IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B34 of 2020

BETWEEN: **OAKEY COAL ACTION ALLIANCE INC**
Appellant

NEW ACLAND COAL PTY LTD (ACN 081 022 280)
First Respondent

10 **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND SCIENCE**
Second Respondent

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

APPELLANT'S WRITTEN SUBMISSIONS ON THE FIRST RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

20 **PART II: STATEMENT OF ISSUES**

2. The principal issue raised by the application of the first respondent, New Acland Coal Pty Ltd (**NAC**), is whether the interests of justice will be served by ordering the appellant to pay $90,000 as security for NAC's costs of the appeal.

PART III: FACTS

The grant of special leave

3. The history of the proceedings to this point are summarised in the appellant's submissions in the appeal.[1] In short, the appeal arises from objections in the Land Court of Queensland to NAC's proposed Stage 3 of the New Acland Coal Mine on the Darling Downs in southeast Queensland. The Queensland Court of Appeal found the Land
30 Court's decision was affected by apprehended bias but declined to set aside the decision and its findings and order a rehearing untainted by bias.[2]

4. The application for special leave to appeal was filed on 29 November 2019. It raised

[1] Exhibit AK-6 to the affidavit of Andrew Michael Kwan, affirmed 18 August 2020 (**Kwan affidavit**).

[2] *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184 (**CA1**) and *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 238 (**CA2**).

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Filed on behalf of the Appellant by:
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two questions of general importance, namely whether “utility” could justify not setting aside the findings of an inferior court affected by bias, and how bias affects the validity of decisions of inferior courts. The Court (Bell and Gageler JJ) granted special leave following an oral hearing on 5 June 2020.[3]

5. The steps leading up to the hearing of the appeal are now well-advanced. The appellant filed its written submissions on 24 July 2020. NAC is to file its written submissions on Friday 21 August 2020. The appeal has been listed for hearing in 7 weeks time on Tuesday 6 October 2020.

The appellant’s financial position

10 6. The appellant is a not-for-profit incorporated association whose objects are related to the public interest in protecting fertile farmland and the environment.[4]

7. NAC relies on various documents demonstrating that the appellant has no assets or income[5] and it has stated that it considers the appellant to be “an incorporated association with no substantial assets”.[6] The appellant accepts that this is an accurate description of its financial position. There is also an extant costs order against the appellant in favour of NAC arising from the proceedings below that has been assessed at $736,823.41.[7] This costs order is subject to challenge in the appeal to this Court.

8. The appellant’s members are largely local farmers, graziers, veterinarians and concerned townspeople,[8] with the majority being over the age of 65.[9] Those members
20 are of limited means and find themselves in a perilous economic situation because of the combined effect of the drought and the COVID-19 pandemic.[10]

9. The appellant accepts that if a costs order is made against it, it will not be able to pay it. For the same reasons, if the order for security sought by NAC is made, it will not itself be able to pay it.

NAC’s financial position

10. NAC is a major mining company pursuing a multi-billion dollar mine expansion. As at

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3 The transcript of the special leave hearing is at Exhibit AK-7 to the Kwan affidavit.

4 Affidavit of Paul Bernard King, affirmed 18 August 2020 (**King affidavit**), at [2]-[3].

5 Affidavit of Brett Stuart Cook sword 6 August 2020 (**Cook affidavit**), [7]-[8].

6 Letter from Clayton Utz dated 21 November 2019,Exhibit AK-5 to the Kwan affidavit.

7 Cook affidavit, [9]-[12].

8 King affidavit, [5].

9 Statutory Declaration of Paul Bernhard King (**King Statutory Declaration**), 11 February 2019, Exhibit PK-4 to the King affidavit.

10 King affidavit, [11].

September 2019, a year ago, it had spent over $126 million pursuing the disputed proposal for development of Stage 3 of the mine.[11] Further, in 2019 the revenue of NAC's company group was over $1.3 billion, with NAC's mine producing around 35-40% of the group's coal and revenue.[12]

11. In the context of the resources available to NAC and the money it has already expended on the project, the $90,000 sought as security for costs is insignificant for NAC.

