects should the project be approved.

[193] As a result, and in combination with the other noise-related matters addressed above, NAC's further submissions on the evidence should be rejected. It follows then that the appropriate conclusion for this Court (on any approval recommendation) is that the proper limits are those found by Member Smith and not the draft EA.

CONSIDERATION OF THE STATUTORY CRITERIA

[194] OCAA submits that NAC's submissions should be rejected and turns, at this point, to consider how the Court should consider the statutory criteria in s 269(4) of the MRA and s 191 of the EPA within the constraints imposed by Bowskill J.

[195] As noted earlier, in effect, in the context where Member Smith based his decisions to:

(a) recommend rejection of the MLAs on the basis of s 269(4)(i), (j), (k), (l) and (m) of the MRA; and

(b) recommend refusal of the EA application on s 191 of the EPA generally,

due to his concerns about groundwater, intergenerational equity and noise, it is only the conclusions in relation to those provisions and, the overall issue of what recommendations ought to be made, including amendments to conditions, that are open to reconsideration.

[196] As a consequence, this section will focus on those statutory criteria, in addition to s 5 of the EPA, which is a further relevant consideration.

[197] The relevant starting point for the assessment of the applications for Stage 3 of the mine against the statutory criteria is to recognise that, as discussed at the start of these submissions:

(a) the mine has operated since 2001 and the expansion of the mine to Stage 3 commenced in 2016 when NAC started mining "West Pit"; and

(b) the land around Acland in which the mine is proposed is amongst the best 1.5% of agricultural land in Queensland and significant from an agricultural perspective.[170]

(c) agricultural activities have been undertaken successfully on the land for many generations, with the real likelihood that, all things being equal, such agricultural

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[169] Member Smith's reasons at [742].
[170] Member Smith's reasons at [1299].

activities will continue for many more generations. NAC's mining operations, if Stage 3 is approved, will only last for some 12 years.[171]

[198] It is, therefore, necessary to consider the impacts of approval of the applications for Stage 3 in the context of the *cumulative* impacts of the mine's operations since 2001 in an area of high value agricultural land – the State's southern food bowl – which is surrounded by neighbouring farms that have been farmed for generations.

[199] This starting point is necessary:

(a) when assessing the ML applications under s 269(4) of the MRA, whether

(i) the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management;[172]

(ii) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof;[173]

(iii) the public right and interest will be prejudiced;[174] and

(iv) any good reason has been shown for a refusal to grant the mining lease;[175] and

(v) taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use;[176] and

(b) when assessing the EA application under s 191 of the EPA, whether:

(i) the proposal is consistent with the principle of intergenerational equity;[177]

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

(iii) the public interest; and

(iv) in the circumstances, approval best achieves the object of the EPA.[178]

[200] The past impacts of Stage 1 and Stage 2 of the mine, to which the continued operation and expansion of Stage 3 will be cumulative to, are extensive.

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[171] Member Smith's reasons at [325].
[172] MRA, s 269(4)(i).
[173] MRA, s 269(4)(j).
[174] MRA, s 269(4)(k).
[175] MRA, s 269(4)(l).
[176] MRA, s 269(4)(m).
[177] EPA, s 191(g) and standard criteria (a)(ii).
[178] EPA, s 5; and *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 at [58].

[201] Member Smith made clear factual findings of the extensive past impacts of the mine on the surrounding community due to:

(a) dust:[179]

> [587] The evidence of [surrounding neighbours for Stage 2 of the mine] Mrs Harrison, Mrs Mason, Mr Beutel, and the Plant family in particular cannot be ignored. I have no doubt they have been greatly inconvenienced and impacted by dust produced by the mine and given their evidence, it is quite possible EA limits with respect to dust and particulate matter have been exceeded.

(b) noise:[180]

> [721] … The objectors on the other hand have provided the literal 'truck load' of evidence and material detailing what they say to be unacceptable levels of noise generated by NAC's operation of Stages 1 and 2. Looking at all of the evidence before me in its entirety, in my view the objectors who have made noise complaints have not been well served in the past by either NAC or the statutory party. My independent, considered view on what I have before me is consistent with the evidence given by the objectors that they have actually been treated very poorly by both NAC and the statutory party.
>
> [722] … The historical performance of NAC in responding to and investigating noise complaints prior to the TARP (an installation of the 'real time' Sentinex monitor) was not satisfactory.

(c) sleep disturbance:[181]

> [1183] Similarly evidence from Mrs Mason, Dr Plant, Mr Ward and Mr Beutel of acute sleep disturbance due to mine noise cannot be ignored. …
>
> [1185] I accept the direct evidence of the local objectors over Dr McKenzie's belief as to what he expects should have been happening. Based on the objector's lived experiences, it is likely their physical health has been impacted by the mine. In my view many objectors have had their sleep disturbed due to mine noise and this sleep disturbance has led to an impact on their general health and wellbeing. Both experts agree on the adverse impacts sleep disturbance can have on general health and wellbeing.

(d) mental health:[182]

> [1245] Despite NAC's bold assertion that the objectors did not lead evidence that even one person's mental health has been adversely affected by the mine; there is clear evidence of adverse mental health impacts resulting from NAC's mining operations …
>
> [1252] There is a multitude of evidence from witnesses and objectors that NAC's mining operations to date, including complaint handling, has caused them emotional and mental distress. It is apparent on a thorough consideration of the evidence received during this hearing, that this distress has at times adversely impacted their mental health.
>
> [1253] At the end of Mr Holt QC's cross-examination, [NAC's expert] Dr Chalk acknowledged that some members of the community have suffered a lot of distress about the mine but was unsure whether that distress equated to a mental illness. Dr Chalk then acknowledged that mental health is not just an absence of mental illness.
>
> [1254] I accept Dr Chalk's evidence that psychological distress particularly for farmers and people in rural areas can be contributing factors for mental illness, and that stressors play a role

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[179] Member Smith's reasons at [587].
[180] Member Smith's reasons at [721] (OCAA notes, in particular, that [791] is best characterised as a *factual finding* rather than a conclusion in relation to the application of the criteria in s 269(4) of the MRA, or ss 190-191 of the EPA, the overall recommendation to make or what conditions ought to be imposed).
[181] Member Smith's reasons at [1183] and [1185].
[182] Member Smith's reasons at [1245], [1252]-[1258] (footnotes omitted).

> in the development of depressive disorders but questions remain about the magnitude of their effect. Compounding stressors over a long period increase the psychological risk. Further, mental illness is a multi-faceted illness with many causal factors and the stress/mental distress complained of here does not of itself mean that mental illness will follow.
>
> [1255] It is concerning that the stressors/distress experienced by some local residents due to the mine may well lead to a medically diagnosed mental illness. However I am not confined to defining poor mental health as the presence of a medically diagnosed mental illness. As described above, mental health is more than that and relates to a person's sense of well-being and ability to function properly. The evidence clearly establishes that some community members do not have a sense of well-being and are not always functioning properly as a result of the mine and concerns about the revised Stage 3 expansion. I note Dr Chalk's evidence that many of the stressors mentioned to him raise red flags as to the existence of poor mental health.
>
> [1256] In terms of this objection however, the question is whether revised Stage 3 will have an unacceptable impact on mental health. Certainly NAC's existing mining operations have at times had an adverse impact on the mental health of some local residents, however I believe with appropriate conditioning the new revised Stage 3 project will not have an unacceptable impact on mental health sufficient to recommend that the project not go ahead.
>
> [1257] I also note Ms Elliott's evidence that the mental health of the current employees and their families is likely to be adversely impacted if revised Stage 3 is not approved.
>
> [1258] In my view, it is clear on the evidence that, whether or not the revised Stage 3 is approved, one segment of the community or another will experience mental distress.

(e) loss of Acland as a town:[183]

> [75] The fact that Acland as a town in effect no longer exists cannot be dismissed, in my view, as a simple sideline to the matters in dispute. …

[202] In weighing the cumulative impacts of Stage 3 of the mine on the surrounding community and the loss of high value agricultural land, the lack of substantial royalties for the State is highly relevant.

[203] As noted earlier in these submissions, due to the fact that 93% of the land to be mined under Stage 3 was granted under pre-1910 titles, NAC will only pay 7% of the usual royalties to the State. NAC will in effect pay the vast majority of its royalties (calculated at 7% of the value of the coal) to its related company APC.[184] Only an estimated $39.9 million will be paid in royalties over the life of this project.[185]

[204] Member Smith found:[186]

> [1051] The fact that 93% of the land to be mined in revised Stage 3 does not require royalties to be paid to the state (but rather to the land owners - primarily APC, a New Hope related company) is a relevant factor in determining on public interest grounds whether this coal mine extension should be approved or not. The loss of the normally expected royalties (estimated at approximately $436 million over the life of the project) cannot be ignored and is significant.

[205] The lack of substantial royalties substantially reduce the public interest in granting the MLAs and EA amendment.

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[183] Member Smith's reasons at [75].
[184] Member Smith's reasons at [883].
[185] Member Smith's reasons at [1040].
[186] Member Smith's reasons at [1051].

[206] Taking these matters into account, even including wider economic benefits and employment, allowing Stage 3 of the mine to continue and expand south and west is not in the public interest and is contrary to intergenerational equity, particularly given:

(a) the long history of damage caused by the mine to this rich agricultural area and the noise and dust impacts on the surrounding community, which further expansion of the mine will compound and build on;

(b) To the extent that the mine produces public benefits (e.g. due to royalties), those have also been received from the mine in the past and any future public benefits only adds, marginally, to what has already been received.

