=B..64-19

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. of 2019

BETWEEN:

OAKEY COAL ACTION ALLIANCE INC
Applicant

NEW ACLAND COAL PTY LTD ACN 081 022 380
First Respondent

CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND ~~HERITAGE PROTECTION~~ SCIENCE
Second Respondent

PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND
Third Respondent

APPLICATION FOR SPECIAL LEAVE TO APPEAL

The applicant applies for special leave to appeal from orders 3 and 4 made by the Queensland Court of Appeal on 1 November 2019.

PART I: GROUNDS AND ORDERS

Grounds

1. The Court of Appeal erred in concluding that, although the findings of the Third Respondent were affected by apprehended bias: .

   a. there was no utility in setting aside orders 4-8 made by Bowskill J in the Supreme Court on 28 May 2018;

   b. it was not open to it to interfere with the orders made in the Land Court by Kingham P on 7 November 2018, which were binding upon the parties;

   c. it should not remit the matter to the Land Court for a further hearing that was unaffected by the findings of the Third Respondent.

2. The Court of Appeal erred in concluding that it should not set aside the orders of Kingham P made on 7 November 2018 and the decision of the Second Respondent made on 12 March 2019.

3. The Court of Appeal erred in concluding that the applicant should pay the First Respondent's costs of the appeal and cross-appeal.

Date of document: 29 November 2019
Filed on behalf of the Applicant by:
Environmental Defenders Office (Qld) Inc
8/205 Montague Rd, West End, Qld, 4101
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Ref: Sean Ryan (Principal Solicitor)

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Orders sought

1. Appeal allowed, with costs.
2. Set aside order 3 made by the Court below, and in lieu thereof:
   (1) Orders 4 to 8 of the orders made by Bowskill J on 28 May 2018 be set aside.
   (2) The First Respondent's applications be referred back to the Land Court to be reconsidered according to law.
   (3) The recommendations of Kingham P of the Land Court on 7 November 2018 under s 269 of the *Mineral Resources Act 1989* (Qld) and s 190 of the *Environmental Protection Act 1994* (Qld) be set aside.
   (4) The decision of the Second Respondent on 12 March 2019 under s 194 of the *Environmental Protection Act 1994* (Qld) be set aside.
3. Set aside order 4 made by the Court below, and order instead that each party bear its own costs of the appeal and cross-appeal.

PART II: SPECIAL LEAVE QUESTIONS

1. Having found that a decision of an inferior court is affected by a reasonable apprehension of bias, is it open to a court on review of that decision to refuse to set it aside and order a new trial either: at all; in the absence of exceptional circumstances; or on the basis of a lack of "utility" in doing so?
2. Can an order of a superior court requiring an inferior court to proceed in a particular way augment the jurisdiction of the inferior court such as to make valid a decision of the inferior court that would, absent such validation, be a nullity?

PART III: ARGUMENT

Background

1. The First Respondent, New Acland Coal Pty Ltd (**NAC**), owns and operates an existing open-cut mine on the Darling Downs west of Brisbane. NAC has been operating the mine since 2001. The mine was expanded in 2006. NAC now proposes a further expansion of the mine (**Stage 3**). For that purpose, NAC has applied under the *Mineral Resources Act 1989* (Qld) (**MRA**) for two mining leases, and under the *Environmental Protection Act 1994* (Qld) (**EPA**) to amend its existing environmental authority to cover the expanded activities. Objections were lodged in relation to each application, including by the Applicant. The applications, and objections, were referred to the Land Court of Queensland for hearing in accordance with the requirements of the MRA and

EPA.[1] The Second Respondent, the chief executive of the Department of Environment and Heritage Protection, was a necessary party to those proceedings as the administering authority under the EPA.

