HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B34 of 2020

BETWEEN:

OAKEY COAL ACTION ALLIANCE INC
Applicant

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

CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND SCIENCE
Second Respondent

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

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. This appeal raises three principal issues.

3. *First,* where the Court of Appeal had found that a decision of an inferior court, the Land Court of Queensland (the **Land Court**), was affected by a reasonable apprehension of bias, was it open to the Court of Appeal to then decide *not* to set aside the findings made by the Land Court and order a full rehearing either: at all; in the absence of exceptional circumstances; or on the basis of a lack of "utility" in doing so?

4. *Secondly,* where the primary judge in the Supreme Court of Queensland had determined that the decision of the Land Court was *not* affected by apprehended bias but had remitted it back to the Land Court for certain limited matters to be re-determined on other grounds, did the Supreme Court's order render valid the subsequent decision of the Land Court even where it incorporated findings that have now been found by the Court of Appeal to be affected by apprehended bias?

5. *Thirdly,* and if required, should the Court set aside not only the original decision of the Land Court found to have been affected by apprehended bias but also subsequent

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administrative decisions tainted by it?

PART III: SECTION 78B NOTICES

6. The appellant considers that s 78B notices are not necessary.

PART IV: DECISIONS BELOW

7. The reasons of the primary judge in the Supreme Court of Queensland, Bowskill J, are *New Acland Coal Pty Ltd v Smith* [2018] QSC 88 (**QSC1**) and *New Acland Coal Pty Ltd v Smith (No 2)* [2018] QSC 119 (**QSC2**).

8. The reasons of the Court of Appeal are *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2019] QCA 184 (**CA1**) and *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2019] QCA 238 (**CA2**).

9. None of these decisions have been reported.

PART V: FACTS

Stage 3 of the New Acland mine

10. 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 when Stage 1 commenced. Stage 2 of the mine commenced in 2007.[1]

11. NAC applied for a further expansion of the mine, Stage 3, in 2007. The initial proposal was rejected by the Queensland Government in 2012 and NAC then reduced the scale of the proposed project.[2] The revised project involved applications by NAC under the *Mineral Resources Act 1989* (Qld) (**MRA**) for two mining leases, and under the *Environmental Protection Act 1994* (Qld) (**EPA**) to amend NAC's existing environmental authority to cover the expanded activities. During the course of 2013 and 2014, the revised project was assessed by an environmental impact statement under the *State Development and Public Works Organisation Act 1971* (Qld).[3]

12. Objections were then lodged in relation to each application in 2015, including by a group of farmers and other community members in the Oakey region represented by the Appellant.[4] Where there are such objections, the MRA and EPA confer jurisdiction

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1 *New Acland Coal Pty Ltd v Ashman (No. 4)* [2017] QLC 24 (**LC1**), [20] (CAB, Vol 1, p. 16).

2 LC1, [20]-[21] (CAB, Vol 1, p. 16).

3 LC1, Appendix (CAB, Vol 1, pp. 466-467).

4 LC1, [85]-[86] (CAB, Vol 1, pp. 27-34).

upon the Land Court to determine disputes that might arise concerning such matters, and to make recommendations to the relevant decision-makers about whether the applications should be approved.[5] Such recommendations constitute a mandatory relevant consideration for these decision-makers, but those decision-makers are not bound to follow the recommendations.[6] The Land Court is an inferior court of record: see s 4 of the *Land Court Act 2000* (Qld) (**LCA**).

The Land Court proceedings before Member Smith

13. The objections to the applications were heard in the Land Court by the Third Respondent (**Member Smith**). The Second Respondent, the chief executive of the Department of Environment and Science (**DES**), was a necessary party to those proceedings as the administering authority under the EPA.[7]

14. The hearing of the objections to the applications commenced in late 2015 and raised a range of complex issues for consideration and determination, 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.[8]

15. After a hearing involving almost 100 sitting days, Member Smith gave judgment on 31 May 2017.[9] Most of Member Smith's findings were in NAC's favour.[10] Ultimately, however, he recommended that each of the applications be rejected.