[207] In a nutshell: enough is enough. The community around the mine has suffered enough. Enough high value agricultural land has been lost. Enough public benefit has been obtained from mining the resources in the area. It remains "'inappropriate' to expand the mine in the State's southern food bowl".[187]

[208] Based on Member Smith's factual findings, even including wider economic benefits and employment, the Court should find for the purposes of assessing the applications for the rehearing that:

(a) the operations to be carried on under the authority of the proposed mining lease will not conform with sound land use management;[188]

(b) the adverse environmental impact caused by allowing Stage 3 of the mine to continue and to expand further will be extensive and cumulative on past impacts to good quality agricultural land and the surrounding community;[189]

(c) the public right and interest will be prejudiced;[190]

(d) good reason has been shown for a refusal to grant the mining lease;[191] and

(e) taking into consideration the current and prospective uses of that land, the proposed mining operation is not an appropriate land use;[192] and

(f) the proposal is not consistent with the principle of intergenerational equity;[193]

(g) the grant of the EA application is not in the public interest; and

(h) in the circumstances, refusal of the EA application best achieves the object of the EPA.[194]

[209] The lack of public interest and not meeting the requirements of intergenerational equity and other criteria in s 269(4)(i)-(m) of the MRA and s 191 of the EPA are dramatically tilted further against recommending approval if, as a consequence of Bowskill J's reasons

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[187] Member Smith's reasons at [58], quoting the then Premier's reasons for rejecting the original stage 3 proposal in March 2012.
[188] MRA, s 269(4)(i).
[189] MRA, s 269(4)(j).
[190] MRA, s 269(4)(k).
[191] MRA, s 269(4)(l).
[192] MRA, s 269(4)(m).
[193] EPA, s 191(g) and standard criteria (a)(ii).
[194] EPA, s 5; and *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 at [58].

discussed above at [75]-[82], wider economic benefits and employment from the mine are required to be excluded from consideration.

RECOMMENDATIONS THE COURT SHOULD MAKE

[210] In this context, assuming the Court finds it has jurisdiction to proceed and even if the Court considers wider economic benefits and employment from the mine, OCAA's ultimate submission is that the Court should recommend:

(a) that MLAs be rejected; and

(b) the EA application be refused,

as the applications are contrary to the public right and interest and intergenerational equity and other criteria in s 269(4)(i)-(m) of the MRA and s 191 of the EPA.

[211] If the Court decides, contrary to OCAA's submission, to recommend that the MLAs and EA application be approved, the recommendations should be subject to:

(a) a condition that the approvals not take effect unless and until an application is made by the Applicant to the Coordinator-General to change imposed conditions D1-D3 as stated in Appendix 2 of the Coordinator-General's evaluation report for the mine, and on the basis of that application, or otherwise (for example, on the Coordinator-General's own initiative) the conditions being changed, consistent with the Land Court's recommendation that the noise level ($L_{Aeq,\ adj,\ 15\ min}$) for evening (6pm-10pm) and night (10pm-7am) operations should be set at 35 dB for each and not 42 dB and 37 dB; and

(b) further amendments to the conditions of the draft EA as set out in Appendix 1, including that continuous noise monitoring be made publicly available in real time.

[212] OCAA's proposed amendments to the EA conditions are considered in the following section and Appendix 1.

AMENDMENTS OF EA CONDITIONS

[213] It is unnecessary to go beyond OCAA's submissions in Appendix 1 in relation to the proposed amendments to the EA conditions, save for three amendments, namely the need:

(a) to define the limits of the mine pit areas with more precision in condition A2;

(b) for noise conditions to reflect Member Smith's factual findings that 35 dB was the appropriate noise limits for evening and night operations; and

(c) for real-time and publicly available, online monitoring.

Condition A2 – define the limits of the mine pit areas with more precision

[214] Given Member Smith's findings regarding West Pit and his expressed the view that NAC had already commenced Stage 3,[195] discussed above, OCAA submits that consideration of the public interest under s 191 of the EPA requires the wording of condition A2 of the

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[195] Member Smith's reasons at [125], [245], [378], [389], [391], [683] and [1392]-[1405].

draft EA to be clarified to remove any doubt that NAC's interpretation of the existing EA that it can mine anywhere within the mining lease areas provided it complies with the conditions of the EA, cannot be repeated should Stage 3 of the mine proceed.

[215] OCAA submits that such a clarification will be consistent with the CG's stated conditions in the sense of complimenting and adding to a CG condition.[196]

[216] OCAA submits that such a clarification of condition A2 of the draft EA is:

> A2. In carrying out the mining activity authorised by this environmental authority, the holder of this environmental authority must comply with Figure 1 (Revised Project Overview – Mine Area). Mining pits and the extraction of coal must be confined to the areas shown as "Disturbance Areas – Stage 2 – Mining Areas" and the areas shown as the "Stage 3 Pit Areas".

[217] In addition, Figure 1 in the draft EA should be replaced with a map of better quality version of the same image as the image in the draft EA is almost illegible.

Noise conditions should recommend 35dB limits for evening and night operations

[218] For the reasons given earlier, there is very little "decisional freedom" for making recommendations that do not incorporate Member Smith's noise limits of 35 dB. To do so has a high risk of the decision being open to judicial review for lacking "an evident and intelligible justification when all relevant matters were considered".

[219] Bowskill J provided, at [337], a simple path for the Court to both reflect Member Smith's factual findings on the appropriate noise limits for the mine while also complying with the requirements not to recommend conditions that are inconsistent with the CG's conditions by making a recommendation subject to a condition that it not take effect unless and until the CG's conditions are changed to be consistent with the Court's recommendation on the appropriate noise limits of 35 dB.

[220] Should the Court decide to recommend approval, OCAA submits it should use the mechanism Bowskill J provided to both reflect Member Smith's findings and meet the requirements of s 190(2) of the EPA.

[221] Adopting the language used by Bowskill J at [337] and incorporating the technical definitions of the noise characteristics being limited in the CG Conditions and draft EA, any recommendations for approval should be subject to:

> A condition that they not take effect unless and until an application is made by the Applicant to the Coordinator-General to change imposed conditions D1-D3 as stated in Appendix 2 of the Coordinator-General's evaluation report for the mine, and on the basis of that application, or otherwise (for example, on the Coordinator-General's own initiative) the conditions being changed, consistent with the Land Court's recommendation that the noise level ($L_{Aeq,\ adj,\ 15\ min}$) for evening (6pm-10pm) and night (10pm-7am) operations should be set at 35 dB for each and not 42 dB and 37 dB.

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[196] Member Smith's reasons at [173]-[184] citing *Xstrata*.

Need for real-time and publicly available, online monitoring

[222] In addition to reflecting Member Smith's factual findings on the appropriate noise limits, the Court's recommendations should reflect his findings on the need for publicly available, real-time, online monitoring.

[223] Member Smith made the need for publicly available, real time, online monitoring for dust clear in his findings:[197]

> [588] The current complaints based system in dealing with air quality and dust issues is of little value because any testing mandated by EHP (sometime after a complaint has been made), is likely to have occurred when operational and particularly meteorological conditions were different to those experienced by nearby residents when they experienced the dust nuisance and made their dust complaints. Still conditions or light winds are very important in terms of exposure to particulate matter and dust. Essentially, investigations by EHP at a later time with potentially very different conditions suffer from the same difficulties as the investigation of noise complaints.
>
> [589] Because no regular monitoring has been undertaken by NAC in or around the mine site, it is impossible to confirm whether EA air quality limits have or have not been adhered to. I suspect limits may not always have been adhered to, given the lived experiences of Mrs Harrison, Mrs Mason, Mr Beutel, and the Plant family. …
>
> [598] However in my view particularly with regards to air quality, more so than dust, exposure to potentially high levels should not be contracted out of under any circumstances. There is emerging evidence that short term and long term exposure to particulate matter particularly PM2.5 particles, is dangerous to health and there is no evidence of a safe level of exposure to these particles. Every person whether they be a mine worker or their spouse or their children or their grandparents, or people who rent properties from NAC or APC should not be exposed to unsafe levels of particulate matter. I note Dr McCarron, Dr Plant and Mrs Mason have adopted this view in their submissions.
>
> …
>
> [611] Despite the failure of the existing complaints based EA to meet community concerns with respect to air quality near the mine (such as EHP only requiring monitoring of air quality after a complaint has been lodged when conditions may be different, and then to look at dispute resolution with the complainant), the current EA provisions requiring NAC to meet specific air quality and dust limits is sound. A logical extension to this limits based system is to have monitoring publically available in real time so when community members believe that they are being impacted by excessive dust or particulate matter levels, they can immediately check the nearest monitor online for recorded levels. Such a system ensures compliance as EHP (the regulator) has immediate access to the monitoring data and the monthly environmental reports (see clause A14 in the draft EA). The availability of the monitoring data may also assist nearby residents and NAC, as although residents may believe they are being unlawfully impacted, monitoring may show that limits are being met.

[224] Member Smith made similar factual findings and conclusions in relation to noise at [809]. Using the colours shown in the attached marked-up version of Member Smith's reasons to distinguish (binding) factual findings (in yellow) and (non-binding) conclusions, that paragraph provides:

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[197] Member Smith's reasons at [588], [589], [598] & [611] (footnote omitted).

> [809] On the same basis that I recommended that air quality and dust monitoring data be made publically available, I recommend noise monitoring data be provided in real time online and hence be made publically available. The provision of this data online in real time will take out the adversarial complaints based process which has not worked and ensure NAC are directly accountable to EHP for its noise emissions. As with air quality, no doubt NAC will have online information explaining noise data and clarify its noise emissions in its monthly publically available environmental reporting, see CG (condition 3) and EHP (A14). It is vital for community relations and wellbeing that local residents can access real time noise monitoring data. I am confident local residents would not be upset or confused by the raw data. In fact the provision of this data may help local residents become more aware of what level of noise is acceptable.

[225] Given these factual findings, OCAA submits the EA conditions should provide publicly available, real-time, online monitoring for both dust and noise.