2. The hearing raised a range of complex issues for consideration and determination by the Land Court, including in relation to air quality and dust, noise, lighting, visual amenity, traffic, transport, general and agricultural economics, climate change, biodiversity of flora and fauna, physical and mental health, land values, livestock and rehabilitation, land use and soils, intergenerational equity, community and the social environment, heritage values and cultural heritage, groundwater and surface water.[2] For reasons given on 31 May 2017, the Third Respondent (**Member Smith**), although making various findings in favour of NAC, recommended that each of the applications be rejected.[3]

3. NAC sought review of this decision pursuant to, inter alia, ss 20 and 21 of the *Judicial Review Act 1991* (Qld), s 58 of the *Constitution of Queensland 2001* and the Court's inherent jurisdiction.[4] The grounds relevantly included that the decision was affected by apprehended bias (**Bias Issue**) and that the Land Court had erred in its approach to issues relating to groundwater, intergenerational equity and noise (**Groundwater Issues**).

4. On 2 May 2018, Bowskill J dismissed the application for review in relation to the Bias Issue, but concluded that Member Smith had erred on the Groundwater Issues. In light of these findings, Bowskill J made orders on 28 May 2018 remitting the matter back to the Land Court for determination (the **Remittal Orders**).[5] In doing so, however, her Honour ordered that the Land Court would be bound by the findings and conclusions of Member Smith that did not relate to the Groundwater Issues, so as to avoid the "re-litigation" of issues that had not the subject of successful challenge: at [29], [34]. Her Honour stated at [37] (emphasis added):

> It would be entirely inimical to the interests of justice to permit the parties to avoid the binding effect of the findings and conclusions already reached by the Land Court, after a full hearing, *which are not tainted in any way* by the outcome of this judicial review proceeding.

5. On 30 May 2018, the Applicant appealed against the Remittal Orders, challenging the

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1 As to the MRA, see ss 265-271A. As to the EPA, see ss 185-194.

2 *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 at [4].

3 *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24 at [1858]-[1859].

4 *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 at [5].

5 *New Acland Coal Pty Ltd v Smith & Ors (No 2)* [2018] QSC 119.

conclusions on the Groundwater Issues. NAC cross-appealed on the Bias Issue.

6. Meanwhile, the applications were referred back to the Land Court in accordance with the Remittal Orders. The Applicant sought to have that hearing adjourned pending determination of the appeal from the Remittal Orders. On 20 June 2018, Kingham P determined that the hearing should proceed.[6]

7. On 7 November 2018, Kingham P recommended that the applications be approved.[7] In accordance with the Remittal Orders, in reaching that recommendation her Honour was bound by, and adopted, "most" of the findings and conclusions of Member Smith.[8] However, she said that this constituted a "significant" constraint on the exercise of her discretion, indicating that she would otherwise have taken a different approach in some respects.[9]

8. On 12 March 2019, the Second Respondent approved the amendment of NAC's environment authority to cover Stage 3 in accordance with Kingham P's recommendation. No decision has yet been made by the Minister for Natural Resources, Mines and Energy in relation to the recommendations to approve the mining leases.

The decisions of the Court of Appeal

9. Following a hearing between 27 February 2019 and 1 March 2019, on 10 September 2019, the Court of Appeal handed down judgment on the appeal from the orders of Bowskill J (**CA1**).[10] The Court of Appeal determined that the decision of Member Smith was affected by apprehended bias and therefore allowed the cross-appeal on the Bias Issue. The Applicant's appeal on the Groundwater Issues was dismissed.

10. The Court noted at CA1 [56] that NAC had originally endeavoured to hold the Bias Issue in reserve unless the Court proposed to allow the Applicant's appeal on the Groundwater Issues, as NAC "wishes to retain the benefit of the orders made by Bowskill J", and if it succeeded on the Bias Issue "then it will lose that benefit". But the Court of Appeal recognised that allegations of bias, whether actual or ostensible, constitute a challenge to the very validity of a judicial decision: CA1 [57]. Such allegations involve an assertion that the administration of justice has failed: CA1 [57].

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6 *New Acland Coal Pty Ltd v Ashman & Ors (No 6)* [2018] QLC 17 at [9]-[44].

7 *New Acland Coal Pty Ltd v Ashman & Ors (No 7)* [2018] QLC 41. The recommendation was subject to the requirement that the Coordinator-General approve a change to the imposed noise conditions by 31 May 2019, which approval was subsequently obtained by NAC.

8 See, for example, ibid [6], [26], [28], [181].

9 See ibid [234]-[235].

10 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184.

