COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

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

Appellant:	**OAKEY COAL ACTION ALLIANCE INC**
	AND
First Respondent:	**NEW ACLAND COAL PTY LTD ACN 081 022 380**
	AND
Second Respondent:	**CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND SCIENCE**

APPELLANT'S OUTLINE OF ARGUMENT

INTRODUCTION

[1] This appeal raises important questions of law for the approval of major projects involving multiple, overlapping statutory schemes. It also raises important questions of principle for the sufficiency of reasons given by an administrative decision-maker to fulfil a specific statutory task when faced with an enormous volume of complex and conflicting expert and lay witness evidence, lengthy submissions from multiple parties, and where urgency is required in delivering reasons.

[2] This outline addresses the grounds of the Appellant's (**OCAA's**) appeal only. OCAA will respond to the First Respondent's (**NAC's**) Notice of Contention and Cross Appeal after receiving NAC's outline.

FACTUAL BACKGROUND AND CHRONOLOGY

Application and objection process

[3] NAC owns and operates an existing open-cut coal mine, the New Acland Coal Mine (**the mine**), on the Darling Downs west of Brisbane.

[4] The land around the mine is amongst the best 1.5% of agricultural land in Queensland and significant from an agricultural perspective.[1]

[5] Mining leases for stages 1 and 2 of the mine were granted under the *Mineral Resources Act* 1989 (**MRA**) in 2001 and 2006 respectively.[2]

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[1] *New Acland Coal Pty Ltd v Ashman & Ors (No 4)* [2017] QLC 24 (**Land Court member's reasons**) at [1299].
[2] Land Court member's reasons at [51]-[55] and *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 (**primary judge's principal reasons**) at [1].

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[6] NAC applied to expand the mine to "Stage 3", south of the existing mine, in 2007.

[7] 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".[3]

[8] NAC submitted a revised, smaller proposal for Stage 3 in the second half of 2012.[4] 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.

[9] The revised Stage 3 was assessed by an environmental impact statement (**EIS**) under the *State Development and Public Works Organisation Act* 1971 (***State Development Act***) and the Coordinator-General (**CG**) issued a report recommending approval of the project, subject to stated conditions, on 19 December 2014.[5]

[10] NAC applied to amend its existing environmental authority (**EA**) for the mine under s 224 of the *Environmental Protection Act* 1994 (**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.[6]

[11] A delegate of the Second Respondent (as the administering authority for the EPA) issued a draft EA under s 172 of the EPA on 28 August 2015.[7]

[12] 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.[8]

[13] Ultimately, there were 27 objectors to the MRA applications and 32 objectors to the EA amendment application, with 20 objectors having both MRA and EPA objections, including OCAA.[9]

[14] There were multiple grounds of objections, including the impacts of the mine on groundwater and noise.[10]

[15] 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 2,000 pages of submissions were received by the court.[11] 28 expert and 38 lay witnesses gave evidence across multiple topics,[12] including groundwater and noise.

[16] NAC repeatedly urged the Land Court member to progress the hearing as a matter of urgency.[13]

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[3] Land Court member's reasons at [58].
[4] Land Court member's reasons at [59].
[5] Land Court member's reasons at [65].
[6] Land Court member's reasons at [70] and EPA, s 232.
[7] Land Court member's reasons at [67] and Appendix C (Chronology), p 458.
[8] Land Court member's reasons, Appendix C (Chronology), p 458.
[9] Land Court member's reasons at [80].
[10] Land Court member's reasons at [84]-[86].
[11] Land Court member's reasons at [19].
[12] Land Court member's reasons at [103]-[112].
[13] Land Court member's reasons at [114].

[17] The hearing initially concluded in late 2016 but, after the evidence closed, NAC applied for leave to introduce new evidence or, in the alternative, leave to reopen its case to tender further groundwater evidence, being a report on groundwater impacts from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (**IESC**) established under s 505C of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (**EPBC Act**). The Land Court member granted NAC's application to reopen the groundwater evidence subject to all parties being permitted to call fresh evidence on this issue.[14] The closing submissions after this further evidence concluded on 19 May 2017 with the filing of a reply by NAC.

Land Court member's decisions

[18] The Land Court member delivered his decisions and reasons, totalling 459 pages, on 31 May 2017, less than two weeks after the close of submissions. He stated he delivered his decision with such speed because of the wishes of all of the parties, not just the claims of urgency by NAC.[15]

[19] The Land Court member's decisions were 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.

[20] The Land Court member'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:[16]

(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).[17]

(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

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[14] See *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1.
[15] Land Court member's reasons at [128].
[16] Land Court member's reasons at [1799]-[1800].
[17] Land Court member's reasons at [1802] and [1803].

in the evening and night in accordance with the learned Member's findings which are inconsistent with the stated conditions of the CG.[18] 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.[19]

(d) Under s 269(4)(l) of the MRA, good reason has been shown for refusal of both mining leases.[20]

(e) Under s 269(4)(m) of the MRA, the learned Member considered he had "no option" in the exercise of his discretion but to determine that the proposed mining operation is not an appropriate land use taking into consideration the current and prospective uses of the land, primarily for the reasons of: [21]

(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 the learned Member recommended refusal of the application to amend the environmental authority due to:[22]

(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

[21] On 14 February 2018, a delegate of the Second Respondent (**the delegate**) made a final decision under s 194 of the EPA to refuse NAC's application to amend the EA, substantially relying upon the findings of the Land Court member in relation to noise limits, intergenerational equity and groundwater.[23]

Judicial review before the primary judge

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

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[18] Land Court member's reasons at [1804]-[1806].
[19] Land Court member's reasons at [1806].
[20] Land Court member's reasons at [1807] and [1834].
[21] Land Court member's reasons at [1808] and [1835].
[22] Land Court member's reasons at [1838] and [1839].
[23] Primary judge's principal reasons at [63] and *New Acland Coal Pty Ltd v Smith & Ors (No 2)* [2018] QSC 119 (**reasons on final orders**) at [7].

[23] NAC's application was based on 12 grounds (though numbered 1-15) at the time of the principal hearing.[24]

[24] The primary judge rejected the majority of NAC's grounds, including that the decisions were affected by apprehended bias, but allowed the application on the basis of:[25]

(a) Ground 10, in relation to the Land Court lacking jurisdiction to "fully consider" the impacts of the mine on groundwater due to further approval requirements under the *Water Act* 2000 (Qld) (***Water Act***);

(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.

[25] Had the primary judge 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 the Land Court member failed to failed to address in his reasons at all the operation of the associated water licence (**AWL**) provisions of the *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.[26]

[26] After the primary judge'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.[27]

[27] OCAA appeals against the primary judge's principal decision and subsequent decision on final orders.

THE LAND COURT'S JURISDICTION TO CONSIDER GROUNDWATER[28]

[28] The primary judge erred in construing the MRA and the EPA in concluding that the Land Court had no jurisdiction and it was an error of law for the Land Court to consider, when hearing objections and making recommendations under s 269 of the MRA and s 190 of the EPA, the potential impacts of the proposed mine on groundwater quantity,[29] in summary because:

(a) The statutory task under each Act plainly requires consideration of the impacts of a mine on groundwater when raised in properly made objections and in evidence to which no objection is taken in the hearing before the Land Court.

(b) There is nothing in the language of "authorised activity" or "mining activity" that constrains the Land Court from considering the impacts of a mine on groundwater under s 269(4) of the MRA or s 191 of the EPA.

