**COURT OF APPEAL**
**SUPREME COURT OF QUEENSLAND**

**CA NUMBER:** 5751 of 2018
**NUMBER:** BS No. 6002 of 2017

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|---|---|
| **Appellant:** | **OAKEY COAL ACTION ALLIANCE INC** |
| **First Respondent:** | **NEW ACLAND COAL PTY LTD ACN 081 022 380** |
| **Second Respondent:** | **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND SCIENCE** |
| **Third Respondent:** | **PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND** |

## NOTICE OF CROSS APPEAL

To the appellant

1. The first respondent cross appeals from the decisions of the learned primary judge made on 2 May 2018 and 28 May 2018.

GROUNDS

2. In the event that the appellant's grounds of appeal are upheld and the first respondent's notice of contention is dismissed, the first respondent relies on the grounds set out below.

3. The learned primary judge erred in concluding that the decision by the third respondent was not made in circumstances where there was apprehended bias:

   (a) by concluding that, by failing to take any action immediately following the 2 February 2017 hearing, the first respondent may be taken to have waived any objection to the third respondent continuing to hear and determine the matters;

   (b) by failing to conclude that a fair minded lay observer might reasonably apprehend from the third respondent's reasons delivered on 31 May 2017 that the third respondent might then still be affected by the personal offence, feelings and views formed at the 2 February 2017 hearing; and

   (c) by failing to conclude that the third respondent's reasons delivered on 31 May 2017 indicated an effective revival on the part of the third respondent of the personal offence, feelings and views formed at the 2 February 2017 hearing.

SUPREME COURT OF QUEENSLAND BRISBANE

**NOTICE OF CROSS APPEAL**
Filed on behalf of the First Respondent
Form 65 R.755(1)

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4. The learned primary judge erred as follows:

(a) by concluding at paragraphs [292] to [293] of the reasons delivered on 2 May 2018 that, on the proper construction of section 191(f) of the *Environmental Protection Act 1994* (Qld) (**EPA**), the third respondent was not required to carry out the environmental objective assessment referred to in section 51(1)(a) of the *Environmental Protection Regulation 2008* (Qld) (**EPR**) and thereby failing to conclude that the third respondent committed jurisdictional error or other error of law by failing to carry out the environmental objective assessment referred to in section 51(1)(a) of the EPR;

(b) having concluded at paragraphs [292] to [293] and [295] of the reasons delivered on 2 May 2018 that the third respondent was required under section 191(f) of the EPA to consider the administering authority's environmental objective assessment under section 51(1)(a) of the EPR, by concluding at paragraph [296] of the reasons delivered on 2 May 2018 that the third respondent had done so and thereby failing to conclude that the third respondent committed jurisdictional error or other error of law by failing to do so;

(c) by failing to conclude that the third respondent was in error by reason of failing to consider or provide adequate reasons for his conclusions with respect to relevant aspects of the Noise EPP as he was required to do under s.51(1)(c) of the EPR;

(d) by failing to conclude that the third respondent committed jurisdictional error or other error of law by failing to consider or provide adequate reasons for his conclusions about evidence and submissions as to the following matters:

(i) that the draft environmental authority (**Draft EA**) noise limits are consistent with the acoustic quality objectives (**AQO**) in the *Environmental Protection (Noise) Policy 2008* (Qld) (**Noise EPP**), because:

A. the AQO levels in Schedule 1 of the Noise EPP relate to the inside of a dwelling;

B. the noise experts agreed that 7dB(A) is the appropriate façade noise correction to apply;

C. 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;

(ii) the Draft EA noise limits are more onerous than the levels contemplated by Schedule 1 of the Noise EPP, because the former are measured over a shorter (15mins) time interval than the latter (1hr);

(iii) it was common ground between the noise experts that the Draft EA imposed greater restrictions than the current environmental authority, that sensitive receptors will have an improved acoustic environment as a result, and that the Draft EA conditions are strict in terms of ensuring compliance;

(iv) the appellant's noise expert agreed that the improvement for sensitive receptors would be somewhere between a clearly perceptible one, and one which is half as loud;

