HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND EDELMAN JJ

OAKEY COAL ACTION ALLIANCE INC APPELLANT

AND

NEW ACLAND COAL PTY LTD & ORS RESPONDENTS

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd
[2021] HCA 2
Date of Hearing: 6 October 2020
Date of Judgment: 3 February 2021
B34/2020

ORDER

1. *Appeal allowed.*

2. *Set aside orders 3 and 4 of the orders made by the Court of Appeal of the Supreme Court of Queensland on 1 November 2019 and, in their place, order that:*

   (a) *orders 4, 5, 6, 7 and 8 of the orders made by the Supreme Court of Queensland on 28 May 2018 be set aside;*

   (b) *the first respondent's applications be referred back to the Land Court of Queensland to be reconsidered according to law;*

   (c) *the decision of the second respondent made on 12 March 2019 under s 194 of the* Environmental Protection Act 1994 *(Qld) be set aside; and*

   (d) *each party bear its own costs of the appeal and cross-appeal in that Court.*

3. The first respondent pay the appellant's costs of the appeal to this Court.

On appeal from the Supreme Court of Queensland

Representation

J K Kirk SC with O R Jones and C J McGrath for the appellant (instructed by the Environmental Defenders Office)

D R Gore QC with D G Clothier QC and N Andreatidis QC for the first respondent (instructed by Clayton Utz)

Submitting appearances for the second and third respondents

CATCHWORDS

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd

Administrative law – Apprehended bias – Relief – Jurisdiction of inferior courts – Where first respondent applied for additional mining leases and amendment to existing environmental authority ("applications") – Where appellant and others lodged objections to applications – Where first decision of Land Court of Queensland ("Land Court") recommended that both applications be rejected – Where Supreme Court of Queensland rejected arguments by first respondent that recommendations made by Land Court affected by apprehended bias, but held recommendations involved errors of law and remitted certain matters to Land Court for reconsideration – Where second decision of Land Court constituted by different Member recommended applications be approved subject to conditions – Where amendment to environmental authority granted by delegate of second respondent – Where Court of Appeal allowed cross-appeal by first respondent and held that recommendations in Land Court's first decision affected by apprehended bias – Whether open to Court of Appeal, after finding that recommendations in Land Court's first decision affected by apprehended bias, not to refer matters to which recommendations related back to Land Court for full reconsideration, and instead to make consequential orders limited to declaration that procedural fairness not observed – Whether matters to which recommendations related should not be referred back to Land Court on basis of discretion to refuse relief.

Words and phrases – "administrative decision", "administrative function", "apprehended bias", "binding", "declaration", "discretion to refuse relief", "environmental authority", "error of law", "inferior court", "jurisdictional error", "lacking in legal force", "Land Court", "mining lease", "nullity", "procedural fairness", "qualified order for referral back", "setting aside", "spent", "statutory precondition", "valid".

Environmental Protection Act 1994 (Qld), Ch 5.
Judicial Review Act 1991 (Qld), s 30.
Land Court Act 2000 (Qld).
Mineral Resources Act 1989 (Qld), Ch 6.

1 KIEFEL CJ, BELL, GAGELER AND KEANE JJ. This appeal is from a judgment of the Court of Appeal of the Supreme Court of Queensland (Sofronoff P, Philippides JA and Burns J) on appeal by way of rehearing from a judgment of a single judge of the Supreme Court (Bowskill J) on judicial review of recommendations made by the Land Court in proceedings under the *Mineral Resources Act 1989* (Qld) ("the MRA") and the *Environmental Protection Act 1994* (Qld) ("the EPA").

2 The Land Court is established under the *Land Court Act 2000* (Qld) ("the LCA") as an inferior court of record[1] having both judicial functions and administrative functions[2]. The Land Court consists of the President and other Members[3], and is constituted for the exercise of jurisdiction by a Member sitting alone[4].

3 Each proceeding under the MRA and the EPA involved performance by the Land Court of an administrative function. Each recommendation was a decision of an administrative character, to which the *Judicial Review Act 1991* (Qld) ("the JRA") applied.

4 The Court of Appeal concluded that both recommendations made by the Land Court were erroneous in law and were affected by apprehended bias on the part of the Member who constituted the Land Court. Neither of those conclusions is now in issue. The second conclusion was contrary to a conclusion of Bowskill J, who had found error of law but not apprehended bias in relation to the recommendations of the Land Court. Based on her finding of error of law alone, Bowskill J had made orders under the JRA which included orders setting aside the recommendations and referring the matters to which the recommendations related back to the Land Court for reconsideration on a limited basis.

5 The Court of Appeal gave effect to its conclusion that the recommendations were also affected by apprehended bias by supplementing Bowskill J's orders with a declaration. The declaration was to the effect that the Member had failed to observe procedural fairness in making the recommendations.

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1 Section 4 of the LCA.

2 Section 3 (definition of "administrative function") and s 35 of the LCA.

3 Section 13 of the LCA.

4 Section 14 of the LCA.

6 The ultimate question in this appeal is whether the Court of Appeal, instead of making the declaration, ought to have made an order under the JRA referring the entirety of the matters to which the recommendations related back to the Land Court for full reconsideration. That is what ought to have occurred.

7 The complicated procedural history needs to be outlined before turning to the arguments of the parties and explaining why the Court of Appeal ought to have made that order.

Procedural history

8 New Acland Coal Pty Ltd operates an open-cut coal mine near Oakey on the Darling Downs in Queensland. New Acland has for some time been seeking to expand the mine. To do so, it has applied for additional mining leases under the MRA and for an amendment to its existing environmental authority under the EPA. Numerous objections have been lodged to each application. The objectors include Oakey Coal Action Alliance Inc. Oakey represents a group of farmers and other community members on the Darling Downs.

9 Under provisions of the MRA and the EPA which will need to be examined in due course, the making of the objections led to referral of New Acland's applications to the Land Court for consideration and recommendation. A recommendation by the Land Court under the relevant provisions of the MRA is to the Minister for Natural Resources, Mines and Energy, who gets to make the ultimate decision to grant or refuse the additional mining leases for which New Acland has applied. A recommendation by the Land Court under the relevant provisions of the EPA is to the Chief Executive of the Department of Environment and Science, who gets to make the ultimate decision to grant or refuse the amendment New Acland seeks to its environmental authority.