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[24] The relevant application at the time of the hearing was NAC's Amended Application for a Statutory Order of Review and Application for Review, dated 28 November 2017.
[25] Primary judge's principal reasons, summarised at [378].
[26] Primary judge's principal reasons at [255].
[27] Primary judge's reasons on final orders at [8]-[9].
[28] Ground 1 of the OCAA's Notice of Appeal.
[29] Primary judge's principal reasons [227]-[229] and [233]-[236]. Note also [32] & [34], [65], [67], [72]-[74], [196], [208] and the construction of s 748 of the EPA at [220]-[223].

(c) The Land Court has repeatedly considered the impacts of mines on groundwater in the past when hearing objections under the MRA and EPA. Consideration of the impacts of mines on groundwater represents the status quo as reflected by the quantity of evidence led on groundwater in this hearing without objection.

(d) The existence of the further approval requirements for groundwater in the transitional AWL scheme in the *Water Act* does not oust jurisdiction to consider groundwater under the MRA and EPA. Multiple approval requirements typically stand together and operate cumulatively where each Act has a distinct purpose, different from the other.

(e) Even if the existence of the AWL scheme on its face suggests that groundwater is not to be considered under the MRA or EPA (although OCAA does not submit this is the case), the transitional provisions in s 748 of the EPA makes clear that it must be. The primary judge impermissibly added words to s 748 to find otherwise.

[29] Further, the primary judge erred in concluding that, even if the Land Court did have jurisdiction to consider the potential impacts of the proposed mine on groundwater quantity, that jurisdiction did not extend to permit the Land Court to "fully consider" such impacts because such consideration would prejudge the outcome of, or precluded or prevented, or was made without regard to, the assessment of an application for an AWL for the proposed mine under the *Water Act*,[30] because:

(a) Once groundwater was not precluded from consideration (as an irrelevant consideration or outside the Land Court's jurisdiction) under s 269(4) of the MRA or s 191 of the EPA, it was a matter for the Land Court to determine the extent of consideration, and the weight to be given to it, and the recommendations that ought to be made having regard to groundwater issues under the MRA and EPA.

(b) The Land Court member did not in fact prejudge, preclude or prevent an application for an AWL under the *Water Act* being made, nor was this the legal effect of his decisions under the MRA or EPA.

[30] These matters are examined in more detail in the following sections.

The Land Court's statutory task

[31] The impacts of a proposed mine on groundwater are plainly relevant to multiple factors the Land Court is *bound* to consider[31] in performing its statutory task under s 269 of the MRA and ss 190 and 191 of the EPA, namely:

(a) The mandatory requirement in s 269(4)(i) of the MRA to consider whether "the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management" creates a wide discretionary criterion that logically allows consideration of the sustainability of the proposed operations and its effect on current and future land use management. Issues such as land rehabilitation and the effects of the proposed operations on land use management on neighbouring properties are plainly within the scope of the subsection. Given the importance of groundwater for agriculture, there is no reason why the impacts of

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[30] Primary judge's principal reasons at [229], [230], [233], [234] and [235].

[31] As mandatory considerations in the sense of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

mining operations on the availability and quality of groundwater on surrounding farms would not be considered under this criterion in an appropriate case.

(b) The mandatory requirement in s 269(4)(j) of the MRA to consider whether "there will be any adverse environmental impact caused by [the proposed mining] operations and, if so, the extent thereof" is limited only by the existence of a causal connection between the mining operations and the adverse environmental impact.[32] "Environment" is defined very widely in the MRA and includes "ecosystems and their constituent parts [and] all natural and physical resources …".[33] The type of adverse environmental impact that may be considered under s 269(4)(j) is not limited and may logically extend to matters such as pollution, land degradation, noise, dust, and impacts to biodiversity or groundwater. The adverse environmental impact is not limited to the land the subject of the mining operations[34] and may extend to adverse environmental impacts on neighbouring land. There is no reason why the impacts of mining operations on the availability and quality of groundwater on surrounding farms could not be considered under this criterion.

(c) The mandatory requirement in s 269(4)(k) of the MRA to consider whether "the public right and interest will be prejudiced" involves a discretionary balancing exercise of the widest import confined only so far as the subject matter and the scope and purpose of the statute may enable.[35] The benefits of a proposed mine in creating jobs and generating royalties for the State are relevant to consider under this criterion, as are negative consequences on the environment and community conflict generated by a mining operation. The burning of coal overseas by third parties contributing to climate change has been held to be relevant under this criterion of the MRA when assessing a coal mine even though such a matter is not relevant under s 269(4)(j).[36] There is no reason why the impacts of a mine on groundwater at surrounding farms cannot be considered under this criterion also.

(d) The mandatory requirement in s 269(4)(l) of the MRA to consider whether "any good reason has been shown for a refusal to grant the mining lease" is extremely wide and limited only by the subject matter, scope and purposes of the Act.[37] Clearly, there must be a *good* reason, as opposed to a reason that is extraneous to the purposes of the Act.[38] The question of whether good reason has been shown must depend on all the circumstances of the particular case.[39] Again, there is no

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

[33] See Sch 2 (Dictionary) of the MRA and s 8 of the EPA.

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

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

[36] *CCAQ v Smith* [2015] QSC 260 at [36]-[41] (Douglas J); *CCAQ v Smith* [2016] QCA 242 at [39]-[43] per Fraser JA, [51] per Morrison JA and [1] per Margaret McMurdo P.

[37] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

[38] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

[39] See *Campbell v United Pacific Transport* [1966] Qd R 465, at 472 (Gibbs J) in the context of considering whether "good reason" had been shown for leave to proceed after six years without a step in the proceedings.

reason why the impacts of a mine on groundwater of surrounding farms cannot be considered under this criterion also.

[32] Similarly, under s 191 and the standard criteria of the EPA, considering matters such as "intergenerational equity", "the character, resilience and values of the receiving environment" affected by a proposed mine and "the public interest" allows a very wide scope of matters to be considered. There is no reason why the impacts of a mine on groundwater of surrounding farms cannot be considered under these criteria.

[33] In the context of the mandatory considerations the Land Court member was bound to consider in performing the statutory task given to him under the MRA and EPA, and the grounds of objections to the mine and the evidence on groundwater that was not objected to during the hearing, he plainly had jurisdiction to consider the impacts of the mine on groundwater. Indeed, had he failed or refused to consider groundwater in this context he would, in truth, have erred by failing to exercise jurisdiction.[40]

[34] The primary judge explained her reasoning for constraining the broad considerations in s 269(4)(k) and (l) at [34] of her principal reasons (footnotes in original, emphasis in bold added):

> The requirement under s 269(4)(k), to consider whether the public right and interest will be prejudiced (by the grant of the mining lease) contemplates broader considerations.[41] However, sub-s (k) and, for that matter, sub-s (l) (which requires consideration of whether "any good reason" has been shown for a refusal to grant the mining lease) are to be construed harmoniously, not inconsistently, with sub-s (i) and (j),[42] such that **they could not be relied upon to expand the Land Court's jurisdiction**, in a hearing under ss 268 and 269, to include consideration of, for example, adverse environmental impacts caused by operations or activities for which some other source is the authority other than the proposed mining lease.