The judicial review proceedings before Bowskill J

16. 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 Supreme Court's inherent jurisdiction.[11] The grounds relevantly included that the decision of

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

6 As to the MRA, see s 271. As to the EPA, see s 194B.

7 EPA, s 186.

8 QSC1, [4] (CAB, Vol 2, p. 566).

9 LC1, [1858]-[1859] (CAB, Vol 1, p. 409).

10 QSC1, [4] (CAB, Vol 2, p. 566); *New Acland Coal Pty Ltd v Ashman (No 7)* [2018] QLC 41 (**LC3**), [6] (CAB, Vol 2, p. 494); CA1, [97] (CAB, Vol 2, p. 783).

11 QSC1, [5] (CAB, Vol 2, p. 567). The Further Amended Application for a Statutory Order of Review and Application for Review is at CAB, Vol 2, pp. 680-707.

Member Smith was affected by apprehended bias (**Bias Issue**) and that Member Smith had erred in law in his approach to issues relating to groundwater, intergenerational equity and noise (**Groundwater Issues**).[12]

17. None of the objectors to the applications in the Land Court were joined to the judicial review proceedings. As a consequence, the Appellant sought and was granted leave to join the proceedings to oppose the relief being sought by NAC. Member Smith entered a submitting appearance and the OCAA assumed the role of primary contradictor.[13]

18. On 2 May 2018, in QSC1, Bowskill J dismissed the application for review in relation to the Bias Issue. However, her Honour concluded that Member Smith had erred on the Groundwater Issues. Bowskill J subsequently gave a further judgment on consequential matters (QSC2), making orders on 28 May 2018 remitting the matter back to the Land Court for determination (the **Remittal Orders**). The Remittal Orders are at CAB, Vol 2, pp. 728-729.

19. In doing so, Bowskill J 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 been the subject of successful challenge: QSC2, [29], [34]-[38]. Her Honour stated (emphasis added):

> [36] … The conclusions I reached in relation to the grounds of review relating to noise, groundwater and, relatedly, intergenerational equity, are discrete, and do not affect, or infect, the findings in relation to the other issues dealt with by the first respondent. The position would be different had I found the apprehended bias ground was established, as such a finding would infect the whole of the Land Court's decision. …
>
> [37] … 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.

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12 QSC1, [7] (CAB, Vol 2, p. 567).

13 QSC2, [44](2) (CAB, Vol 2, p. 726).

20. As the Court of Appeal therefore later (and correctly) observed, most of Member Smith's findings were "preserved"[14] and "maintained"[15] by the Remittal Orders. Those findings of Member Smith continued to "bind the parties" at the remitted hearing.[16]

21. One of the other Remittal Orders made by Bowskill J (order 3) set aside a decision of the Second Respondent to refuse the application for an amendment of the environmental authority under the EPA. That was because that decision had been based on Member Smith's rejection recommendation: QSC2, [6]-[9].

22. On 30 May 2018, the Appellant appealed against the Remittal Orders, challenging the conclusions on the Groundwater Issues.[17] NAC cross-appealed on the Bias Issue.[18]

The decisions of Kingham P and the Second Respondent

23. Meanwhile, the applications were referred back to the Land Court in accordance with the Remittal Orders. The Appellant sought to have that hearing adjourned pending determination of the appeal from the Remittal Orders. On 20 June 2018, however, Kingham P determined that the hearing should proceed.[19]

24. In doing so, Kingham P expressly noted that Member Smith's findings "significantly confine the scope of the remitted hearing" (at [3]), that the Court was "bound by all Member Smith's findings and conclusions on all key issues, except groundwater, inter-generational equity as it relates to the issue of groundwater, and noise" (at [18(b)]) and that Bowskill J's orders "give full effect to any untainted findings and conclusions from Member Smith's decision" (at [43]). Kingham P noted that the remitted hearing was *not*, due to these constraints, a true rehearing (at [17], [21]).