(v) the noise experts agreed that the noise from the mine can be suitably monitored to determine whether noise limits are being complied with;

(vi) the noise experts agreed that, with the benefit of that monitoring, and with proper management, attenuation and adaptive measures, the noise limits in the Draft EA can be complied with;

(vii) the appellant's noise expert agreed that the "*existing acoustic environment*", as referred to in section 10 of the EPP Noise, includes the noise of existing mine activities, and, as the first respondent's noise expert explained:

A. the notion of "*background creep*", to which section 10 of the EPP Noise refers, involves the incremental introduction of additional noise sources, such that noise creeps up over time;

B. the Draft EA conditions provide for "*anti-creep*", because noise levels will be reduced under the Draft EA;

(viii) the 2dB(A) difference between the appellant's noise expert's night-time limit (35dB(A)) – the night-time period being 9 hours – and the Draft EA limit (37dB(A)) would be imperceptible or insignificant, such that it would be unreasonable to require the first respondent to undergo added mitigation to achieve a 2dB(A) reduction;

(ix) the opinion of the appellant's noise expert was that the noise limit for both evening and night operations should be set at 35dB(A), but that is inconsistent with the recognition in Schedule 1 of the Noise EPP that the evening AQO (35) may be higher than the night time AQO (30), given the higher ambient levels in a dwelling in the (4hr) evening period (6pm-10pm);

(x) even accepting the contention of the appellant's noise expert and the appellant that the AQOs in Schedule 1 of the Noise EPP refer to the total noise level measured at a sensitive receptor, conditions F1 and F3 of the Draft EA accommodate that interpretation, because they require the holder of the environmental authority to "*ensure that noise generated by the mining activities does not cause….(the specified limits of 42 and 37)….to be exceeded at a sensitive place*" and to "*immediately implement noise abatement measures to*

*avoid exceeding the relevant limits*" if monitoring indicates the potential for their exceedance;

(xi) the appellant's noise expert's recommended limits were artificial, because they were based upon "minimum deemed background noise levels of 30dB(A) in the evening and night and 35db(A) during the day periods";

(xii) the AQOs in Schedule 1 of the EPP Noise are intended to enhance or protect the environmental value of "*health and being*", so that if the EPP Noise recognises that those values are protected at 37dB(A), then a lower limit is neither reasonable or practical.

5. Having concluded at paragraph [306] of the reasons delivered on 2 May 2018 that the third respondent's reliance upon the outcome in *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth - Brisbane Co-Op Ltd & Ors, and Department of Environment and Resource Management* [2012] QLC 013 was misplaced, the learned primary judge erred by concluding that such reliance did not give rise to an error of law and thereby failing to conclude that the third respondent committed jurisdictional error or other error or law by that reliance.

6. The learned primary judge erred as follows:

(a) by concluding in paragraph [329] that, the proper construction of section 190(2) of the EPA is that this provision does not operate as a constraint on the discretionary power conferred on the Land Court, by section 190(1) of the EPA, to determine whether it will recommend approval of the application, either on the terms of the draft environmental authority proposed, or on different conditions, or recommend refusal of the application;

(b) by finding in paragraph [330] that, section 190(2) of the EPA does not prevent the Land Court considering the particular subject-matter of a Coordinator-General's condition; nor does it prevent the Land Court recommending refusal of the application on the basis of a view that the Coordinator-General's condition(s) on particular matter(s) are inadequate;

(c) in the alternative to paragraphs 6(a) and 6(b), by concluding at paragraph [345] that, there was inconsistency between the noise limits proposed by the third respondent and the noise limits imposed by the Coordinator-General's stated conditions.