10 Referral of the applications for additional mining leases commenced a proceeding in the Land Court under the MRA to which New Acland and Oakey and other objectors were parties. Referral of the application for amendment of the environmental authority commenced a proceeding in the Land Court under the EPA to which New Acland and Oakey and other objectors were parties and to which the Chief Executive was also a party.

11 Together, the proceedings gave rise to complex overlapping issues for hearing and determination by the Land Court. They included economic issues. They also included issues in relation to air quality and dust, noise, transport and roads, 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.

12 The proceedings came to be heard together in the Land Court by Member Smith over a period of almost 100 hearing days. Member Smith rendered a decision in which he made many findings favourable to New Acland[5]. He found that the expanded mine was likely to provide a significant economic benefit to the local region, to Queensland and to Australia. On most other issues, he found either no adverse impact or impacts that could be appropriately managed.

13 In the result, however, Member Smith recommended that both applications be refused. His findings on three issues led him to make those recommendations. One was noise, which he found to exceed acceptable limits. Another was groundwater, the potential impact on which he found to have been inadequately modelled. The other was intergenerational equity, which he found was breached by the potential for the impact on groundwater to adversely affect landholders in the vicinity of the mine for hundreds of years.

14 New Acland applied to the Supreme Court for a statutory order of review of the recommendations under ss 20 and 21 of the JRA as well as for non-statutory judicial review of the recommendations in the exercise of the jurisdiction conferred by s 58 of the *Constitution of Queensland 2001* (Qld). The grounds on which New Acland relied included that the recommendations were affected by apprehended bias on the part of Member Smith. They also included that Member Smith erred in law in his findings and conclusions on each of the three issues that had led him to recommend that the applications be refused.

15 When the judicial review application was commenced, the only parties to it were New Acland and Member Smith, who properly entered a submitting appearance. Oakey applied to become a party. Its application was granted. After the Chief Executive acted on Member Smith's recommendation under the EPA to refuse the application to amend the environmental authority, the Chief Executive was added as a further party and his refusal decision was added to the decisions challenged in the judicial review application.

16 The judicial review application was heard by Bowskill J[6]. Her Honour found that the recommendations were not affected by any apprehended bias on the part of Member Smith that was able to be complained of by New Acland but that

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5 *New Acland Coal Pty Ltd v Ashman [No 4]* [2017] QLC 24.

6 *New Acland Coal Pty Ltd v Smith* (2018) 230 LGERA 88.

they were affected by errors of law on each of the three issues which had led Member Smith to make them.

17 Her Honour made orders setting aside the recommendations of Member Smith, setting aside the refusal decision of the Chief Executive, and referring the matters to which the recommendations related back to the Land Court to be further considered by a different Member[7]. Concerned to head off re-litigation of issues left untouched by the judicial review proceedings, however, her Honour made further orders which qualified the order referring the matters back to the Land Court. One of the further orders introduced a qualification that, for the purposes of further consideration, "the parties before the Land Court are bound by, and the Land Court is directed to proceed on the basis of, the findings and conclusions reached by" Member Smith on all issues other than the three issues which had led Member Smith to make the recommendations which her Honour set aside. Another introduced a qualification that "[t]he parties before the Land Court are bound by the factual findings made by [Member Smith] in relation to noise" and that "[t]he Land Court is directed to further consider the key issue of noise ... on the basis that the undisturbed factual findings as to noise stand, but on the basis of such further consideration of the evidence before [Member Smith], and any submissions, as the Land Court considers appropriate".

18 Whether her Honour had power to make those further orders is not raised in the appeal. The present relevance of the further orders is that they were complied with by Oakey, New Acland and the Chief Executive, and by Kingham P, who promptly and diligently set about reconsidering the matters to which the recommendations related on referral back to the Land Court.

19 Kingham P commenced her reconsideration of those matters in the implementation of the orders made by Bowskill J soon after the filing by Oakey in the Court of Appeal of a notice of appeal from those orders and soon after the filing by New Acland of a notice of cross-appeal from those orders. In so proceeding, Kingham P refused an application for an adjournment by Oakey[8]. Oakey did not seek judicial review of that refusal. Neither Oakey nor New Acland sought a stay of the orders of Bowskill J pending determination of the appeal and cross-appeal by the Court of Appeal.

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7 *New Acland Coal Pty Ltd v Smith [No 2]* [2018] QSC 119.

8 *New Acland Coal Pty Ltd v Ashman [No 6]* [2018] QLC 17.

20 Kingham P completed her reconsideration before the hearing of the appeal and cross-appeal in the Court of Appeal[9]. In the result, Kingham P made new recommendations that New Acland's applications for mining leases and its application for an amendment to its environmental authority be approved subject to conditions concerning noise. Her Honour made clear in her published reasons that her recommendations might have been different had she not been constrained in exercising discretion by the further orders made by Bowskill J which required her to proceed on findings and conclusions of Member Smith.

21 Acting on Kingham P's recommendation to him, a delegate of the Chief Executive subsequently granted the application for amendment of the environmental authority sought by New Acland. The Minister is yet to make a decision on the applications for the new mining leases sought by New Acland.

22 The existence of Kingham P's new recommendations and the Chief Executive's new decision was brought to the attention of the Court of Appeal before the hearing of the appeal and cross-appeal.

Oakey's appeal and New Acland's cross-appeal to the Court of Appeal

23 By its notice of appeal to the Court of Appeal, Oakey challenged the findings of Bowskill J that the recommendations made by Member Smith were affected by errors of law.

24 By its notice of cross-appeal to the Court of Appeal, New Acland sought to challenge the finding of Bowskill J that the recommendations were not affected by apprehended bias on the part of Member Smith, but only if Oakey's appeal was allowed. The Court of Appeal undoubtedly correctly refused to permit New Acland to pursue the issue of apprehended bias in that conditional manner[10]. Put to its election, New Acland chose to pursue the issue of apprehended bias unconditionally. New Acland amended its notice of cross-appeal accordingly.

25 The Court of Appeal, having reserved its decision, delivered reasons for judgment on the substantive issues raised by the appeal and the cross-appeal[11].

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9 *New Acland Coal Pty Ltd v Ashman [No 7]* [2018] QLC 41.

10 cf *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 611-612 [117].

11 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2019) 2 QR 271.

The reasons were delivered by Sofronoff P, with whom Philippides JA and Burns J agreed. Appropriately addressing the cross-appeal first, Sofronoff P took a more adverse view of the behaviour of Member Smith during the hearing before him than had Bowskill J to conclude that the recommendations made by Member Smith were affected by apprehended bias[12]. Going on to address the appeal, Sofronoff P concluded that Bowskill J had been correct to hold that the recommendations made by Member Smith were affected by errors of law she had identified[13].