It noted at [61] that in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 (***Concrete***), Kirby and Crennan JJ had stated that claims of actual bias or apprehended bias strike at the validity and acceptability of the trial and its outcome. For that reason, when such question are raised on appeal they should be dealt with before other substantive issues are decided, and if the allegation is made out, "a retrial will be ordered irrespective of possible findings on other issues" (CA1 [61]). On that basis, the Court of Appeal determined NAC's cross-appeal first, having in effect required NAC to accept that its raising of this ground could not be made contingent on the Applicant's appeal being allowed (see CA1 [63]). NAC was put to an election.

11. On the cross-appeal the Court of Appeal, applying the relevant common law principles, concluded that the decision of Member Smith was affected by apparent bias: CA1 [99]-[103]. As a consequence, the Court of Appeal indicated that orders should be made that the Remittal Orders of Bowskill J be set aside, and that the applications be referred back to the Land Court for a new hearing: [117]. Having reached the conclusion that it did on the Bias Issue, the Court of Appeal's stated approach was correct.

12. However, after CA1 the Court of Appeal permitted further submissions on the appropriate orders. On 1 November 2019 it delivered a further judgment on that issue (**CA2**).[11] In stark contrast to its position in the course of the hearing of CA1, and in its first judgment, it now determined that despite the finding of bias the Remittal Orders should stand, and it simply declared that Member Smith had "failed to observe the requirements of procedural fairness". It stated that orders 4-8 made by Bowskill J (relating to remittal to the Land Court) "have been performed" (CA2 [16]).

13. The Court gave two reasons for not setting those orders aside. First, "[t]hose orders having been spent, there would be no utility in setting them aside" (CA2 [17]). Secondly, it considered that when the matter had gone back before Kingham P in the Land Court pursuant to the Remittal Orders, the Land Court was obliged by the terms of those orders, and because its jurisdiction had been validly invoked, to proceed to determine the dispute: CA2 [10]. It stated at CA2 [17]:

> Nor is it open for this court in this appeal to interfere with the orders made by President Kingham in determining the dispute between the parties. Those are valid orders of the Land Court and, subject to being set aside on appeal, they bind the parties. There has been no such appeal.

14. The Court referred to no authority, including those authorities to which it had referred

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[11] *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238.

and upon which it had relied in CA1, and which the Applicant had again invoked.

The significance and effect of a finding of apprehended bias

15. The rule against actual or apprehended bias is of vital importance in maintaining confidence in the independent and impartial administration of justice. In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, the plurality stated at [7]:

> The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined.

16. If actual or apprehended bias is found on review or appeal there must be a retrial, regardless of the court's findings on other issues. As Gaudron J observed in *Ebner* at [102], "[c]onstitutional requirements [such as the requirement for an impartial and independent tribunal] cannot yield to expediency or convenience". In *Concrete*, the respondent to an appeal had, as in the present case, sought to hold the allegations of apprehended bias in reserve to be deployed in the event that their other arguments failed. Kirby and Crennan JJ noted that this was not the correct approach, stating at [117]:[12]

> Allegations of this nature are serious. If made, the party making them is obliged to seek relief reflecting their seriousness... An intermediate appellate court dealing with allegations of apprehended bias, coupled with other discrete grounds of appeal, must deal with the issue of bias first. It must do so because, logically, it comes first. Actual or apprehended bias strike at the validity and acceptability of the trial and its outcome. It is for that reason that such questions should be dealt with before other, substantive issues are decided. It should put the party making such an allegation to an election on the basis that if the allegation of apprehended bias is made out, a retrial will be ordered irrespective of possible findings on other issues. Even if a judge is found to be correct, this does not assuage the impression that there was an apprehension of bias.[13] Furthermore, if, as here, an intermediate appellate court finds the allegation made out, but grants no relief because it otherwise finds in favour of the party making the allegation, a defect in the administration of justice has been found to have occurred which, in the absence of any successful appeal on the point, will remain unremedied. Inevitably, this adversely affects public confidence in the administration of justice.