[35] This reasoning is in error in that it wrongly constrains the consideration in s 269(4)(k) and (l) to what is already permitted under s 269(4)(i) and (j). Such a construction – that they "could not be relied upon to expand the Land Court's jurisdiction …" – renders the considerations in s 269(4)(k) and (l) superfluous to s 269(4)(i) and (j). A court construing a statutory provision must strive to give meaning to every word of the provision so that no word shall prove superfluous.[43]

[36] While expressly citing the Court's decision in *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 (***CCAQ v Smith***) the primary judge's reasoning is inconsistent with that decision. The Court held in that case that the consideration of the "public right and interest" under s 269(4)(k) of the MRA was wider than, and not constrained by, the limitations in s 269(4)(j), thereby allowing the Land Court to consider the greenhouse gas (scope 3) emissions from the burning of coal from a mine occurring overseas and *not* under the authority of the mining lease granted under the MRA.[44]

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[40] *Abebe v Commonwealth* (1999) 197 CLR 510 at 552 (Gaudron J); and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 339-340 (Gaudron J).
[41] For example, as in *CCAQ v Smith*, the scope 3 emissions which could result from the transportation and burning of coal from the mine by others: see [2015] QSC 260 at [41]; [2016] QCA 242 at [42].
[42] See, for example, *Ross v R* (1979) 141 CLR 432 at 440.
[43] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382, [71].
[44] *CCAQ v Smith* at [33] (regarding the limits of s 269(4)(j)) and [42] (regarding s 269(4)(k)) per Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this point).

The definitions of "authorised activity" and "mining activity" should not constrain general considerations

[37] The primary judge applied contradictory reasoning in relation to the effect of the definitions of "regulatory requirement" in s 191(f) of the EPA and "authorised activity" in the MRA, the latter of which her Honour also applied to the definition of "mining activity" in s 110 of the EPA.[45]

[38] In relation to "regulatory requirement", the primary judge held that [282] (footnotes in original):

> A definition in an Act is no more than an aid to construing the provisions of the Act itself.[46] It cannot operate to alter the otherwise plain meaning of the provision, and if it does not fit comfortably into the text, the exercise of construction needs to address any linguistic, logical or grammatical infelicities that arise.[47]

[39] But in relation to "authorised activity" in the MRA[48] and "mining activity" in s 110 of the EPA, the primary judge did precisely that; by construing s 269(4) of the MRA and s 191 of the EPA to alter the otherwise plain meaning of the provisions, in ways that do not fit comfortably into the text, and without addressing the linguistic, logical or grammatical infelicities that arise.

[40] The primary judge repeatedly emphasised that the assessments of the applications under the MRA and under the EPA were limited to what was authorised by the grant of the mining lease and environmental authority.[49] This laid the foundation in her Honour's reasoning to limit the broad considerations in s 269(4)(i), (j), (k) and (l) of the MRA and s 191 of the EPA to exclude the consideration of the impacts of the mine on groundwater quantity.

[41] Several ways in which the primary judge's construction to exclude from the Land Court's jurisdiction the impacts of the mine on groundwater do not fit comfortably into the text of s 269(4) of the MRA and s 191 of the EPA were addressed earlier; however, there are further ways in which the primary judge's construction does not fit comfortably with the text and leads to logical infelicities.

[42] The activity authorised by the grant of the mining lease is the physical activities associated with winning and extracting coal within the boundaries of the mining lease.[50]

[43] There is no question that the physical activities associated with winning and extracting coal from the proposed mine, involving three large open-cut mining pits, will impact on groundwater. The fact that a further approval is necessary under the *Water Act* to approve

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[45] Primary judge's principal reasons at [46]-[48].
[46] *Kelly v R* (2004) 218 CLR 216 at [103] per McHugh J; *Hastings Co-operative Ltd v Port Macquarie Hastings Council* (2009) 171 LGERA 152 at [16]-[18]; see also *Lamb v Brisbane City Council* [2007] 2 Qd R 538 at [47].
[47] *Commissioner of Police v Kennedy* [2007] NSWCA 328 at [44] per Basten JA; *SZGIZ v Minister for Immigration & Citizenship* (2013) 212 FCR 235 at [30] per Allsop CJ, Buchanan and Griffiths JJ.
[48] Sch 2 (Dictionary) of the MRA defines "authorised activity", relevantly, as "An *authorised activity*, for a mining tenement, is an activity that its holder is, under this Act or the tenement, entitled to carry out in relation to the tenement."
[49] Primary judge's principal reasons at [32]-[34], [46]-[48], [65], [67], [72]-[74], [196], [208] and the construction of s 748 of the EPA at [220]-[223].
[50] As noted by the primary judge at [33] in the context of s 269(4)(i) and (j), citing *Xstrata* at [528]-[530] and *CCAQ v Smith* [2016] QCA 242 at [27] and [31].

interference with groundwater does not alter the fact that the winning of coal applied for under the MRA inherently involves approving impacts on groundwater *for the purpose* of winning the coal. It is illogical to reason otherwise.

[44] The Court's decision in *CCAQ v Smith* affirmed President MacDonald's reasons in *Xstrata* that the Land Court's consideration of the "public right and interest" under s 269(4)(k) of the MRA is not limited to only the activities authorised under the MRA but can include the consideration of greenhouse gas emissions from the burning of coal overseas that is not authorised under the mining lease or environmental authority.[51]

[45] Requiring the Land Court to ignore impacts of a mine on groundwater under the MRA and EPA on the basis that interfering with groundwater is not an "authorised activity" under either Act would mean that the Land Court was required to assess the mine in a piecemeal way and based on a factual fiction in circumstances where:

(a) The facts involve NAC's proposal to expand an existing open-cut coal mine in the midst of agricultural land.[52]

(b) The proposed mine expansion has the potential to cause very large and long-term impacts to the groundwater upon which surrounding farms depend.

(c) The potential impact of the mine on groundwater was the subject of multiple objections from surrounding landholders and extensive evidence in the hearing before the Land Court member.[53]

(d) After the evidence closed in 2016, NAC applied for leave to introduce new evidence or, in the alternative, leave to reopen its case to tender further groundwater evidence, which NAC submitted, *inter alia*, was "so material that the interests of justice are best served by allowing its admission".[54] The Land Court member granted NAC's application to reopen the groundwater evidence subject to all parties being permitted to call fresh evidence on this issue.[55]

(e) NAC did not object to groundwater evidence being tendered at any stage during the hearing in the Land Court and the learned Member duly considered the evidence that was before him and decided in the objectors' favour.[56]

[46] The primary judge's reasoning on groundwater,[57] if correct, would mean that objectors to the mine and the Land Court member in the hearing of objections to it under the MRA and the EPA were required to assess the mine on the basis of a factual fiction that it would not cause any impact on groundwater. To even consider such a matter would be outside

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[51] *CCAQ v Smith* [2016] QCA 242 at [40]-[42] per Fraser JA with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue).
[52] The Land Court member's reasons summarise the history and context of the mine at [42]-[70] and the agricultural value of surrounding land at [1299].
[53] Land Court member's reasons at [85], item 1 and [86], item 13, and [1436]-[1682].
[54] See *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1 at [6], item 5(a).
[55] See *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1.
[56] Land Court member's reasons, particularly at [1436]-[1682].
[57] Primary judge's principal reasons at [227]-[229] and [233]-[236]. Note also [32] & [34], [65], [67], [72]-[74], [196], [208] and the construction of s 748 of the EPA at [220]-[223].

the jurisdiction of the Land Court member in hearing the objections and making his recommendations.

[47] Such an approach, based on fiction, would mean that in considering general considerations for the Land Court's recommendations such as whether "the public right and interest" will be prejudiced,[58] whether the mine "will conform with sound land use management,"[59] and "intergenerational equity",[60] the potential impacts of the mine on groundwater quantity were themselves irrelevant factors that the Land Court member was bound *not* to consider.[61]

[48] The primary judge's approach would lead to a piecemeal approach to assessments under the MRA, EPA and, it seems inevitably, the *Water Act*. How can a decision-maker assess the "public interest" of an application under the MRA, EPA and *Water Act* if:

(a) under the MRA and EPA the decision-maker cannot assess (negative) impacts on groundwater quantity of a mine; and

(b) correspondingly, and as a logical consequence of the trial judge's reasoning, under the *Water Act*, a decision-maker assessing an AWL cannot assess anything other than the water quantity issues (i.e. they must, presumably, exclude balancing the negatives of noise, dust, etc of mining and all of the positives of winning the mineral (royalties and jobs, etc))?

