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**

OCAA SUBMISSIONS ON JURISDICTION TO CONSIDER EXISTING MINING OPERATIONS

INTRODUCTION

[1] Member Smith found at [683]-[685] and [802] of his reasons that Stage 3 had already commenced with the mining of West Pit.[1]

[2] The Applicant (**NAC**) submitted in its outline in relation Member Smith's proposed amendments to condition B1 of the draft environmental authority (**EA**) to reflect his finding that Stage 3 had already commenced (with similar submissions for amendments to conditions B5-B12, F1, F2 and F3):[2]

> 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.

[3] NAC submitted in its further reply submissions in Table 2 (Amendments to the Draft Environmental Authority Conditions) filed on 24 September 2018, in relation to condition B1 (footnotes in original):[3]

> The subject of this hearing is the extension of mining (and a rail spur) into two new mining leases, MLA50232 and MLA700002. The observation of Member Smith that NAC in the "broad sense" has already undertaken Stage 3 activities within the existing mining leases is irrelevant to the condition, as

[1] As discussed in OCAA's outline for the rehearing, 8 August 2018, at [26]-[45].
[2] NAC outline of submissions for the remitted hearing, 17 July 2018, (**NAC's outline**), p 48 (condition B1). Similar submissions were made for similar amendments to the draft EA conditions at p 54 (conditions B5-B12) and pp 58-59 (conditions F1-F3).
[3] NAC's Table 2 (Amendments to the Draft Environmental Authority Conditions), filed on 24 September 2018 (**Table 2**), p 3. NAC made similar submissions in Table 2 in relation to condition A2 (p 2), B5-B12 (p 7), & F1 (p 10).

Environmental Defenders Office (Qld) Inc
8/205 Montague Rd West End QLD 4101
Telephone: (07) 3211 4466
Facsimile: (07) 3844 0766
Email: edoqld@edo.org.au

> the condition is to apply to mining activities the subject of the EA amendment. Existing Stage 2 mining activities are not the subject of this hearing.[4]
>
> The intent of the first paragraph of the proposed condition B1, as set out in the evidence of Mr Loveday, was to ensure the existing EA conditions applied until Stage 3 commenced.[5] The only suggested amendments that NAC proposes from the draft EA are for clarification purposes, i.e. to provide for a definition of "Commencement of Stage 3 Mining Activities" and to clarify that B5-B12 which regulate stage 2 cease to apply after the commencement of mining in the new MLs.
>
> NAC submits that it is not bound by Member Smith's recommendation for this condition as it is outside the scope of matters before the Land Court to impose a condition that seeks to regulate the existing Stage 2 mine.

[4] NAC also seeks to insert into the draft EA conditions a definition of the "Commencement of Stage 3 Mining Activities" making the commencement by reference only to activities (the removal of overburden) on ML 50232,[6] the Stage 3 mining lease (**ML**), and to change Figure 1 to:

(a) "reflect the up-to-date approved plan of operations";[7] or

(b) insert a new Figure 1 shown at p 65 in the marked-up version of the draft EA (Exhibit F) tendered yesterday, 2 October 2018, which extends the area shown for "Mining Areas" for Stage 2 to extend across the whole of the southwest corner of ML50216, the Stage 2 ML, where NAC is currently mining West Pit.

[5] NAC initially accepted that Member Smith's findings at [684], [685] and [802] that Stage 3 mining activities have commenced were binding findings,[8] but it now seeks to retract that acceptance in its further reply submissions, at least in relation to [802], which NAC claims is a "non-binding conclusion".[9]

[6] The Statutory Party's table of further submissions on consistency of proposed noise conditions with the CG's conditions, served 1 October 2018, accept that NAC's proposal to define the "Commencement of Stage 3 Mining Activities", making the commencement by reference only to activities (the removal of overburden) on ML 50232, in condition F2 and the definitions of the draft EA are consistent with the CG's conditions.

[7] These submissions address the Court's jurisdiction to consider the existing mining operations on Stage 2, in particular to respond to NAC's submissions that:

(a) the Court cannot recommend amendments to the draft EA conditions that apply to the existing mining activities on the stage 1 and 2 MLs; and

(b) the mining of West Pit is lawful and cannot be considered by the Court.

THE EA AMENDMENT APPLICATION RELATES TO MINING ON ALL FOUR MLs

[8] NAC's application to amend its existing EA to authorise Stage 3 was applied for and is being assessed as a "major amendment" pursuant to Ch 5, Pt 7 of the *Environmental Protection Act* 1994 (Qld) (**EPA**). Applying s 235 of that Part with necessary changes,

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[4] Also see sections 235 and 176 (2) (b) *EPA*.
[5] RJ [680].
[6] NAC's outline, p 67 and NAC's Table 2, p 10 (condition F2) and p 16 (definitions).
[7] NAC's Table 2, pp 2 and 17 in relation to condition A2 and Figure 1.
[8] NAC outline, p 27 (regarding [684]-[686]) and p 29 (regarding [802]).
[9] NAC Table 1 (Findings and conclusions), filed 24 September 2018, p 16.

the Court should consider the criteria in s 191 "only … to the extent they relate to the proposed amendment."

[9] It is clear from the application materials before the Court that the proposed amendment relates to integrated mining activities across all four MLs. Therefore, changes to the conditions for the existing mining operations are inherent in the application and within the jurisdiction of the Court to consider.

[10] NAC's EA amendment application, made 13 April 2015, described the tenures that the application related to as all four MLs:[10]

> TENURE DETAILS (IF APPLICABLE)
>
> MINING LEASES 50170 AND 50216 AND MINING LEASE APPLICATIONS 50232 AND 700002

[11] The EA amendment application also included "Attachment 1 – Map of New Acland Coal Mine Stage 3 Expansion" (see Exhibit 2; EHP.0002) showing the application area, which showed the application relating to all four MLs, including:[11]

(a) two mining pits (Manning Vale East Pit and Willeroo Pit) spanning both MLA50232 and ML50216;

(b) coal processing and handling areas on ML50170 and ML50216 (shown as green, blue and yellow shapes but not specifically identified in the key); and

(c) an internal haulage road to link the coal processing and handling areas on ML50170 and ML50216 to the rail loop in the southwest corner of MLA50232.

[12] Similarly, the CG Report described the project by reference to all four MLs, including coal processing and handling areas on ML50170 and ML50216:[12]

> ## 2.2 Project description
>
> The project is located around 160 kilometres (km) west of Brisbane, 35km north-west of Toowoomba, and 14km north-west of the town of Oakey.
>
> The New Acland Stage 3 project proposes expansion of the existing open-cut NAC mine to produce up to 7.5Mtpa of thermal coal until the year 2029, or an approximately 12 year period depending on when construction commences.
>
> Figure 2.1 shows the location of the project.
>
> …

[10] See Exh 3, EHP.0003, soft page 36.
[11] See Exh 2; EHP.0002.
[12] Exh 16; EHP.0016, soft pages 12-14.

