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

BACKGROUND

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

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

[3] NAC applied to expand the mine to "Stage 3" to the south and west of the existing mine.

[4] A revised Stage 3 was assessed by an environmental impact statement (**EIS**) under the *State Development and Public Works Organisation Act* 1971 and the Coordinator-General (**CG**) issued a report recommending approval of the project, subject to stated conditions, on 19 December 2014.[2]

[5] There were multiple objections to the grant of mining leases for Stage 3 of the mine under the *Mineral Resources Act* 1989 (Qld) (**MRA**) and amendments to NAC's environmental authority (**EA**) for the mine under the *Environmental Protection Act* 1994 (Qld) (**EPA**). The grounds of objections included the impacts of the mine on groundwater and noise.[3]

[6] A member of the Land Court heard the objections under the MRA and EPA. Following a hearing of almost 100 sitting days during which 28 expert and 38 lay witnesses gave evidence across multiple topics,[4] including groundwater and noise, he decided to recommend under s 269 of the MRA that NAC's two applications for mining leases be rejected and to recommend under s 190 of the EPA that NAC's application to amend its EA for Stage 3 be refused.

[7] The Land Court member's recommendations were based on the statutory criteria stated in s 269(4)(i), (j), (k), (l) and (m) of the MRA and s 191 of the EPA and his factual findings in relation to groundwater impacts, intergenerational equity, and noise limits.[5]

---

[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 [65].
[3] Land Court member's reasons at [84]-[86].
[4] Land Court member's reasons at [103]-[112].
[5] Land Court member's reasons at [1799]-[1800], [1802]-[1808], [1834]-[1835], and [1838]-[1839].

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

[8] On 14 February 2018, a delegate of the Second Respondent made a final decision under s 194 of the EPA to refuse NAC's application to amend the EA (**delegate's decision**).[6]

[9] NAC applied for judicial review of the Land Court member's decisions. The primary judge rejected the majority of NAC's grounds but allowed the application on the basis of ground 10 (groundwater), ground 7 (intergenerational equity) & ground 1(aii) (noise).[7] Had the primary judge reached a different view in respect of ground 10, her Honour would have held that ground 15 (insufficient reasons) was established.[8] The primary judge also set aside the delegate's decision as it relied on the member's findings.[9]

THE LAND COURT'S JURISDICTION TO CONSIDER GROUNDWATER[10]

[10] The primary judge erred in construing the MRA and EPA in concluding that the Land Court had no jurisdiction to consider the potential impacts of the proposed mine on groundwater quantity,[11] 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.

(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.

(c) The Land Court has repeatedly considered the impacts of mines on groundwater in the past when hearing objections under the MRA and EPA. Parliament recognised this jurisdiction in s 1250D(5) and (6) of the *Water Act* 2000 (Qld) (***Water Act***). Consideration of the impacts of mines on groundwater represents the status quo.

(d) Both the CG's conditions and the conditions stated in the draft EA imposed requirements for monitoring and regulation of the impacts of the mine on groundwater. The Land Court was obliged by ss 190 and 191(d) of the EPA to consider these matters.

(e) The existence of the further approval requirements for groundwater in the transitional associated water licence (**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.[12]

(f) 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.

[11] 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*,[13] because:

(a) once groundwater was not precluded from consideration 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

---

[6] *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 (**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].
[7] Primary judge's principal reasons, summarised at [378].
[8] Primary judge's principal reasons at [255].
[9] Primary judge's reasons on final orders at [7]-[9].
[10] Ground 1 of the OCAA's Notice of Appeal.
[11] 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].
[12] *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 2 NSWLR 681 at 686 (Privy Council) (***Wyong***); and *South Australia v Tanner* (1988-89) 161 CLR 166 (***Tanner***) at 170-171.
[13] Primary judge's principal reasons at [229], [230], [233], [234] and [235].

under the MRA and EPA; and

(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.

The Land Court's statutory task

[12] The impacts of a proposed mine on groundwater are relevant to multiple factors the Land Court is *bound* to consider in performing its statutory task under s 269 of the MRA and s 190 of the EPA. The mandatory considerations in ss 269(4)(i), (j), (k), (l) and (m) of the MRA involve matters to which the impacts of a mine on groundwater can clearly be relevant. Similarly, under s 191 and the standard criteria of the EPA, matters such as "intergenerational equity", "the character, resilience and values of the receiving environment" and "the public interest" allow a very wide scope of matters to be considered. There is no reason why the impacts of a mine on groundwater cannot be considered under these criteria.