26 It followed that the appeal was to be dismissed and that the cross-appeal was to be allowed. Sofronoff P indicated in his reasons that the appropriate consequential orders would be for the qualified order for referral back made by Bowskill J to be set aside, for the subject matters of the recommendations made by Member Smith to be referred back to the Land Court for full reconsideration, and for Oakey to pay New Acland's costs[14].

27 Having regard to the existence of the new recommendations made by Kingham P and to the new decision made by the delegate of the Chief Executive, however, the Court of Appeal permitted the parties to make further written submissions about the appropriateness of the consequential orders proposed by Sofronoff P. Having received those written submissions, the Court of Appeal was persuaded by New Acland to take a different course.

28 In supplementary joint reasons for judgment addressed to the orders to be made as a consequence of dismissing the appeal and allowing the cross-appeal[15],

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12 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2019) 2 QR 271 at 279-308 [20]-[103].

13 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2019) 2 QR 271 at 308-310 [104]-[115].

14 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2019) 2 QR 271 at 310-311 [117].

15 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd [No 2]* (2019) 2 QR 312.

the Court of Appeal said of the qualified orders for referral back made by Bowskill J[16]:

> "Those orders having been spent, there would be no utility in setting them aside. 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."

The Court of Appeal went on[17]:

> "In summary, setting aside the orders for rehearing would accomplish nothing and it is not open in this proceeding to interfere with the final orders made by President Kingham or with the decision of the delegate."

29 Dismissing the appeal and allowing the cross-appeal to it, the Court of Appeal then made consequential orders limited to a declaration to the effect that, in making his recommendations, Member Smith failed to observe procedural fairness, together with an order that Oakey pay New Acland's costs of the appeal and cross-appeal and of the proceedings before Bowskill J.

Oakey's appeal to this Court

30 By special leave, Oakey now appeals to this Court from so much of the judgment of the Court of Appeal as comprises those consequential orders.

31 Oakey points out that the new recommendations made by Kingham P are administrative decisions made by an inferior court. Being based in part on findings and conclusions of Member Smith, those recommendations are themselves affected by the same apprehended bias that the Court of Appeal found to affect the recommendations made by Member Smith.

32 Oakey seeks from this Court orders setting aside Kingham P's new recommendations and the Chief Executive's new decision. But, says Oakey, whether or not the new recommendations and new decision are set aside, each is

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16 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd [No 2]* (2019) 2 QR 312 at 315 [17].

17 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd [No 2]* (2019) 2 QR 312 at 315 [18].

"a decision that lacks legal foundation and is properly regarded, in law, as no decision at all"[18]. Each is in that sense a legal "nullity", binding on no one. For that reason, says Oakey, the existence of the new recommendations and new decision can be no impediment to the making of the consequential orders originally correctly thought appropriate by Sofronoff P: orders setting aside the qualified order for referral back made by Bowskill J, referring the subject matters of the recommendations made by Member Smith back to the Land Court for full reconsideration, and ordering New Acland to pay Oakey's costs.

33 For its part, New Acland ultimately accepts that Kingham P's recommendations, being based in part on findings and conclusions of Member Smith, are affected by the same apprehended bias that the Court of Appeal found to affect the recommendations made by Member Smith. Nevertheless, says New Acland, the Court of Appeal was correct to treat them as "valid" and as "binding" on Oakey and New Acland. New Acland says that the recommendations are valid and binding on Oakey and New Acland by force of the qualified order for referral back made by Bowskill J. New Acland says in the alternative that the mere fact that the Land Court has made a recommendation is sufficient to allow the Minister now to decide its applications for additional mining leases under the MRA and that the mere fact that the Land Court made a recommendation was sufficient for the delegate of the Chief Executive to have made the new decision to approve the amendment to its existing environmental authority under the EPA.

34 New Acland goes on to say that "the long and unhappy circumstances of this case" give rise to discretionary reasons for upholding the Court of Appeal's refusal to set aside the qualified order for referral back made by Bowskill J. New Acland points to evidence adduced in the hearing before the Court of Appeal that it has altered its position and expended substantial funds on the faith of the decision of Bowskill J and in reliance on the recommendations of Kingham P. New Acland says that Oakey has "had its day in court". The applications for additional mining leases under the MRA and for an amendment to New Acland's existing environmental authority under the EPA have been outstanding for a very long time. They should not now be referred back to the Land Court for yet another potentially lengthy and costly hearing.

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18 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51].

Kingham P's new recommendations do not have legal consequences by force of the orders made by Bowskill J

35 Being orders made by the Supreme Court in the exercise of judicial power as a superior court of record, the qualified orders for referral back to the Land Court made by Bowskill J on the judicial review application are valid until set aside[19]. To New Acland's argument that Kingham P's recommendations are valid and binding on Oakey and New Acland by force of those orders, however, there are two complete answers.

36 The first complete answer lies in recognising the source of power for, and limited operation of, the orders made by Bowskill J. The source of power for those orders is s 30(1) of the JRA, which is modelled on s 16(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

37 Section 30(1) of the JRA provides:

> "On an application for a statutory order of review in relation to a decision, the court may make all or any of the following orders –
>
> (a) an order quashing or setting aside the decision, or a part of the decision ...;
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions (including the setting of time limits for the further consideration, and for preparatory steps in the further consideration) as the court determines;
>
> (c) an order declaring the rights of the parties in relation to any matter to which the decision relates;
>
> (d) an order directing any of the parties to do, or to refrain from doing, anything that the court considers necessary to do justice between the parties."

38 Bowskill J's order setting aside the recommendations made by Member Smith was an order under s 30(1)(a) of the JRA. Her Honour's order referring New Acland's applications for additional mining leases under the MRA and for

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19 *New South Wales v Kable* (2013) 252 CLR 118 at 133 [32], 135 [38]. See also *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590 at 603-604.

amendment to its existing environmental authority under the EPA back to the Land Court for further consideration was an order under s 30(1)(b) of the JRA. The operation of that order was to require the Land Court to re-exercise the statutory jurisdictions conferred on it under the MRA and the EPA.

39 The qualifications to the order for referral back introduced by the further orders made by Bowskill J were sought to be made under s 30(1)(b) of the JRA insofar as they were framed as directions to the Land Court and under s 30(1)(d) of the JRA insofar as they were framed as directions to the parties. Those further orders cannot be interpreted as having any greater scope of operation than s 30(1)(b) and (d) of the JRA permit.