2.2.1 Project components

The key components of the project include:

- mining in three new pits, namely, the Manning Vale West, Manning Vale East and Willeroo pits
- mining and out-of-pit dumps located on mining lease 50216
- emplacement of two out-of-pit spoil dumps associated with the Manning Vale and Willeroo mine pits
- construction of a new eight kilometre-long rail spur line and balloon loop on mining lease application (MLA) (infrastructure) 700001 from Jondaryan onto MLA50232
- construction of the Train Load-out Facility (TLF) within MLA50232
- construction of a Materials Handling Facility (MHF) on mining lease 50216
- upgrade of the existing Coal Handling Preparation Plant (CHPP) complex, ROM and product coal stockpile areas and supporting infrastructure on mining lease 50170
- relocation and potential upgrade of the current power supply for the mine operation and the local 11kV distribution system
- decommissioning of the existing mine's Jondaryan Rail Load-out Facility (JRLF)
- relocation and potential upgrade of the existing local telecommunication network.

The project's disturbance footprint will total around 1,466 hectares (ha). Within this, the three open-cut areas will equate to around 1,201ha. The final voids will total around 457ha, have depths ranging between 60–80 metres (m) and be profiled with slopes from 8 to 19 degrees.

[13] The draft EA also describes the location of the environmentally relevant activities for the amended EA by reference to all four MLs, as follows:[13]

Location(s)
ML50170
ML50216
ML700002
ML50232

[14] It is clear that the EA application involved an integrated activity spanning all 4 MLs, including Stage 1, 2 & 3 MLs for mine pits, transport to CHPP & Material Handling Facility, transport to rail spur & rail spur.

[15] As a consequence, NAC's submissions that the Court cannot consider or recommend conditions applying to the existing mining activities on ML 50170 (originally the Stage 1 ML but also used for Stage 2 and 3) or ML 50216 (originally the Stage 2 ML but also used in Stage 3) is wrong (both factually and legally).

[16] Were the Court to exclude the activities on Stage 1 and 2 MLs (ML50170 & ML50216) from consideration, it would be an error of law as a misapprehension of the Court's function and power.

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[13] See Exh 9; EHP.0009, soft page 1.

IMPACTS OF STAGE 2 MINING ACTIVITIES ARE RELEVANT

[17] The Court must consider the impacts of Stage 3 mining activities in the context of cumulative impacts on the environment and the lawful limits of Stage 2 mining activities, including:

(a) in considering whether the Stage 3 will cause "any adverse environmental impact" (s 269(4)(j) MRA); and

(b) the "character, resilience and values of the receiving environment" as part of the Standard Criteria for s 191(g) of the EPA.

[18] Therefore, the impacts (and lawful limits) of Stage 2 mining activities are not irrelevant to the Court's statutory function, task or jurisdiction under s 269 of the *Mineral Resources Act* 1989 (Qld) (**MRA**) and ss 190 and 191 of the EPA.

MINING WEST PIT IS UNLAWFUL

[19] Contrary to NAC's submissions, the Statutory Party's seeming acceptance,[14] and OCAA's submissions before Member Smith (which involved an error of law addressed in the next section), the mining of West Pit or any areas outside the mine pits footprints NAC applied for in seeking approval for Stage 2 are unlawful under the existing EA for Stage 2 and the EPA.

[20] The reasons for this require consideration of what NAC applied for in seeking approval for Stage 2, the statutory context of the Stage 2 approval, and interpretation of the existing EA.

Error of law in OCAA's submissions to Member Smith

[21] OCAA's closing submissions before Member Smith contained an error of law by accepting or assuming that the mining of West Pit was lawful.[15]

[22] That error affects the jurisdiction of the Court to consider the Stage 3 applications and needs to be corrected at this point.

Stage 2 application process

[23] On 1 February 2005 NAC applied under the MRA for MLA 50216 to expand the mine to Stage 2.

[24] NAC also applied to amend its EA under the EPA for Stage 2 in 2005.

[25] NAC applied under s 70 of the EPA to have Stage 2 of the mine assessed by an environmental impact statement (**EIS**) prepared under Ch 3 of the EPA and the project was assessed in this manner in 2005-2006. The terms of reference of the EIS described the project on p 5, relevantly as:[16]

> Briefly the project will:
>
> …

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[14] See Mr Loveday's evidence at T80-57, lines 40-45.
[15] e.g. OCAA's closing submissions to Member Smith, 13 September 2016, at [1649], [1786](a) & [1809].
[16] The Terms of Reference were attached to the Stage 2 EIS in Ch 16 / s 16 (Exhibit 1150; TMP.0931).

- require the gradual development of two new open cut areas, South and Centre Pits, by 2007 and 2013, respectively; …

[26] The EIS process involved public notification and submission processes.

[27] New Hope Coal Australia (**NHCA**), at the time a trading name of the parent company of NAC, described the project in the EIS for Stage 2 in 2006 as follows:[17]

> The New Acland Coal Mine Stage 2 Expansion Project ('Project') involves the expansion of the mine producing thermal coal for the export and domestic markets … until approximately 2021.
>
> The key elements of the Project are:
>
> - Expansion of the existing mining activities by the addition of the South and Centre Pits resource areas within Mining Lease Application (MLA) 50216 to the existing North Pit on ML 50170.
> - …
>
> The main elements of the Project area shown in Figure 2.1.

[28] NHCA made no mention in the EIS project description for Stage 2 of "West Pit" or mining outside of three named pits: South, Centre and North Pits (note that "Centre Pit" is sometimes called "Central Pit" in later NAC documents).

[29] Similarly, NHCA made no mention of any "West Pit" in describing Stage 2 when discussing the coal resources and coal reserves in the EIS:[18]

> The Project involves the on-going development of the existing North Pit on ML 50170 and the commissioning of two additional resource areas – South and Centre Pits. The three pits will be developed sequentially to supply up to 4 Mtpa of saleable product coal per year until 2021 to both the export and domestic markets. …

[30] The mine footprint for the Stage 2 was shown in the EIS Ch 2 (Description of Project) Fig 2-1, January 2006.[19] Three pits were shown: 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.

[31] No public objections were lodged to Stage 2 and ML 50216 was subsequently granted for a term of 20 years on 7 December 2006 and commenced on 1 January 2007.