17. The approach mandated by the High Court's decision in *Concrete* has been consistently

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[12] Gummow ACJ agreed at [2]-[3]. At [172], Callinan J stated that "[t]he decision that the trial just had manifested apprehended bias...would have called for an order for a fresh trial rather than the orders consequential upon the Full Court's other holdings in favour of the respondents".

[13] See *Antoun v R* (2006) 224 ALR 51 at [2] per Gleeson CJ.

applied by intermediate appellate courts at State[14] and Federal level.[15] The consequences of a finding of apprehended bias were clearly identified by the Court of Appeal in argument at the main hearing. During argument, NAC accepted the point raised by Sofronoff P that a finding of apprehended bias was "nuclear in its effect" and that if it was established there should be a new trial.[16]

18. Nevertheless, in CA2 the Court of Appeal determined that this approach should not be followed. In so doing, the Court departed from authority and fundamental principle. Decisions of an inferior court affected by apprehended bias should be set aside as of course – or, in the alternative, unless there are exceptional circumstances. There is no case, so far as the Applicant is aware, in which any exception to the principle set out in *Concrete* in relation to apprehended bias has been applied such so as to leave in place findings affected by apprehended bias. The Court's two proffered reasons for declining to do so were not to the point (and did not constitute exceptional circumstances).

There was utility in setting aside the Remittal Orders

19. As to the Court's first reason – the lack of "utility" in setting aside the Remittal Orders – it is not clear quite what the Court of Appeal meant by this, and whether it envisaged the exercise of a discretion or some sort of balancing exercise which would take into account certain (unidentified) factors. Whatever it meant, to the extent relevant, there was utility in setting aside the Remittal Orders and requiring a new hearing.

20. It was necessary that those orders be set aside, and a new hearing take place, to protect the integrity of the judicial system, as explained above. A finding of bias strikes at the validity and acceptability of the trial and its outcome and there is ongoing prejudice to the proper administration of justice by not setting such orders aside.

21. Moreover, here the decision of Member Smith had continuing effect. The effect of the

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[14] See, for example, *Hills v Chalk* [2008] QCA 159 at [5]-[7] per Keane JA; *Williams (as liquidator of Scholz Motor Group P/L (in liq)) v Scholz* [2008] QCA 94 at [6]-[8] per Keane JA (with whom Muir JA and Mackenzie AJA agreed); *Olsen v Olsen* [2019] NSWCA 278 at [34] per White JA (with whom Meagher JA and Emmett AJA agreed); *Tangsilsat v Council of the Law Society of New South* Wales [2019] NSWCA 144 at [35] per White JA (with whom Bell P at Macfarlan JA agreed); *Royal Guardian Mortgage Management Pty Ltd v Nguyen* (2016) 332 ALR 128; [2016] NSWCA 88 at [9]-[13] per Basten JA; [259]-[261] per Ward JA with whom Emmett AJA agreed; *Aydin v The Queen* [2019] VSCA 83 at [15] per Priest, Niall and T Forrest JJA; *Bodycorp Repairers Pty Ltd v Holding Redlich* [2018] VSCA 17 at [87] per Whelan and Santamaria JJA and T Forrest AJA; *QRS v Legal Profession Board of Tasmania* [2017] TASFC 10 at [9]-[12] per Blow CJ.

[15] See, eg, *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113 at [93] per Greenwood, Reeves and Wigney JJ; *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCAFC 144 at [48]-[52] per Greenwood and Rangiah JJ, cf [59] per Reeves J.

[16] See T1-7 line 1-11, also T1-18 line 1.

Remittal Orders – which (to the subsequent disquiet of Kingham P) greatly confined the remitted hearing in the Land Court – was to leave in place most of the findings and conclusions of Member Smith, being those contrary to the Applicant's position. Yet, the Court of Appeal having upheld the cross-appeal on the Bias Issue, it was no longer the case that "the findings and conclusions [other than on the Groundwater Issues] ... *are not tainted in any way*".[17]

22. The Applicant accepts, of course, that the Bias Issue was a point pursued by NAC and resisted by it. The Applicant's position was that Member Smith's findings and conclusions were not affected by apprehended bias. Nevertheless, such bias having been found, whether and to what extent those findings should stand or not is not a matter for NAC's choice. Although Member Smith's ultimate recommendations were in the Applicant's favour, his findings on most issues were not.[18] If there is a perception of a risk that an impartial mind was not brought to the resolution of the issues before Member Smith, such impartiality could have perverted *any* of the findings of Member Smith, and in either party's favour. For example, where a decision-maker has an interest connected with one side of a dispute, there may be concern that they might tend to *disfavour* that side, in whole or in part. Moreover, the utility of setting aside the Remittal Orders is linked to the errors manifest in the Court's second reason for declining to do so.