[49] The primary judge's reasoning creates a piecemeal approach that is a minefield for decision-makers under the MRA, EPA and *Water Act* in assessing matters such as whether an application is in the "public interest" under the transitional provisions for assessing mines after the *Water Reform and Other Legislation Amendment Act 2014* (**WROLA**) and *Environmental Protection (Underground Water Management) and Other Legislation Amendment Act* 2016 (**EPOLA**), which took effect on 6 December 2016.

[50] The statutory scheme of the EPA, MRA and *Water Act* do not require such a piecemeal approach and to do so is contrary to their subject-matter, scope and purpose.

Consideration of groundwater under the MRA and EPA reflects the status quo

[51] Prior to amendments contained in the WROLA and EPOLA that took effect on 6 December 2016, a series of Land Court decisions from 2012-2015 in *Xstrata*,[62] *Hancock*,[63] *Endocoal*[64] and *Adani*[65] had held it had jurisdiction to consider the impacts of mines on groundwater in hearing objections to a mine under s 269 of the MRA and

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[58] MRA, s 269(4)(k).
[59] MRA, s 269(4)(i).
[60] EPA, s 191(g) and standard criteria (a)(ii) as defined in Sch 2 (Dictionary).
[61] In the established meaning of these terms: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J.
[62] *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth – Brisbane Co-Op & Anor* (2012) 33 QLCR 79; [2012] QLC 13 at [205]-[260] (MacDonald P) (***Xstrata***), decided on 27 March 2012.
[63] *Hancock Coal Pty Ltd v Kelly & Ors & DEHP (No. 4)* (2014) 35 QLCR 56; [2014] QLC 12 at [81]-[129] (Smith M) (***Hancock***), decided on 8 April 2014.
[64] *Endocoal Limited v Glencore Coal Queensland Pty Ltd & Anor* (2014) 35 QLCR 462; [2014] QLC 54 at [68]-[101] (Smith M) (***Endocoal***), decided on 16 December 2014.
[65] *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48 at [59]-[233] (MacDonald P), decided on 15 December 2015 (***Adani***).

ss 190-191 (or the previous, equivalents in ss 222 and 223) of the EPA.[66] MacDonald P held in *Xstrata* that the Land Court had some, though limited, jurisdiction to consider the impacts of mines on groundwater, including the impacts on groundwater supply for surrounding farmers.[67] The Land Court member had held previously in *Hancock* and *Endocoal* that the Land Court had a general jurisdiction to consider the impacts of mines on groundwater.[68] MacDonald P adopted this wider position in *Adani*.[69]

[52] Parliament can be presumed to have endorsed that judicial interpretation[70] by re-enactment of the MRA and EPA in materially the same form and language after those decisions,[71] until being expressly confirmed and consolidated into the EPA as part of a reform package for water laws, including the WROLA and EPOLA, that commenced on 6 December 2016.[72] The principle that re-enactment of a rule after judicial consideration is presumed to be an endorsement of its judicial interpretation, while criticised, is not a fiction here given the specialised role of the Land Court for mining objections and the politically sensitive nature of the field of mining regulation.[73]

[53] That the status quo was to consider groundwater under the EPA is reflected in the facts that:

(a) the Coordinator-General's stated conditions for the draft EA;[74] and

(b) the draft EA proposed by the administering authority,

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[66] The Land Court's jurisdiction to consider the impacts of mines on groundwater was disputed in each of those cases. Douglas J accepted, without criticism, the Land Court's jurisdiction to consider groundwater in *CCAQ v Smith* [2015] QSC 260, although it was not disputed in that case.

[67] *Xstrata* (2012) 33 QLCR 79; [2012] QLC 13 at [205]-[260].

[68] *Hancock* (2014) 35 QLCR 56 at [81]-[129] and *Endocoal* (2014) 35 QLCR 462 at [68]-[101].

[69] *Adani* [2015] QLC 48 at [59]-[233]. Cochrane M also subsequently adopted this wider view of the Land Court's jurisdiction to consider groundwater under the EPA, MRA and the transitional provisions inserted by the WROLA in *Hancock Galilee Pty Ltd v Currie & Ors* [2017] QLC 35 (see, particularly, at [248]-[255]).

[70] Although the Land Court decisions were administrative in nature, it is a specialised court for mining applications: *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107 (Philip McMurdo J, as his Honour then was).

[71] *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-7 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; and *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502-3 [15]-[16] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.

[72] Many amendments were made to the EPA and MRA after *Xstrata* was decided, on 27 March 2012, and prior to the enactment of the water reforms, on 6 December 2016, including:

(a) the *Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012*, which was introduced on 12 May 2018 and assented to 14 August 2012, and which re-enacted the relevant criteria for the Land Court's recommendation for mining applications under the EPA, previously stated in s 223, in materially the same form in s 191;

(b) the *Mines Legislation (Streamlining) Amendment Act 2012*, which was introduced on 2 August 2012 and assented to on 29 August 2012, and which was intended to streamline and improve the efficiency of resource project approvals in Queensland but did not alter the multiple approvals required under the MRA, EPA and *Water Act* for mines impacting on groundwater; and

(c) the *State Development, Infrastructure and Planning (Red Tape Reduction) and Other Legislation Amendment Act 2014*, introduced on 3 June 2014 and assented to 15 August 2014, which provided, amongst other things, that where an activity required approval under the EPA and the *Sustainable Planning Act 2009*, a single integrated application could be made but did not alter the multiple approvals required under the EPA, MRA and *Water Act* for mines impacting on groundwater.

[73] *Electrolux Home Products Ltd v Australian Workers Union* (2004) 221 CLR 309 at 346 [81] per McHugh J (cf Gleeson CJ at 323-325 [7]-[8] and Gummow, Hayne and Heydon JJ at 370-1 [161]-[162]).

[74] See *Coordinator-General's evaluation report on the EIS* for the mine (December 2014), pp 177-181.

both contained conditions requiring monitoring of, and regulating, the impacts of the mine on groundwater (quality and quantity), including prescribing "groundwater level trigger change thresholds" that must not be exceeded at 38 specified monitoring points on and around the proposed mine;[75] and

(c) the Coordinator-General's imposed conditions 10-12 for a Groundwater Monitoring and Management Program, to be approved under the *Water Act*, were repeatedly linked to stated conditions for the draft EA.[76]

[54] The Land Court was obliged to consider both the Coordinator-General's conditions[77] and the conditions stated in the draft EA[78] and, therefore, could not avoid or refuse to consider the conditions in each addressing monitoring and regulation of the impacts of the mine on groundwater quantity and quality. This is a further reason why the impacts of the mine on groundwater quantity were plainly within the jurisdiction of the Land Court.

The primary judge impermissibly altered the language of s 748 of the EPA

[55] The primary judge held at [206] that, in light of amendments to the MRA and *Water Act* that took effect from 6 December 2016, it was unnecessary to directly address whether the Land Court member's approach in *Hancock* was or was not correct.

[56] Rather, the primary judge held that transitional provisions in s 748 of the EPA deprived the Land Court of jurisdiction to consider the impacts of the mine on groundwater under s 269 of the MRA and ss 190 and 191 of the EPA.[79]

[57] The primary judge had to add words to s 748 of the EPA to reach this conclusion. The section, which commenced on 6 December 2016, provides:

> **748 Particular applications made but not decided before commencement**
>
> (1) This section applies if—
>
> (a) an application of a type mentioned in section 126A or 227AA was made before the commencement; and
>
> (b) immediately before the commencement, the application had not been decided.
>
> (2) The application must be dealt with and decided as if the *Environmental Protection (Underground Water Management) and Other Legislation Amendment Act 2016* had not commenced.