25. On 7 November 2018, Kingham P recommended that the applications be approved if changes were made to conditions for noise.[20] In accordance with the Remittal Orders, in reaching that recommendation Kingham P again recognised that she was bound by,

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14 CA1, [56] (CAB, Vol 2, p. 773).

15 CA1, [117] (CAB, Vol 2, p. 787).

16 CA2, [4] (CAB, Vol 2, p. 791).

17 Notice of Appeal in Court of Appeal, (CAB, Vol 2, p. 730).

18 Notice of Cross-Appeal in Court of Appeal, (CAB, Vol 2, p. 744).

19 *New Acland Coal Pty Ltd v Ashman (No 6)* [2018] QLC 17 (**LC2**) at [9]-[44] (CAB, Vol 2, pp. 477-483).

20 LC3, [260]-[274] (CAB, Vol 2, pp. 550-552). 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.

and thus adopted, "most" of the findings and conclusions of Member Smith.[21] Kingham P 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.[22] Reflecting the limited nature of the remitted hearing, it took place over only three sitting days, as compared to the almost 100 sitting days required to determine, in their entirety, the objections to the applications before Member Smith.

26. On 12 March 2019 the Second Respondent, acting again in accordance with the Land Court's recommendation, approved the amendment of NAC's environmental authority to cover Stage 3 in accordance with Kingham P's recommendation.[23] 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

27. The Court of Appeal hearing occurred from 27 February 2019 and 1 March 2019, *after* and in full knowledge of Kingham P's recommendations. On 10 September 2019, the Court of Appeal handed down judgment on the appeal from the orders of Bowskill J (CA1). 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 Appellant's appeal on the Groundwater Issues was dismissed.

28. The Court noted (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".[24]

29. 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]. 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

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21 See, for example, LC3, [6], [26], [28], [181] (CAB, Vol 2, pp. 494, 497, 498, 534).

22 See LC3, [234]-[235] (CAB, Vol 2, pp. 544-545).

23 AFM, pp. 95-168.

24 NAC's Notice of Cross-Appeal is at CAB, Vol 2, p. 744.

outcome. Thus when such questions 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]). NAC was put to an election by the Court. After an adjournment to seek instructions,[25] NAC elected to maintain the cross-appeal, withdrawing the attempt to make it conditional: CA1, [63].

30. On that basis, the Court of Appeal determined NAC's cross-appeal first. Applying the relevant common law principles, the Court 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]. This accorded with the position that NAC had pursued at the hearing. The Court also went on to determine the Groundwater Issues, rejecting the Appellant's appeal on that point. It did so in acknowledgement of the fact that "the result of the cross-appeal means that the case will have to be reheard": CA1, [105].

31. However, after CA1 the Court of Appeal permitted further submissions on the appropriate orders, at the joint request of the parties. On 1 November 2019 it delivered a further judgment on that issue (CA2). In stark contrast to its previous position, it now determined that despite the finding of bias the Remittal Orders should stand, and it simply declared that in making the recommendations he did, 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]).

32. The Court gave two reasons for not setting those orders aside. First, it said that "[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]. The Court of Appeal 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

[25] Transcript of hearing before the Court of Appeal, 27 February 2019, T1-8, lines 19-20 – T-10, line 29 (AFM, pp. 36-38).

bind the parties. There has been no such appeal.

33. The Court referred to no authority, including those authorities to which it had referred and upon which it had relied in CA1, and which the Appellant had again invoked.

PART VI: ARGUMENT

34. The Appellant submits that the Court of Appeal was right in CA1 to conclude that the result of its finding of apprehended bias was that the orders of Bowskill J should be set aside and a new hearing ordered, and that the Court of Appeal was wrong in CA2 to take a different approach.

The significance and effect of a finding of apprehended bias

35. The first issue raised by the appeal is what should occur when a court determines that a decision of a lower court, and the findings made in it, are affected by apprehended bias. The Appellant submits the simple rule is that the decision and findings must be set aside and a new hearing ordered. There is no room for the application of any discretion, and even if there was any such room the circumstances justifying its exercise would have to be truly exceptional. There are no such exceptional circumstances in the present case.