40 The purpose of the suite of powers conferred by s 30(1) of the JRA, including the powers of direction conferred by s 30(1)(b) and (d), is to "allow flexibility in the framing of orders so that the issues properly raised in the review proceedings can be disposed of" in a way that "avoid[s] unnecessary re-litigation between the parties of those issues"[20]. The amplitude of those powers "should not be unnecessarily confined"[21].

41 Wide though the discretionary power conferred by s 30(1)(b) to attach directions to the order for referral is, however, the power does not extend to authorise a decision-maker to proceed in a manner inconsistent with the statute that governs the making of the decision referred back for further consideration[22]. And wide though the discretionary power conferred by s 30(1)(d) to make an order directed to the parties is, the power does not extend to authorise making an order that is not necessary to do "justice according to law"[23]. Neither a direction attached to an order for referral under s 30(1)(b) nor an order directing the parties under

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20 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 543 [80], quoting *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 644.

21 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 538 [62]. See also *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 355-356 [32].

22 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 530 [33].

23 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 434.

s 30(1)(d) can authorise a decision-maker to engage in a process of further consideration that is in excess of the decision-maker's statutory jurisdiction.

42 Whether the further orders made by Bowskill J, which had the effect of requiring Kingham P to adopt most of the findings and conclusions of Member Smith, were consistent with the requirement of the LCA that the Land Court be constituted for the exercise of jurisdiction by a Member "sitting alone"[24] might be open to be questioned, but is not raised as an issue in the appeal. For present purposes what is important is that, whilst Kingham P's reconsideration of New Acland's applications faithfully implemented Bowskill J's order, Kingham P's reconsideration of those applications necessarily occurred, and the resultant new recommendations were necessarily made, in the purported exercise of the statutory jurisdictions conferred on the Land Court under the MRA and the EPA.

43 Left unappealed, Bowskill J's judgment and orders might well have given rise to estoppels operating between Oakey, New Acland and the Chief Executive to limit the grounds on which Kingham P's recommendations might be able to be challenged by Oakey in subsequent judicial review proceedings[25]. Even then, the operation of those estoppels would have been between the parties. Their operation could not alter the underlying substantive question of statutory authority and statutory validity.

44 The force and effect of Kingham P's recommendations therefore depend on whether the recommendations comply with the express and implied conditions of the exercise of the statutory jurisdictions conferred on the Land Court under the MRA and the EPA. The recommendations gain no additional force or effect by reason of having been made in consequence of Bowskill J's order for referral back under s 30(1)(b) of the JRA or the directions added under s 30(1)(b) and (d) of the JRA.

45 The second complete answer to New Acland's reliance on the qualified orders for referral back to the Land Court made by Bowskill J lies in recognising that those orders were the very orders under appeal to the Court of Appeal. Those orders had been framed by Bowskill J to reflect her Honour's conclusion that the findings and recommendations made by Member Smith were not affected by apprehended bias. That conclusion having been found to be erroneous by the

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24 Section 14 of the LCA.

25 cf *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 at 18-19 [48], 27 [84].

Court of Appeal, the orders under appeal could and should have been set aside by the Court of Appeal as an incident of the appeal.

46 True, the orders were "spent" to the extent that they had been implemented by Kingham P in making the new recommendations. But, as will be seen, the orders were not framed in a way that could produce, and had not in fact produced, recommendations that fulfilled the statutory duties of the Land Court under the MRA and the EPA and that met the statutory preconditions to the making of decisions by the Minister under the MRA and by the Chief Executive under the EPA.

Kingham P's new recommendations do not have legal consequences under the MRA or the EPA

47 The circumstance that the Land Court has been established by legislation as a court means that any jurisdiction conferred on it is necessarily conditioned by the requirement that it observe procedural fairness in the exercise of that jurisdiction[26]. Indispensable to the requirement that the Land Court observe procedural fairness in the exercise of its jurisdiction is that the process by which it exercises that jurisdiction must be and be seen to be independent and impartial[27] so that the decision it makes at the conclusion of that process is and is seen to be the result of a neutral evaluation of the merits. That inherent requirement conditions its jurisdiction to perform administrative functions no less than its jurisdiction to perform judicial functions[28].

48 The circumstance that the Land Court has been established as an inferior court, as distinct from a superior court, means that failure to comply with a condition of its jurisdiction to perform a judicial function renders any judicial order it might make in the purported performance of that judicial function lacking in

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26 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 72 [68], 99 [156], 106-108 [181]-[188].

27 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343 [3], 362-363 [79]-[82], 372-373 [115]-[116].

28 *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [21]-[23], 154-155 [55], [57]-[58]; *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140 at 146-147 [16], [18], 152-153 [53]-[54], 164 [130]; 375 ALR 47 at 52-53, 60-61, 76.

legal force. That is so whether or not the judicial order is set aside[29]. Failure on the part of the Land Court to comply with a condition of its jurisdiction to perform an administrative function correspondingly renders any administrative decision it might make in the purported performance of that administrative function lacking in legal force. That, again, is so whether or not the decision is set aside[30].

49 Orthodox analysis therefore supports Oakey's characterisation of Kingham P's recommendations as nullities. Kingham P did not behave in any way that gave rise to any apprehension of bias on her part. Through adopting findings and conclusions of Member Smith in accordance with the directions of Bowskill J, the process by which Kingham P arrived at the new recommendations she made nevertheless breached a condition of the exercise of the Land Court's jurisdiction to perform its administrative functions under the MRA and the EPA. The recommendations are nullities in that they do not comply with a condition of the statutory conferral of the administrative functions in the purported performance of which they were made. New Acland does not challenge that orthodoxy.

50 Building on the understanding that "a thing done in the purported but invalid exercise of a power ... [is] a 'nullity' in the sense that it lacks the legal force it purports to have" but "is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences"[31], New Acland's alternative argument is that the mere fact of the existence of Kingham P's recommendations is enough to meet the statutory preconditions to the making by the Minister of the ultimate decision to grant or refuse New Acland's applications for additional mining leases under the MRA and to the making by the Chief Executive of the ultimate decision to grant or refuse New Acland's application for amendment to its environmental authority under the EPA. Put in other words, New Acland's alternative argument is that a purported recommendation, or as New Acland

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29 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 445-446 [26]-[28], 453 [55]. See also *Cameron v Cole* (1944) 68 CLR 571 at 585, 589-591.