[13] In the context of those mandatory considerations, the Land Court member was bound to consider the grounds of objections to the mine which included objections based on groundwater impacts. Had he failed or refused to consider groundwater in this context he would, in truth, have erred by failing to exercise jurisdiction[14] and misunderstanding his statutory function.[15]

[14] The primary judge explained her reasoning for constraining the broad considerations in s 269(4)(k) and (l) at [34] of her principal reasons that "they could not be relied upon to expand the Land Court's jurisdiction" beyond s 269(4)(i) and (j). This construction 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.[16]

[15] The primary judge's reasoning is inconsistent with the Court's decision in *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 (***CCAQ v Smith***), which held 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).[17]

Jurisdiction to consider groundwater impacts is not ousted by reference to "authorised activity" or "mining activity"

[16] The primary judge held that the assessments of the applications under the MRA and the EPA were limited to what was authorised by the grant of the mining lease and environmental authority.[18] 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 groundwater impacts of the mine.

[17] 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.[19] 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 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.

[18] The primary judge's reasoning on groundwater, 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 in a piecemeal way on the basis of a fiction that it would not cause any impact on

---

[14] *Abebe v Commonwealth* (1999) 197 CLR 510 at 552 (Gaudron J); & *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 339-340 (Gaudron J).

[15] Noting the recent decision in *Legal Services Commissioner v Nichols* [2018] QCA 158 at [11], [21], [24], [27] & [29]-[30].

[16] *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382, [71].

[17] *CCAQ v Smith* [2016] QCA 242 at [33] and [42] per Fraser JA (with whom Morrison JA agreed).

[18] 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].

[19] As noted by the primary judge at [33] in the context of s 269(4)(i) and (j).

groundwater. To even consider such a matter or the extensive groundwater evidence tendered during the hearing[20] would be outside the Land Court's jurisdiction. 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.

The Land Court was obliged by the CG conditions and the draft EA to consider groundwater

[19] Both the CG's stated conditions for the draft EA[21] and the draft EA proposed by the administering authority, 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.[22] In addition, the CG's imposed conditions 10-12 for a Groundwater Monitoring and Management Program, to be approved under the *Water Act*, and the CG's recommended conditions for the *Water Act*, were repeatedly linked to conditions in the draft EA.[23]

[20] The Land Court was obliged to consider both the CG's stated conditions[24] and the conditions in the draft EA[25] 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.

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

[21] A series of Land Court decisions from 2012-2015 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 ss 190-191 (or the previous, equivalents in ss 222 and 223) of the EPA. 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.[26] The Land Court member had held previously in *Hancock*[27] and *Endocoal*[28] that the Land Court had a general jurisdiction to consider the impacts of mines on groundwater. MacDonald P adopted this wider position in *Adani.*[29]

[22] Parliament can be presumed to have endorsed that judicial interpretation[30] by re-enactment of the MRA and EPA in materially the same form and language after those decisions,[31] until being expressly confirmed and consolidated into the EPA as part of a reform package for water laws, including 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.[32] The principle that re-enactment of a rule after judicial consideration is

---

[20] NAC itself tendered extensive groundwater evidence and, after the evidence closed, applied to reopen its case to allow further groundwater evidence to be tendered: see *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1.

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

[22] See stated condition E4 of the CG report, pp 179-181, and condition D4 of the draft EA.

[23] CG report, Appendix 1 (Imposed conditions), pp 164-165, & Appendix 3 (Recommended conditions), Sch 3, pp 211-212.

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

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

[26] *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.

[27] *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.

[28] *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.

[29] *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***). 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]).

[30] 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).

[31] *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-7; and *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502-3 [15]-[16].

[32] 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, the *Environmental Protection (Greentape Reduction) and Other Legislation*

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.[33]

[23] Parliament expressly recognised that the Land Court had jurisdiction to consider the impacts of mines on groundwater during the objection hearing process under the EPA and MRA, and that such impacts were being validly assessed by the Land Court at the time of passage of the WROLA and EPOLA. It did so in s 1250D(5) and (6) of the *Water Act*, which specified that an AWL was not required if, inter alia, the "impacts on underground water" were "subject to consideration in a Land Court hearing in which objectors led expert evidence on the impacts on underground water" and the Land Court objections decision under the EPA and MRA did not specify any impediments relating to groundwater to the grant of the mining activities applications.[34]

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

[24] The primary judge impermissibly altered the words of s 748 of the EPA to find that it 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.[35]

[25] The primary judge's interpretation of s 748 of the EPA is directly inconsistent with s 1250D(5) and (6) of the *Water Act*, which recognised the Land Court had jurisdiction to consider groundwater under the EPA and MRA objecting hearing process and was exercising that jurisdiction at the time of passage.

[26] The primary judge's construction also 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 inserting s 839 into the amendments of the MRA and inserting the AWL provisions into the *Water Act.*[36]

[27] The primary judge's construction fails to recognise that EPOLA did not remove s 235(3) from the MRA, nor did it insert the new entitlement for holders of a mining lease to use underground water in s 334ZP of the MRA. Both of these amendments were made by WROLA.[37]

[28] If the legislature had intended the transitional arrangements in s 748(2) of the EPA to provide that an 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: excluded the operation of the whole of the EPOLA, not merely the new requirements in ss 126AA and 227AA; and 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.