The decision of the Court in Concrete

36. In *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 the plurality said 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.

37. The rule against actual or apprehended bias is of particular importance in application to courts, as it is of vital significance in maintaining confidence in the independent and impartial administration of justice. That is especially so when matters of public controversy are involved, as here. As stated at CA1, [20] (citations omitted):

> As a court of record, and notwithstanding that it is an inferior court, the Land Court must have and must maintain the characteristics of an Australian Court. The most fundamental of these characteristics are independence and impartiality.

38. 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. 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 its other arguments failed. Kirby and Crennan JJ

held that this was not the correct approach, stating at [117]:

> 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.[26] 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.

39. Gummow ACJ agreed at [2]-[3]. At [172], Callinan J similarly stated that "[t]he decision that the trial judge 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".

40. The decision in *Concrete* mandates that, given the wider importance to the justice system of maintaining confidence in the validity and acceptability of the trial and its outcome, a finding that a trial has been affected by a reasonable apprehension of bias necessitates a retrial being ordered irrespective of possible findings on other issues. It follows that there is no discretion not to order a retrial, whether because of lack of utility or for any other reason.

41. The approach in *Concrete* has been consistently applied by intermediate appellate courts

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[26] See *Antoun v The Queen* (2006) 224 ALR 51 at [2] per Gleeson CJ.

at State[27] and Federal level.[28] It has not been suggested in those cases that the appellate court has a discretion as to whether to set aside findings made by a lower court that are found to be affected by apprehended bias. There is no such case, so far as the Appellant is aware, in which any exception to the principle set out in *Concrete* in relation to apprehended bias has been applied so as to leave in place findings affected by apprehended bias.

42. Consistent with the *Concrete* approach, the consequences of a finding of apprehended bias were clearly identified by the Court of Appeal in argument at the main hearing. At the commencement of oral 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. It elected to proceed with its cross-appeal on that basis.[29] 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) to maintain confidence in the validity and acceptability of the trial and its outcome.

43. It is true of course that Bowskill J *did* set aside Member Smith's recommendations (because NAC had succeeded on the Groundwater Issues). However, the effect of Bowskill J's approach was that most of Member Smith's findings continued in effect and remained binding on the parties.

44. The Court's two proffered reasons for declining to set aside the Remittal Orders and order a rehearing were not to the point (and did not constitute exceptional circumstances). These are addressed in turn below.

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27 See, for example, *Hills v Chalk* [2009] 1 Qd R 409 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 NSW* [2019] NSWCA 144 at [35] per White JA (with whom Bell P and Macfarlan JA agreed); *Royal Guardian Mortgage Management Pty Ltd v Nguyen* (2016) 332 ALR 128 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.

28 See, eg, *Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113; (2019) 371 ALR 426 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.

29 See Transcript of hearing before the Court of Appeal, 27 February 2019, T1-7 line 1-11, also T1-18 line 1 (AFM, pp. 35, 46).

There was utility in setting aside the Remittal Orders

45. 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.

46. *First*, the decision of Member Smith had continuing effect. The effect of the 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 Appellant's position. The Court of Appeal having upheld the cross-appeal on the Bias Issue, it was no longer the case (as Bowskill J had stated when making the Remittal Orders) that "the findings and conclusions [other than on the Groundwater Issues] … *are not tainted in any way*".[30] Given that Kingham P's recommendations depended substantially on Member Smith's decision, which was infected with jurisdictional error (see further below in answer to the Court's second reason), the Land Court had not completed its assessment function.

47. *Secondly*, and tied to that point, setting aside the orders would make clear to the relevant decision-makers under the MRA (the Minister for Resources) and the EPA (the chief executive of DES) what the status of Kingham P's recommendations was. Those decision-makers are required by those statutes to take into account recommendations made by the Land Court as a mandatory relevant consideration for the final decisions on the applications (where objections have been made and have not been withdrawn).[31] No doubt what they are required to take into account is a valid recommendation.