Statutory context of the Stage 2 approval

[32] At the time Stage 2 of the mine was approved in 2006 the major approvals required for large mines or expansions of existing mines were under the MRA and EPA.

[33] In 2006 when the application for MLA 50216 for Stage 2 of the mine was assessed under the MRA, Pt 7 of the MRA provided the application process, within which:

(a) Section 234 allowed the Governor in Council to grant a mining lease;

(b) Section 245 provided for applications for mining leases to be made in the approved form and including specifying "the boundaries of the land applied for";

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[17] New Hope Coal (Australia), *New Acland Coal Mine Stage 2 Expansion Project Environmental Impact Statement*, January 2006, Ch 2 (Description of Project), s 2.1 (Key Elements of the Project), p 2-1 (Exhibit 871; TMP.0827). A similar description was provided in the Executive Summary and at other points in the EIS.
[18] Ibid, s 2.3 (The Coal Mine), p 2-4 (Exhibit 871; TMP.0827).
[19] Exhibit 871; TMP.0827 (reproduced in OCAA's outline at p 7 and OCAA's site visit bundle (Exhibit E), p 4).

(c) Section 260 provided a right to lodge an objection to the application;

(d) Sections 265-269 provided for an objection hearing before the Land and Resources Tribunal (**LRT**); and

(e) Section 271 provided for the Minister administering the MRA to "recommend to the Governor in Council that a mining lease be granted and an instrument of lease be issued to the applicant with respect to the whole or part of the land the subject of the application" or "to reject the application."

[34] In 2006 when the application for the EA for Stage 2 was assessed under the EPA, applications for EAs were assessed under Ch 5, within which:

(a) Ch 3 provided an EIS process for mines that did not undergo an EIS under the *State Development and Public Works Organisation Act 1971* (Qld);

(b) Ch 6, Pt 6 provided for processing non-code compliant applications for environmental authority (mining lease) for level 1 mining projects, which Stage 2 was;

(c) Sections 211-213 provided for public notice of the application;

(d) Section 212 provided that the public notice must include "a description of each relevant mining activity" and "the land on which the mining activities are to be carried out."

(e) Section 216 provided a right for any person to object to the application;

(f) Sections 219-223 provided for an objection hearing before the LRT;

(g) Section 225 provided for the EPA Minister to approve or refuse "the application":

> **225 EPA Minister's decision on application**
>
> (1) The EPA Minister must make 1 of the following decisions (the *Minister's decision*)—
>
> (a) that the application be granted on the basis of the draft environmental authority for the application;
>
> (b) that the application be granted, but on conditions stated in the Minister's decision that are different to the conditions in the draft;
>
> (c) that the application be refused.

[35] Stage 2 of the mine was assessed by an EIS prepared under Ch 3 of the EPA in 2005-2006. The terms of reference of the EIS described the project on p 5, relevantly as "the graduate development of two new open cut areas, South and Centre Pits, by 2007 and 2013, respectively."[20]

[36] While the existing EA was originally granted under the EPA in force in 2006, any offences of the EPA due to recent or current mining activities at the mine must be assessed against the EPA in force at the time of the offences, hence the current version of the EPA is relevant for considering such offences.

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[20] The Terms of Reference were attached to the Stage 2 EIS in Ch 16 / s 16 (Exhibit 1150; TMP.0931).

[37] Under the current version of the EPA, as relevant here:

(a) Section 9 defines "environmental value" as, relevantly, a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety".

(b) Section 14(1) defines "environmental harm" as "any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance."

(c) Section 426 makes it an offence to carry out an environmentally relevant activity "unless the person holds, or is acting under, an EA for the activity."

(d) Section 430 makes it an offence to contravene a condition of an EA;

(e) Section 437 makes it an offence to unlawfully cause serious environmental harm.[21]

(f) Section 438 makes it an offence to unlawfully cause material environmental harm.[22]

(g) Section 440 makes it an offence to unlawfully cause environmental nuisance.[23]

(h) Section 493A defines unlawful environmental harm, relevantly as follows:

> **493A When environmental harm or related acts are unlawful**
>
> (1) This section applies in relation to any of the following acts (***relevant acts***)—
>
> (a) an act that causes serious or material environmental harm or an environmental nuisance;
>
> (b) an act that contravenes a noise standard;
>
> (c) a deposit of a contaminant, or release of stormwater run-off, mentioned in section 440ZG.
>
> *Note—*
>
> See chapter 8, part 3 (Offences relating to environmental harm), section 440Q (Offence of contravening a noise standard) and section 440ZG (Depositing prescribed water contaminants in waters and related matters).
>
> (2) A relevant act is unlawful unless it is authorised to be done under—
>
> (a) an environmental protection policy; or
>
> (b) a transitional environmental program; or
>
> (c) an environmental protection order; or
>
> (d) an environmental authority; or
>
> (e) a development condition of a development approval; or
>
> (f) a prescribed condition for a small scale mining activity; or

[21] EPA, s 17 defines "serious environmental harm" and s 493A defines "unlawful environmental harm".
[22] EPA, s 16 defines "material environmental harm" and s 493A defines "unlawful environmental harm".
[23] EPA, s 15 defines "environmental nuisance" and s 493A defines "unlawful environmental harm".

> (g) an emergency direction; or
>
> (h) an authorisation under the *Petroleum and Gas (Production and Safety) Act 2004*, section 294B and the authorisation relates to a bore or well mentioned in section 294B(1)(a) or (c) of that Act.
>
> (3) However, it is a defence to a charge of unlawfully doing a relevant act to prove—
>
> (a) the relevant act was done while carrying out an activity that is lawful apart from this Act; and
>
> (b) the defendant complied with the general environmental duty.
>
> …

[38] In relation to the statutory context, a further provision of note in the EPA is s 291, which provides that an EA prevails to the extent of inconsistency over a plan of operations for a mine:

> **291 Environmental authority overrides plan**
>
> (1) This section applies if there is any inconsistency between the environmental authority and a plan of operations.
>
> (2) The authority prevails to the extent of the inconsistency.
>
> (3) The environmental authority holder must, within 15 business days after the holder becomes aware of the inconsistency, amend the plan to remove the inconsistency.
>
> Maximum penalty for subsection (3)—100 penalty units.