30 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-616 [51]-[53], 618 [63].

31 *New South Wales v Kable* (2013) 252 CLR 118 at 138-139 [52], citing Forsyth, "'The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law", in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) 141, esp at 147-148.

prefers to say it a "recommendation in fact", made by the Land Court is sufficient to meet the precondition to the making of each of those statutory decisions.

51 To address that argument requires attention to the scheme of the relevant provisions of the MRA and of the EPA.

52 The MRA includes within its principal objectives to "ensure an appropriate financial return to the State from mining" as well as to "encourage environmental responsibility" and "encourage responsible land care management" in mining[32]. Chapter 6 sets out a regime under which an application for a mining lease must be specifically notified to affected landowners, to the relevant local government and to infrastructure providers, and must also be publicly notified in a local newspaper[33]. For each notification, there is an objection period. Any objection properly made by any entity within the applicable objection period triggers referral of the application and all properly made objections to the Land Court[34].

53 The Land Court on referral has a duty to conduct a hearing into the application and objections, and into matters that it is required by the MRA to consider[35], and to produce a recommendation to the Minister that the application be rejected or granted in whole or in part subject to such conditions as it considers appropriate[36]. The matters that the Land Court is required by the MRA to consider include whether the operations to be carried out under the authority of the proposed mining lease will conform with sound land use management, whether there will be any adverse environmental impact caused by those operations, whether "the public right and interest will be prejudiced" and whether the proposed mining operation is an appropriate use of the land taking into consideration the current and prospective uses of the land[37].

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32 Section 2 of the MRA.

33 Section 252A of the MRA.

34 Section 265 of the MRA.

35 Section 268 of the MRA.

36 Section 269(1)-(3) of the MRA.

37 Section 269(4) of the MRA.

54 The decision to grant or reject the application for the mining lease lies with the Minister[38]. In considering the application, the Minister must consider the recommendation of the Land Court and must himself or herself also consider the matters which the Land Court is required by the MRA to consider in making the recommendation[39].

55 The MRA in that way conforms to the commonly encountered legislative model which "entails the holding of an inquiry by a body authorized to make a recommendation to a ... Minister [who] may make a decision rejecting the recommendation without conducting any further inquiry" under which "[t]he hearing before the recommending body provides a sufficient opportunity for a party to present [its] case so that the decision-making process, viewed in its entirety, entails procedural fairness"[40].

56 In *Forrest & Forrest Pty Ltd v Wilson*[41], by reference to a long line of previous authority, the majority in this Court stated:

> "[W]here a statutory regime confers power on the executive government of a State to grant exclusive rights to exploit the resources of the State, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant. When a statute that provides for the disposition of interests in the resources of a State 'prescribes a mode of exercise of the statutory power, that mode must be followed and observed'. The statutory conditions regulating the making of a grant must be observed. A grant will be effective if the regime is complied with, but not otherwise."

57 Understood in that light, it is apparent that the recommendation of the Land Court mandated by Ch 6 of the MRA as a precondition to the making of a decision by the Minister to grant or reject an application for a mining lease in the event of an objection is a recommendation which is the product of compliance with all of the express and implied conditions of the statutory process by which the recommendation is required to be produced. Central to those implied conditions of that statutory process by which the recommendation is required to be produced is

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38 Section 234 of the MRA.

39 Section 271 of the MRA.

40 *South Australia v O'Shea* (1987) 163 CLR 378 at 389.

41 (2017) 262 CLR 510 at 529 [64] (footnotes omitted).

that the Land Court observe procedural fairness in conducting the hearing and in making the recommendation.

58 New Acland's argument that a recommendation in fact is all that need exist to meet the statutory precondition to the making by the Minister of a decision to grant or reject an application for a mining lease is therefore denied both by the structure of Ch 6 and by the purpose of the MRA.

59 The argument is unsupported by either of the two decisions of this Court relating to analogous provisions of the *Mining Act 1978* (WA) on which New Acland relies. The issue in the first[42] was whether certiorari was available to quash a recommendation of a mining warden concerning an application for a mining lease. The holding was that the recommendation had sufficient legal effect on legal rights to attract certiorari because it was a precondition to the decision of the Western Australian Minister to grant or refuse the application. The holding cannot be taken to suggest that a purported but invalid recommendation of the mining warden would have been enough to meet that precondition. Certiorari is available to expunge the purported legal effect of an invalid decision[43]. The issue in the second[44] was whether a reasonable apprehension that a decision of the Western Australian Minister to grant the application for a mining lease in accordance with the recommendation of the mining warden was affected by bias arose from the circumstance that a departmental officer peripherally involved in the non-statutory process of briefing the Minister had a pecuniary interest in the application. The holding was that the decision was not affected by a reasonable apprehension of bias. That holding says nothing about the effect on the decision of the Western Australian Minister of a reasonable apprehension of bias in the statutory process leading up to the recommendation of the mining warden.

60 Turning from the MRA to the EPA, the stated object of the EPA is "to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends"[45]. The EPA relevantly pursues that object by making it an offence for a person to carry on an environmentally relevant

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42 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

43 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at 492 [25].

44 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438.

45 Section 3 of the EPA.

activity, including a mining activity, unless the person is the holder of an environmental authority for that activity[46].

61 Under Ch 5 of the EPA, an application for an environmental authority (including an application for an amendment to an existing environmental authority) is made to the relevant administering authority. The making of an application triggers a staged decision-making process. One of the stages applicable to an application for an environmental authority to carry out a mining activity involves giving public notice and an opportunity for public submissions[47].

62 The decision stage is itself stepped[48]. The first step is for the administering authority – for relevant purposes, the Chief Executive – to make what is, in effect, a preliminary decision on the application[49]. If the decision then made by the administering authority is to issue the applicant an environmental authority on other than standard conditions[50], the administering authority must give notice of the decision to any submitters accompanied by a draft environmental authority[51]. Any submitter may then object[52], following which the administering authority must refer the application to the Land Court[53].

63 Referral of the application by the administering authority following objection starts proceedings in the Land Court (to which the administering authority, the applicant and any objector are parties[54]) which must result in an

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46 Section 426 of the EPA.