The decision of Kingham P was not a valid and binding decision

23. The Court's second reason – that the Land Court's jurisdiction had been validly invoked, and that its subsequent recommendations were valid and binding on the parties – did not constitute exceptional circumstances, and itself manifests error.

24. As an inferior court of record established pursuant to the *Land Court Act 2000* (Qld) (addressed CA1 [19]-[20]), the decisions and recommendations of the Land Court will only be valid and bind the parties if they were made within jurisdiction; if those orders are not made within jurisdiction, then they are a nullity.[19] A denial of procedural fairness (including by reason of apprehended bias) will ordinarily involve a failure to comply with a condition of the exercise of decision-making power, and thus be

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[17] Quoting Bowskill J, *New Acland Coal Pty Ltd v Smith & Ors (No 2)* [2018] QSC 119 at [37], emphasis added.

[18] *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 at [4].

[19] *AG for NSW v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 357 per McHugh J, approved in *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at [27]-[28] per Gaudron, Gummow and Callinan JJ. More generally, note *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (***Bhardwaj***) at [51]-[53] per Gaudron and Gummow JJ.

jurisdictional error.[20] Because the findings of Member Smith were infected by apprehended bias, he committed jurisdictional error, and therefore did not make any valid findings pursuant to the relevant statutory provisions conferring jurisdiction on the Land Court. Further, because Kingham P's subsequent recommendations were *confined by and based upon* the findings of Member Smith on everything except the Groundwater Issues, and those findings are null and void, a key component of the reasoning of Kingham P is absent, with the result that her recommendations were also not made within jurisdiction.

25. Thus the recommendations of Kingham P do not bind the parties, as the Land Court has not performed the task required of it under the relevant statutory provisions. Those recommendations are invalid. The Court of Appeal was therefore wrong to conclude that the recommendations of Kingham P were made within jurisdiction and were valid and binding upon the parties. There is therefore no impediment to the Land Court now remaking its recommendations.

26. The Court of Appeal correctly observed at CA2 [10] that the Land Court had been obliged to act in accordance with the Remittal Orders while they were in effect. The orders of a superior court of record, such as the Supreme Court of Queensland, are valid until set aside.[21] The Land Court thus had to comply with the Remittal Orders. Nevertheless, the Court of Appeal was wrong to imply that it followed from this that the recommendations *of the Land Court* were valid and binding. A superior court has power to make orders that would otherwise be outside the jurisdiction of an Act which it purports to apply by reason of the conferral upon it of the status of a superior court.[22] However, that does not mean that an order of a superior court can augment or enlarge the powers, or circumscribe the duties and functions, of an inferior court such as to render valid a decision of that inferior court otherwise made beyond jurisdiction.

27. A defining characteristic of a court is that it accords procedural fairness, necessitating that a court cannot be authorised to proceed in a manner that does not ensure procedural fairness.[23] A superior court has no power to authorise an inferior court to proceed in a

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[20] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [25] per Gleeson CJ; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [60] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[21] eg *State of NSW v Kable* (2013) 252 CLR 118 (***Kable No 2***) at [32].

[22] See *Kable No 2* at [57] per Gageler J.

[23] *Nicholas v The Queen* (1998) 193 CLR 173 at [74] per Gaudron J; *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334 at [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Kuczborski v Queensland* (2014) 254 CLR 51 at [226]-[227] per Crennan, Kiefel, Gageler and Keane JJ.

manner which denies procedural fairness. In the present case, the Remittal Orders of Bowskill J required Kingham P to take into account and apply the findings of Member Smith. Whilst the Land Court was obliged to comply with those orders, that does not mean that it thereby had jurisdiction to adopt and apply findings affected by apprehended bias, such that its decision is not infected with jurisdictional error.

