

BETWEEN:

OAKY COAL ACTION ALLIANCE INC
Appellant

NEW ACLAND COAL PTY LTD ACN 081 022 380
First Respondent

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CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND SCIENCE
Second Respondent

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

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FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

1. The First Respondent certifies that this Outline is in a form suitable for publication on the internet.

Part II:

2. As a matter of principle, the decision of the Court of Appeal (on 21 November 2019) was correct, because: (a) following the institution of the appeal (on 30 May 2018) and the cross appeal (on 13 June 2018), matters had progressed towards finality, with the making of the Kingham P recommendations decision (on 7 November 2018), the grant by the CG of NAC's request to impose the stricter noise conditions (on 12 February 2019) and the grant by the DES of the EA Amendment Application (on 12 March 2019) , leaving only the decision of the Minister under the MRA in relation to the mining lease application in "*the long and unhappy circumstances of this case*"; (b) OCAA did not seek a stay of any proceedings, despite Kingham P declining (on 20 June 2018) to adjourn the remitted hearing pending the outcome of the appeal to the Court of Appeal; (c) OCAA did not commence any proceedings to challenge the Kingham P recommendations decision or the DES decision; (d) following the decision by the CG, OCAA abandoned (on 26 February 2019) its grounds of appeal relating to noise; (e) both before Bowskill

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J and the Court of Appeal, OCAA had vigorously opposed the contention that the decision of Member Smith (on 31 May 2017) was affected by apprehended bias; (f) the decision of Member Smith had already been set aside by the orders made by Bowskill J (on 28 May 2018), and the remaining orders had been performed; (g) the decisions of Kingham P and the DES are valid, or should be treated as valid; (h) there was no proceeding before the Court of Appeal in which relief was claimed by OCAA in respect of those decisions; (i) the Court of Appeal had a discretion as to what relief should be granted to reflect NAC's success in CA1, and the relief granted in CA2 is consistent with the interests of justice.

10 3. One does not need to look beyond *Kable No 2* (JBA case 25) to conclude that the decisions of Kingham P and the DES are valid¹. Indeed, the position here is stronger. In *Kable No 1*, this Court had set aside the order of Levine J, with the central question in *Kable No 2* being whether, until it was set aside, the order had provided lawful authority for Mr Kable's detention. Here, the orders made by Bowskill J have not been set aside, and they provided lawful authority for the subsequent decisions of Kingham P, the DES and the CG. The position here is also stronger than that in *Wilde* (JBA case 27)². There, the order made by the Supreme Court on 23 April 1979 extending the time for registration of the charge was later set aside, but it was a lawful decision when the charge was registered, such that that
20 step was also lawful.

4. Alternatively, an analysis of the *LCA*, the *MRA* and the *EPA* reveals that all that is required is that there be recommendations in fact, and that they should be treated as valid until set aside in appropriate proceedings³. OCAA's contention that the recommendation of Kingham P is necessarily not made within jurisdiction because it was based upon findings of Member Smith does not confront the statutory scheme, or the difficulty that Kingham P, as the decision-maker, was free of any apprehended bias⁴.

¹ RS paras 23-31, 53

² RS fn.33; paras 31-32

³ RS paras 34-52

⁴ RS[18]-[31]

5. The Court of Appeal had a discretion as to what relief should be granted to reflect NAC's success⁵. In the field of judicial review, it is well established that relief is discretionary, even if the decision reviewed involves a denial of procedural fairness⁶. The decision in *Concrete* does not establish any fixed rule to opposite effect⁷, and involved very different circumstances. In determining what relief should be granted, it is the interests of justice that will prevail⁸.
6. OCAA's identification of a "core point"⁹ is inaccurate because, following CA1, and in the light of subsequent events, both OCAA and NAC sought orders which neither party had sought in the filed documents¹⁰. It is also inaccurate for OCAA to effectively convey that it is NAC that has given the jurisdictional error argument centrality¹¹, because OCAA's reliance upon it was first advanced in this Court, and permeates the AS¹².
7. OCAA's contentions on the costs issue are groundless, given its agreement to the orders below, the implications of the substantive decision below, and the limited success in the context of the whole proceedings that success in this Court would involve¹³. The submission in Reply [19] is made without any evidentiary foundation¹⁴. OCAA's reliance upon public interest issues ignores NAC's complaint that that too lacks a proper evidentiary foundation¹⁵, and overlooks that there is a public interest in winning valuable resources¹⁶.

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⁵ *JRA* s.30(1); *UCPR* r.766(1)(a); see also r.765(1)

⁶ RS para 60

⁷ RS paras 58, 59

⁸ RS paras 61-68

⁹ Reply [3]

¹⁰ RS[10][11]

¹¹ Reply [3]

¹² eg AS[47][52]-[55][58]-[63][64]-[67]

¹³ RS paras 69-77; the submission in Reply [17] is incorrect, as this Court declined to grant special leave on the ground that the Court of Appeal erred in relation to its order for costs

¹⁴ and is illogical

¹⁵ RS fn.99

¹⁶ see eg *MRA* s.2(a)(c)