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
Appellant

NEW ACLAND COAL PTY LTD (ACN 081 022 380)
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 REPLY SUBMISSIONS

11 September 2020
Filed on behalf of the Appellant by:
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PART I: CERTIFICATION

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

PART II: FACTS

2. NAC suggests at RS [9] that the Court of Appeal did not have knowledge of the recommendations of Kingham P prior to the hearing before it from 27 February to 1 March 2019. The Court was informed of the recommendations on 26 February 2019.[1]

PART III: ARGUMENT IN REPLY

3. NAC's main answer to the appeal seems to be to attack the argument that Kingham P's decision was and is a nullity. That argument of nullity is put by the Appellant as part of its response to the Court of Appeal's second reason in CA2. It is not the "central tenet" of the appeal: cf RS [17]. And NAC's lengthy response on the topic fails to address one core point: the Appellant seeks that this Court make *the very orders that NAC sought in its cross-appeal* as a consequence of its bias challenge. Regardless of the issues about whether or not the Remittal Orders somehow elevate or protect the reconsideration decision by Kingham P, it is those very Remittal Orders which were the subject of the cross-appeal and which the Appellant seeks be set aside.

4. In so doing, the Appellant seeks that this Court give effect to the approach stated by Kirby and Crennan JJ in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [117], being the approach NAC knowingly accepted after choosing to maintain its bias argument in the face of querying by the Court of Appeal. NAC contends at RS [59] that the statement in *Concrete* was obiter. That characterisation is open to argument, but even if obiter, the statement was carefully considered; agreed in by Gummow ACJ and supported by Callinan J; correct;[2] and consistently applied in courts of all jurisdictions ever since (see AS [41]).

5. NAC contends that the decision in *Concrete* does not created a "fixed rule" (RS [58]), and that where bias is found the court should be treated as having a broad discretion as to relief, informed by the interests of justice: RS [60]-[63]. The Court's approach in *Concrete* did not contemplate the application of any discretion. The rule against apprehended bias exists because even the appearance of departure from the independence and impartiality of a tribunal (let alone court) must be prohibited lest the integrity of the

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1 Email (by consent) to the Court of Appeal Registry, 26 February 2019: RFM, p 7.

2 The "internal inconsistency" that is alleged by NAC at RS [59] to have been identified by the NSW Court of Appeal in *Jamal v DPP (NSW)* [2019] NSWCA 121 at [53] refers to the order in which bias issues are to be dealt with, and has no bearing on the present appeal.

judicial system be undermined: AS [36]. Bias is a particularly egregious form of procedural unfairness (cf RS [60]). That the right to allege it can be waived (RS [63]) does not undermine the significance of a bias finding in a court, once made. There can be no justification for allowing findings infected by bias to stand; or, if there could be, it would need to be the most exceptional justification. There can be no sufficient discretionary basis to decline to make the orders sought in the cross-appeal in circumstances where NAC made a conscious, informed decision to pursue them.

The utility in setting aside the Remittal Orders

6. Both "utility" and the "interests of justice" (should they be relevant) require that the Remittal Orders be set aside and a full re-hearing ordered. In CA2, the Court of Appeal made only a declaration that the findings of Member Smith were contrary to the requirements of procedural fairness (CA2 [19]). This declaration necessarily and fundamentally undermined the recommendation of Kingham P, which was largely based upon those findings. A recommendation of the Land Court is a mandatory relevant consideration for the Minister in making their decision: RS [41], [43]. It is difficult to see how the Minister could properly take into account a recommendation the foundation of which a court has found to be infected by apprehended bias. NAC suggests that the Minister can simply weigh the declaration in the balance as a "signal" (RS [56]). To what effect? The submission ignores the fact that the legislation requires that the Minister have the benefit of, and take into account, a considered recommendation of the Land Court.

7. NAC's submissions proceed on the premise that if Kingham P's recommendations are "effective", then the Court of Appeal's approach in CA2 was necessarily correct: eg RS [2], [54]-[56]. But even if they were "effective" in some way, that would not preclude the Court having made the orders that NAC sought. The Land Court was exercising an administrative jurisdiction (see RS [35]-[36]), and "there is nothing in the nature of an administrative decision which requires a conclusion that a power to make a decision, once purportedly exercised, is necessarily spent".[3] Nothing in the statutory regime here precluded this. Indeed, NAC's own case emphasises that Bowskill J (and thus the Court of Appeal) had power under s 30(1)(b) of the *Judicial Review Act 1991* to make an order "referring the matter to which the decision relates to the person who made the decision for further consideration" and that this would provide authority for the Land Court to make new recommendations following such further consideration: RS [24], [26], [27].

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[3] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [5] per Gleeson CJ.

8. There is no reason why this power should not have been exercised to require the Land Court to conduct a full rehearing, regardless of whether the Kingham P recommendations were technically "effective". There was every reason to do so where, in light of what was declared in CA2, the recommendations of Kingham P are now undermined.

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

9. Although NAC submits that "there is no apprehended bias against Kingham P" (RS [22]) it is common ground (eg RS [19]) that her Honour's recommendations were substantially based on findings of Member Smith, which findings *were* affected by apprehended bias.