48. In contrast, the declaration ultimately made by the Court of Appeal (in its order 3) – that, in making his recommendation, Member Smith had "failed to observe the requirements of procedural fairness" – had no utility and served to confuse the situation. It says nothing about the validity or invalidity of any recommendation or decision incorporating or based upon the findings of Member Smith. What is the Minister for Resources to do when presented with the reasons and recommendations of Kingham P together with the Court of Appeal's declaration that the decision which founded those

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30 QSC2, [37], emphasis added (CAB, Vol 2, p. 723).

31 In particular, MRA, ss 260-272 and EPA, ss 152-163 and 182-194.

recommendations was reached in breach of procedural fairness?

49. *Thirdly*, and more generally, it was necessary that the Remittal Orders be set aside, and a new hearing take place, to protect the actual and perceived 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.

50. The Appellant accepts, of course, that the Bias Issue was a point advanced by NAC relating to apprehended bias against NAC. The Appellant'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 or the Appellant's choice.

51. Moreover, although Member Smith's ultimate recommendations were in the Appellant's favour, his findings on most issues were not.[32] 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. In CA1 the Court of Appeal noted at [103] that whilst the fact "that the Member decided some issues in favour of Acland is a factor that must be taken into account … the Member could hardly have decided every issue against Acland". Earlier, at [96], it quoted Aickin J stating that "repeated denials of prejudging might well convey the impression of 'protesting too much …'". There is a possible concern that a decision-maker with an interest connected with one side of a dispute might tend to *disfavour* that side, in whole or in part, or seek to be seen to do so. The degree to which this may have occurred in a case such as this, if at all, is speculative – hence the general rule of setting aside.

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

52. 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 – also manifests error. As noted above, the Land Court is an inferior court of record. Its jurisdiction is established, relevantly for the purposes of the present appeal, by the LCA, the MRA and the EPA. The decisions and recommendations of the Land Court will only be valid and bind the parties if they were made within the jurisdiction so conferred;

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[32] QSC1, [4] (CAB, Vol 2, p. 566).

if those orders are not made within jurisdiction, then they are a nullity.[33] As Gageler J observed in *State of NSW v Kable* (2013) 252 CLR 118 (***Kable No 2***) at [56]:

> A judicial order of an inferior court made without jurisdiction has no legal force as an order of that court…the order may be challenged collaterally in a subsequent proceeding in which reliance is sought to be placed on it.

53. That is distinctly applicable where the error involves a finding of bias. 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 jurisdictional error.[34] 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 provisions conferring jurisdiction on the Land Court.

54. 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. Thus a key foundation of the reasoning of Kingham P is absent – that is to say, her Honour's reasoning and recommendations were founded on a decision which was infected with jurisdictional error – with the result that her recommendations were also not made within jurisdiction.

55. As noted, Kingham P's powers were sourced in the LCA, the EPA and the MRA. None of those statutory provisions can properly be regarded as conferring power to make a decision which is based on findings affected by bias, regardless of whether that decision arose on a remittal or not. There is no express power to this effect, and no basis for any such power to be implied. In *Bhardwaj* at [48] Gaudron and Gummow JJ observed that:

> legislative provisions should not be construed as giving rise to an implication which gives an administrative decision greater force or effect than it would otherwise have unless that implication is strictly necessary.

56. Thus the recommendations of Kingham P are invalid, as the Land Court has not performed the task required of it under the relevant statutory provisions. The Court of Appeal was therefore wrong to conclude that the recommendations of Kingham P were

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33 *Attorney-General (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] and [55] 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.

34 *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.

made within jurisdiction and were valid and binding upon the parties. As a result, there is no impediment to the Land Court now remaking its recommendations.