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[75] Stated condition E4 of the *Coordinator-General's evaluation report on the EIS* for the mine (December 2014), pp 179-181, required "Groundwater levels when measured at the monitoring locations specified in Table E1 - Groundwater monitoring locations and frequency must not exceed the groundwater level trigger change thresholds specified in Table E3." This was reflected in condition D4 of the draft EA. Conditions D5 and D8- D12 of the draft EA imposed further obligations in relation to groundwater monitoring and regulation linked to the *Water Act*.

[76] e.g. the CG's imposed condition 10(b) provided that, "The groundwater management and monitoring program must be provided to the administering authority for the *Water Act 2000* for approval in accordance with the requirements of the baseline monitoring program in relevant conditions of the project's EA."

[77] By EPA, s 190(2).

[78] By EPA, ss 190(1) and 191(d).

[79] Primary judge's principal reasons at [206]-[225].

[58] The primary judge stated:[80]

> … In my view, the proper construction of s 748 of the EPA is that it means applications of the type mentioned in s 126A and s 227AA are to be dealt with and decided as if the amendments to the EPA effected by the EPOLA had not commenced. That is, they are to be dealt with and decided, without the additional obligation imposed by ss 126A and 227AA, in terms of what is to be provided with the application.

[59] The second part of the primary judge's construction altered the language of s 748(2). Section 748(2) does not state, "The application must be dealt with and decided without the additional obligation imposed by ss 126A and 227AA".

[60] The primary judge's construction fails to deal with the fact that the EPOLA contained provisions other than those inserting ss 126AA and 227AA into the EPA. Materially, EPOLA included provisions:

(a) inserting s 839 into the amendments of the MRA; and

(b) inserting the AWL provisions into the *Water Act*.[81]

[61] Materially also, the primary judge's construction also fails to deal with the fact that EPOLA *did not* contain the provisions:

(a) removing s 235(3) from the MRA (this was done by the WROLA); and

(b) inserting the new entitlement for holders of a mining lease to use underground water in s 334ZP of the MRA (this was done by the WROLA).[82]

[62] If the legislature had intended the transitional arrangements in s 748(2) of the EPA to provide that "The application must be dealt with and decided without the additional obligation imposed by ss 126A and 227AA for existing applications" it could have easily said so. It chose different language that:

(a) excluded the operation of the whole of the EPOLA, not merely the new requirements in ss 126AA and 227AA; and

(b) allowed the operation of WROLA to take effect, thereby removing s 235(3) and providing a new entitlement for holders of a mining lease in s 334ZP of the MRA.

[63] Contrary to the construction given to it by the primary judge, s 748 meant three things for the Land Court member in assessing the EA amendment on 31 May 2017:

(a) *First*, he should ignore the effect of the previous s 235(3) of the MRA, as it had been repealed (by the WROLA).

(b) *Second*, he should assess the EA amendment on the basis that the grant of the mining lease would enliven the right to use underground water under s 334ZP of the MRA even without an AWL being granted (as neither s 839 of the MRA nor the AWL provisions of the *Water Act* were taken to have commenced).

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[80] Primary judge's principal reasons at [220], read in the context of [215]-[225].
[81] EPOLA, Pt 5, ss 31 and 36 (pp 21-24 and 26-40).
[82] WROLA, Pt 4, ss 10 and 11 (pp 48-51).

(c) *Third*, in effect, this meant that for assessing the EA amendment application for the mine under ss 190 and 191, the learned Member should assume that no further approval requirements were necessary for the take or interference with groundwater under the *Water Act.*

[64] In reality, NAC is required to obtain an AWL because, except for the purposes of the assessment by the Land Court and the Administering Authority of the EA amendment application under Ch 5 of the EPA created by the transitional provisions, s 839 of the MRA is actually in force now and provides that s 334ZP does not apply to a mining lease if an application for an EA was made but not decided before s 334ZP commenced.

[65] It follows that NAC requires an AWL under the *Water Act* but its EA amendment application is to be assessed on the basis that it is not. The fact that s 748 created a legal fiction is not unusual. Transitional provisions by their nature often create legal fictions that bridge changes in statutory schemes.

[66] The language of s 748(2) is unambiguous. The primary Judge's construction has the effect of adding words to the subsection in a way that alters its obvious meaning. Parliament has issued a clear statutory command which this construction fails to comply with.

[67] Because of the lack of ambiguity, there is no need to refer to the explanatory notes. However, the explanatory notes confirm the plain language of the section. The explanatory notes for s 748 provide:[83]

> … This transitional provision provides that environmental authority applications and amendment applications which are in progress upon commencement are to be decided under the old provisions. This will maintain the status quo for the assessment process for applications which have been made but not decided before commencement.

[68] In the context of the previous interpretation that the Land Court had given to its jurisdiction to consider groundwater impacts of mines under s 269(4) of the MRA and ss 190 and 191 of the EPA (or equivalent earlier provisions of the EPA) examined earlier, the statements in the explanatory notes to the purpose of s 748 being to provide that applications in the process of being assessed "are to be decided under the old provisions" to "maintain the statutory quo" for such applications should be presumed as maintaining the previous interpretation. That is, that the Land Court had jurisdiction to consider the impacts of mines on groundwater in hearing objections to a mine under s 269 of the MRA and ss 190-191 of the EPA.[84] The primary judge, however, rejected such an interpretation.[85] Her Honour erred in doing so.

Further approval requirements for groundwater do not oust jurisdiction

[69] If the Appellant's submissions above in relation to s 748 are accepted then the Land Court member had jurisdiction to consider groundwater and was correct to do so. It is obviously no answer to that submission that there is a separate AWL process.

[70] However, because the primary judge rejected the Appellant's construction of s 748, she bolstered the conclusion that the MRA and EPA did not confer jurisdiction to consider

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[83] *EPOLA Bill 2016 Explanatory Notes*, p 7.
[84] In a similar way as the legislative history was considered in *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 500-3 [11]-[16] per French CJ, Hayne, Kiefel, Gageler and Keane JJ.
[85] Primary judge's principal reasons at [223].

groundwater by reference to the existence of a separate and distinct AWL regime. The Appellant submits that the AWL regime is capable of – and does – stand with a EPA and MRA regime that permits assessment of groundwater.

[71] In *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 2 NSWLR 681 (***Wyong***), the Privy Council considered whether planning permission was required for mining where a mining lease had been granted under the *Mining Act 1906* (NSW). Their Lordships concluded that planning permission was required:[86]

> Both Acts apply, or are capable of being applied, with complete generality to land in the State of New South Wales. Can they, in relation to a given piece of land, coexist? In their Lordships' opinion they clearly can, and do. The Acts have different purposes, each of which is capable of being fulfilled.

[72] Similarly, in *South Australia v Tanner* (1988-89) 161 CLR 166 (***Tanner***), the High Court rejected an argument that a prohibition on zoos contained in regulations under the *Waterworks Act 1932* (SA) was inconsistent with the provisions of the *Planning Act 1982* (SA), which, it was said, provided a complete code for development. In rejecting this argument, the plurality accepted a submission by the Attorney-General for South Australia that:[87]

> Both pieces of legislation can stand together and operate cumulatively. They can do this because each Act has a distinct purpose, different from the other.

[73] The primary judge rejected reliance on these cases[88] but, with respect, the Appellant submits that these cases are apposite here where the MRA, EPA and *Water Act* each have a distinct purpose relevant to mining that is different from each other but overlapping.