47 Part 4 of Ch 5 of the EPA.

48 Part 5 of Ch 5 of the EPA.

49 Section 170(2) of the EPA.

50 Section 170(2)(b) of the EPA.

51 Section 181 of the EPA.

52 Section 182(2) of the EPA.

53 Section 185(1) of the EPA.

54 Section 186 of the EPA.

objections decision[55]. For that purpose, the Land Court is to hold a hearing, which must be timed to coincide with its hearing of any application for and objection to the grant of a mining lease under the MRA[56]. The objections decision must be in the form of a recommendation to the administering authority: that the application be approved based on the draft environmental authority, that the application be approved on conditions different from those in the draft environmental authority, or that the application be refused[57]. In making the objections decision, the Land Court must consider the application, the draft environmental authority, any objections and, amongst other things, applicable planning criteria[58].

64 The final step in the decision stage of the decision-making process under Ch 5 of the EPA is then for the administering authority to decide whether: to approve the application based on the draft environmental authority, to approve the application on conditions different from those in the draft environmental authority, or to refuse the application[59]. In making that final decision, the administering authority must have regard to matters which include the objections decision[60].

65 No differently from the recommendation of the Land Court which the Minister must take into account in deciding to grant or reject an application for a mining lease under the MRA, the objections decision of the Land Court to which the administering authority must have regard in making the final decision whether to approve an application for an environmental authority can only be one which is the product of compliance with all of the express and implied conditions of the statutory process by which the recommendation constituting the objections decision is required to be produced. No differently from the statutory process for the making by the Land Court of a recommendation under the MRA, central to the conditions implied into the statutory process for the making by the Land Court of a recommendation under the EPA is that the Land Court observe procedural fairness in conducting a hearing and in making the recommendation.

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55 Section 185(4) of the EPA.

56 Section 188 of the EPA.

57 Section 190(1) of the EPA.

58 Section 191 of the EPA.

59 Section 194(2) of the EPA.

60 Section 194(4) of the EPA.

66 A recommendation in fact made by the Land Court is insufficient to meet the preconditions to the making of a decision by the Minister to grant or refuse an application for a mining lease under the MRA. Likewise, a recommendation in fact made by the Land Court is insufficient to meet the preconditions to the making by the administering authority of a decision to grant or refuse an application for a variation of an environmental authority under the EPA. New Acland's alternative argument fails.

Discretion

67 Intrinsic to the nature of the orders which s 30(1) of the JRA authorises the Supreme Court to make is that the discretion it confers to make those orders is to be exercised as appropriate to give effect to rights, duties and powers judicially determined on the application for judicial review in which the orders are made. Where, as here, circumstances found to have arisen in an administrative process are determined on an application for judicial review to result in statutory duties remaining unperformed, an order referring the matters to which the decisions relate back to the decision-maker under s 30(1)(b) should in principle be made "unless circumstances appear making it just that the remedy should be withheld"[61].

68 The circumstances that might make it just to withhold such an order cannot be cabined. Examples include "if a more convenient and satisfactory remedy exists", "if no useful result could ensue", or if the applicant "has been guilty of unwarrantable delay or ... bad faith"[62]. The circumstances, however, are not at large. Practical inconvenience of giving effect to the rights, duties and powers that have been judicially determined is not amongst them. Neither individually nor in combination are the considerations on which New Acland relies sufficient to justify discretionary refusal of such an order in the circumstances of the present case.

The available and appropriate consequential orders

69 Consistently with the orders originally indicated by Sofronoff P, the substantive orders appropriate to have been made in the appeal to the Court of

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61 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 108 [56], quoting *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

62 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 108 [56], quoting *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

Appeal in consequence of its conclusion of apprehended bias on the part of Member Smith were orders setting aside the qualified order for referral back made by Bowskill J and substituting an order referring New Acland's applications back to the Land Court for full reconsideration.

70 The new decision of the delegate of the Chief Executive, being based on the recommendations of Kingham P, could and should also have been set aside by the Court of Appeal. The recommendations of Kingham P could not themselves have been set aside given that Kingham P was not a party to the judicial review application or to the appeal to the Court of Appeal[63]. That, however, is no impediment to the making of the other orders.

Disposition

71 The appeal must be allowed. The declaration and orders for costs made by the Court of Appeal must be set aside. In their place, it should be ordered that the qualified order for referral back made by Bowskill J be set aside, that New Acland's applications be referred back to the Land Court to be reconsidered according to law, that the new decision of the delegate of the Chief Executive be set aside, and that each party bear its own costs of the appeal and cross-appeal. New Acland should pay Oakey's costs of the appeal to this Court.

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63 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 46 [131]-[132].

EDELMAN J.

The unfortunate history of this appeal

72 Nearly 14 years ago, New Acland Coal Pty Ltd ("New Acland Coal") sought to expand its mining operations in what was described as its Stage 3 expansion. After making a modification in its project proposal, New Acland Coal submitted applications to permit the expanded activity. It applied for two additional mining leases and an amendment of its existing environmental authority. The amendment application was assessed and a draft environmental authority was issued. Objections were brought, by Oakey Coal Action Alliance Inc ("Oakey Coal Action") and others, to the mining leases and the amendment to the environmental authority sought by New Acland Coal.

73 More than five years ago the objections by Oakey Coal Action and others were referred to the Land Court for that Court to consider and to make non-binding recommendations to the Minister for Natural Resources, Mines and Energy and the Chief Executive of the Department of Environment and Science respectively under the *Mineral Resources Act 1989* (Qld) and the *Environmental Protection Act 1994* (Qld). The non-binding recommendations are but one stage in the larger decision-making process for the grant of the mining leases and the amendment.

74 The hearing in the Land Court occupied approximately 100 sitting days spread over more than a year, involving 19 issues for expert evidence and thousands of exhibits. It was the longest hearing in the long history of that Court. The 408-page decision of the Member of the Land Court was comprehensive and exhaustive. On judicial review of this decision in the Supreme Court of Queensland, although Bowskill J held that there were some legal errors in the Member's decision, much of the decision was undisturbed, and her Honour's order for a rehearing[64] (order 5) was confined only to "the key issues of groundwater, intergenerational equity (as it relates to groundwater) and noise" with a direction that the hearing otherwise proceed "on the basis of" the findings and conclusions of the Member.

75 With the extraordinary delay that had existed, one highly beneficial and practical effect of order 5 made by Bowskill J was to eliminate the need for another full hearing and potentially many more years of delay. The rehearing before Kingham P took only three days. Kingham P recommended, subject to conditions, the approval of New Acland Coal's applications for mining leases and its

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64 See *Judicial Review Act 1991* (Qld), s 30(1)(a), (b), (d).

application for an amendment to its environmental authority[65]. The Chief Executive, taking into account Kingham P's recommendation, granted the application for amendment of the environmental authority[66].