57. It is important to recall, in this regard, that before the Court of Appeal the Appellant simply sought (relevantly) the *very same orders sought by NAC itself* in its Notice of Cross Appeal consequent upon a finding of apprehended bias,[35] namely, that Bowskill J's remittal orders be set aside, and the matter be referred back to the Land Court for reconsideration. The Appellant sought below that NAC be held to its election. It bears emphasis that the appeal and the cross-appeal were heard *after* Kingham P's recommendation had been made. It was necessarily implicit in the cross-appeal, and the manner in which it was pursued by NAC, that anything done pursuant to the Remittal Orders, which were under challenge in the cross-appeal, would be of no legal consequence if the bias finding was upheld. As NAC itself accepted during argument before the Court of Appeal, a finding of apprehended bias is "nuclear" in effect.

The impact of the Court's decision in *Kable (No 2)*

58. The second principal issue raised by the appeal is whether the Remittal Orders made by the Supreme Court (as a superior court of record) rendered valid the subsequent decision of the Land Court even where it incorporated findings affected by apprehended bias. This was not quite expressly suggested by the Court of Appeal but it appears to have been implied. In any event, the Appellant understands NAC to rely on the point. It turns on whether the Remittal Orders had the effect of expanding the Land Court's jurisdiction as conferred by the LCA, MRA and EPA, such that Kingham P's decision is, because made in accordance with the Remittal Orders, valid and binding.

59. 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. As this Court reiterated in *Kable (No 2)* (see plurality at [32]), the orders of a superior court of record are valid until set aside. Nevertheless, the Court of Appeal was wrong to imply that it followed from this that the recommendations *of the Land Court*, incorporating findings affected by apprehended bias, were valid and binding. A superior court has power to make orders that would otherwise be outside the jurisdiction of a statute which it purports to apply by reason of the conferral upon it of the status of a superior court.[36]

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35 NAC's Notice of Cross-Appeal (CAB, Vol 2, p. 744).

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

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.

60. There is no analogy to be drawn between the decision in *Kable (No 2)* and the present case. In *Kable (No 2)* the detention of Mr Kable pursuant to the order of Levine J was found to be lawful even though this Court had found that the *Community Protection Act 1994* (NSW), which purported to confer authority on the NSW Supreme Court to make the order, was constitutionally invalid. The Supreme Court's order itself provided a source of power for the State of NSW to imprison Mr Kable while it was in effect. Thus French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ held that the order of Levine J "authorised" the detention of Mr Kable (at [27]). Similarly, Gageler J spoke (at [53]) of the "independent legal force" of the court's order, regardless of the underlying statute (see also at [66]).

61. The same cannot be said for Bowskill J's orders and the Land Court's jurisdiction as an inferior court. The Land Court's powers do not derive, in whole or in part, from orders of the Supreme Court of Queensland. What the Remittal Orders did was set aside the decision of Member Smith, remit the matter to the Land Court, but limit the role of that Court on that remittal so as only to re-assess certain matters. The powers and functions being exercised by the Land Court continued to be those granted by the LCA, EPA and MRA. The Land Court continued to exercise its own statutory jurisdiction. The Remittal Orders did not confer some different or additional superior court type status to that further exercise of jurisdiction. And the statutory jurisdiction of the Land Court obliged it to accord procedural fairness. As already noted, the Court of Appeal had itself stated at CA1 [20] that "the Land Court must have and must maintain the characteristics of an Australian Court", the most fundamental of which "are independence and impartiality".

62. The problems with the Court of Appeal's approach are illustrated by a further aspect of CA2. The Court of Appeal correctly accepted that if the Appellant had succeeded on the Groundwater Issues and the cross-appeal on the Bias Issue had been dismissed – ie had the Appellant won on both issues, instead of losing on both – the Remittal Orders should have been set side (CA2, [15]). The result would then have been that Member Smith's decision would not have been set aside and would be binding. However, on the Court of Appeal's reasoning, Kingham P's decision would *also* be valid and binding on

the parties because it was made pursuant to Bowskill J's orders, such that in this scenario there would be two binding recommendations on the applications to opposite effect. This cannot be right. The correct answer would have been that, because Kingham P adopted the wrong approach on the Groundwater Issues (albeit as required by Bowskill J) her Honour's recommendation would not be binding, leaving Member Smith's recommendation (in this scenario, untainted by bias) as the only lawful and binding recommendation.