7. The learned primary judge ought to have concluded that the third respondent committed jurisdictional error or other error of law by failing to properly interpret and apply the principles of intergenerational equity contained in the Standard Criteria as mandated by section 191 of the EPA by reason that:

(a) the third respondent incorrectly applied the principle of intergenerational equity by the manner in which he applied the following sub-principles:

(i) the "conservation of quality principle"; and

(ii) the "conservation of options principle";

(b) in applying the principle of intergenerational equity, the third respondent's reasoning was unreasonable, inconsistent and irrational and he took into account matters irrelevant to the application of the principle as follows:

(i) at paragraph [1342], the third respondent stated that the coal in relation to the Stage 3 Project will remain in the ground to be mined by future generations who perhaps find ways to do that when the risk to landowner groundwater supplies is either completely removed or lessened and perhaps find processes of burning or using the energy produced by coal in such ways that no GHG or pollutant effect is caused; and

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

(c) in applying the principle of intergenerational equity, the third respondent failed to take into account matters relevant to the application of the principle as outlined below;

(d) at paragraphs [1328] and [1329], the third respondent accepted submissions of the appellant to the effect that:

(i) 457 ha of mine voids will be permanently lost to cropping;

(ii) 923 ha of good quality land within the MLA will probably be lost to cropping;

(iii) the Stage 3 Project will potentially remove the option for 22,000 ha of land in the drawdown zone of the mine to be used for cropping; and

(iv) future generations will not have access to the mineral resources extracted by the proposal;

(e) in accepting the submissions of the appellant referred to above, the third respondent failed to consider or provide adequate reasons for his conclusions about evidence and submissions as to the following matters:

(i) in respect of the 457 ha of mine void land, the Coordinator-General's condition requiring the first respondent to secure an offset with respect to such land and related expert evidence;

(ii) in respect of the 923 ha of land within MLA 50232, the Coordinator-General's imposed condition requiring the first respondent to rehabilitate disturbed land to support the best post-disturbance land use possible and related expert evidence;

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

(iv) in respect of the 22,000 hectares of land in the drawdown zone, how any drawdown impacts will be managed in accordance with the evidence and submissions referred to in paragraph 15 of the first respondent's Further Amended Application for a Statutory Order of Review and Application for Review; and

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

(f) At paragraph [1334], the third respondent concluded that "*there is a tension between a requirement for a make good agreement and intergenerational equity*" and at paragraph [1336] that the first respondent's draft make good agreement "*does not…make any real effort to meet the needs of impacted landholders in 200 years time*". In doing so, the third respondent misunderstood the effects of a make good agreement generally, misunderstood and misinterpreted the first respondent's draft make good agreement and failed to consider or provide adequate reasons for his conclusions about the evidence and submissions referred to in paragraph 15 of the first respondent's Further Amended Application for a Statutory Order of Review and Application for Review including failing to consider in accordance with authority that the first respondent would comply with its legal obligations in respect of the Stage 3 project.

ORDERS SOUGHT

1. The cross appeal is allowed.

2. Orders 4 to 9 of the orders made by the Supreme Court of Queensland on 28 May 2018 are set aside.

3. In lieu thereof, order that:

(a) The matters to which the Recommendations Decisions relate are referred back to the Land Court to be considered by a different member of the Land Court.

(b) The appellant pay the first respondent's costs of the proceeding in the Supreme Court of Queensland.

4. The appellant pay the first respondent's costs of the appeal.

PARTICULARS OF THE FIRST RESPONDENT:

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|---|---|
| Name: | **New Acland Coal Pty Ltd ACN 081 022 380** |
| Residential or business address: | 3/22 Magnolia Drive, Brookwater, QLD 4300 |
| First respondent's solicitor's name: | Mark Geritz |
| and firm name: | Clayton Utz |
| Solicitor's business address: | Level 28, Riparian Plaza, 71 Eagle Street<br>Brisbane Qld 4000 |
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Signed: _____

Description: Mark Geritz of Clayton Utz, Solicitors for the First Respondent

Dated: 13 / 06 / 2018

This Notice of Cross Appeal is to be served on:

of: **Oakey Coal Action Alliance Inc.**
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8/205 Montague Rd
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of: **Chief Executive, Department of Environment and Science**
C/- Peter Dwyer
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of: **Paul Anthony Smith, Member of the Land Court of Queensland**
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