CONCLUSION

[226] The Court must re-exercise the whole of the discretion in s 269(4) of the MRA and s190 of the EPA within the constraints imposed by Bowskill J. That is, the Court must re-exercise the whole of the discretion in s 269(4) of the MRA and s190 of the EPA, not only in relation to noise issues, on the basis of Member Smith's findings and conclusions (with specified exceptions for groundwater, intergenerational equity and noise).

[227] The mine has operated since 2001 and the expansion of the mine to stage 3 commenced in 2016 when NAC started mining "West Pit". The applications must be assessed on that basis.

[228] Allowing Stage 3 of the mine to continue and expand south and west is not in the public interest and is contrary to intergenerational equity and other considerations under s 269(4)(i)-(m) of the MRA and s 191 of the EPA, given:

(a) the long history of damage caused by the mine to this rich agricultural area and the noise and dust impacts on the surrounding community, which further expansion of the mine will compound and build on; and

(b) to the extent that the mine produces public benefits (e.g. due to royalties), those have also been received from the mine in the past and any future public benefits only adds, marginally, to what has already been received.

[229] In a nutshell: enough is enough. The community around the mine has suffered enough. Enough high value agricultural land has been lost. Enough public benefit has been obtained from mining the resources in the area. It remains "'inappropriate' to expand the mine in the State's southern food bowl".[198]

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[198] Member Smith's reasons at [58], quoting the then Premier's reasons for rejecting the original stage 3 proposal in March 2012.

[230] Assuming the Court finds it has jurisdiction to proceed and even considering wider economic benefits and employment from the mine, OCAA submits that the Court should make recommendations:

(a) that MLAs be rejected; and

(b) the EA application be refused,

as the applications are contrary to the public right and interest, intergenerational equity and other criteria in s 269(4)(i)-(m) of the MRA and s 191 of the EPA.

[231] The lack of public interest and not meeting the requirements of intergenerational equity and other considerations under s 269(4) of the MRA and s 191 of the EPA are dramatically tilted further against recommending approval if, as a consequence of Bowskill J's reasons discussed above at [75]-[82], wider economic benefits and employment from the mine must be excluded from consideration.

[232] If the Court decides not to accept these submissions, and decides to recommend approval, there is very little "decisional freedom" for making recommendations that do not incorporate Member Smith's noise limits of 35dB. To do so has a high risk of the decision being open to judicial review for lacking "an evident and intelligible justification when all relevant matters were considered".

[233] Bowskill J provided, at [337], a simple path for the Court to both reflect Member Smith's factual findings on the appropriate noise limits for the mine while also complying with the requirements not to recommend conditions that are inconsistent with the CG's conditions by making a recommendation subject to a condition that it not take effect unless and until the CG's conditions are changed to be consistent with the Court's recommendation on the appropriate noise limits of 35dB.

[234] Therefore, if the Court decides to recommend that the MLAs and EA application be approved, the recommendations should be subject to:

(a) a condition that they not take effect unless and until an application is made by the Applicant to the Coordinator-General to change imposed conditions D1-D3 as stated in Appendix 2 of the Coordinator-General's evaluation report for the mine, and on the basis of that application, or otherwise (for example, on the Coordinator-General's own initiative) the conditions being changed, consistent with the Land Court's recommendation that the noise level ($L_{Aeq,\ adj,\ 15\ min}$) for evening (6pm-10pm) and night (10pm-7am) operations should be set at 35 dB for each and not 42 dB and 37 dB; and

(b) further amendments to the conditions of the draft EA as set out in Appendix 1, including that continuous noise monitoring be made publicly available online in real time.

Dr Chris McGrath
Counsel for OCAA
8 August 2018

APPENDIX 1: TABLE OF EA CONDITION AMENDMENTS

Schedule A – General

Condition	DES draft EA condition: black OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: General				
A2 **Figure 1**	In carrying out the mining activity authorised by this environmental authority, the holder of this environmental authority must comply with Figure 1 (Revised Project Overview – Mine Area). Mining pits and the extraction of coal must be confined to the areas shown as "Disturbance Areas – Stage 2 – Mining Areas" and the areas shown as the "Stage 3 Pit Areas". *[Figure 1 in the draft EA linked to condition A2 should be replaced with a map of better quality version of the same image. A similar recommendation should be made for Figures 2, 4, 5, and 6 as all are nearly illegible in the draft EA].*	Arising from 683-685 & 802	*[NAC did not consider this condition]*	See OCAA's submissions above at [167]-[168]. The need for this condition arises from Member Smith's findings at [683]-[685] and [802] that NAC has commenced Stage 3 by mining "West Pit". The wording of condition A2 of the draft EA should be clarified to remove any doubt that NAC's interpretation of the existing EA that it can mine anywhere within the mining lease areas provided it complies with the conditions of the EA, cannot be repeated should Stage 3 of the mine proceed. Such a clarification is consistent with the CG's stated conditions in the sense of complementing and adding to a CG condition. In addition, Figure 1 should be replaced with a map of better quality version of the same image as the image in the draft EA is almost illegible.

Schedule B – Air

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Air				
B1	~~At the commencement of Stage 3 New Acland mine project mining activities, the holder of the environmental authority must comply with conditions **B1 – B4** below.~~ At the commencement of Stage 3 New Acland mine project mining activities, the holder of the	686	NAC submits that the effect of this amendment would be to apply the condition to existing mining activities, which is outside the scope of the EA amendment application and therefore outside the jurisdiction of the Land Court. NAC further submits that Stage	OCAA objects to NAC's submission on the basis that draft EA conditions, where adopted, will apply to all of NAC's mining activities at the Acland Mine site. OCAA supports the Land Court's finding that NAC has already undertaken Stage 3 mining activities in the broad sense as understood by the bulk of witnesses (lay

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	environmental authority must comply with conditions **B1 - B4** below. The environmental authority holder shall ensure that ~~all reasonable and feasible~~ ~~avoidance and mitigation measures are employed so that the~~ dust and particulate matter emissions generated by the mining activities do not cause exceedances of the following levels when measured at any sensitive receptor or commercial place: a) Dust deposition of 120 milligrams per square metre per day, averaged over 1 month, when monitored in accordance with the most recent version of Standards Australia AS/NZS 3580.10.1 Methods for sampling and analysis of ambient air - Determination of particulate matter - Deposited matter - Gravimetric method; b) A concentration of particulate matter with an aerodynamic diameter of less than 10 micrometres (PM10) suspended in the atmosphere of 50 micrograms per cubic metre over a 24-hour averaging time[1] and 25 micrograms per cubic metre over a 1 year averaging time, for no more than 5 exceedances recorded per year[2], when monitored in accordance with the most recent version of either: (1) Standards Australia AS/NZS 3580.9.6 Methods for sampling and analysis of ambient air - Determination of suspended particulate matter - PM10 high volume sampler with size- selective inlet - Gravimetric method; or (2) Standards Australia AS/NZS 3580.9.9 Methods for sampling and analysis of ambient air - Determination of suspended	673, 701 635	3 mining, which is the subject of the EA amendment application, has not commenced. Suggested the following condition: At the ~~commencement~~ Commencement ~~of Stage 3 New Acland~~ ~~mine project mining activities~~ Mining Activities, the holder of the environmental authority must comply with conditions B1 - B4 below and conditions B5 - B12 cease to apply. *[Balance of condition as recommended by Land Court]*	and expert) and other evidence by mining that part of the Manning Vale East Pit located within the existing ML50216 **[684]**. These Stage 3 activities are outside of the mine pit footprint for which approval was sought and granted for Stage 2 of the mine in 2005-2006. OCAA supports the changes preferred by the Land Court to: • delete the first paragraph in B1 **[686]**; • amend the second paragraph to add the word 'holder' in the first line of the second clause after the words 'environmental authority' **[701]**; • add the word 'receptor' after the word 'sensitive' omit the words deleted in the second paragraph **[673]**; • amend B1(b) to include PM10 annual standard of 25ug/m^3 as a compliance condition **[635]**; • amend B1(b)(c) to include the 24 hour average standard for TSP of 80ug/m3 as a conditioned limit **[641]**; • insert B1(d to provide for the addition of PM2.5 limits of 25ug/m3 (24 hour average) and 8ug/m3 (annual average) **[623]**; and • include provision for the limits set in the EA to automatically change to reflect changes in the EPPs **[710].** OCAA supports the changes preferred by the Land Court, made to the second footnote, that: • an *exceptional event rule* be inserted, so that NAC has to meet the 24 hour average PM10 limit of 50ug/m3 unless there is an exceptional event as described in the EHP Model Mining Conditions Guideline (Document ID: EHP.0011) (Exhibit 11); and

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	particulate matter - PM10 low volume sampler - Gravimetric method; or (3) Standards Australia AS 3580.9.8 Methods for sampling and analysis of ambient air - Determination of suspended particulate matter - PM10 continuous direct mass method using a tapered element oscillating microbalance analyser; c) A concentration of particulate matter suspended in the atmosphere of 80 micrograms per cubic metre over a 24-hour averaging time and 90 micrograms per cubic metre over a 1 year averaging time, when monitored in accordance with the most recent version of AS/NZS3580.9.3:2003 Methods for sampling and analysis of ambient air - Determination of suspended particulate matter - Total suspended particulate matter (TSP) - High volume sampler gravimetric method. d) concentration of particulate matter with an aerodynamic diameter of less than 2.5 micrometres (PM2.5) suspended in the atmosphere of 25 micrograms per cubic metre over a 24-hour averaging time[1] and 8 micrograms per cubic metre over a 1 year averaging time.[1] 1 These limits are based upon relevant air quality objectives contained in the Environmental Protection (Air) Policy 2008 and shall be automatically amended to reflect any amendment or replacement of the relevant air quality objective in the Environmental Protection (Air) Policy 2008. 2 The five exceedances allowed each year within B1 b) are only permitted to allow for exceptional events that are known to occur, but which cannot	641 623 710		• NAC is limited to 5 exceedances for exceptional events **[650]-[655]**. OCAA's support for footnotes 1 and 2 is contingent upon the Statutory Party's agreement that footnotes are sufficiently enforceable.