63. 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 v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 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. Here, as noted above, the Appellant was simply seeking the very same orders that NAC itself had sought in its cross-appeal.

Whether any consequential orders should be made

64. The third principal issue raised by the appeal is whether, should it be necessary to do so, the Court can and should set aside the decision of Kingham P and the decision of the Second Respondent made on 12 March 2019 to approve the amendment of NAC's environmental authority to cover Stage 3 in accordance with Kingham P's recommendation.

65. For the reasons given above, the decision of Kingham P was made beyond jurisdiction, and as the recommendation of Kingham P was a mandatory relevant consideration for the Second Respondent in making a decision, that decision was also made beyond jurisdiction.[37] Kingham P's recommendation was a necessary precursor to the decision of the Second Respondent. In this context it is arguably not necessary that orders setting these two decisions aside be made.

66. Nevertheless, in the interests of completeness and clarity for all concerned, in its submissions for the purposes of CA2 the Appellant sought an order that the recommendations of Kingham P and the decision of the Second Respondent be formally

[37] Affidavit of Mark Andrew Geritz sworn 9 September 2019, paras. 3, 5 (AFM, pp. 65-66).

set aside pursuant to rr 5, 658 and 766 of the *Uniform Civil Procedure Rules 1999* (Qld). These are wide powers that confer considerable flexibility upon the Court. As Wilson J noted in *Johnston v Brisbane City Council* [2015] 2 Qd R 184 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".

67. In the present circumstances, there is no basis on which it could be found that the recommendations of Kingham P, or the decision of the Second Respondent, were lawfully made. There are no matters that could or would be raised in separate proceedings challenging those decisions that could not have been, and have not been, raised in the present proceedings.

68. 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 amended environmental authority approved "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]".[38] The Second Respondent did not object to the orders sought by the Appellant in the Court of Appeal, and has filed a submitting appearance in this Court.[39]

69. It may be recalled that in light of Member Smith's recommendation, the Second Respondent had originally refused the application to amend the environmental authority on 14 February 2018.[40] This was held to be invalid and set aside by Bowskill J.[41] It would be an incongruous (and wrong) result if, Bowskill J having had the power to set aside the decision of the Second Respondent when it acted upon Member Smith's recommendation, the Court did not equally have the power to set aside the decision of the Second Respondent when it acted upon the recommendation of Kingham P which was itself based on Member Smith's findings.

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38 Second Respondent's Outline of Submissions, dated 23 September 2019, para. 2 (AFM, p. 288).

39 CAB, Vol 2, p. 813.

40 QSC1, [63] (CAB, Vol 2, p. 578).

41 See order 3 of Remittal Orders (CAB, Vol 2, p. 729); QSC2, [6]-[9] (CAB, Vol 2, pp. 713-714).

Costs

70. For the reasons above the appeal should be allowed with costs. As to the proceedings below, the Appellant submits that the correct order is that each party bear its own costs of the appeal and cross-appeal to the Court of Appeal, along with the proceedings before Bowskill J.

71. As regards the proceedings before Bowskill J, her Honour ordered that each party bear its own costs.[42] In so doing, her Honour referred to the rationale for the costs principle as identified by McHugh J in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67]; noted that the litigation had to be brought by NAC to correct what it saw as Member Smith's errors, and that the Appellant took on the role of the primary contradictor which was of assistance to the Court; and noted that although NAC had succeeded in overturning the recommendations, it had not succeeded on all grounds raised. Her Honour's order was overtaken on appeal, where in CA2 it was ordered that the Appellant pay NAC's costs of the appeal, the cross-appeal, and the proceeding before Bowskill J.