28. The Court of Appeal correctly accepted that if the Applicant had succeeded on the Groundwater Issues, the Remittal Orders should have been set side (CA2 [15]). Yet had that occurred, then on the Court of Appeal's reasoning the recommendations of Kingham P on the Groundwater Issues would still have been valid and binding because made pursuant to the Remittal Orders. Plainly, the existence of Kingham P's decision would not have precluded the issue going back to the Land Court. If that type of jurisdictional error by Member Smith would lead to that result, there was all the more reason why it would do so when the error in question was apprehended bias.

29. It is also not clear what the Court of Appeal meant by its assertion that the Remittal Orders were "spent" (CA2 [17]). If it intended to convey that those orders had been performed, then this was not a good reason for proceeding as it did. There is no principle that an order that should not have been made should not be set aside simply because action has been taken in relation to it. In *Kable No 1*,[24] the Court set aside the orders of Levine J even though, as the Court found in *Kable No 2*, this did not have the effect of rendering Mr Kable's detention unlawful.

Consequential orders

30. In its submissions for the purposes of CA2, the Applicant sought an order that the recommendations of Kingham P on 7 November 2018 under s 269 of the MRA and s 190 of the EPA be formally set aside pursuant to rr 5, 658 and 766 of the *Uniform Civil Procedure Rules 1999* (Qld). This was not strictly necessary as, for the reasons set out above, the decisions are a nullity. In accordance with the approach in *Bhardwaj*, there was then and is now no impediment to the Land Court remaking its recommendation. Nevertheless, completeness and clarity supported the making of a formal order setting aside Kingham P's decision.

31. The Applicant also sought an order that the decision of the Second Respondent on 12 March 2019 to grant an Environmental Authority under s 194 of the EPA be set aside.

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[24] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable No 1***).

This decision was made following the recommendation of Kingham P.[25] The Court of Appeal noted that this order was sought by the Applicant (at CA2 [12]), but then gave no reasons for refusing to make it. The Second Respondent is a party to the present proceedings. As the Second Respondent correctly acknowledged in submissions to the Court of Appeal, "[a] finding of bias would normally vitiate administrative action based upon a decision so affected", and the Environmental Authority granted "was (in part) based upon Mr Smith's recommendation, albeit after President Kingham had conducted the remitted objections hearing and made a recommendation favourable to [NAC]".[26] As Alan Wilson J noted in *Johnston v Brisbane City Council* [2014] QSC 268 at [73], the nature of the proper form of relief pursuant to the Supreme Court of Queensland's inherent jurisdiction is "of technical concern but not to a degree which should confound the Court and prevent the fashioning of appropriate orders".

32. If special leave is granted, the Applicant will make submissions on appeal as to what costs orders should have been made below. But that issue raises no special leave point.

Reasons for a grant of special leave

33. Each special leave question is a question of public importance. The Court of Appeal's approach in CA2 is contrary not only to its approach in CA1, but also to authority of this Court in relation to the proper approach to be taken where a decision is affected by apprehended bias. CA2 suggests the existence of an exception, of uncertain scope, to the requirement to set aside decisions affected by apprehended bias and remit such decisions for a further hearing. Such an exception is contrary to principle and authority.

34. CA2 also provides for a substantial expansion of the principle affirmed in *Kable No. 2*, such that an order of a superior court may not only operate to augment the jurisdiction of an inferior court, but to do so in a manner than mandates that the inferior court apply findings affected by apprehended bias.

35. Moreover, absent correction by this Court, the decision-makers in relation to NAC's applications under the MRA and EPA are left in an invidious position. In particular, under the MRA the Minister must be provided with, and is required to take into account, recommendations of the Land Court prior to granting a mining lease: ss 265, 269, 271. The Minister will be presented with recommendations of the Land Court that they are told by the Court of Appeal are both valid and binding, such that a further hearing before

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[25] Affidavit of Mark Andrew Geritz sworn 9 September 2019, paras. 3, 5.