NAC's conduct in relation to the appeal to this Court

12. NAC's application for security for costs has been brought some 2 months after special leave was granted. If security for costs is ordered, the likely effect will be the shutting out of the appeal.[13]

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13. This is not the first attempt by NAC to achieve such a result. Despite a Justice of this Court stating at the special leave hearing that "issues of costs will depend on the outcome of the appeal in the ordinary way",[14] NAC continued to press the Queensland Supreme Court to wind-up the appellant due its inability to pay those very same costs.[15] On 22 July 2020, however, Davis J adjourned the winding up until after the determination of the appeal to this Court, finding that the "making of a winding up order will practically frustrate the appeal".[16]

14. NAC, through its solicitors, has also sought to bring pressure directly to bear on the appellant's office bearers and its solicitors, the Environmental Defenders Office (**EDO**), to discontinue the application to this Court, in a letter of 5 December 2019 sent after the special leave application had been filed, as follows:

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    (a) NAC stated that it is considering seeking personal costs orders (in respect of the proceedings in the High Court and those below) against the appellant's office bearers "and against any other non-parties who are seeking to advance their agenda and interests in the High Court".[17]

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11 At 23 September 2019 the overall costs incurred and committed for Stage 3 of the mine were $126.2 million: affidavit of Mark Andrew Geritz, sworn 23 November 2019, at [27] (see exhibit AK-4 to Kwan affidavit).

12 Kwan affidavit, [7]-[8].

13 King affidavit, [21].

14 Transcript, p. 8, line 263 – p. 9, line 304 (Exhibit AK-7 to the Kwan affidavit).

15 See King affidavit, [18]-[20]; *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc* [2020] QSC 212 at [34]-[35] (Davis J).

16 *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc* [2020] QSC 212 at [57], see also [53].

17 Letter from Clayton Utz dated 5 December 2019, Exhibit AK-5 to the Kwan affidavit.

(b) NAC also stated that, in the event that the appellant persists with the appeal and NAC is subsequently successful in appointing a liquidator over the appellant, it will "require" the liquidator to "investigate any claims which [the appellant] may have for losses arising by failure of any advisors to provide advice in accordance with the standards required by law".[18]

15. This conduct affects the likelihood that the appellant's members, or anyone else, would be willing to fund security for the costs of the appeal. It is also conduct bearing upon the question of whether the interests of justice require an order for security to be made.

PART IV: ARGUMENT

10 16. Rule 59.01 of the *High Court Rules 2004* provides for applications for security for costs.[19] The principles to be applied do not differ from those applied under earlier rules of the Court.[20]

17. At least since the introduction of special leave requirements in s 35A of the *Judiciary Act 1903* in 1984, applications for security for costs in this Court have been subject to different considerations to security for costs in lower courts in light of the general public importance of the issues that come before the Court: *Webster v Lampard* (1993) 112 ALR 174 at 176 per Toohey J. Justice Gaudron summarised the general approach in *Perre v Apand Pty Ltd* (1998) 157 ALR 433 at [8] (footnotes in original):

> The general approach of this Court in relation to the giving of security for costs
> 20 is that "appellants who have persuaded the Court that their applications for special leave to appeal warrant a grant ought not lightly to be shut out because of their financial position."[21] That is not to say that where, as here, the question for determination in the appeal is a matter of general importance, that consideration can "override the interests of the parties"[22]. Rather, it is necessary, in that situation, to ask whether the interests of justice will be served by shutting out the appeal[23].

18. Here, in practical terms, should security for costs of $90,000 be ordered, it is likely to

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18 Letter from Clayton Utz dated 5 December 2019, Exhibit AK-5 to the Kwan affidavit.

19 While the first respondent's application does not refer to r 59.01 (but, instead, refers to rr 6.06.1, 21.09.4, 23.03.4, 27.06.2, 27.07.6, 32.01.2 and 57.05.2), the appellant understands it is made under r 59.01.

20 In *John Alexander's Clubs Pty Ltd & Anor v White City Tennis Club Ltd* [2009] HCATrans 342, at lines 413-480, Heydon J dismissed an application for security for costs and referred with approval to decisions under earlier rules: ***Devenish*** *v Jewel Food Stores Pty Ltd* [1990] HCA 35; (1990) 94 ALR 664 at 666 per Mason CJ; and ***Webster*** *v Lampard* (1993) 112 ALR 174 at 175-176 per Toohey J.