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	be managed by the environmental authority holder. Such events could include emissions from bushfires, fuel reduction burning for fire management purposes or dust storms. All exceedances due to such events would not be considered to be in breach of B1 b) if the environmental authority holder can demonstrate that the exceedance was caused by such events.	650-655		
	Draft EA to be worded to make it clear that NAC bear the onus and not sensitive receptors in terms of showing it had not caused environmental harm and have not exceeded air quality and dust standards prescribed in the EA. This condition is contested by NAC as per its submission.	703-705	NAC submits that a specific condition is not necessary as the EA holder already has responsibility to ensure the limits in condition B1 are not exceeded. Condition B1 of the draft EA requires the holder to ensure that dust and particulate matter emissions generated by the mining activities do not cause exceedances of the prescribed levels. Therefore, NAC submits that an amended or new condition is not required. NAC further submits that the requirement for real time monitoring data to be online avoids the issue of the onus of proof, raised in RJ [705]. *[No new condition required as B1 already has this effect]*	OCAA supports the changes preferred by Member Smith that the EA include a condition that NAC bears the onus of proof (not sensitive receptors) in terms of showing that it has been compliant with set limits in the EA **[703]** such as noise, air quality and dust**.** This condition should be clear and unambiguous **[705].** NAC did not take the opportunity to make any submissions contrary to this in the Land Court **[704].** The Land Court strongly endorsed this position after finding that NAC is, and will potentially, be creating environmental harm for its own profit in this relatively closely settled farming community, with many residents residing there long before NAC arrived **[705]**.
B3	**Air emissions management** An Air Emissions Management Plan must be developed by a suitably qualified and experienced person and implemented. The Air Emissions Management Plan must incorporate a program for continuous improvements for the management of dust resulting from mining operations with respect to, but not limited to: a) The collection of air quality and meteorological data in accordance	695-700	*[As recommended by Land Court]*	OCAA supports the changes preferred by Member Smith to: • Include the words 'and experienced' after 'suitably qualified **[699]-[700]**; • Include PM10 monitoring via trend monitoring at three additional locations to the north, north-west and east of the mine to improve understanding of air quality data **[594]-[595],** noting OCAA objects to the minimum timeframe submitted by NAC;

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	with **Table B1: Air quality monitoring requirements**; b) In addition to the air quality monitoring specified in Table B1: Air quality monitoring requirements, the Air Emissions Management Plan should [propose / include] monitoring of PM10 at 3 additional locations (one to the north-west, one to the north and one to the east of the mine site) [for /via] trend monitoring for a minimum period of 3 years from the Commencement of Stage 3 Mining Activities to improve understanding of air quality data; ~~b)~~c) A dust forecasting system provide daily predictions of upcoming meteorological conditions in order to identify adverse meteorological conditions likely to produce elevated levels of dust including PM10 at a sensitive or commercial place due to the mining conditions; and ~~c)~~d) A dust control strategy which activates a timely implementation of dust control management actions aimed to avoid ~~elevated levels of~~ or minimise dust including PM10 at a sensitive receptor or commercial place due to mining activities. NOTE: Additional trend monitoring proposed in accordance with condition B3(b) can be undertaken using different instruments and methods from those specified in **Table B1: Air quality monitoring requirements**.	594-595 696 697 594-595		• that a dust forecasting system as defined in commitment 257/258 of NAC's register of commitments for Stage 3 be specifically conditioned in B3 **[696]**; and • that the dust control strategy be conditioned in accordance with OCAA's wording at **[697].** OCAA submits that there is no reference to the NOTE proposed by NAC within the references it has provided, and should be omitted.
B4A	The holder of this environmental authority is to make publicly available monitoring results and dust forecasting system online in real-time. The holder must make all air quality and meteorological data held in accordance with	611-612	*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court, to ensure the community has immediate access to NAC's dust monitoring and forecasting publically available online **[611]-[612].**

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	condition B3, including the dust forecasting system, publicly available, online, and in real-time.			
B4B	The holder will provide a "first flush" system to any nearby resident within 5 kilometres from a boundary of the mine who asks for same to be installed, to ensure their drinking water is not contaminated by dust from the mine.	1205-1207	*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court.

Table B1: Air quality monitoring requirements

DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue							RJ para	NAC's submissions	OCAA's submissions
Monitoring location*	**Air quality indicator**	**Instrument**	**Frequency**	**Air quality limit**	**Nuisance limit**	**Monitoring method**			
1,2 (Acland)	PM2.5	Compliant	Continuous	25µg/m³ (24 hr avg) 8µg/m³ (annual)		Compliant method to match instrument eg. AS 3580.9.12- 2013	621,	*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court on the basis that the conditions reflect: • the insertion of a PM2.5 monitor [**621**] and [**615**] • the PM_{10} standard of 25ug/m3 (noting further comments in relation to clause B1(b) above) [**635**] • new monitoring locations [**593**], [**595**] and [**601**], noting that no 'alternative locations' were mentioned in the judgment **[593]**.
	PM_{10}	TEOM	Continuous	50µg/m³ (24 hr avg) 25µg/m³ (annual)		AS 3580.9.8-2008	635		
	TSP	Hi-Vol Sampler	24hr, 1 day in 6	90µg/m³ (annual)	80µg/m³ (24 hr avg)	AS/NZS 3580.9.3:2003			
	TSP#[1]	Modified TEOM#	Continuous	90µg/m³ (annual)	80µg/m³ (24 hr avg)	Modified TEOM			
	Insoluble solids	Dust gauge	Monthly		120mg/m²/day	AS/NZS 3850.10.1:2003			
	Wind speed and direction		Hourly			AS 3580:14-2011			

DES draft EA condition: black **Changes agreed by OCAA: purple** **NAC changes disputed by OCAA: red** **OCAA proposed changes: blue**							**RJ para**	**NAC's submissions**	**OCAA's submissions**
Monitoring location*	**Air quality indicator**	**Instrument**	**Frequency**	**Air quality limit**	**Nuisance limit**	**Monitoring method**			
7, 8 (or an alternative location to the north of the Stage 3 New Acland mine) identified in the Air Emissions Management Plan developed pursuant to condition B3)2	PM10	TEOM	Continuous	50µg/m³ (24 hr avg) 25µg/m³ (annual)		AS 3580.9.8- 2008	593, 595 635	*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court **[593]** to remove the 'alternative location':
38, 39 (or an alternative location to the north- west of the Stage 3 New Acland mine identified in the Air Emissions Management Plan developed pursuant to condition B3)2	PM10	TEOM	Continuous	50µg/m³ (24 hr avg) 25µg/m³ (annual)		AS 3580.9.8- 2008	593, 595 635	*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court **[593]** to remove the 'alternative location'.
A location to the south and Within 1 kilometre to the south of the Stage 3 New Acland Mine	PM10	TEOM	Continuous	50µg/m³ (24 hr avg) 25µg/m³ (annual)		AS 3580.9.8- 2008	601-602 643, 656	*[As recommended by Land Court noting submissions]* The Court recommended that "exactly the same monitoring be undertaken to the south as that proposed in the draft EA for the other	OCAA supports the changes preferred by the Land Court to better reflect the decision on the basis that the condition requires 'exactly the same' monitoring to the south as is proposed in the draft EA for the other monitoring positions **[601]** and **[602]**), and removal of the 5 day
	TSP	Hi-Vol Sampler[1]	24hr, 1 day in 6	90µg/m³ (annual)	80µg/m³ (24 hr avg)	AS/NZS 3580.9.3:2003			
	Insoluble solids	Dust gauge	Monthly		120mg/m²/ day	AS/NZS 3850.10.1:2003			

DES draft EA condition: black **Changes agreed by OCAA: purple** **NAC changes disputed by OCAA: red** **OCAA proposed changes: blue**							**RJ para**	**NAC's submissions**	**OCAA's submissions**
Monitoring location*	**Air quality indicator**	**Instrument**	**Frequency**	**Air quality limit**	**Nuisance limit**	**Monitoring method**			
								monitoring locations". Not all monitoring locations are the same (e.g. some only require PM10, others require TSP and insoluble solids). NAC submits that this is acceptable if monitoring of PM10, TSP and insoluble solids is required.	exceedance allowance per **[643]** and **[656]).** It is agreed that this should fall within the categories of PM10, TPS and insoluble solids.
35,36 (west of mine site)	PM10	TEOM	Continuous	50µg/m³ (24 hr avg) 25µg/m³ (annual)		AS/NZS 3580.9.8-2008	635	*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court.
	TSP	Hi-Vol Sampler[1]	24hr, 1 day in 6	90µg/m³ (annual)	80µg/m³ (24 hr avg)	AS/NZS 3580.9.3:2003			
	Insoluble solids	Dust gauge	Monthly		120mg/m²/day	AS/NZS 3850.10.1:2003			
Acland-Silverleigh Road (at site on Fig 6 where real time PM10 and dust deposition is monitored)	PM10	TEOM	Continuous	50µg/m³ (24 hr avg) 25µg/m³ (annual)		AS/NZS 3580.9.8-2008		*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court.
	TSP	Hi-Vol Sampler	24hr, 1 day in 6	90µg/m³ (annual)	80µg/m³ (24 hr avg)	AS/NZS 3580.9.3:2003			
	Insoluble solids	Dust gauge	Monthly		120mg/m²/day	AS/NZS 3850.10.1:2003			
As per figure 6	Insoluble solids	Dust gauge	Monthly		120mg/m²/day	AS/NZS 3850.10.1:2003			

DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue							RJ para	NAC's submissions	OCAA's submissions
Monitoring location*	**Air quality indicator**	**Instrument**	**Frequency**	**Air quality limit**	**Nuisance limit**	**Monitoring method**			
Siting of monitoring equipment						AS/NZS 3580.1.1:2007			
**See Figures 5 and 6 (CG 's report Figures 3-1 and 3-2 Revised Environmental Management Plan (New Acland AEIS)* **See Figures 5 and 6 (CG's report Figures 3-1 and 3-2 Revised Environmental Management Plan (New Acland AEIS, August 2014)* *# Data from the modified TEOM and Hi-Vol samplers to be used to calibrate the modified TEOM for monitoring TSP.* *Calibration needs to be undertaken over at least a 6 month period from June to December. Once the modified TEOM has been calibrated it can be used to measure TSP instead of the Hi-Vol sampler.* [1] *The modified TEOM can be used to measure TSP at other sites.* 2 This monitoring is required for a minimum period of 3 years from the commencement of operations of the Stage 3 project mining activities, and can be individually removed or redeployed when it can be demonstrated impacts are controlled to a level acceptable to the regulator with consideration of past and future operations.								*[As recommended by Land Court]*	OCAA objects to the insertion footnote. OCAA submits that this was not recommended by the Land Court and thus monitoring should be continuous.