[74] Similarly, the requirements to assess impacts on groundwater under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth)[89] do not oust or over-ride the requirements to consider groundwater impacts under the MRA and EPA.

The Land Court member did not prejudge, preclude or prevent assessment under the *Water Act*

[75] The primary judge held that the approach taken by the Land Court member prejudged, precluded or prevented the assessment of an application for an AWL for the proposed mine under the *Water Act*[90] but, with respect, that is not correct.

[76] The Land Court member did not in fact prejudge, preclude or prevent an application for an AWL under the *Water Act* being made, nor was this the legal effect of his decisions under the MRA or EPA.

[77] The Land Court member was required to make recommendations to the final decision makers under the MRA and EPA. They were not bound to accept his recommendations.

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[86] *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 2 NSWLR 681 at 686 per Lord Wilberforce delivering the judgment of the Privy Council.
[87] *South Australia v Tanner* (1988-89) 161 CLR 166 at 170-171 per Wilson, Dawson, Toohey and Gaudron JJ.
[88] Primary judge's principal reasons at [235]
[89] EPBC Act, ss 24D and 24E, noting also s 10 (Relationship with State law).
[90] Primary judge's principal reasons at [230], [233], [234] and [235].

Nor did his recommendations preclude or prevent NAC applying for an AWL under the *Water Act*.

[78] The primary judge referred to *Walker v Noosa Shire Council* [1983] 2 Qd R 86 (***Walker***) as "apposite".[91] However, *Walker* does not support her Honour's conclusion.

[79] *Walker* is authority for the principle that, with the exceptions where an application is a clear futility or is tainted with illegality that cannot be cured, it is generally desirable that such applications be considered on their merits one at a time, and without undue speculation on the fate of other necessary applications.[92]

[80] *Walker* is not authority for a proposition that where multiple approvals are required for a development to proceed, the various approvals may not consider issues relevant to other approvals. Such an approach would be contrary to *Wyong* and *Tanner* that multiple approval requirements can stand together and operate cumulatively where each Act has a distinct purpose, different from the other.

[81] Neither is *Walker* authority for narrowing the matters required to be considered (e.g. the public interest) or relevant to those matters (e.g. how the benefits of royalties may outweigh the environmental harm in considering the public interest) by a statutory scheme simply because those matters are also relevant to a separate approval process.

[82] The Land Court member complied with *Walker*, *Wyong* and *Tanner* in making his decisions as he:

(a) was faced with objections based on (amongst other grounds) groundwater issues to the grant of two mining lease applications under the MRA and an amendment of an environmental authority under the EPA;

(b) did not pre-judge the outcome of the approval process under the *Water Act* and use that pre-judgment as a basis to recommend refusal under the MRA and EPA;

(c) did not recommend refusal under the MRA and EPA because relevant approvals under the *Water Act* had not been obtained (a situation akin to what occurred in *Walker*); and

(d) recommended refusal of the applications under the MRA and EPA based on the evidence presented at the hearing regarding groundwater and the criteria in s 269(4) of the MRA and s 191 of the EPA.

[83] It would have been wrong for the Land Court member to ignore matters that are relevant to assessing mandatory considerations like the standard criteria simply because they are also relevant for a separate statutory approval that has already been obtained or must be obtained in the future. Indeed, the only requirement relating to a separate approval the learned Member was required to consider under the EPA was the status of a relevant mining lease application.[93]

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[91] Primary judge's principal reasons at [231]-[232]

[92] *Walker* at 88-89 per Thomas J (whom DM Campbell and McPherson JJ agreed).

[93] EPA, s 191(h). Similarly, there is no requirement for the administering authority to consider other approvals in ss 176 and 235 of the EPA in deciding a site-specific EA amendment application.

The Land Court judge was entitled to "fully consider" groundwater

[84] If – consistent with the Appellant's submission – the Land Court member had jurisdiction to consider groundwater under s 269(4) of the MRA or s 191 of the EPA, it was a matter for the Land Court member to determine the extent of consideration, and the weight to be given to it, and the recommendations that ought to be made having regard to groundwater issues under the MRA and EPA.

[85] The weight to be given to considerations under s 269(4) of the MRA and s 191 of the EPA is entirely a matter for the Land Court.[94] As Gibbs J stated in *Sinclair* regarding the similar role and considerations for the Mining Warden hearing objections to mining leases at the time:[95]

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

[86] Fraser JA (with whom Morrison JA agreed generally and Margaret McMurdo P agreed on this issue) stated in *CCAQ v Smith* at [46]-[47] in relation to the Land Court's considerations under the previous s 223 (now s 191) of the EPA and s 269(4) of the MRA:

> The word "consider", like expressions such as "have regard to" and "take into account", leaves it to the Land Court to decide what, if any, weight should be given to each of the matters set out in s 223.[96] The same analysis is applicable in relation to the requirement in s 269(4) of the *Mineral Resources Act* that the Land Court "shall take into account and consider" the identified matters.
>
> Accepting that the concept of "environmental harm" is of great significance in other aspects of the operation of the *Environmental Protection Act*, the relevant function of the Land Court is not qualified by any requirement about the manner in which it must consider the identified matters or about the weight to be given to any of the relevant considerations. I am unable to accept the appellant's argument that any such qualification is implied in that Act.

[87] The primary judge contradicted this reasoning and erred by qualifying the extent of consideration and weight to be given to relevant considerations.

ENGAGING IN MERITS REVIEW ON GROUNDWATER[97]

[88] In addition to wrongly deciding the question of jurisdiction, the primary judge erred in law and exceeded the Supreme Court's jurisdiction on judicial review by concluding: [98]

> "it is difficult to see why [the Land Court member] did not make a recommendation, referring to his concerns [about groundwater], and making it clear (consistent with the legislation in any event) that if the mining lease was granted, operations should not be permitted to commence until an associated water licence was obtained (as in *Hancock*)",

as this involved adverse conclusions on the merits of the Land Court member's decisions

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[94] Other than cases of legal unreasonableness: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J; or irrationality: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.
[95] *Sinclair v Mining Warden* (1975) 132 CLR 473 at 482. Similarly, see *Rathborne v Abel* (1964) 38 ALJR 293 (HCA) at 295 per Barwick CJ and 301 per Kitto J; and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 per Mason J.
[96] See *Rathborne v Abel* (1964) 38 ALJR 293 at 295, 301; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.
[97] OCAA's Notice of Appeal, ground 2.
[98] Primary judge's principal reasons at [232].

and recommendations made within jurisdiction.

[89] The primary judge appears to have decided that, in the circumstances before the Land Court member where he was unsatisfied with the state of the groundwater evidence presented by NAC, he *ought to have* made a similar recommendation as he had made for the mine the subject of his decision in *Hancock.*

[90] The primary judge did *not* find the Land Court member's decision not to adopt a similar approach as he had in *Hancock* was legally unreasonable or irrational. Merely that it was "difficult to see why" his Honour had not adopted the same approach.

[91] The primary judge's reasoning in this regard trespassed into the merits of the Land Court member's decisions and, as such, exceeded the role of a court in judicial review.