76 The Court of Appeal then heard an appeal by Oakey Coal Action, and a cross-appeal by New Acland Coal, from the decision of Bowskill J. Over the objection of Oakey Coal Action, the Court of Appeal allowed New Acland Coal's cross-appeal from the decision of Bowskill J[67], concluding that the conduct of the Member gave rise to an apprehension of bias following the publication of a newspaper article that had "deeply offended the Member"[68]. Although the apprehension of bias would generally have required the decision of the Member to be set aside, the Court of Appeal declined to order a new hearing. The central reason that a new hearing was not ordered was that Kingham P had resolved this stage of the dispute.

77 In Oakey Coal Action's application for special leave and on this appeal, it proposed orders that the matter be remitted to the Land Court to start all over again. Oakey Coal Action had itself initially opposed such an outcome in the Court of Appeal by resisting the setting aside of the Member's decision. And despite seeking an entirely new hearing, Oakey Coal Action did not join Kingham P to the appeal in this Court and thus cannot obtain orders setting aside the orders of Kingham P. This has the curious effect that Oakey Coal Action seeks orders for a new hearing to determine a matter that is, and will remain, resolved at the time this Court makes those orders. Nevertheless, Oakey Coal Action's appeal must succeed.

Summary of my reasoning

78 The starting point, which is not controversial in this Court, is the conclusion of the Court of Appeal that the manner in which the Member conducted the first

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65 *New Acland Coal Pty Ltd v Ashman [No 7]* [2018] QLC 41. See *Mineral Resources Act 1989* (Qld), s 269; *Environmental Protection Act 1994* (Qld), s 190.

66 See *Environmental Protection Act*, s 194.

67 No issue arises on this appeal, and no submissions were made, as to the correctness of the Court of Appeal requiring New Acland Coal to elect before the appeal whether to pursue its cross-appeal: compare *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 611-612 [117] (Kirby and Crennan JJ) with 634 [172] (Callinan J) and *Royal Guardian Mortgage Management Pty Ltd v Nguyen* (2016) 332 ALR 128 at 130-131 [9]-[11].

68 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2019) 2 QR 271 at 307 [101].

hearing gave rise to an apprehension of bias so that the remittal of the matter to Kingham P should not have incorporated the direction in order 5 that the hearing proceed "on the basis of" the findings and conclusions of the Member on all issues apart from groundwater (including intergenerational equity) and noise. The parties' submissions can be addressed and resolved in four steps:

(1) Once it is concluded that order 5 should be set aside, the decision of Kingham P involves apprehended bias arising from an unjustified lack of independence. The highly unusual circumstances of that conclusion arise because her Honour's dependence upon the identified findings and conclusions of the Member was both required and justified by order 5. But setting aside order 5 removes that justification.

(2) The principle derived from *New South Wales v Kable*[69] ("*Kable [No 2]*") is that the setting aside of the order of a superior court does not deprive executive or administrative acts of validity if they are done pursuant to the order and in the interim before it is set aside. But that principle does not provide administrative acts, and matters which depend upon those acts, with prospective or continuing validity for the period after the order is set aside.

(3) The mere fact that the decision was made by Kingham P, rather than the validity of the decision, is not sufficient to establish the jurisdictional condition to enliven the power of the Chief Executive to make the decision to approve the amendment to the existing environmental authority under the *Environmental Protection Act*.

(4) Although it is possible that discretionary reasons could, in exceptional circumstances, justify the refusal to order a new hearing despite an apprehension of a reasonable person that the prior decision-maker might be affected by bias, on balance the discretionary reasons upon which New Acland Coal relied – including the delays and the expenditure of funds in reliance upon the decision – are not sufficient to do so in this case.

(1) Judicial review for apprehended bias

The ground of judicial review

79 In *Hot Holdings Pty Ltd v Creasy*[70], Gaudron, Gummow and Hayne JJ said that there is a "large question" whether there exists a ground of judicial review permitting the issue of a writ of certiorari based upon "the 'process' of decision-making being affected by those who participate in that process having

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69 (2013) 252 CLR 118 at 133 [32], 135 [38].

70 (2002) 210 CLR 438 at 455-456 [52].

some interest in its outcome". That question has not been resolved by this Court. It was not necessary to resolve it in *Hot Holdings*. No submissions were made on it in this case. Much, however, may depend upon what is meant by a ground of judicial review based upon "the 'process' of decision-making" being "affected". It might be doubted, for example, whether a ground of judicial review could exist based upon the apprehended bias of persons involved in the decision-making "process" if that apprehension could not possibly lead to any concern about unjustified dependence or partiality by the decision-maker. Hence, in *Hot Holdings* the peripheral involvement in the decision-making process by an officer who had a pecuniary interest in the outcome did not lead to a conclusion that the Minister had acted with unjustified dependence or partiality. On the other hand, if the apprehension of bias of a person involved in the process casts doubt upon the independence or impartiality of the decision-maker then the decision might be invalid. For instance, in *Baker v Canada (Minister of Citizenship and Immigration)*[71], the dependence by a decision-maker upon a subordinate, including relying on the subordinate to write the notes that were taken to be the reasons for decision, could not be justified due to a reasonable apprehension that the subordinate was affected by bias.

80 In this case, it is unnecessary to extend the ground of judicial review beyond its orthodox expression as a rule against bias and apprehended bias. That rule is that the tribunal, or more accurately the person or persons constituting the tribunal, which exercises jurisdiction must be, and must be seen to be, independent and impartial. The test for a reasonable apprehension of bias is whether a hypothetical fair-minded lay observer, properly informed of the nature of the decision and the context in which it was made as well as the circumstances leading to the decision, might reasonably apprehend that the decision-maker might not have brought an independent and impartial mind to making the decision[72].

81 Bias and apprehended bias are phenomena concerned with the mindset and apprehended mindset of people and, relevantly, decision-makers. The thought processes of people can exhibit, or be apprehended to exhibit, unjustified dependence upon, or partiality towards, relevant matters. Processes cannot. Processes have no thought process. The decisions of this Court are therefore replete with references to the independence and impartiality of the mind of the relevant decision-maker. In *R v Commonwealth Conciliation and Arbitration*

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71 [1999] 2 SCR 817.

72 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345 [6]-[7]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20]-[23], citing *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519 and *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 459 [68].