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
B5	~~**Dust Nuisance**~~ ~~Subject to conditions M2 and 86, the release of dust or particulate matter or both resulting from the mining activity must not cause an environmental~~ nuisance, at any sensitive place.	686	NAC submits that conditions B5- B12 should be reinstated as per the draft EA as they apply to existing operations under the current EA. See submissions made in relation to condition B1 above. Amendments are only suggested to correct typographical errors. *[As per draft EA with minor typographical corrections]* **B5** **Dust Nuisance** Subject to conditions **M2** and **B6,** the release of dust or particulate matter or both resulting from the	OCAA supports the Land Court's recommendation that conditions B5-B12 be deleted **[686]**, and objects to the reinsertion of B5-B12 as proposed by NAC, as this is inconsistent with the judgment at multiple points.
B6	~~**Dust Deposition Monitoring**~~ ~~If the environmental authority holder can provide evidence through monitoring that the following limits are not being exceeded then the holder is not in breach of condition 85:~~ ~~a) Dust deposition of 120 milligrams per square metre per day, averaged over one month, when monitored in accordance with AS 3580.10.1 Methods for sampling and analysis of ambient air~~			

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	~~Determination of particulates - Deposited matter - Gravimetric method of 1991; and~~ ~~b) A concentration of particulate matter with an aerodynamic diameter of less than 10 micrometre (µm) (PM10) suspended in the atmosphere of 150 micrograms per cubic metre over a 24 hour averaging time, at a sensitive place downwind of the operational land, when monitored in accordance with:~~ ~~- particulate matter - Determination of suspended particulate PM10 high volume sampler with size selective inlet - Gravimetric method, when monitored in accordance with AS 3580.9.6 Methods for sampling and analysis of ambient air - Determination of suspended particulate matter - PM (sub) 10 high volume sampler with size selective inlet - Gravimetric method of 1990; or~~ ~~- any alternative method of sampling PM10, which may be permitted by the 'Air Quality Sampling Manual' as published from time to time by the administering~~ authority. ~~NOTE: You must propose which monitoring method is appropriate in accordance with condition (86) (a) or (b) or both.~~		mining activity must not ~~cuase~~cause an environmental nuisance, at any sensitive place. **B6** **Dust Deposition Monitoring** If the environmental authority holder can provide evidence through monitoring that the following limits are not being exceeded then the holder is not in breach of condition **B5**: a) Dust deposition of 120 milligrams per square metre per day, averaged over one month, when monitored in accordance with AS 3580.10.1 Methods for sampling and analysis of ambient air - Determination of particulates - Deposited matter - Gravimetric method of 1991; and b) A concentration of particulate matter with an aerodynamic diameter of less than 10 micrometre (µm) (PM10) suspended in the atmosphere of 150 micrograms per cubic metre over a 24 hour averaging time, at a sensitive place downwind of the operational land, when monitored in accordance with: - particulate matter - Determination of suspended particulate PM10 high-volume sampler with size-selective inlet - Gravimetric method, when monitored in accordance with AS 3580.9.6 Methods for sampling and analysis of ambient air - Determination of suspended particulate matter - PM (sub) 10 high volume sampler with size-selective inlet - Gravimetric method of 1990; or - any alternative method of sampling PM10, which may be permitted by the 'Air Quality Sampling Manual' as published from time to time by the administering authority.	
B7	~~If monitoring indicates exceedence of the relevant limits in condition 86, then the environmental authority holder must:~~ ~~a) address the complaint including the use of appropriate dispute resolution if~~ required; or ~~b) as soon as practicable or at the request of the administering authority, implement dust abatement measures so that emissions of dust from the activity~~ do not result in further environmental nuisance.			
B8	~~Rehabilitation must be carried out in such a manner as to minimise releases of wind blown dust and erosion.~~			
B9	~~Dust emissions from mining activities must be suppressed by the use of water or treated in any other suitable manner to prevent a dust nuisance at a sensitive place.~~			
B10	~~All sealed traffic areas must be cleaned as necessary to minimise the release of~~ dust and particulate matter to the atmosphere.			
B11	~~Trafficable areas must be sealed with bitumen or an equivalent hard~~			

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	~~surface, or~~ otherwise maintained to the satisfaction of the administering authority, in a ~~condition which minimises the release of wind-blown or traffic generated dust.~~		NOTE: You must propose which monitoring method is appropriate in accordance with condition **(B6) (a)** or **(b)** or both. **B7** If monitoring indicates ~~exceedence~~exceedance of the relevant limits in condition **B6**, then the environmental authority holder must: a) address the complaint including the use of appropriate dispute resolution if required; or b) as soon as practicable or at the request of the administering authority, implement dust abatement measures so that emissions of dust from the activity do not result in further environmental nuisance. **B8** Rehabilitation must be carried out in such a manner as to minimise releases of wind-blown dust and erosion. **B9** Dust emissions from mining activities must be suppressed by the use of water or treated in any other suitable manner to prevent a dust nuisance at a sensitive place. **B10** All sealed traffic areas must be cleaned as necessary to minimise the release of dust and particulate matter to the atmosphere. **B11** Trafficable areas must be sealed with bitumen or an equivalent hard surface, or otherwise maintained to the satisfaction of the administering authority, in a condition which minimises the release of wind-blown or traffic generated dust. **B12** Temporary roads used for material haulage must be watered or treated in any other suitable manner to minimise wind-blown or traffic generated dust.	
B12	~~Temporary roads used for material haulage must be watered or treated in any other suitable manner to minimise wind-blown or traffic generated dust.~~			

Schedule C - Water

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Water				
C15	If quality characteristics of the receiving water at the downstream monitoring points exceed any of the trigger levels specified in **Table C4: Receiving waters contaminant trigger levels** during a release event the environmental authority holder must compare the downstream results to the upstream results in the receiving waters and: a) where the downstream result is the same or a lower value than the upstream value for the quality characteristic then no additional monitoring and reporting action is required; or b) where the downstream results exceed the upstream results complete an investigation into the potential for environmental harm and provide a written report to the administering authority within 90 days of receiving the results and in the next annual return, outlining: 1. details of the investigations carried out; and 2. actions taken to prevent environmental harm. NOTE: Where an exceedance of a trigger level has occurred and is being investigated, in accordance with (b) of this condition, no further reporting is required for subsequent trigger events for that quality characteristic.	1729	*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court, with one minor proposed clerical amendment.
C24	~~If quality characteristics of the release exceed any of the trigger levels specified in Table C4 - Receiving waters contaminant trigger levels, potential contaminants during a release event, the environmental authority holder must compare the downstream results in the receiving waters to the trigger values specified in Table C4 - Receiving waters contaminant trigger levels, potential contaminants and:~~ ~~a) where the trigger values are not exceeded then no action is to be taken; or~~ ~~b) where the downstream results exceed the trigger values specified Table C4 - Receiving waters contaminant trigger levels, potential contaminants for any quality characteristic, compare the results of the downstream site to the data from background monitoring sites and~~ ~~1. if the result is less than the background monitoring site data, then no action is to be taken; or~~ ~~2. if the result is greater than the background monitoring site data, complete an investigation into the potential for environmental harm and provide a~~	1729	*[As recommended by Land Court]*	OCAA supports the changes preferred by the Land Court.

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	~~written~~ ~~report to the administering authority within 90 days of receiving the result ,~~ ~~outlining~~			
~~C25~~ C24	If an exceedance in accordance with Condition ~~C24(b)(2)~~ C15(b)(2) is identified, the holder of the environmental authority must notify the administering authority in writing within 24 hours of receiving the result.	1729	RJ referred to condition C15(b)(2) but here is no such condition number.	OCAA supports the changes preferred by the Land Court as amended by NAC.

Schedule F - Noise

<table>
<tr><th>Condition</th><th>DES draft EA condition: black
Changes agreed by OCAA: purple
NAC changes disputed by OCAA: red
OCAA proposed changes: blue</th><th>Judgment paragraph</th><th>NAC's submissions</th><th>OCAA's submissions</th></tr>
<tr><td colspan="5">Agency interest: Noise</td></tr>
<tr><td>F1</td><td>
Noise limits

The holder of this environmental authority must ensure that noise generated by the mining activities does not cause ~~exceed~~ the criteria in ~~Table F1 - Noise limits (existing operations) and~~ Table F1b - Noise limits (operations) to be exceeded at a sensitive place or commercial place.