21 *Webster* at 394 per Toohey J; see also *Devenish* at 666; 64 ALJR 533 at 534 per Mason CJ; ***Merribee*** *Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 155 ALR 1 at 10; 72 ALJR 1055 at 1062 per Kirby J.

22 *Lucas v Yorke* (1983) 50 ALR 228 (***Lucas***) at 230; 58 ALJR 20 at 21 per Brennan J.

23 *Lucas* at 21 per Brennan J.

shut out the appeal. The appellant cannot pay. Neither can its members.[24] What is more, the drought and the COVID-19 pandemic have further undermined its ability to raise any money, as has the NAC's own conduct in seeking personal costs orders against those who assist the appellant in pursuing this litigation. By contrast, the $90,000 sought by NAC is palpably insignificant to it.

19. A number of further factors indicate the interests of justice will not be served by making an order for security.

20. *First*, the Court has already granted special leave to appeal and the grounds of the appeal have, at the least, significant prospects of success.[25] The Court of Appeal's decision not to set aside the third respondent's decision after finding it was affected by apprehended bias is contrary to past authority, including of this Court.

21. *Second*, the proceeding raises matters of general public importance quite apart from the interests of the parties, as reflected in the grant of special leave.[26] The Court of Appeal's approach, if left uncorrected, will likely be relied on in future cases where bias is made out.

22. *Third*, in the context of the resources available to NAC and the money it has already expended on the mine expansion, the amount sought as security for costs is insignificant for NAC. The Court can infer that NAC's purpose in applying for security for costs is not because of the financial security itself but, rather, to shut down the appeal. NAC's conduct is thus oppressive.[27]

23. *Fourth,* NAC has delayed its application for security for costs.[28] Special leave was granted on 5 June 2020. NAC did not immediately seek security. Instead, it first sought (unsuccessfully) to wind-up the appellant before making the present application over two months later on 7 August 2020.

24. In that context, a significant proportion of the costs of the appeal have already been incurred and the appeal is almost ready for hearing.[29] The appellant has now filed its written submissions in the appeal and NAC is due to file its submissions on 21 August

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[24] King affidavit, [11]-[15].

[25] *Webster* at 175-176 per Toohey J; *Devenish* at 666 per Mason CJ.

[26] *Devenish* at 666 per Mason CJ.

[27] *Pioneer Park Pty Ltd (In Liq) v ANZ* (2007) 25 ACLC 1; [2007] NSWCA 344 at [55]-[56] per Beazley JA (with whom Tobias and McColl JJA agreed).

[28] *Devenish* at 665-666 per Mason CJ.

[29] *Webster* at 176 per Toohey J; *Merribee* at [26.4(a)] per Kirby J.

2020. It is inevitable that NAC will already have completed the vast majority, if not all, of the work required for those submissions at the time of hearing of this application. Subject to the appellant's reply, all that then remains is the hearing itself in under two months' time.[30]

25. In that regard, NAC's evidence indicates that its total costs estimate for the appeal is $170,498.44, of which $95,113.75 will have been spent "pre-hearing" (which goes up to the preparation of submissions and reading of submissions in reply).[31] Indeed, of that amount, $16,937.00 has been allocated for this very security application. Incidentally, the estimate appears unrealistically high in other significant respects – there will be no need for flights, hotels and travel time to Canberra.

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26. *Fifth*, the nature of the proceeding is such that, even if unsuccessful, an order for costs in favour of the winning party might not be made or might be limited.[32]

27. *Sixth*, if security for costs is ordered it will effectively shut the appellant out in circumstances where the appellant's impecuniosity is itself a matter which the appeal may help to cure.[33] The appellant submits in the appeal that the costs awarded against it by the Court of Appeal, which is a key reason for its impecuniosity, should be set aside.

28. In these circumstances, the interests of justice will not be served by making an order for security. The application for security for costs should be dismissed, with costs.

18 August 2020

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30 As in *Devenish* at 666 per Mason CJ.

31 Affidavit of Anthony Deane, Ex AJD-1.

32 *Singer v Berghouse* (1993) 114 ALR 521 at 522 per Gaudron J.

33 *Merribee* at [26.4(g)] per Kirby J.