[29] Contrary to the construction given to it by the primary judge, s 748 meant the Land Court member in assessing the EA amendment on 31 May 2017 had to ignore the effect of the previous s 235(3) of the MRA and had to 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). The primary Judge's construction has the effect of adding words to the subsection in a way that alters its obvious meaning and which cannot stand with s 1250D(5) and (6) of the *Water Act*. Parliament has issued a clear statutory command, which the primary judge's construction fails to comply with.

[30] The language of s 748(2) is unambiguous and, therefore, there is no need to refer to the explanatory notes. However, the explanatory notes confirm the plain language of the section. The explanatory notes

---

Amendment Act 2012, 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.

[33] *Electrolux Home Products Ltd v Australian Workers Union* (2004) 221 CLR 309 at 346 [81].

[34] Section 1250D of the *Water Act* was inserted by EPOLA. Section 1250D(5) and (6) were inserted by amendments made during the second and third readings of the EPOLA Bill. The plain meaning of s 1250D(5) and (6) is confirmed by the Minister's speech when introducing the amendments (Hansard, 9 November 2016, p 4362) and the explanatory notes for the amendments, pp 4-5.

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

[36] EPOLA, Pt 5, ss 31 and 36 (pp 21-24 and 26-40).

[37] WROLA, Pt 4, ss 10 and 11 (pp 48-51).

for s 748 state that it provides for applications in progress upon commencement "to be decided under the old provisions" and that it "will maintain the status quo".[38] 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) and s 1250D(5) and (6) of the *Water Act* examined earlier, the "status quo" is one in which 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.

Further approval requirements for groundwater do not oust jurisdiction

[31] 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.

[32] 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 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 EPA and MRA regimes that permit assessment of groundwater.

[33] The MRA, EPA and *Water Act* stand together and operate cumulatively. They can do this because each Act has a distinct purpose, different from the other but overlapping. [39]

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

[34] 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*[40] but, with respect, that is not correct.

[35] 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 recommendations under the MRA or EPA.

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

[37] The primary judge referred to *Walker v Noosa Shire Council* [1983] 2 Qd R 86 (***Walker***) as "apposite".[41] However, *Walker* does not support her Honour's conclusion.

[38] *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 applications be considered on their merits one at a time, and without undue speculation on the fate of other necessary applications.[42]

[39] *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 the principle that multiple approval requirements can stand together and operate cumulatively where each Act has a distinct purpose, different from the other.[43] Neither is *Walker* authority for narrowing the matters required to be considered (e.g. the public interest) or relevant to those matters simply because those matters are also relevant to a separate approval process.

[40] The Land Court member complied with *Walker* in making his decisions as he 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. Nor did he 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*). Rather, he (correctly as a matter of law and within the scope of his discretion) recommended

---

[38] *EPOLA Bill 2016 Explanatory Notes*, p 7.
[39] *Wyong* at 686; and *Tanner* at 170-171. The primary judge rejected reliance on these cases at [235].
[40] Primary judge's principal reasons at [230], [233], [234] and [235].
[41] Primary judge's principal reasons at [231]-[232].
[42] *Walker* at 88-89 per Thomas J (with whom DM Campbell and McPherson JJ agreed).
[43] *Wyong* at 686; and *Tanner* at 170-171.

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.

[41] It would have been wrong for the Land Court member to ignore matters relevant to assessing mandatory considerations simply because they are also relevant for a separate statutory approval that has already been obtained or must be obtained in the future.

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

[42] 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.

[43] Other than in cases of legal unreasonableness or irrationality,[44] 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.[45]

ENGAGING IN MERITS REVIEW ON GROUNDWATER[46]

[44] In addition to wrongly deciding the question of jurisdiction, at [232] 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*. 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. 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[47]

[45] The primary judge erred in law in concluding, at [255], 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 NAC'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.

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

(a) failing to give the member's reasons a beneficial construction;[48]

(b) 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;[49]

(c) 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**);[50]

---

[44] Considering *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

[45] *CCAQ v Smith* [2016] QCA 242 at [46]-[47] per Fraser JA (with whom Morrison JA agreed). Similarly, see *Sinclair v Mining Warden* (1975) 132 CLR 473 at 482 per Gibbs J; *Rathborne v Abel* (1964) 38 ALJR 293 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.

[46] OCAA's Notice of Appeal, ground 2.

[47] OCAA's Notice of Appeal, ground 3.

[48] The Land Court hearing objections under the MRA and EPA performs an administrative not a judicial function (: *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107) but the primary judge declined to apply *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at [100] of her reasons (see also [332]).