~~Table F1a - Noise limits (existing operations)~~
<table>
<tr><th>~~Noise level dB(A) measured as~~</th><th colspan="3">~~All days~~</th></tr>
<tr><td></td><td>~~7am - 6pm~~</td><td>~~6pm - 10pm~~</td><td>~~10pm - 7am~~</td></tr>
<tr><td></td><td colspan="3">~~Noise measured at a 'Noise sensitive~~ place'</td></tr>
<tr><td>LAr, 1 hour</td><td>~~50~~</td><td>~~45~~</td><td>~~40~~</td></tr>
<tr><td>~~LAmax~~</td><td>-</td><td>-</td><td>~~50~~</td></tr>
</table>
</td><td>801-802</td><td>
NAC submits that Table F1a should not be deleted, as the effect of this amendment would be to apply the Stage 3 noise conditions to existing operations. NAC submits that this is outside the scope of the EA amendment application and therefore outside the jurisdiction of the Land Court.

NAC submits that Table F1b (below) should retain the noise limits for night and evening stated in the CG conditions.

NAC submits that condition F1 should retain the wording used in the CG conditions that mine noise must not "cause" the criteria to be exceeded.

Finally, NAC submits that the condition be amended to consistently refer to 'noise sensitive place'.

F1

Noise limits

The holder of this environmental authority must ensure that noise generated by the mining activities does not cause the criteria in Table F1a - Noise limits (existing operations) and Table F1b - Noise limits (operations) to be exceeded at a noise sensitive place ~~or commercial~~ place.
</td><td>
OCAA objects to NAC's submission on the basis that it is inconsistent with the Land Court's recommendation in [801]-[802].

These paragraphs provide that table F1a's noise limits were draft conditions originally relating to operations prior to the commencement of Stage 3 mining activities.

The Court took the view that due to fact that Stage 3 mining operations had already commenced (see OCAA's submission above in relation to condition B1), Table F1a was not further applicable, and hence, Table F1b noise limits should apply. There is, therefore, no need to include Table F1a's noise limits in F1 or as a table in the draft EA.

OCAA submits that the appropriate noise level for evening and night operations
</td></tr>
</table>

<table>
<tr><th>Condition</th><th>DES draft EA condition: black
Changes agreed by OCAA: purple
NAC changes disputed by OCAA: red
OCAA proposed changes: blue</th><th>Judgment paragraph</th><th>NAC's submissions</th><th>OCAA's submissions</th></tr>
<tr><td colspan="5">Agency interest: Noise</td></tr>
<tr><td></td><td>Table F1b - Noise limits (operations*) (includes construction activities and rail spur)
<table>
<tr><th rowspan="2">Noise level dB(A) measured as</th><th colspan="3">All days</th></tr>
<tr><th>7am - 6pm</th><th>6pm – 10pm</th><th>10pm – 7am</th></tr>
<tr><td></td><td colspan="3">Noise measured at a 'Noise sensitive place'</td></tr>
<tr><td>LAeq, adj, 15 min</td><td>42</td><td>~~42~~35</td><td>~~37~~35</td></tr>
<tr><td>~~LAmax~~ max Lp 15mi</td><td>-</td><td>-</td><td>~~50~~47</td></tr>
<tr><td>~~LAmax~~</td><td>-</td><td>-</td><td>~~56~~</td></tr>
<tr><td>~~LAeq(24hr)~~</td><td>-</td><td>-</td><td>~~50~~</td></tr>
</table></td><td></td><td>Table F1a - Noise limits (existing operations)
<table>
<tr><th rowspan="2">Noise level dB(A) measured as</th><th colspan="3">All days</th></tr>
<tr><th>7am -</th><th>6pm-10pm</th><th>10pm-7am</th></tr>
<tr><td></td><td colspan="3">Noise measured at a 'Noise sensitive place'</td></tr>
<tr><td>LAr, 1 hour</td><td>50</td><td>45</td><td>40</td></tr>
<tr><td>LAmax</td><td>-</td><td>-</td><td>50</td></tr>
</table>
Table F1b - Noise limits (operations*) (includes construction activities)
<table>
<tr><th rowspan="2">Noise level dB(A) measured as</th><th colspan="3">All days</th></tr>
<tr><th>7am - 6pm</th><th>6pm – 10pm</th><th>10pm – 7am</th></tr>
<tr><td></td><td colspan="3">Noise measured at a 'Noise sensitive</td></tr>
<tr><td>LAeq, adj, 15 min</td><td>42</td><td>42</td><td>37</td></tr>
<tr><td>LAmax</td><td>-</td><td>-</td><td>50</td></tr>
<tr><td>LAmax</td><td>-</td><td>-</td><td>56</td></tr>
<tr><td>LAeq(24hr)</td><td>-</td><td>-</td><td>50</td></tr>
</table></td><td>should be set in accordance with those proposed by Mr John Savery in the Joint Report of Noise Experts submitted as part of the Land Court proceedings, as modified by the further comments from Mr Savery attached.

OCAA submits that amending condition F1 to reflect the wording 'cause.. to be exceeded' is acceptable.

OCAA submits that the both 'sensitive place' and 'commercial place' should be retained as these are both defined terms within the EA.</td></tr>
<tr><td>F2</td><td>~~Noise limits in Table F1a – Noise limits (existing operations) only apply until the commencement of mining~~ ~~activities (removal of overburden) for the~~</td><td>687, 801-803</td><td>NAC submits that this condition should be retained. See submissions relating to condition F1 above.
Noise limits in Table F1a - Noise limits (existing</td><td>OCAA objects to NAC's submission on the basis that it is inconsistent with the Land Court's recommendation at [801]-[802].</td></tr>
</table>

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Noise				
	~~Manning Vale East Pit, the Manning Vale West Pit or the Willeroo Pit as shown on Figure 1 - Revised Project Overview - Mine Area.~~		operations) only apply until the c Commencement of Stage 3 ~~m~~Mining aActivities ~~(removal of overburden) for the Manning Vale East Pit, the Manning Vale West Pit or the Willeroo Pit as shown on Figure 1 - Revised Project Overview - Mine Area~~.	Paragraph **[687]** provides that the first paragraph of clause B1 and conditions B5-B12 in the draft EA can be deleted (mirrored changes should occur with respect to Part F of the draft EA relating to noise). Paragraphs [**801]-[803]** provide that table F1a is ultimately unnecessary and should be omitted from the draft EA on the basis that table F1a's noise limits were draft conditions originally relating to operations prior to the commencement of Stage 3 mining activities.
F3	If monitoring indicates the potential for exceedance of the relevant limits in ~~**Table F1a - Noise Limits (existing operations)** and~~ **Table F1 b - Noise Limits** then the environmental authority holder must immediately implement noise abatement measures to avoid exceeding the relevant limits.	687, 801-802	NAC submits that these amendments should not be made. See submissions relating to condition F1 above. *[As per draft EA]* **F3** If monitoring indicates the potential for exceedance of the relevant limits in **Table F1a- Noise Limits (existing operations)** and **Table F1 b - Noise Limits** then the environmental authority holder must immediately implement noise abatement measures to avoid exceeding the relevant limits.	As above.
F5	Monitoring and reporting A Noise Monitoring Program must be developed by a suitably qualified and experienced person and to the satisfaction of the administering authority to monitor compliance with Table F1b - Noise limits (operations). The Noise Monitoring Program must be implemented as soon as possible. The Noise Monitoring Program must incorporate a program for noise monitoring and recording in accordance with Table F3 - Compliance noise monitoring	806	*[As recommended by Land Court]*	OCAA supports the Land Court's preferred changes with further minor amendment to include the words 'as soon as possible' in red to better reflect Mr John Savery's recommendation to the Land Court.

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Noise				
	location and frequency which must include the following descriptor characteristics and matters: a) ~~LAN,T (where N equals the statistical levels of 1, 10 and 90 and T = 15 15 to 60 mins)~~ LAeq, adj, 15 min - day, evening night; b) maximum (LAmax) noise levels - night (for a minimum of 30 minutes); c) background noise LA90; d) the level and frequency of occurrence of impulsive or tonal noise and any adjustment and penalties to statistical levels; e) ⅓ octave band spectrums; f) atmospheric conditions including temperature, relative humidity and wind speed and directions; g) effects due to any extraneous factors such as traffic noise and natural sources (e.g. insects, birds, wind); h) location, date and time of monitoring; and if a complaint concerns low frequency noise, ~~Max LpLIN,T~~ LLINeq 10 mins (internal), LAeq 10 mins (internal) and one third octave band measurements in LLINeq 10 mins (internal)~~dB(LIN)~~ for centre frequencies in the 10 - 200 Hz range.			
F8	The Noise Monitoring Program must also include a system of real time performance monitoring against the criteria in Table F1b - Noise limits (operations) at: i. location in Acland to be identified in the Noise Monitoring Program; ii. location to the east of the Stage 3 New Acland mine to be identified in the Noise Monitoring Program; iii. location to the north of the Stage 3 New	807-808	NAC notes this condition is intended for performance management, rather than compliance purposes, as noise will be impacted by other sources. Both experts agreed that the appropriate way to measure compliance is with attended monitoring, and that real time monitoring is a performance management tool. See the examination-in-chief of Mr Savery at T44-79, and the cross- examination of Mr Elkin, at T41- 57 and T44-61.	OCAA supports the Land Court's preferred changes. OCAA contests NAC's submission that the only appropriate way to measure compliance is with attended monitoring. NAC's submission is not supported by the references it has provided, and OCAA submits that it has mischaracterised the evidence.