SUFFICIENCY OF REASONS ON GROUNDWATER[99]

[92] The primary judge erred in law in concluding that the Land Court member's reasons were inadequate and failed to accord procedural fairness by failing to address at all the operation of the AWL provisions of the *Water Act* and by failing to properly address the First Respondent's argument concerning the operation and effect of the combined role of the various other approvals and conditions to address his concerns about the uncertainty associated with the groundwater modelling.[100]

[93] The primary judge erred in making this conclusion by:

(a) failing to give the member's reasons a beneficial construction;[101]

(b) concluding that the standard to be applied in determining the sufficiency of the member's reasons was the same as if the member had been exercising a judicial function, even though the member was exercising a non-binding, administrative function;[102]

(c) failing to conclude that the extent of the member's duty to give reasons was affected and defined by the statutory function that was served by the giving of the reasons;[103]

(d) failing to conclude that the primary statutory function that was served by the giving of reasons within the statutory context of s 269 of the MRA and s 190 of the EPA was to inform and guide the MRA Minister and the administering authority in making their respective decisions under the MRA and EPA (**the statutory function of the reasons**);[104]

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[99] OCAA's Notice of Appeal, ground 3.
[100] Primary judge's principal reasons at [255] read in the context of Ground 15.
[101] The primary judge expressly declined to apply *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (Brennan CJ, Toohey, McHugh and Gummow JJ) at 272 at [100] of her reasons (see also [332]). As an example of her Honour failing to give the Land Court member's reasons a beneficial construction, see [272] in relation to the member failing to perform a "balancing exercise".
[102] Primary judge's principal reasons at [82]-[101] and [246]-[255].
[103] Contrary to *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 22 CLR 480 at 497-498 [43], [45] and [46] per French CJ, Crennan, Bell, Gageler and Keane JJ.
[104] The primary judge said at [92] of her reasons that *Wingfoot* was "of little assistance here".

(e) failing to conclude that the member could lawfully tailor his reasons to meet the statutory function of the reasons, as the member stated he had done in his reasons; and

(f) failing to have regard to material circumstances in which the reasons were given, namely:

(i) the urgency to provide the decisions as repeatedly requested by NAC; [105] and

(ii) the volume of the evidence and submissions before the member.[106]

[94] In *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 22 CLR 480 (***Wingfoot***) the High Court made clear that observations and principles drawn from cases involving judicial decisions or administrative decisions in other statutory contexts about the adequacy of reasons are of limited utility. The adequacy of the reasons of an administrative decision-maker varies according to the statutory function served by the reasons.[107]

[95] Viewed within the statutory context of the MRA, EPA and the *Land Court of Queensland Act* 2000 (Qld) (**LCA**), the primary function served by the Land Court giving reasons for its decisions under s 269 of the MRA and s 190 of the EPA is to inform and guide the MRA Minister and the Administering Authority in making their respective decisions under ss 271 and 271A of the MRA and s 194 of the EPA.

[96] The Land Court member correctly identified this function on several occasions in his reasons and this clearly guided the extent that he provided reasons.[108]

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

[98] With respect, the primary judge's conclusion at [255] does not reflect a fair reading of the Land Court member's reasons in circumstances where:

(a) the Land Court member's reasons at [1679] expressly rejected reliance on the draft EA conditions for groundwater, which themselves cross-referenced to the Coordinator-General's conditions 10-12 requiring a Groundwater Management and Monitoring Program to be approved and reviewed in the future under the *Water Act*;[109] and

(b) the draft EA, containing conditions D4-D12 for ongoing groundwater management and monitoring linked to further approval under the *Water Act*, was a central point of reference for the whole proceedings and which the Land Court member was required by s 190 of the EPA to base his recommendations on.

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[105] See the Land Court member's reasons at [114]-[117], [118]-[130], [1655]-[1657] and [1878].
[106] See the Land Court member's reasons at [19], [36], [37], [38], [97], [113], [202], 203], and [205].
[107] Similarly, see *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 482-483 per McPherson and Davies JJA.
[108] Land Court member's reasons at [36], [38] and [210].
[109] See conditions D8-D12 of the draft EA and imposed conditions 10-12 of Appendix 1 of the *Coordinator-General's evaluation report on the EIS* for the mine (December 2014), pp 164-165.

[99] Given these circumstances, it cannot be said that the Land Court member failed to consider the Groundwater Management and Monitoring Program under the draft EA, which was required to be approved and reviewed under the *Water Act*, or further approval requirements under the *Water Act*.

[100] In these circumstances and in the context of the statutory task for which reasons were required, the Land Court member gave adequate reasons for rejecting NAC's argument for future improvements to their groundwater model and future monitoring in accordance with the conditions of the draft EA linked to further approval under the *Water Act*.

[101] Further, the Land Court member delivered his decision and reasons very soon after the evidence and closings submissions and there was no "operative delay" that would raise concern the member was unable to recall the evidence or require him to put beyond question any suggestion that he had lost an understanding of the issues due to the delay.[110] As such, this is a case where a court exercising judicial review or on appeal is entitled to assume that the mere failure to refer to evidence does not mean that it has been overlooked or that other forms of error have occurred.[111] The primary judge did not give the Land Court member's reasons the benefit of that assumption.

INTERGENERATIONAL EQUITY[112]

[102] The primary judge erred in law by concluding that the Land Court member's consideration and application of the principle of intergenerational equity was unlawful as a consequence of his consideration of the impact of the mine on groundwater quantity.[113]

[103] The primary judge's error in concluding that the impacts of the mine on groundwater could not be considered under the MRA and EPA were addressed above and need not be repeated. If the Court holds the Land Court had jurisdiction to consider the impacts of the mine on groundwater under the MRA and the EPA, the primary judge's reasoning on intergenerational equity must also fall.

[104] Further, the primary judge erred in law and exceeded the jurisdiction of the Supreme Court on judicial review by concluding that the Land Court member incorrectly applied the principle of intergenerational equity as a mandatory requirement and failed to properly balance it with other considerations such as the economic benefits of the mine as:[114]

(a) in reaching this conclusion the primary judge failed to give the member's reasons a beneficial construction,[115] including his express consideration of the "economic benefit derived from the project" in the context of applying the principle of intergenerational equity;[116]

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[110] *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 at [72] and [76] per Carr, Emmett and Gyles JJ.
[111] *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 at [72] and [80] per Carr, Emmett and Gyles JJ.
[112] OCAA's Notice of Appeal, grounds 4 and 5.
[113] Primary judge's principal reasons at [264].
[114] Primary judge's principal reasons at [265]-[274] with reference to the language of ground 7, particular (i), of NAC's Amended Application for a Statutory Order of Review and Application for Review, dated 28 November 2017, which is specifically referred to at [274] of the reasons.
[115] Contrary to *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.
[116] Land Court member's reasons at [1340].

(b) this involved adverse conclusions on the merits of the Land Court member's decisions and recommendations made within jurisdiction; and

(c) the Land Court is not required to weigh up (that is, balance) the considerations in s 269(4) of the MRA or s 191 of the EPA,[117] rather, the weight to be given to the matters set out in each is a matter for the Land Court and its relevant function is not qualified by any requirement about the manner in which it must consider the identified matters.[118]

NOISE CONDITIONS[119]

Beneficial construction of the Land Court member's reasons

[105] The primary judge erred in law by failing to give a beneficial construction to the Land Court member's reasons that he was "compelled" and had "no option" but to recommend refusal of the application to amend the environmental authority under s 190(1) of the EPA due to his inability to recommend noise conditions inconsistent with Coordinator-General's stated conditions and, in doing so, he did not conduct the balancing exercise required by s 191 of the EPA.[120]

[106] Such a beneficial interpretation, that such statements reflected the weight the learned Member gave to particular issues and the valid exercise of his discretion to make recommendations, rather than being compelled by law is consistent with the facts that the Land Court member:

(a) correctly identified the legal tests he was required to apply in making his recommendations under the MRA and EPA at numerous places in his reasons;[121]

(b) cited in his reasons past decisions of the Land Court making recommendations regarding mining applications under the MRA and EPA in which the correct tests were applied in exercising the Land Court's administrative discretion[122] or important principles were established on judicial review of the Land Court;[123] and

(c) used a variety of terms to describe the weight he attached to particular issues and the exercise of his discretion to make recommendations.