[49] Contrary to *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 22 CLR 480 (***Wingfoot***) at 497-498 [43], [45] and [46]. Similarly, see *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 482-483 per McPherson and Davies JJA.

[50] The primary judge said at [92] of her reasons that *Wingfoot* was "of little assistance here".

(d) 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

(e) failing to have regard to material circumstances in which the reasons were given, namely the urgency to provide the decisions as repeatedly requested by NAC [51] and the volume of the evidence and submissions before the member.[52]

[47] Viewed within the statutory context of the MRA, EPA and the *Land Court Act* 2000 (Qld), 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 s 271A of the MRA and s 194 of the EPA. The Land Court member correctly identified this function and it clearly guided the extent that he provided reasons.[53]

[48] 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.

[49] 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*;[54] 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.

[50] 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*.

[51] 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 approval based on 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*.

INTERGENERATIONAL EQUITY[55]

[52] The primary judge erred in law by concluding, at [264], 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.

[53] 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.

[54] Further, the primary judge erred in law and exceeded the jurisdiction of the Supreme Court on judicial review by concluding, at [265]-[274], that the Land Court member incorrectly applied the principle of intergenerational equity as a mandatory requirement and failed to properly balance it with other

---

[51] See the Land Court member's reasons at [114]-[117], [118]-[130], [1655]-[1657] and [1878].

[52] See the Land Court member's reasons at [19], [36], [37], [38], [97], [113], [202], 203], and [205].

[53] Land Court member's reasons at [36], [38] and [210].

[54] See conditions D8-D12 of the draft EA and imposed conditions 10-12 of Appendix 1 of the CG report, pp 164-165.

[55] OCAA's Notice of Appeal, grounds 4 and 5.

considerations such as the economic benefits of the mine as:

(a) in reaching this conclusion the primary judge failed to give the member's reasons a beneficial construction,[56] including his express consideration of the "economic benefit derived from the project" in the context of applying the principle of intergenerational equity;[57]

(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,[58] 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.[59]

NOISE CONDITIONS[60]

Beneficial construction of the Land Court member's reasons

[55] 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.[61]

[56] 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;[62]

(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[63] or important principles were established on judicial review of the Land Court;[64] 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.[65]

[57] 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[66] and s 191 of the EPA[67] before going on to state, at [198], that he "must balance all of the relevant considerations".

[58] 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 at [1858] and [1859] that the mining leases should be rejected and the application to amend the EA should be refused. In the context where he identified the correct legal tests, his reasons make it clear that he used expressions such as "I

---

[56] Contrary to *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.
[57] Land Court member's reasons at [1340].
[58] The primary judge's principal reasons at [271] stated that such a balancing exercise is required.
[59] *CCAQ v Smith* [2016] QCA 242 at [46]-[47] per Fraser JA with whom Morrison JA agreed.
[60] OCAA's Notice of Appeal, grounds 6 and 7.
[61] Primary judge's principal reasons at [331]-[336] & [339].
[62] e.g. Land Court member's reasons at [136], [146], [198] and applied at [1776]-[1839].
[63] e.g. Land Court member's reasons at [177]-[179], [183]-[187], [196], [198], [781]-[784], [1196]; and [181]-[182].
[64] e.g. Land Court member's reasons at [194]-[195] referring to *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107.
[65] These were summarised at [394] of OCAA's outline of argument, dated 23/11/17, before the primary judge.
[66] Land Court member's reasons at [136].
[67] Land Court member's reasons at [146].

am left with no option but …" as expressions reflecting the weight he attached to particular findings that led him to feel compelled, within the constraints of s 190 of the EPA, to make those recommendations.

[59] 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 no weight?

Construction of s 190 of the EPA

[60] Further, the primary judge erred in construing s 190 of the EPA by concluding, at [337], [338] and [378](3), that s 190 allowed the Land Court member to recommend approval of the application to amend the EA subject to a condition that the recommendation not take effect until a CG's condition is changed. Further, the primary judge erred by failing to conclude that the Land Court member had no power under s 190 to recommend conditions that were inconsistent with the CG'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 EA for the mine were inconsistent with a CG condition, the only option lawfully available to the member was to recommend refusal of the application.

[61] 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]".[68] 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.[69]

[62] In circumstances where the Land Court member had formed a view,[70] 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 EA 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 EA (under s190(1)(a)(ii) of the EPA) because the appropriate noise levels that ought to be imposed as conditions on the EA for the mine were inconsistent with a CG 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).

[63] 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.

[64] 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

[65] The appeal should be allowed.

Saul Holt QC and Dr Chris McGrath
Counsel for the Appellant
25 July 2018

---

[68] Primary judge's principal reasons at [337].
[69] 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).
[70] See, particularly, the Land Court member's reasons at [773] and [782]-[787].