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Noise				
	Acland mine to be identified in the Noise Monitoring Program; and iv. location to the west of the Stage 3 New Acland mine to be identified in the Noise Monitoring Program.		*[In order to make it clear that performance monitoring is for performance management purposes, proposed condition F8 should include the following note:* ***NOTE:** The performance monitoring required under this condition is to be used for performance management rather than monitoring for compliance with Table F1b - Noise limits (operations).* *Proposed condition F8 should therefore be:]* The Noise Monitoring Program must also include a system of real time performance monitoring against the criteria in Table F1b - Noise limits (operations) at: i. location in Acland to be identified in the Noise Monitoring Program; ii. location to the east of the Stage 3 New Acland mine to be identified in the Noise Monitoring Program; iii. location to the north of the Stage 3 New Acland mine to be identified in the Noise Monitoring Program; and iv. location to the west of the Stage 3 New Acland mine to be identified in the Noise Monitoring Program. **NOTE:** The performance monitoring required under this condition is to be used for performance management rather than monitoring for compliance with Table F1b - Noise limits (operations).	The broad transcript references NAC has provided (T44-79, T41-57 and T44-61) only support an argument that the unvalidated Quattro system of monitoring is unsuitable for compliance monitoring, rather than the Type 1 validated Sentinex monitor. There is no reference to the Type 1 validated Sentinex monitor being inappropriate for compliance purposes. In fact, Mr Savery described data from the Type 1 validated Sentinex monitor as something 'you could bet your house on' (T44-79, line 29). OCAA submits the Type 1 validated Sentinex monitor is an accurate means of establishing noise contribution from NAC (with appropriate post-processing analysis), which is reliable for compliance purposes, as confirmed by NAC's own noise expert. See the cross-examination of Mr Elkin at T41-68 Lines 8-11, the SLR report included in the Statement of Evidence of Mr Elkin – Exhibit 1114 – NAC.0060 - at soft page 75, and the cross-examination of Mr Elkin at 44-62 lines 1-8.
F9	Noise monitoring data be provided in real-time on-line. The holder must make all noise monitoring data publicly available, online, and in real-time.	810	*[As recommended by Land Court]*	OCAA supports the Land Courts preferred condition, and objects to NAC's submission on the basis that noise monitoring data should be provided real time online, which should be 'publically available' at **[810].**

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Noise				
				There are numerous examples of continuous data being provided directly to public websites and no technical impediment to such a condition being complied with.
F10	**Noise management** A Noise and Vibration Management Plan must be developed by a suitably qualified and experienced person and to the satisfaction of the administering authority and must be implemented. The Noise and Vibration Management Plan must incorporate a program for continuous improvements for the management of noise emissions caused by mining operations and must include, but is not limited to: a) a detailed description of the noise management system; b) a description of the noise mitigation measures that would be implemented to ensure best practice noise management is being employed, is regularly benchmarked against contemporary industry standards and is regularly reviewed to ensure continual improvement; c) the Noise Monitoring Program described in condition F5 and Table F3 - Compliance noise monitoring location and frequency; d) a comprehensive noise management system that uses a combination of predictive meteorological forecasting and real-time noise monitoring data to guide the day to day planning of mining operations and the implementation of both proactive and reactive mitigation measures to ensure compliance with these conditions, improved understanding of noise data at the monitoring locations in Table F3 -	811	*[As recommended by Land Court]*	OCAA supports the condition preferred by the Land Court.

<table>
<tr><th>Condition</th><th>DES draft EA condition: black
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NAC changes disputed by OCAA: red
OCAA proposed changes: blue</th><th>Judgment paragraph</th><th>NAC's submissions</th><th>OCAA's submissions</th></tr>
<tr><td colspan="5">Agency interest: Noise</td></tr>
<tr><td></td><td>Compliance noise monitoring location and frequency and its correlation with the noise data collected from the locations specified in condition F8;
e) a protocol for determining exceedances of the conditions;
f) a protocol for recording and responding to complaints;
g) the content of the monthly compliance report required under Condition 3 of the imposed conditions of the Coordinator-General, including for the provision of data in that report. and a peer review of that content.</td><td></td><td></td><td></td></tr>
<tr><td>Table F3</td><td>Compliance noise monitoring location and frequency<table><tr><th>Monitoring location*</th><th>Frequency</th></tr><tr><td>1 (Acland)</td><td>Continuously</td></tr><tr><td>34 (rail spur), 35 and 38 (or alternative sensitive places identified in the Noise Monitoring Program developed pursuant to condition F5)</td><td>Continuously</td></tr><tr><td>4, 8 and 10 (or alternative sensitive places identified in the Noise Monitoring Program developed pursuant to condition F5)</td><td>Continuously</td></tr><tr><td>11, 15 and 19 (or alternative sensitive places identified in the Noise Monitoring</td><td>Continuously</td></tr></table></td><td>812</td><td>NAC submits that compliance monitoring should be monthly, whereas continuous monitoring is a management measure and not suitable as a compliance requirement.

Both experts agreed that the appropriate way to measure compliance is with attended monitoring, and that real time monitoring is a performance management tool. See the examination-in-chief of John Savery, at T44-79, cross- examination of John Savery at T47-30 and the cross-examination of Shane Elkin, at T41-57 and T44-61.

Compliance noise monitoring location and frequency<table><tr><th>Monitoring location*</th><th>Frequency</th></tr><tr><td>1 (Acland)</td><td>Monthly</td></tr><tr><td>34 (rail spur), 35 and 38 (or alternative sensitive places identified in the Noise</td><td>Monthly</td></tr></table></td><td>OCAA supports the condition preferred by the Land Court and opposes NAC's submission on the basis that the frequency should be constant to properly reflect the Land Court's recommendation.

Compliance monitoring should be continuous, as it will provide an unambiguous record of the noise emissions of the mine and a correlation of compliance performance with the noise limits.

It is also important that the meterological conditions, particularly wind speed, wind direction, temperature and humidity be logged and reported for the mine site alongside the noise compliance measurements at ground level and also at a height above ground level (typically 10m).</td></tr>
</table>

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Noise				
	Program developed pursuant to condition F5)		Monitoring Program developed pursuant to condition F5) 4, 8 and 10 (or alternative sensitive places identified in the Noise Monitoring Program developed pursuant to condition F5) 11, 15 and 19 (or alternative sensitive places identified in the Noise Monitoring Program developed pursuant to condition F5) — Monthly *See Figure 5 (Figure, Figure 3-1 Revised (New AclandAEIS))	
F11	*[The Court rejected proposed new condition A16]* NAC – proposed for insertion: **Mitigation** Upon receiving a written request from the owner of a noise sensitive place shown in **Figure X - Noise Sensitive Places (Mitigation)**, the environmental authority holder shall implement additional reasonable and feasible noise mitigation measures at the noise sensitive place in consultation with the owner. If within 3 months of receiving this request from the owner of the noise sensitive place, the environmental authority holder and the owner cannot agree on the measures to be implemented, or there is a dispute about the implementation of these measures, then either party	813	The proposed new condition has been amended to only apply to noise sensitive places. Figure X is intended to refer to Landholder Map 21, which was Ex.961 (Document ID: NAC:0128). **Mitigation** Upon receiving a written request from the owner of a noise sensitive place shown in **Figure X - Noise Sensitive Places (Mitigation)**, the environmental authority holder shall implement additional reasonable and feasible noise mitigation measures at the noise sensitive place in consultation with the owner. If within 3 months of receiving this request from the owner of the noise sensitive place, the environmental authority holder and the owner cannot agree on the measures to be implemented, or there is a dispute	OCAA supports the inclusion of condition A16 and Figure X subject to the proposed amendments, to ensure that any mitigation measures implemented under condition A16 will not prejudice the rights of the owner of a sensitive place. Figure X should also be circulated to all objectors to the Land Court proceedings to ensure all sensitive places are accurately shown.

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Noise				
	may refer the matter to a suitably qualified and experienced person appointed by the Chief Executive or the President for the time being of the Institute of Engineers for resolution. The suitably qualified and experienced person's decision as to the mitigation measures to be implemented shall be final. binding on the environmental authority holder. A mitigation measure implemented under condition A16, including any application of Figure X, does not limit the environmental authority holder's culpability under any other condition or prejudice the owner of a sensitive place's rights to seek any other remedy. The environmental authority holder is responsible for payment of costs of the suitably qualified and experienced person.		about the implementation of these measures, then either party may refer the matter to a suitably qualified and experienced person appointed by the Chief Executive or the President for the time being of the Institute of Engineers for resolution. The suitably qualified and experienced person's decision as to the mitigation measures to be implemented shall be final. The environmental authority holder is responsible for payment of costs of the suitably qualified and experienced person.	

Schedule I - Biodiversity

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Biodiversity				
I11	Should additional MSES species and communities be located that were not previously identified during field surveys, the development of management plans and/or additional offsets may be required to address any significant residual impacts for matters of state environmental significance in accordance with the EOS for the project.	1130	*[As recommended by Land Court]*	OCAA supports the condition preferred by the Land Court.
I12	Notification of the discovery of additional protected plants or MSES species and communities will be impacted is to be provided to the administering authority within five business days of the discovery. The proponent is required to propose how the species is to be managed and to seek advice from	1130	*[As recommended by Land Court]*	OCAA supports the condition preferred by the Land Court.

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	DEHP on the undertaking.			
18(b)	The surveys must be sufficient to identify the extent to which the following will be unavoidably impacted by the project: a) Protected wildlife listed under the *Nature Conservation Act* 1992; b) Matters of state environmental significance (M~~N~~SES) as defined by the State Planning Policy; and c) MNES as listed under the EPBC Act	1131	*[As recommended by Land Court]*	OCAA supports the condition preferred by the Land Court including the abbreviation "MNES" being changed to MSES for grammatical purposes.

Schedule M - Community

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Community				
M1	The holder of this environmental authority must record all environmental complaints received about the mining activities including: a) name, address and contact number for of the complainant; b) time and date of complaint; c) reasons for the complaint; d) investigations undertaken; e) conclusions formed; f) actions taken to resolve the complaint; g) any abatement measures implemented; and h) person responsible for resolving the complaint. The information as outlined in paragraphs (a) to (h) with the consent of the complainant, must be sent to the administering authority (and the complainant) within 28 days of the action taken to resolve the complaint.	1262-1263 1425-1426	*[As recommended by Land Court]*	OCAA supports the condition preferred by the Land Court.