[39] Section 291 of the EPA is particularly relevant to establish that the 2015 Plan of Operations[24] showing "West Pit", or the June 2018 Plan of Operations,[25] do not have the effect of making NAC's actions in mining West Pit lawful. A plan of operations is not "approved" by the administering authority, as NAC submits, it is merely "given" to the administering authority by the EA holder.[26] A plan of operations that exceeds what is authorised under an EA is inconsistent with the EA and the EA prevails in this situation.[27]

Relevant conditions of the existing EA

[40] The most recent version of the current EA for the mine was signed on 15 July 2015.[28]

[41] The covering page of the existing EA lists the "location details" for the environmentally relevant activity (**ERA**) for mining by reference to ML50170 and ML50216:

Environmentally relevant activity and location details

Environmentally relevant activity(ies)	Location(s)
Schedule 2A ERA 13 Mining Black Coal Schedule 2 ERA 31 (2) (b) Mineral processing >100,000t/year	ML50170 ML50216

[24] Exhibit 870; TMP0826.
[25] Exhibit J.
[26] EPA, s 289.
[27] EPA, s 291.
[28] Exhibit 15.

[42] This description of the location indicates that the two listed environmentally relevant activities may be conducted within the whole of the area granted for the MLs but "mining activity" includes a wide range of activities related to mining, including rehabilitation and buffer areas, not merely digging the open-cut mine pits.[29]

[43] The EA also states on its covering page:

> An environmental authority authorises the carrying out of an ERA and does not authorise any environmental harm unless a condition stated by the authority specifically authorises environmental harm.

[44] There is no condition in the existing EA expressly stating or delimiting the area in which environmental harm associated with the construction of any mining pits is authorised (e.g. by damaging environmental values associated with vegetation and fauna on the site, digging the mining pits, and interfering with groundwater).

[45] Put another way, it is not possible to read only the existing EA and know where environmental harm can be caused by construction of mine pits. The existing EA does not identify where environmental harm can be caused by construction of mine pits. It cannot be interpreted in isolation without reference to the application documents in this regard.

[46] Conditions E1 and E2 of the existing EA provide some limits on disturbance by reference to Map 2 – Schedule K but do not specifically authorise environmental harm associated with any mining pits. These conditions provide:

> **Schedule E – Land**
>
> **Buffer Zone**
>
> (E1) The holder of the environmental authority must not cause any disturbance within 50 metres of the high bank of Lagoon Creek (buffer zone) as shown on Map 2 - Schedule K unless in accordance with condition E2 and E3.
>
> (E2) The holder of the environmental authority is authorised to construct and maintain a flood protection levee and access road for inspection purposes, with the tow of the levee being no closer than 50 metres from the high bank of Lagoon Creek as shown on Map 2 - Schedule K.

[47] The legibility of Map 1(Surface water monitoring points) of Schedule K to the existing EA in Exhibit 15 is quite poor but is just possible to identify the words "Central Pit" and "South Pit" in red letters on it.

[48] Map 1 of Schedule K was taken from the Stage 2 EIS in January 2006.[30] The map comes from Figure 4-16, p 4-14, in Ch 4 (Water Resources) of the EIS[31] and the legibility of that map is much better than in Exhibit 15. The same map is also included in Appendix A to the Draft Environmental Management Plan, which was Ch 16 of the Stage 2 EIS. It shows the boundaries of Central Pit and South Pit in pink but no "West Pit".

[49] Map 2 of Schedule K in the EA shows Lagoon Creek running on the south-eastern and eastern sides of South Pit, which is the opposite side to where West Pit has now been constructed.

[50] It might be implied from Map 1 and Map 2 of Schedule K that the mine pit boundaries shown in them reflect the mine footprint approved by the existing EA expressly stated by the conditions. The mine pit footprint applied for is clearly depicted in the existing EA.

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[29] See EPA (as in force at 7 December 2006), s 147.
[30] Exhibits 1130-1153.
[31] Exhibit 1135.

[51] The interpretation of these conditions is discussed below.

Effect of Plan of Operations

[52] Plans of Operations are required for mining activities and petroleum leases under the EPA.[32] They provide an "action plan" detailing how a mine will be operated to comply with the conditions of the EA and other requirements of the EPA, including matters such as rehabilitation and waste management.[33]

[53] A number of conditions of the existing EA make cross-references to relatively minor matters to be addressed under the "Plan of Operations". These include:

(a) condition A7 regarding the monitoring program;

(b) condition C1 (water management plan);

(c) the note to Sch E – Table 1 (Final Land Use and Rehabilitation Approval Schedule); and

(d) condition E30 (decommissioning of dams).

[54] Plans of Operation do not over-ride the conditions of an EA or authorise environmental harm because:

(a) Plans of Operations are subsidiary documents that do not affect the proper construction of an EA for a mining activity;[34]

(b) Plans of Operations given to the administering authority under s 289 of the EPA are not "approved" by the administering authority;

(c) Plans of Operations that exceed or are inconsistent with what is approved under an EA are invalid to the extent of inconsistency;[35] and

(d) It would subvert the statutory process for public notification, EIS and objection rights in the EPA for EA applications and amendments, if a Plan of Operations could authorise substantially different mining activities having far greater impacts on the environment and surrounding landholders that was applied for and publicly advertised for the EIS and EA of a mining activity.

(e) Allowing a Plan of Operations to substantially alter a mining activity after an EA was publicly advertised and approved and public objection rights had passed would mean approval of the EA would lack finality or certainty.[36]

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[32] See in the current version of the EPA, Ch 5, Part 12, Div 1, ss 285-291.
[33] See EPA, s 288.
[34] This is evident from the construction of the EPA in which the EA is the primary document approving a mining activity (see EPA, ss 288, 291). The EA is publicly advertised and open to objections; a Plan of Operations is not.
[35] EPA, s 291.
[36] *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737-739 per Priestley JA, 739-740 per Clarke JA and 740-741 per Meagher JA.

Proper construction of the existing EA

Relevant principles

[55] The principles for interpreting what an approval (including conditions of approval) authorises have been considered extensively in the context of other legislative schemes but few cases have dealt with compliance with conditions of an EA granted under the EPA.

[56] Wilcox J's judgment in *Hubertus Schuetzenverein Liverpool Rifle Club Ltd v Commonwealth* (1994) 51 FCR 213 (***Hubertus***) is an oft-cited decision in relation to the extent to which application documents can be referred to in construing the scope of development consents. In it, his Honour stated at 222:

> The authorities clearly establish that it is legitimate, in construing a development consent, to look at the plans that accompanied the application. However, this may be done only where the consent document expressly or inferentially incorporates the terms of the application and only where this is necessary for the purpose of *interpreting* the consent. … It is not legitimate to look at the documents that accompanied the application, or even the application itself, to contradict (whether by way of extension or contraction) the scope of a consent stated in clear terms.

[57] The relevant facts in *Hubertus* were that a rifle club had applied to a council for approval of a sporting facility and included in its application a plan showing a number of facilities such as a "clubhouse" and "playground". The council had responded in a letter and later formal consent by reference to the application and the facilities proposed on the land.