[26] Second Respondent's Outline of Submissions, dated 23 September 2019, [2].

the Land Court lacks any utility, and also told that the same recommendations are infected by a denial of the requirements of procedural fairness. The correct solution in the present case is for the Remittal Orders to be set aside and a new hearing to be held.

PART IV: COSTS

36. The Applicant does not seek any special order on costs if special leave is refused.

PART V: AUTHORITIES

Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577 at [117].

PART VI: LEGISLATIVE PROVISIONS

10 37. The relevant legislative provisions are annexed.

29 November 2019



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TAKE NOTICE: Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the applicant.

The Applicant is represented by: Environmental Defenders Office (Qld) Inc, 8/205 Montague Rd, West End, Qld, 4101, Telephone: (07) 3211 4466; Email: edoqld@edoqld.org.au

ANNEXURE: APPLICABLE PROVISIONS

***Environmental Protection Act 1994* (Qld), ss 190 and 194**

190 Nature of objections decision

(1) The objections decision for the application must be a recommendation to the administering authority that—

(a) if a draft environmental authority was given for the application—

(i) the application be approved on the basis of the draft environmental authority for the application; or

(ii) the application be approved, but on stated conditions that are different to the conditions in the draft environmental authority; or

(iii) the application be refused; or

(b) if a draft environmental authority was not given for the application—

(i) the application be approved subject to conditions; or

(ii) the application be refused.

(2) However, if a relevant mining lease is, or is included in, a coordinated project, any stated conditions under subsection (1)(a)(ii) or (b)(i)—

(a) must include the Coordinator-General's conditions; and

(b) can not be inconsistent with a Coordinator-General's condition.

194 Final decision on application

(1) This section applies if—

(a) the administering authority referred the application to the Land Court under section 185 and an objections decision is made about the application; …

(2) The administering authority must decide—

(a) if a draft environmental authority was given for the application—

(i) that the application be approved on the basis of the draft environmental authority for the application; or

(ii) that the application be approved, but on stated conditions that are different to the conditions in the draft environmental authority; or

(iii) that the application be refused; or

….

(4) In making the decision, the administering authority must—

(a) have regard to—

(i) the objections decision, if any; and

(ii) all advice, if any, given by the MRA Minister or the State Development Minister to the administering authority under section 193; and

(iii) if a draft environmental authority was given for the application—the draft environmental authority; …

***Mineral Resources Act 1989* (Qld), ss 265, 269, 271**

265 Referral of application and objections to Land Court

(1) Subsections (2) and (3) apply if—

(a) a properly made objection is made for an application for a mining lease; and

(b) the application for the mining lease relates to an application under the Environmental Protection Act, section 125 for an environmental authority for a mining activity relating to a mining lease; and

(c) either—

(i) an objection notice relating to the application for the environmental authority is given under the Environmental Protection Act, section 182(2) to the EPA administering authority; or

(ii) the applicant for the environmental authority has requested, under the Environmental Protection Act, section 183(1), that the application for the environmental authority be referred to the Land Court.

(2) The chief executive must refer the following to the Land Court for hearing—

(a) the application for the mining lease;

(b) all properly made objections for the application for the mining lease;

(c) all objection notices, relating to the application for the environmental authority, given under the Environmental Protection Act, section 182(2);

(d) if the applicant for the environmental authority has requested the EPA administering authority to refer the application to the Land Court under the Environmental Protection Act, section 183—a copy of the request.

(3) The chief executive must make the referral within 10 business days after the latest of the following—

(a) the last objection day for the application for the mining lease;

(b) if an owner of land may lodge an objection under section 260(2)—the last day of the period for lodging an objection under that subsection;

(c) the last day on which the application for the environmental authority may be referred to the Land Court under the Environmental Protection Act, section 185(2).

(4) Subsections (5) and (6) apply if—

(a) a properly made objection is made for an application for a mining lease; and

(b) the application for the mining lease does not relate to an application under the Environmental Protection Act, section 125 for an environmental authority for a mining activity relating to a mining lease.

(5) The chief executive must refer the application for the mining lease, and all properly made objections for the application, to the Land Court for hearing.