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
M5	*[Court found that, to the greatest extent possible, post mining, NAC should be required to reopen as many closed roads as possible to give additional access to Acland in general and the war memorial in particular. The draft EA should be amended with the inclusion of special conditions to that effect.]*	866	*[As recommended by Land Court]* NAC must reopen as many closed roads as practicable at the conclusion of mining to give additional access to Acland in general and the war memorial in particular.	OCAA supports the condition preferred by the Land Court.
M6	Wherever practicable, any transportation of basalt from stockpiles within the mining lease areas must utilise haul roads and the like within the mining lease areas. Wherever possible, transportation of basalt from stockpiles within the mining lease area must be done by utilising roads within the mining lease area and, except where absolutely necessary, not by utilising public roads.	868	*[As recommended by Land Court]*	OCAA submits that NAC's comment on the proposed condition is much less onerous than the Land Court's recommended at **[868]**, and should be amended on this basis.

Schedule H – Land and Rehabilitation

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Land and Rehabilitation				
H1A	The topsoil should first be stripped off any place where out-of-pit dumping is to occur so as to cause as little loss of topsoil as possible. Excess topsoil be used for rehabilitation and not otherwise sterilised.	1294-1297	*[As recommended by Land Court]*	OCAA supports the condition preferred by the Land Court at **[1294]-[1297]**.

Definitions

DES draft EA condition: black **Changes agreed by OCAA: purple** **NAC changes disputed by OCAA: red** **OCAA proposed changes: blue**		**Judgment paragraph**	**NAC's submissions**	**OCAA's submissions**
Term	**Definition**			
Commencement of Stage 3 Mining Activities	*[The Court rejected proposed new definition on basis that dust and noise conditions should apply from commencement of the EA amendment and that Stage 3 had commenced.]*	814	NAC submits that Stage 3 has not commenced and therefore it is appropriate that this definition be included. **Commencement of Stage 3 Mining Activities** - The commencement of removal of overburden from ML 50232 for the Manning Vale East Pit, the Manning Vale West Pit or the Willeroo Pit as shown on Figure 1- Revised Project overview - Mine Area	OCAA supports the condition preferred by the Land Court and strongly objects to NAC's submission. Please see OCAA's submissions in relation to condition B1.
Sensitive Place	*[The Court rejected proposed amendment to the definition of 'sensitive place']*	598, 599, 814	The Court's reasons for rejecting the proposed amendment to the definition of 'sensitive place' related to air quality issues only. NAC submits that there is no reason why the separate term 'noise sensitive place' cannot be amended to exclude those places where an agreement is in place only in respect of noise conditions. **noise sensitive place** means: • a legal dwelling, caravan park, residential marina or other residential premises; or • a motel, hotel or hostel; or • a kindergarten, school, university or other educational institution; or • a medical centre or hospital; or • a protected area; or • a public park or gardens; and • includes the curtilage of any such place, but does not include places that are within the boundaries of the mining lease, nor places that are owned or leased by the holder of the environmental authority or its related companies or places for which an agreement has been entered into between the holder of the environmental authority and the owner of the place for the provision of alternative measures to mitigate the impact of mining activities for the Stage 3 New Acland Mine Project at the place.	OCAA supports the condition preferred by the Land Court and rejects NAC's submission, as: • it is not in accordance with the Land Court's recommendation; and • and is inappropriate as all people are entitled to an environment conducive to human health and well-being.

DES draft EA condition: black **Changes agreed by OCAA: purple** **NAC changes disputed by OCAA: red** **OCAA proposed changes: blue**		**Judgment paragraph**	**NAC's submissions**	**OCAA's submissions**
Term	**Definition**			
suitably qualified and experienced person in relation to air emissions	A person who is a Registered Professional Engineer of Queensland (RPEQ) under the provisions of the Professional Engineers Act 2002, and has demonstrated competency and relevant experience in relation to air emissions.	699-700	*[As recommended by Land Court]*	OCAA supports the condition preferred by the Land Court at **[699]-[700].**
suitably qualified person in relation to noise	A person who is a Registered Professional Engineer of Queensland (RPEQ) under the provisions of the Professional Engineers Act 2002, and has demonstrated competency and relevant experience as an acoustician.	815 and ~~699~~	*[As recommended by Land Court]*	OCAA supports the condition preferred by the Land Court at **[815].**

Schedule N – Figures

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
Agency interest: Figures				
Amendment to Figure 1	*[Proposed amendment to Figure 1 not recommended by Court]*	816	NAC submits that Figure 1 is out of date and will need to be changed. The RJ did not include a finding or conclusion that Figure 1 should not be amended. At RJ [816] the Court stated that it may well be inconsistent with the CG conditions, but did not determine this. In any event, NAC submits that inclusion of an updated Figure 1 would not be inconsistent with the CG conditions as Condition A2 Schedule 2 contains Figure 1 which is expressed to be "indicative only". Figure 1 should be amended to reflect the up-to-date approved plan of operations (See Land Court Exhibit 870 / TMP.0826 and paragraph 79.3 of NAC's submissions in the Land Court).	OCAA agrees with Member Smith's finding that changing the condition may be inconsistent with a CG condition. This would particularly be the case if NAC proposed a new map that purported to authorise mining of "West Pit" beyond what was applied for as "Manning Vale East Pit" in the revised Stage 3 applications. It is unclear which figure from NAC's plan of operations NAC is referring to, as the plan of operations (Exhibit 870) has since been updated and does not relate to Stage 3. . As noted earlier in relation to amendments to condition A2, OCAA submits that Figure 1 should be replaced with a map of better quality version of the same image as the image in the draft EA is almost illegible.
Figure X - Noise Sensitive Places (Mitigation)	*[Court noted that proposed Figure X would not be needed given its conclusions with respect to proposed condition A16]*	813	NAC submits that proposed new Figure X - Noise Sensitive Places (Mitigation) should be inserted for the purpose of proposed new condition F11 (above).	OCAA supports the inclusion of condition A16 and Figure X in accordance with its submissions above in relation to condition F11.

Other conditions

Condition	DES draft EA condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
	The holder will provide an independent counselling service to support local landowners with stress related matters resulting from mining activities. The holder must provide an independent counselling service funded by the holder to support local residents with support and assistance in dealing with concerns, stress, and emotional distress flowing from the holder's mining activities.	1259	*[As recommended by Land Court]*	OCAA supports the condition provided by NAC, with amendments to better reflect the Land Court's recommendation at **[1259].**

Mining Lease Conditions

Condition	DES draft ML condition: black Changes agreed by OCAA: purple NAC changes disputed by OCAA: red OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
TBD	*[MLA 50232 should contain a special condition requiring the following paragraphs of the Converge Report to be complied with, with respect to the Wells children's graves:* *21. In the case of the Wells' graves the location is uncertain. As the area has been ploughed there will be no visual evidence of the area originally disturbed for the graves. This is equally true if there are other graves at the site. The easiest approach it to strip the plough horizon by grater and examine the soil colouration below that level (probably about 600mm). This should be undertaken by an archaeologist familiar with this identification process. An alternative may be to use ground penetrating radar or other non-invasive processes. In this instance grating is the preferred approach as there is limited likelihood of significant remains being present to cause an anomaly. As this initial investigation process does not entail exhumation it appears that no permit is needed;* *22. It is desirable that the form, depth and nature of any burial is recorded and kept as an archival document as a record of such burial practices.]*	1435	The holder will: a. further investigate the location of the Wells children's graves; b. if any burial is located, the form, depth and nature of any burial must be recorded and kept as an archival document as a record of such burial practices; and c. comply with any legal requirements and have regard to policies and guidelines relating to removal of human remains.	OCAA supports the inclusion of condition recommended by the Land Court at **[1433]-[1435].** OCAA submits that NAC's proposed condition is lacking in detail, and the condition should require NAC to comply with the detailed requirements provided in the converge report at paragraphs 21 and 22 before it commences any activities on MLA 50232.

CG imposed conditions

Condition	CG EA condition: black OCAA proposed changes: blue	Judgment paragraph	NAC's submissions	OCAA's submissions
CG imposed conditions 17 & 18	**Condition 17. Social Impact Management Report (SIMR): pre-construction** (a) Commencing from the date of this Coordinator-General's Evaluation Report and up to the date of commencement of construction, every six months the proponent is to provide the SIMR to the Coordinator-General. The reports are to be made publicly available by the proponent. (b) The SIMR is to contain: (i) the actions taken to inform the community about project impacts and show that community concerns about project impacts have been taken into account, including the provision of all complaints received by NAC during this period (de-identified) and how NAC has sought to resolve those complaints (ii) the actions, outcomes and adaptive management strategies to avoid, manage or mitigate project-related impacts on community health safety and social infrastructure. The Coordinator-General is to have jurisdiction for this condition. **Condition 18. SIMR: construction and operation** (a) From commencement of construction, the proponent is to provide to the Coordinator-General on an annual basis for a period of five years, a SIMR (construction and operation). The reports are to be made publically available by the proponent. (b) The SIMR (construction and operation) is to describe: (i) the actions taken to inform the community about project impacts and show that community concerns about project impacts have been taken into account , including the provision of all complaints received by NAC during this period (de-identified) and how NAC has sought to resolve those complaints. (ii) the actions, outcomes and adaptive management strategies to avoid, manage or mitigate project-related impacts on community health safety and social infrastructure (iii) the actions, outcomes and adaptive management strategies to avoid, manage or mitigate project-related impacts on local and regional housing markets (iv) the actions, outcomes and adaptive management strategies to enhance local employment, training and development opportunities. The Coordinator-General is to have jurisdiction for this condition.	1424	*[NAC did not consider this condition]*	OCAA supports Member Smith's recommendation at [1424]. OCAA submits that, consistent with Bowskill J's principal reasons at [337], the Court can make a recommendation for approval conditional on CG's imposed conditions being amended to be consistent with the Court's recommendation. Such a clarification is consistent with the CG's stated conditions in the sense of complementing and adding to a CG condition.