[58] Wilcox J held that to determine what the council had approved it would be legitimate to look at the plan submitted by the applicant in which each of the facilities was graphically described. His Honour continued at 222:

> To look at the plan for that purpose would be to use it to interpret the consent. But it is not legitimate, in my opinion, to look at the plan for the purpose of extending the consent; or for the purpose of adding a facility that was not mentioned in the consent document to those listed as approved. This would be to use the plan to contradict the document, not to interpret it.

[59] Rackemann DCJ stated in construing a development approval granted by a local government under the *Integrated Planning Act 1997* (Qld) (**IPA**) in *Brisville Pty Ltd v BCC* [2007] QPEC 63; (2007) QPELR 637 at [8]-[9] (footnotes in original):[37]

> [7] … In construing an approval, the search is not for what the Council may have intended or the applicant understood. Each approval must speak according to its written terms, construed in context, but having regard to its enduring function.[38]

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[37] Another useful summary of the law is found in *Transpacific Industries Group v Ipswich City Council* [2012] QPEC 069; (2013) QPELR 70 at [11]-[16] (Robin QC, DCJ); and *Nadic Investments Pty Ltd v Townsville City Council and Stockland Developments Pty Ltd* [2015] QPEC 040; [2015] QPELR 879 at [23]-[27] (Bowskill QC DCJ)**.** See also *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd* [2017] 1 Qd R 13; [2016] QCA 019 at [42]-[45] per Margaret McMurdo P (with whom Atkinson J agreed) and at [79]-[87] per Morrison JA (who dissenting on the result but not as to the relevant principles to be applied).

[38] See *Auburn Municipal Council v Szabo* (1971) 67 LGRA 427 at 433-4; *House of Peace Pty Ltd v Bankstown City Council* (2000) 106 LGERA 440; and *Serenity Lakes Noosa Pty Ltd v Noosa Shire Council* [2007] QPEC 005 at para [6].

> [8] ... the construction of a development permit is undertaken having regard primarily to the terms of the approval, as it appears on its face, together with other material, such as approved plans, where they are incorporated expressly or by necessarily implication.[39] ...
>
> [9] Permissible extrinsic evidence may include evidence of the "physical reality"[40] as at the time of approval (eg. the nature of the site and, I accept, its context), if that assists in understanding the subject matter and meaning of the approval or a condition contained within it. Expert evidence may also be called to explain technical terms. The scope for extrinsic evidence is however, limited.

[60] That is, generally the application material is only able to referred to when interpreting a development approval if it is incorporated into the development approval *expressly or by necessary implication*. It is common for development approvals to expressly include a condition that the development "comply with the approved plans".[41]

[61] Ambiguity in a condition will generally be construed in a way which places the least burden on the landowner[42] (i.e. ambiguity will be resolved in favour of the person who is said to have breached the condition). The ambiguity, however, must be a genuine one.[43] Rackemann DCJ stated in *Brisville Pty Ltd v BCC* [2007] QPEC 63; (2007) QPELR 637 at [39]:

> [39] I accept, that the evident purpose of the condition or conditions of approval ought be considered in the construction process [analogous to contemporary approaches to statutory interpretation]. I would also not discard a construction which was otherwise tolerably clear, simply because there was another available construction which placed a lesser burden on the land owner. … That is not to say however, that the relative burden on the land owner is irrelevant in resolving residual ambiguity.

[62] A somewhat different approach to construction of conditions under the EPA was adopted by Robertson DCJ in *Swan v Santos GLNG Pty Ltd & Ors* [2017] QPEC 2 at [138]-[140]:

> [138] In dealing with what are essentially civil proceedings, with significant potential detriment to Santos e.g. the finding of criminal conduct albeit in a civil proceeding; it is essential that the Court construe those conditions said to be contravened in accordance with established principles of statutory construction.
>
> [139] Environmental Authorities (EAs) are statutory instruments, pursuant to the *Statutory Instruments Act 1992* (ss 6, 7(2)(c), 7(3)); and by s 14 and Sch 1 of that act, s 14A(1), s 14B(1) and s 35C of the *Acts Interpretation Act* 1954 applies so that:
>
> (a) the interpretation is to be preferred that best achieves the purposes of the EA;
>
> (b) regard may be had to extrinsic material, provided certain circumstances exist; and
>
> (c) any heading to a provision of the EA forms part of that provision.
>
> [140] Planning schemes are also statutory instruments and, in accordance with well-known principles, are to be construed purposefully, in a practical and common sense way, and broadly rather than pedantically or narrowly. In its written outline, Santos relies upon statements of principle that suggest (as indeed most of the authorities dealing with planning schemes suggest), that a practical

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[39] *Aqua Blue Noosa Pty Ltd v Noosa Shire Council* [2005] QPELR 318, *Hubertus Schuetzenverein Liverpool Rifle Club v Commonwealth of Australia* (1994) 85 LGERA 37.
[40] *Caloundra City Council v Pelican Links Pty Ltd* [2005] QCA 84 per Keane JA at [22], [23].
[41] See, e.g. *Brisville Pty Ltd v BCC* [2007] QPEC 63; (2007) QPELR 637 at [18].
[42] *Matijesivic v Logan City Council* [1984] 1 Qd R 599 at 605; (1983) 51 LGRA 51 at 57; *Mariner Construction Pty Ltd & Ors v Maroochy Shire Council* [2000] QPEC 31; [2000] QPELR 334; *BP Australia Ltd v Caboolture Shire Council* [2004] QPEC 012 at [6] per Quirk DCJ; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [65]-[66] per Robertson DCJ; *Transpacific Industries Group v Ipswich City Council* [2012] QPEC 069; (2013) QPELR 70 at [14] (Robin QC, DCJ).
[43] See *Caloundra CC v Pelican Links Pty Ltd* [2004] QPEC 52; [2005] QPELR 128; *Caloundra CC v Pelican Links Pty Ltd & Anor* [2005] QCA 84; [2005] QPELR 596; and *Lucy v OCC Holdings P/L* [2008] QDC 4.

> common sense approach is appropriate to construction of statutory instruments "rather than by meticulous comparison of the language of their various provisions, such as might be appropriate in construing sections of an act of Parliament…": *Gill v Donald Humberstone & Co Ltd* [1963] 3 All ER 180 at [183].