(6) The chief executive must make the referral within 10 business days after the later of the following—

(a) the last objection day for the application for the mining lease;

(b) if an owner of land may lodge an objection under section 260(2)—the last day of the period for lodging an objection under that subsection.

(7) If the Land Court receives a referral under subsection (2) or (5), the Land Court must fix a date for the hearing and immediately give written notice of the date to each of the following—

(a) the chief executive;

(b) the applicant for the mining lease;

(c) a person who has lodged a properly made objection for the application for the mining lease;

(d) a person who has given to the EPA administering authority, under the Environmental Protection Act, section 182(2), an objection notice relating to the application for the environmental authority.

(8) The hearing date must be at least 20 business days after the last objection day for the application for the mining lease.

(9) The Land Court may make an order or direction that a hearing under section 268 for an application for the grant of a mining lease and any objections to the grant happen at the same time as an objections decision hearing under the Environmental Protection Act, section 188 relating to the application for the mining lease.

(10) If all properly made objections referred to the Land Court under subsection (2) or (5) are withdrawn under section 261 or struck out under section 267A before the Land Court forwards its recommendation to the Minister under section 269, the Land Court may remit the matter to the chief executive.

(11) In this section—

properly made objection means an objection lodged under section 260 that has not been withdrawn.

269 Land Court's recommendation on hearing

(1) Upon the hearing by the Land Court under this part of all matters in respect of an application for the grant of a mining lease, the Land Court shall forward to the Minister—

(a) any objections lodged in relation thereto; and

(b) the Land Court's recommendation.

Note—

For other relevant provisions about forwarding documents, see *section 386O*.

(2) For subsection (1)(b), the Land Court's recommendation must consist of—

(a) a recommendation to the Minister that the application be granted or rejected in whole or in part; and

(b) if the application relates to land that is the surface of a reserve and the owner of the reserve has not consented to the grant of a mining lease over the surface area, the following—

(i) a recommendation to the Minister as to whether the Governor in Council should consent to the grant over the surface area;

(ii) any conditions to which the mining lease should be subject.

(3) A recommendation may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers appropriate, including a condition that mining shall not be carried on above a specified depth below specified surface area of the land.

(4) The Land Court, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, shall take into account and consider whether—

(a) the provisions of this Act have been complied with; and

(b) the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate; and

(c) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and

(d) the land and the surface area of the land in respect of which the mining lease is sought is of an appropriate size and shape in relation to—

(i) the matters mentioned in paragraphs (b) and (c); and

(ii) the type and location of the activities proposed to be carried out under the lease and their likely impact on the surface of the land; and

(e) the term sought is appropriate; and

(f) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and

(g) the past performance of the applicant has been satisfactory; and

(h) any disadvantage may result to the rights of—

(i) holders of existing exploration permits or mineral development licences; or

(ii) existing applicants for exploration permits or mineral development licences; and

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

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

(k) the public right and interest will be prejudiced; and

(l) any good reason has been shown for a refusal to grant the mining lease; and

(m) taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use.

(5) Where the Land Court recommends to the Minister that an application for the grant of a mining lease be rejected in whole or in part the Land Court shall furnish the Minister with the Land Court's reasons for that recommendation.

(6) If—

(a) the application is for the grant of a coal mining lease; and

(b) under section 318BA, a preference decision is required;

the Land Court can not recommend that the lease not be granted so as to give preference to petroleum development.

271 Criteria for deciding mining lease application

(1) In considering an application for the grant of a mining lease, the Minister must consider—

(a) any Land Court recommendation for the application; and

(b) the matters mentioned in section 269(4).

Uniform Civil Procedure Rules 1999 (Qld), rr 5, 658 and 766

5 Philosophy—overriding obligations of parties and court

(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

(2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

Example—

The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court.

658 General

(1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.

(2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document.

766 General powers

(1) The Court of Appeal—

(a) has all the powers and duties of the court that made the decision appealed from; …

(4) On an appeal, the powers of the Court of Appeal are not limited because of an order made on an application in a proceeding from which there has been no appeal.

[END OF ANNEXURE]