[107] The variety of terms the learned Member used in making findings attributing the weight he attached to particular issues and the exercise of his discretion to make recommendations included:

(a) "appropriately managed";[124]
(b) "adequately dealt with";[125]

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[117] The primary judge's principal reasons at [271] stated that such a balancing exercise is required.
[118] *CCAQ v Smith* [2016] QCA 242 at [46]-[47] per Fraser JA with whom Morrison JA agreed.
[119] OCAA's Notice of Appeal, grounds 6 and 7.
[120] Primary judge's principal reasons at [331]-[336] & [339].
[121] e.g. Land Court member's reasons at [136], [146], [198] and applied at [1776]-[1839].
[122] e.g. Land Court member's reasons at [177]-[179], [183]-[187], [196], [198], [781]-[784], [1196] (*Xstrata* case); [181]-[182] (*Adani* case).
[123] e.g. Land Court member's reasons at [194]-[195] (*BHP Billiton*).
[124] Land Court member's reasons at [2] and at [13].
[125] Land Court member's reasons at [4].

(c) "appropriate";[126]
(d) "sufficient";[127]
(e) "sufficiently critical";[128]
(f) "sufficiently serious";[129]
(g) "what I consider should be recommended;"[130]
(h) "risks too great";[131]
(i) "properly addressed";[132]
(j) "I am compelled to recommend";[133]
(k) "my only option";[134]
(l) "I have no option but to …";[135] and
(m) "I am left with no option but to …".[136]

[108] The reasons make it clear the Land Court member weighed all of the evidence before him and the relevant considerations as an exercise of discretion rather than being legally bound to recommend refusal on any particular consideration. He identified the correct statutory provisions he was required to apply, s 269(4) of the MRA[137] and s 191 of the EPA[138] before going on to state, at [198]:

> … The Court must balance all of the relevant considerations and make recommendations as provided by the MRA and the EPA, and, in so doing, the Court is to take into account and consider the applicants; the objectors; the relevant legislation; and, of course, the evidence in the hearing.

[109] The Land Court member applied the relevant criteria under s 269(4) of the MRA and s 191 of the EPA at [1776]-[1839] of his reasons and concluded with his determination (emphasis added):

> [1858] **Taking all of the reasoning in this decision into account, I am left with no option** but to recommend to the Honourable the Minister responsible for the MRA that MLA 50232 be rejected. It follows that, as I have recommended that MLA 50232 not be granted, it is appropriate to recommend to the Honourable the Minister responsible for the MRA that MLA 700002 be rejected.
>
> [1859] **Taking all of the reasoning in this decision into account, I am left with no option** but to recommend to the administering authority responsible for the EPA that Draft EA Number EPML 00335713 be refused.

[110] As in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, this is a case where the decision-maker stated the correct tests to be applied in his reasons and any looseness of language in other parts should not be used to interpret his reasons as having applied the wrong test.

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[126] Land Court member's reasons at [5], [757] and [1799].
[127] Land Court member's reasons at [14], [1745] and [1763].
[128] Land Court member's reasons at [1056].
[129] Land Court member's reasons at [1265].
[130] Land Court member's reasons at [784].
[131] Land Court member's reasons at [1679].
[132] Land Court member's reasons at [1680].
[133] Land Court member's reasons at [786].
[134] Land Court member's reasons at [3], [1196], and [1838].
[135] Land Court member's reasons at [1838].
[136] Land Court member's reasons at [1858] and [1859].
[137] Land Court member's reasons at [136].
[138] Land Court member's reasons at [146].

[111] The Land Court member's reasons make it clear that he used expressions such as "I am left with no option but …" as expressions reflecting the weight he attached to particular findings that led him to feel compelled (as a question of weight and an exercise of discretion within the constraints of s 190 of the EPA) to make a particular recommendation.

[112] The weight the Land Court member attributed to the conditions setting the appropriate noise limits, in the context of the constraints placed on his recommendations by s 190(2) of the EPA, was clearly a crucial component of why he stated he had "no option" but to recommend refusal. His reasons make no sense otherwise. Why would he recommend refusal about a matter he considered was of insignificant or trivial weight?

Construction of s 190 of the EPA

[113] Further, the primary judge erred in construing s 190 of the EPA:

(a) by concluding s 190 allowed the Land Court member to recommend approval of the application to amend the environmental authority subject to a condition that the recommendation not take effect until a Coordinator-General's condition is changed;[139] and

(b) by failing to conclude that the Land Court member had no power under s 190 to recommend conditions that were inconsistent with the Coordinator-General's conditions and, as a consequence, in circumstances where the Land Court member had formed a view that the appropriate noise levels that ought to be imposed as conditions on the environmental authority for the mine were inconsistent with a Coordinator-General condition, the only option lawfully available to the member was to recommend refusal of the application.

[114] The primary judge invited the Land Court to avoid the plain meaning of s 190(2) of the EPA by "making any recommendation for approval subject to a condition that it not take effect unless and until [the Coordinator-General's condition is changed]"[140] With respect, providing a back door to avoid the effect of the plain language of s 190(2) goes too far. It renders s 190(2) a mere inconvenience to be avoided rather than statutory language to be interpreted consistent with the normal principles of construction.[141]

[115] In circumstances where the Land Court member had formed a view,[142] as an exercise of discretion based on the weighing of evidence, that:

(a) the application could not be approved on the basis of the draft environmental authority for the application (under s190(1)(a)(i) of the EPA) because the draft conditions were not adequate to protect the acoustic environment; and

(b) the application could not be approved, but on stated conditions that are different to the conditions in the draft environmental authority (under s190(1)(a)(ii) of the EPA) because the appropriate noise levels that ought to be imposed as conditions on the

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[139] Primary judge's principal reasons at [337]-[338] and [378](3) by reference to the language of Ground 1, particulars (i), (iiA) and (ii) of NAC's Amended Application for a Statutory Order of Review and Application for Review, dated 28 November 2017.
[140] Primary judge's principal reasons at [337].
[141] Contrary to *Queensland Coal Pty Ltd v Shaw* [2002] 2 Qd R 288 at 292 [15] per Thomas JA (with whom Davies JA and Cullinane J agreed).
[142] See, particularly, the Land Court member's reasons at [773] and [782]-[787].

environmental authority for the mine were inconsistent with a Coordinator-General condition and therefore could not be included (due to s190(2) of the EPA);

then the only option lawfully available to the member under s 190 of the EPA was to recommend refusal of the application (under s190(1)(a)(iii) of the EPA).

[116] Put another way, in the context of the constraints imposed on his decision by s 190, the learned Member felt compelled by his findings of fact based on the evidence before him regarding noise to exercise his discretion to recommend refusal of the EA application.

[117] In doing so the learned Member was doing nothing more than performing the function given to him by s 190 of the EPA. His recommendations were not binding and the administering authority could form its own views on the final decision that ought to be made under s 194. There is no apparent statutory purpose to be achieved by giving s 190 other than its plain meaning.

CONCLUSION

[118] The appeal should be allowed.

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11 July 2018

ADDENDUM

[119] This outline exceeds the 10-page limit in Practice Direction 3 of 2013 because we considered the Court would be assisted by setting out the factual background and chronology in some detail, so that the grounds of appeal could be considered in context, and OCAA's arguments concerning ground 1 could not be addressed within the page limit. We believe that the detail provided in relation to ground 1 in this outline will assist the parties and the Court and save considerable time in oral argument.