[63] The principles stated by Robertson DCJ in *Swan v Santos GLNG* for construing the conditions of an environmental authority clearly are persuasive; however, his Honour made no mention of the contrary, well established principle that genuine ambiguity in a condition will generally be construed in a way which places the least burden on the landowner.[44] Further cases are likely to address which approach is correct or merge them together.[45]

[64] Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said in *Weston Aluminium Pty Ltd v EPA (NSW)* [2007] HCA 50; (2007) 239 ALR 641; 82 ALJR 74; 156 LGERA 283 (***Weston***) at [14] and [17] in the context of construing s 91(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and whether two approvals authorised a use of land that had not been applied for:

> [14] Thirdly, in 1981, s 91(1) of the EPA Act provided that a development application was to be determined by:
>
> (a) the granting of consent to that application, either unconditionally or subject to conditions; or (b) the refusing of consent to that application.
>
> A development consent thus hinged about the application made by the party seeking consent. It was the application that marked out the boundaries of the consent sought. The consenting authority responded to what was sought by granting or refusing consent and, if consent was granted, doing so either unconditionally or subject to conditions. …
>
> [17] The general approach to construction of development consents [is not disputed by the parties in this case]. It is an approach reflected in a number of decisions of the Court of Appeal of New South Wales to which reference was made.[46] Whether … reference may not be made when construing a consent to anything but the consent itself and any documents incorporated expressly or by necessary implication need not be examined. In particular, it is not necessary in this case to consider what reference may be made to the development application to which the consent responds.

[65] Member Cochrane applied these principles in construing what activities and environmental harm was authorized by an environmental authority granted under the EPA in respect of petroleum pipeline licences in *QGC (Infrastructure) Pty Limited v Chief Executive Department of Environment & Heritage Protection* [2016] QLC 27 at [182]-[185]:

> [182] Mr Hinson for the respondent drew the Court's attention to the decision in *Weston Aluminium v Environment Protection Authority*[47] where it was said in the context of the New South Wales Environment Protection Authority and the *Environmental Planning and Assessment Act* and a licence to import aluminium dross where it was said:[48]
>
> > "A development consent thus hinged about the application made by the parties seeking consent. It was the application that marked out the boundaries of the consent sought. The consuming

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[44] *Matijesevic v Logan City Council (No 2)* (1983) 51 LGRA 51 at 57; *Mariner Construction Pty Ltd & Ors v Maroochy Shire Council* [2000] QPEC 31; [2000] QPELR 334; *BP Australia Ltd v Caboolture Shire Council* [2004] QPEC 012 at [6] per Quirk DCJ; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [65]-[66] per Robertson DCJ.

[45] Similar to the approach in *Brisville Pty Ltd v BCC* [2007] QPEC 63; (2007) QPELR 637 at [8]-[9].

[46] For example, *Royal* Agricultural *Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305 at 310–11 per McHugh JA; *North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd* (1989) 16 NSWLR 50 at 59 per Kirby P; *House of Peace Pty Ltd v Bankstown CC* (2000) 48 NSWLR 498; [2000] NSWCA 44.

[47] *Weston Aluminium v Environment Protection Authority* (2007) 82 ALJR 74

[48] Ibid [14].

> authority responded to what was sought by granting a refusing consent and, if consent was granted, doing so either unconditionally or subject to conditions.
>
> [183] That dicta of the High Court of Australia seems apposite in the present case.
>
> [184] Mr Hinson also drew the Court's attention to *Sericott Pty Ltd v Snowy River Shire Council*[49] where similar sentiments to the High Court decision were expressed.
>
> [185] In that case Beazley JA said:[50]
>
> > "The consent granted, can of course, be no wider than the application to which it relates."

[66] Reflecting this final point, a consent may be unlawful if conditions attached to it have the effect of significantly altering the development in respect of which the consent is made or if the effect of an imposed condition is to leave open the *possibility* that development will be significantly different from the development for which application was made.[51]

Applying these principles to construe the existing EA

[67] Here, where the existing EA does not expressly limit the mining footprint, two critical issues are:

(a) the extent that the existing EA impliedly limits the mine footprint to what NAC applied for in 2005; and

(b) whether the application documents can be referred to in interpreting the existing EA.

[68] In relation to these issues it is noteworthy in considering the text and other content of the existing EA itself that:

(a) The footprint of the mine pits is shown in Maps 1 and 2 annexed to the existing EA in Schudule K.

(b) Condition A1 (Financial assurance) of the existing EA refers to a financial assurance being given to the administering authority "prior to the commencement of activities proposed under this Environmental Authority", which requires consideration of the activities applied for to determine what the condition requires;

(c) A number of conditions (e.g. condition B1 (dust nuisance)) refer to "the mining activity", which is ambiguous but read in context appear to refer to the mining activity applied for.

(d) The existing EA contains many conditions referring to facilities and landmarks on the mine site, such as the "Tailings Storage Facility".[52] Applying the reasoning in *Hubertus*, it is legitimate to refer to the application documents to interpret these aspects of the EA.

(e) Condition E19(b) states "residual voids must comply with Schedule E – Table 3" and that table refers only to the "Central Pit/South Pit Void" and the location of these pits

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[49] *Sericott Pty Ltd v Snowy River Shire Council* (1999) 108 LGERA 66.
[50] Ibid [46].
[51] *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737-738 per Priestley JA with whom Clarke and Meagher JJA agreed.
[52] E.g. condition E14 of the existing EA.

is shown in Map 1 (Surface water monitoring points) and Map 2 (Lagoon Creek, buffer and levee) in Sch K – Maps of the existing EA.

(f) No reference is made in the EA to "West Pit" or any mine pit other than North Pit, Central Pit and South Pit (as shown in Map 1 annexed to the EA).

[69] In addition to these matters contained in the EA itself, the principles stated by the High Court at [14] of *Weston* are apposite for construing an EA granted in 2006 under the (then) power in s 225 of the EPA:

> **225 EPA Minister's decision on application**
>
> (1) The EPA Minister must make 1 of the following decisions (the *Minister's decision*)—
>
> (a) that the application be granted on the basis of the draft environmental authority for the application;
>
> (b) that the application be granted, but on conditions stated in the Minister's decision that are different to the conditions in the draft;
>
> (c) that the application be refused.

[70] In addition to the construction of s 225 of the EPA in force when the existing EA was granted indicating that the application for the EA marked out the boundaries of the consent sought and granted by the EPA Minister in 2006, authority to cause environmental harm within the mining footprint applied for appears to be a necessary implication of the existing EA.

[71] While the mining footprint is not expressly limited to the boundaries shown in Map 1 attached to the existing EA, which were the Stage 2 mine pits applied for in 2005, it appears the limitation to these boundaries is a necessary implication of the EA because if it is not incorporated the existing EA does not authorize environmental harm associated with constructing the mining pits (e.g. the environmental harm due to clearing vegetation, excavating the mining pits, etc).

[72] The existing EA states on page 1 that it "does not authorise any environmental harm unless a condition stated by the authority specifically authorises environmental harm."