10. NAC next contends that, even putting the effect of the Remittal Orders to one side, a recommendation of the Land Court that was made in a procedurally unfair way, and which incorporated findings tainted by bias is nevertheless binding: RS [35]-[52]. This is wrong. It is well-established that bias strikes at the validity and acceptability of the trial and its outcome and undermines the integrity of the judicial system (AS [36], [38]). A defining characteristic of an Australian court is "independence and impartiality" (AS [37], [61]). There is no basis for the suggestion (RS [45], [47]) that the legislation from which the Land Court draws its powers (ie the LCA, MRA and EPA) sanctioned the Land Court to depart from these principles such that it had jurisdiction to make determinations which incorporated findings affected by apprehended bias.[4]

11. NAC's submissions at RS [36]-[37] come close to suggesting that decisions of the Land Court should be treated as though made by a superior court of record. But it has not been designated such.[5] And there is a significant difference between the decisions of superior and inferior courts of record as regards the consequences of a breach of natural justice.[6]

12. NAC contends the Kingham P's recommendations were nevertheless binding because they were made consequent upon orders of the Supreme Court. When an administrative decision is made or act done pursuant to an order of a superior court that is later set aside, the effect of that decision depends on the proper construction of the statutory provisions conferring power on the relevant decision-maker or governing the efficacy of the relevant act: see *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590 at 603-604 per Stephen, Murphy and Wilson JJ. *Wilde* is not authority for the proposition that all

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4 NAC appears to accept that the validity of the 2019 DES decision stands or falls with the validity of Kingham P's recommendation: RS [53].

5 See LCA, s 4; note *Kable No.2* at [34] per the plurality as to the significance of the designation.

6 Note, further to AS [52], *Cameron v Cole* (1944) 68 CLR 571 at 585 per Latham CJ, 589-591 per Rich J, 598-599 per McTiernan J, 607 per Williams J; *Taylor v Taylor* (1979) 143 CLR 1 at 7-8 per Gibbs J.

"concluded acts" done pursuant to an order of a superior court are valid: cf RS [26].

13. For NAC's submission to be correct, therefore, on their proper construction the LCA, MRA and/or EPA must (in combination with the Remittal Orders) grant jurisdiction to the Land Court to act in a way that would otherwise be outside of its jurisdiction and contrary to its status as an Australian Court, ie to make a recommendation that was substantially based on findings found to be affected by apprehended bias. None of the Acts say this expressly, and no such implication would readily be found.

14. Moreover, to the extent that the Remittal Orders can be said to have "authorised" the Land Court to do anything, it was to re-determine the allegations that Bowskill J considered were *not* tainted by bias (see, eg, order 5 of the Remittal Orders[7]). That is, the Land Court was expressly *not* authorised to redetermine the allegations that the Court of Appeal has now found *are* affected by apprehended bias. Those findings were left untouched, not elevated or absolved of bias. They had continuing effect.

15. NAC also relies on *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220: RS [26]. That decision supports the Appellant's position. There, an employee was convicted of an offence and suspended. His conviction was overturned on appeal, and he sued the Commissioner for his unpaid salary since his suspension. The Commissioner relied on a statutory provision which provided that an officer convicted of a felony shall be deemed to have vacated his office. The Court found that because upon the setting aside of the conviction it was avoided *ab initio*, the employee could not be deemed to have vacated his office and was therefore entitled to his salary for that period (at 224-225).

16. The confusion NAC seeks to identify in RS [30] is illusory. As to (a), the Land Court completed the limited task Bowskill J asked it to complete. But that does not render its recommendations valid when they incorporate findings that are infected by apprehended bias and thus were beyond jurisdiction. As to (b), if the Remittal Orders were not appealed, there would be no basis for challenging Bowskill J's conclusion that Member Smith's findings were not affected by apprehended bias. But they were.

Costs

17. NAC is wrong to suggest that there is no appeal against the costs orders made below: RS [71]. That appeal against these orders is made at [6] of the Notice of Appeal.[8]

18. NAC accepts that the Appellant was the only one willing to join the proceedings to oppose

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7 CAB, Vol 2, p. 729.

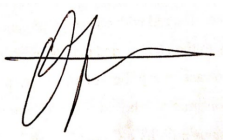
8 CAB, Vol 2, p. 810.

the relief sought by NAC: RS [7]. This underscores the fact that the Appellant was playing the role of necessary contradictor (as noted at RS [76]). The Appellant is a voluntary association directed to public ends.[9] In light of the public interest issues involved, it is appropriate that each party pay their own costs of the proceedings below. This applies to both the Bias Issue and the Groundwater Issues, but is particularly important in relation to the Bias Issue, which occupied the balance of court time. NAC accepts it was not wholly successful in the Court of Appeal, as it maintained that the Bias Issue could be held in reserve, but the Court found against it in this regard: RS [13].

19. The Appellant advanced the costs orders it did below in light of the reasons in CA1 [117], namely that the Appellant should pay NAC's costs of the appeal. After delivering CA1, the Court of Appeal directed the parties to give written notice to the other parties "as to the orders which it contends should be made by the Court in light of its reasons for judgment".[10] As the Court had ruled in CA1 that the Appellant "pay the first respondent's costs of the appeal" and had ordered the parties to make submissions on the form of the final orders "in light of its reasons for judgment", the Appellant proposed a form of orders accordingly. The Appellant therefore approached the issue on the basis that the Court of Appeal had made its ruling in CA1 [117] and it was too late to go behind the Court's finding that the Appellant should pay the NAC's costs. This was not a consent order (cf RS [71]). As to whether this Court is entitled to consider the issue of the costs orders below at all (RS [73]), the issue does not turn on any new issue of fact that need be determined in this appeal, and there is no prejudice to NAC in an appropriate order now being determined.[11]

11 September 2020





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9 Note further *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2020] HCATrans 117.

10 The directions made are at RFM, p 50.

11 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [29]-[31] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ; [67] per McHugh J.