72. In NAC's cross-appeal on the Bias Issue, the Court would have needed to hear and determine the issue (once NAC elected to pursue it) regardless of whatever position the Appellant took – even if it had, say, consented to the orders sought. In that context, it was appropriate and useful for the Appellant again to act as contradictor. Allegations of apprehended bias "are serious": *Concrete* at [117]. No Court would lightly find such an allegation made out, and would always be assisted by having a contradictor.

73. Indeed, and as explained above, in the judicial review proceedings the Appellant played the role of necessary contradictor, given that Member Smith had entered a submitting appearance. Had the Appellant not joined the proceedings, a contradictor may well have needed to be found, particularly in relation to the allegations of apprehended bias. The Appellant thus performed an important role in the litigation in the public interest.

74. The Appellant should not be penalised in costs where the decision of an inferior court is found to be affected by apprehended bias. As explained above, such a finding strikes at the validity and acceptability of the trial and its outcome. The invalidity and unacceptability of the trial and its outcome are not the fault of the Appellant, and it

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42 QSC2, [41]-[45] (CAB, Vol 2, pp. 725-726); see order 9 of the orders made by her Honour (CAB, Vol 2, p. 729).

cannot be criticised for seeking to avoid that outcome.

75. Further, as the Court of Appeal explained, NAC had sought to hold the Bias Issue in reserve, such that it would only be deployed if the Court proposed to allow the Appellant's appeal on the Groundwater Issues (CA1, [56]). As the Court of Appeal correctly observed, this approach was incorrect. Yet NAC then led the Court of Appeal back into error in CA2, necessitating this appeal. The submissions made by the Appellant in CA2 should have been accepted by the Court of Appeal. In that context, there should have been a measure of success on both sides below.

76. Further, while the Appellant was unsuccessful below in CA1, the appeal and cross-appeal raised legal issues of significant public interest and general importance for the operation of mining, environmental and water legislation in Queensland.[43] Its position was not without merit, although ultimately unsuccessful. The Appellant is a small, not-for-profit incorporated association whose objects include the protection of the environment. In 2017 it had approximately 65 members, who were largely local farmers, graziers, veterinarians and concerned townspeople.[44] It did not act in the proceedings for private gain but sought to protect what it perceives as the public interest. In contrast, NAC is a major mining company pursuing a multi-billion dollar mine development and the costs of the proceedings are part of the very substantial costs of its applications for the mine expansion.[45] Whilst there is no public interest immunity for costs, it was appropriate in the circumstances of the proceedings below to order the parties bear their own costs on the appeal and cross-appeal.

77. The Appellant notes that it did not challenge before the Court of Appeal the contention that it should pay NAC's costs before the Court of Appeal and Bowskill J. In retrospect, that concession was wrongly made. In any event, that was before the Court of Appeal erred in its decision in CA2. If the appeal is allowed, the Court can and should exercise its discretion as to costs afresh.

78. For the reasons set out above, the appropriate position is that the order of Bowskill J as to costs at first instance should be restored (achieved by not setting aside order 9 made by her Honour), and in the Court of Appeal each party should bear their own costs of

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43 Raising the considerations considered in *Oshlack v Richmond River Council* (1998) 193 CLR 72.

44 See the affidavit of Paul King, affirmed 23 June 2017, at para 8 (AFM, p. 6).

45 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 para. 27 (AFM, p. 214).

the proceedings.

PART VII: ORDERS SOUGHT

79. The Appellant seeks the following orders:

(a) Appeal allowed, with costs.

(b) Set aside order 3 made by the Court below, and in lieu thereof:

(i) Orders 4 to 8 of the orders made by Bowskill J on 28 May 2018 be set aside.

(ii) The First Respondent's applications be referred back to the Land Court to be reconsidered according to law.

(iii) 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.

(iv) The decision of the Second Respondent on 12 March 2019 under s 194 of the *Environmental Protection Act 1994* (Qld) be set aside.

(c) 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 VIII: ESTIMATE OF TIME REQUIRED

80. The Appellant estimates it will require some 1 hour 45 min for argument in chief, and up to 30 minutes in reply.

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