[73] It is, therefore, necessary to imply that the existing EA authorizes environmental harm to be caused for the mining activity applied for, namely the construction of an open-cut coal mine within the mine footprint of the 2005 application to amend the Stage 1 EA to authorise Stage 2 to be mined.

[74] On this construction, West Pit is unlawful as it is outside the area impliedly authorized to be disturbed for the mining pits by the existing EA.

[75] Put another way, the argument regarding mining outside the mine footprint is this:

(a) The existing EA states on its covering page:

> An environmental authority authorises the carrying out of an ERA and does not authorise any environmental harm unless a condition stated by the authority specifically authorises environmental harm.

(b) This statement on the covering page of the existing EA is consistent with s 493A(2)(d) of the EPA, which provides that an act that causes serious or material

environmental harm or an environmental nuisance "is unlawful unless it is authorised to be done under an EA."

(c) The existing EA expressly authorises environmental harm such as noise within specified limits.[53]

(d) Beyond very limited exceptions,[54] the conditions in the existing EA do not expressly state or delimit the area in which environmental harm to vegetation, biodiversity, or land associated with digging any mining pits is authorised.[55] There is no question that NAC's activities in digging large open-cut mine pits causes environmental harm in these ways.

(e) While there is no express authority in the EA to cause such harm by digging the pits in the existing EA it *must* be implied given that NAC applied for an open-cut coal mine and its application for this activity was approved by the grant of the EA.

(f) NAC has an implied authority to cause harm by digging pits within the mine footprint it applied for.[56]

(g) The harm caused to vegetation, biodiversity, and land and noise by digging West Pit and other pits outside the mine footprint applied for is not authorised by the existing EA and, therefore, contravenes ss 437, 438 and 440 of the EPA.

(h) It is not a defence to a prosecution or civil action for contravening ss 437, 438 and 440 of the EPA that mining outside the mine footprint applied for and approved in 2005-2006 does not contravene s 430 (Contravention of a condition of an EA) or any specific condition.

NAC's past admissions of Stage 2 pit boundaries

[76] NAC's original (2009)[57] and revised (2012)[58] applications for Stage 3 contain clear admissions that:

(a) only three pits, "North Pit", "Centre Pit" and "South Pit", were approved for stage 1 and 2;

(b) no mining pits were approved under stage 1 or 2 for mining in the southwest corner of the stage 2 MLs where "West Pit" is now located; and

(c) the proposed new mining pits for Stage 3 required approval to the extent they were on the Stage 2 ML.

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[53] E.g. conditions D1-D5 of Sch D (Noise nuisance) of the existing EA.
[54] E.g. condition E2 of the existing EA authorises the construction of a flood protection levee in the area shown in Map 2 – Schedule K; and condition F1 requires staff induction and environmental awareness programs for two species (a skink and a lizard) that may be present in the project area.
[55] E.g. by damaging environmental values associated with vegetation and fauna on the site, digging the mining pits.
[56] Note that, consistent with the mine footprint NAC applied for: Map 1 (Surface water monitoring points) in Schedule K of the existing EA shows the general location of North Pit, Central Pit, and South Pit but does not refer to "West Pit" or any other pit; and Map 2 (Lagoon Creek buffer and levee) shows the boundaries of Central Pit and South Pit but does not show "West Pit" and the part of the area shown on the map in which NAC is constructing West Pit is shown as vacant land.
[57] See the map on p 5 contained OCAA's site visit bundle (Exhibit E), which is extracted from Exhibit 1217.
[58] See the map on p 6 contained OCAA's site visit bundle (Exhibit E), which is extracted from Exhibit 20.

[77] For example:

(a) The map of the original Stage 3 proposal showed:

(i) the "Glen Roslyn Stage 1 & 2 Pit Boundary" with three pits, "North Pit", "Centre Pit" and "South Pit", on the stage 1 and 2 MLs, without any "West Pit"; and

(ii) the "Stage 3 Pit Boundary", including part of the enormous Manning Vale Pit extending through Acland into the southwest corner of the Stage 2 ML, precisely where "West Pit" is now located.

(b) The map of the revised Stage 3 proposal showed the "Stage 3 Pit Areas" to include Manning Vale East Pit covering the eastern part of where "West Pit" is now located.

[78] NAC's past admissions were clear but the company has taken a very different approach since 2016.

Response to NAC's new construction argument

[79] NAC's new argument (since 2016) is that the existing EA authorises NAC to mine anywhere within the boundaries of the mining leases granted for Stage 1 and Stage 2 of the mine provided it complies with the EA conditions, including mining areas outside the mine footprint applied for in 2005 (**NAC's new construction**).[59]

[80] On its face, it is a startling argument that an approval (of a mine or other form of large development) can authorise something that:

(a) was not applied for, publicly advertised or assessed; and

(b) is radically different (and with far greater impact) than what was applied for, publicly advertised, or assessed.

[81] OCAA submits that:

(a) NAC's new construction is contrived and artificial.

(b) NAC's new construction contradicts and reverses the express statement on page 1 of the existing EA that it "does not authorise any environmental harm unless a condition stated by the authority specifically authorises environmental harm."[60]

(c) NAC's new construction contradicts and reverses the proper construction of s 493A(2)(d), which provides that an act that causes serious or material environmental harm or an environmental nuisance "is unlawful unless it is authorised to be done under an EA."

(d) Prior to early 2016, NAC had admitted in documents submitted for its Stage 3 application that the mine pit boundaries of Stage 2:

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[59] Based on the testimony on 8 July 2016 (T64-8-T64-44) by Andrew Boyd, Chief Operating Officer of New Hope Group, set out in OCAA's outline for the rehearing at [36]-[39].

[60] NAC's new construction is the reverse of this: NAC construes the existing EA as authorising environmental harm *unless the EA expressly states otherwise.*

(i) were confined to the areas of North Pit, Central Pit and South Pit as applied for in Stage 1 and Stage 2; and

(ii) the approved area of pits did not include the whole of the mining leases or the area in which West Pit has been constructed since early 2016.

(e) The fact that NAC has given the administering authority new Plan of Operations since 2016 showing West Pit[61] does not alter the legal effect of the existing EA limiting the Stage 2 mine footprint to what NAC applied for in 2005 because:

(i) Plans of Operations are subsidiary documents that do not affect the proper construction of an EA for a mining activity;[62]

(ii) Plans of Operations given to the administering authority under s 289 of the EPA are not "approved" by the administering authority;

(iii) Plans of Operations that exceed or are inconsistent with what is approved under an EA are invalid to the extent of inconsistency;[63] and

(iv) It would subvert the statutory process for public notification, EIS and objection rights in the EPA for EA applications and amendments, if a Plan of Operations could authorise substantially different mining activities having far greater impacts on the environment and surrounding landholders that was applied for and publicly advertised for the EIS and EA of a mining activity.

(v) Allowing a Plan of Operations to substantially alter a mining activity after an EA was publicly advertised and approved would mean approval of the EA would lack finality or certainty.[64]

(f) NAC has only adopted its new construction of the existing EA since early 2016 when it perceived that delays in the approval of its revised Stage 3 might not be granted before it exhausted coal in the mine footprint of Stage 2 it applied for in 2005.[65]

(g) Were NAC's new construction correct, the approval of the EA itself would be invalid due to:

(i) the EA could only approve what was applied for;[66]

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[61] E.g. Exhibit 870; TMP.0826 (December 2016).
[62] This is evident from the construction of the EPA in which the EA is the primary document approving a mining activity (see EPA, s 291). The EA is publicly advertised and open to objections a Plan of Operations is not.
[63] See, in particular, s 291 of the current version of the EPA which provides that an EA prevails to the extent of inconsistency over a plan of operations for a mine.
[64] *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737-739 per Priestley JA, 739-740 per Clarke JA and 740-741 per Meagher JA.
[65] Based on the testimony on 8 July 2016 by Andrew Boyd, Chief Operating Officer of New Hope Group, set out in OCAA's outline at [36]-[39].
[66] "The consent granted, can of course, be no wider than the application to which it relates.": *Sericott Pty Ltd v Snowy River Shire Council* [1999] NSWCA 480; 108 LGERA 66 at [46] per Beazley JA with whom Handley and Powell JJA agreed. Similarly, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ said in *Weston Aluminium Pty Ltd v EPA (NSW)* [2007] HCA 50; 239 ALR 641 at [14], "It was the application that marked out the boundaries of the consent sought."

(ii) the EA would significantly alter what was applied for,[67]

in circumstances where the applications for Stage 2 under the MRA and EPA were publicly advertised and surrounding landholders exercised their rights to object based on the mine footprint that NAC applied for in 2005, which was far smaller than the entire mining lease areas.

NAC is contravening the EPA

[82] For the reasons given above and in this section, NAC's new construction argument should not be accepted and, consequently, NAC's mining of West Pit is not authorised by the existing EA and appears to be in contravention of the EPA.

[83] Member Smith found in his reasons at [737] that there were "elevated noise levels at Mr Beutel's residence on both occasions" during the site visit conducted by the Court on 1 September 2016, when NAC should have been preventing excess noise.[68] West Pit was around 800m from Mr Beutel's house at that time.[69] West Pit is now much closer to Mr Beutel's house and it appears that NAC intends to mine West Pit to around 300 m from his house.[70]

[84] Member Smith accepted the evidence of many neighbours of the mine, including Mr Beutel.[71] 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".[72] 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.[73]

[85] Given Member Smith's findings and acceptance of Mr Beutel's evidence, it appears that noise from the mining of West Pit is causing environmental nuisance in contravention of condition D1 of the existing EA and ss 430 (contravening conditions) and 440 (environmental nuisance) of the EPA.

[86] OCAA does not submit that the Court should make a finding at this point that NAC is contravening the EPA. OCAA's submission is to respond to NAC's submission that the mining of West Pit is lawful. The Court should not accept that.

CONCLUSION

[87] In summary, OCAA submits that the Court can and must consider the existing mining operations in assessing the applications for Stage 3 because:

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[67] *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737-738 per Priestley JA with whom Clarke and Meagher JJA agreed.
[68] Member Smith's reasons at [738].
[69] See Exhibit 1841, extracted a p 7 of OCAA's site visit bundle (Exhibit E).
[70] See the 2017 satelitte image used for the site visit, Exhibit D, noting that the Court observed during the site visit West Pit now extends further south, to the smaller "notch" in the ML boundary, making the pit around 500m from Mr Beutel's house. The current plan of operations for the mine (June 2018) (Exhibit J), shows an intention to mine to the southern boundary of the ML, around 300 m of Mr Beutel's house.
[71] Member Smith's reasons at [739].
[72] Exhibit 1195, TMP.0296 (EHP File note of 20 January 2014).
[73] T71-20, Line 40-45.

(a) Pursuant to Bowskill J's order 5, NAC is bound by Member Smith's findings at [683]-[685] and [802] that Stage 3 mining activities have already commenced with the mining of West Pit.

(b) NAC's submissions mistake the MLs and mining activities to which the EA amendment application for Stage 3 of the mine relates. The EA amendment application involves mining activities on all four MLs: ML50170, ML50216, ML50232 and ML700002.

(c) NAC's and the Statutory Party's submissions mistake the MLs and the mining activities that the CG considered in the CG report. The CG report (rightly) understood the mining activities for Stage 3 as occurring on all four MLs: ML50170, ML50216, ML50232 and ML700002.

(d) The Court must consider the impacts of Stage 3 mining activities in the context of cumulative impacts on the environment and the lawful limits of Stage 2 mining activities;[74] therefore, the impacts (and lawful limits) of Stage 2 mining activities are relevant (and not irrelevant) to the Court's statutory function, task or jurisdiction under the MRA and EPA.

(e) The mining of West Pit or any areas outside the mine pits footprint NAC applied for in seeking approval for Stage 2 is not authorised by the existing EA for Stage 2 and it is unlawful under the EPA.

(f) Amending Figure 1 of the draft EA to either:

(i) "reflect the up-to-date approved plan of operations", [75] the current (June 2018) version of which shows West Pit extending across the whole of the southwest corner of ML50216;[76] or

(ii) insert a new Figure 1 shown at p 65 in the marked-up version of the draft EA (Exhibit F) tendered yesterday, 2 October 2018, which extends the area shown for "Mining Areas" for Stage 2 to extend across the whole of the southwest corner of ML50216, where NAC is currently mining West Pit,

is:

(i) prohibited by s 190(2) of the EPA as the revised figure is inconsistent with the figure provided in the CG stated conditions; and

(ii) a major amendment to the existing EA that has not been assessed, publicly notified or approved in accordance with Ch 5 of the EPA.

Dr Chris McGrath
Counsel for OCAA
3 October 2018

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[74] e.g. in considering whether the Stage 3 will cause "any adverse environmental impact" (s 269(4)(j) MRA) and the "character, resilience and values of the receiving environment" as part of the Standard Criteria for s 191(g) of the EPA.
[75] NAC's Table 2, pp 2 and 17 in relation to condition A2 and Figure 1.
[76] Marked for identification as Exhibit J on 2 October 2018.