Commission; Ex parte Angliss Group[73], the Court spoke of a tribunal or its members bringing "fair and unprejudiced minds" to the resolution of the question arising before the tribunal. In *R v Watson; Ex parte Armstrong*[74], Barwick CJ, Gibbs, Stephen and Mason JJ spoke of a judge bringing a "fair and unprejudiced mind to [a] decision". In *Laws v Australian Broadcasting Tribunal*[75], Mason CJ and Brennan J spoke of members of a tribunal bringing an "unprejudiced and impartial mind to the resolution of the issues". In *Webb v The Queen*[76], Mason CJ and McHugh J spoke of "impartiality on the part of [a] juror" to examine the evidence and approach the issues "unemotionally" and "dispassionately". And in the joint judgment in *Ebner v Official Trustee in Bankruptcy*[77], Gleeson CJ, McHugh, Gummow and Hayne JJ spoke of "an independent and impartial tribunal" and "an impartial mind". Although Kirby J suggested that there may be an implied constitutional requirement of "due process of law"[78], his Honour did not decide that point and did not suggest that "due process" required independence or impartiality to be assessed separately from the actual or apprehended state of a decision-maker's mind.

The invalidity of the decision of Kingham P

82 Oakey Coal Action submitted that the apprehension of bias concerning the Member "infected" the decision of Kingham P. As Gaudron, Gummow and Hayne JJ said in *Hot Holdings*, "[i]t would, of course, be wrong to place too much emphasis on metaphorical references to 'infection' or 'taint'"[79]. A more precise analysis, and one which underlies Oakey Coal Action's metaphor, requires focus upon whether the decision-making by Kingham P herself gives rise to an apprehension of bias by reason of her unjustified dependence upon the findings of the Member. The circumstances of this case are therefore a very unusual

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73 (1969) 122 CLR 546 at 554.

74 (1976) 136 CLR 248 at 263.

75 (1990) 170 CLR 70 at 87.

76 (1994) 181 CLR 41 at 47, 55-56.

77 (2000) 205 CLR 337 at 343 [3], 345 [7]. See also Gaudron J at 362-363 [80] ("a judge who is impartial and who appears to be impartial"). See also *Isbester v Knox City Council* (2015) 255 CLR 135 at 149 [31] ("impartiality of the decision-maker"), 153 [50] ("impartial mind to the decision").

78 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 372-373 [115]-[116].

79 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 454 [48].

application of the category described by Deane J in *Webb*[80] where the dependence or partiality of a decision-maker arises from a direct or indirect relationship that the decision-maker has with a person who is involved in the proceedings.

83 The unusual manner in which the decision-making by Kingham P gives rise to an apprehension of bias is a consequence of her Honour, in accordance with order 5 of Bowskill J's orders, quite properly treating herself as bound by the findings and conclusions of the Member in relation to all issues other than "groundwater, intergenerational equity (as it relates to groundwater) and noise". The dependence by which Kingham P decided those issues was both required and justified by order 5. Order 5 specifically required (i) that the parties before the Land Court be "bound" by, and (ii) that the Land Court "proceed on the basis of", all findings and conclusions of the Member other than in relation to "groundwater, intergenerational equity (as it relates to groundwater) and noise". But once the Court of Appeal concluded that there was apprehended bias on the part of the Member then it followed as a matter of logic that order 5 could not stand. And without the justification of order 5, the decision of Kingham P must be taken to be the subject of unjustified dependence and therefore apprehended bias.

84 Since the setting aside of order 5 means that the decision of Kingham P involves unjustified dependence, and therefore apprehended bias, the decision has no authority from the *Land Court Act 2000* (Qld), the *Mineral Resources Act*, or the *Environmental Protection Act* as an administrative function of the Land Court[81]. It was not in dispute that an implication in each of those statutes was that decisions would be made by a person acting independently and impartially[82]. Oakey Coal Action was therefore correct to submit that, prima facie, order 5 should be set aside because the *Judicial Review Act 1991* (Qld) did not empower orders permitting a decision that was dependent upon the expressed views of a Member about whom there was an apprehension of bias[83].

85 Although, prima facie, order 5 should be set aside, the decision of Kingham P cannot formally be set aside without the joinder of Kingham P to the

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80 (1994) 181 CLR 41 at 74.

81 *Land Court Act 2000* (Qld), s 3, Sch 2, definition of "administrative function".

82 See *Land Court Act*, s 7(b); *Mineral Resources Act*, ss 234, 269, 271, 271A; *Environmental Protection Act*, ss 170(2), 190(1), 191, 194.

83 See also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614 [48].

proceedings[84], a step which Oakey Coal Action chose not to take. But a conclusion that the decision of Kingham P is a legal nullity, even without an order setting it aside[85], remains important because Oakey Coal Action challenges the decision of the Chief Executive on New Acland Coal's application under s 194 of the *Environmental Protection Act*, and a precondition for the decision of the Chief Executive was the decision of Kingham P. The Chief Executive is joined as a party to this proceeding.

(2) Continued validity is not conferred upon the decision of Kingham P by the Supreme Court order

86 In *Kable [No 2]*[86], it was held that a judicial order for detention of Mr Kable made by a superior court of record in excess of the jurisdiction of that court provided lawful authority for the executive act of detention of Mr Kable, until the order was set aside. Although the court order was later quashed as being outside jurisdiction, it provided interim support for the act of detention, which would otherwise have been without authority. New Acland Coal submitted that order 5 of the Supreme Court of Queensland, a superior court of record, was therefore equally capable of providing lawful authority for the administrative decision of Kingham P in the Land Court, until order 5 was set aside.

87 Oakey Coal Action submitted that if the *Kable [No 2]* principle operated in this case it would require the *Land Court Act*, *Mineral Resources Act* or *Environmental Protection Act* to be construed so as impliedly to allow the Land Court to act with apprehended bias or upon findings affected by apprehended bias. This misunderstands New Acland Coal's submission. New Acland Coal did not suggest that the *Kable [No 2]* principle permitted a superior court to amend or expand the jurisdiction of an administrative body. Rather, the submission was that an order of a superior court of record, even if erroneously made, is itself a source of authority for administrative action that it directs, until the order is set aside: the effect comes "from the status or nature of the court making the order (as a superior court of record)"[87]. If the order of the superior court were not itself a source of

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84 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 46 [131]-[132].

85 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 445-446 [27]-[28], quoting *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 357; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-616 [51]-[53].

86 (2013) 252 CLR 118 at 133 [32], 135 [38].

87 *New South Wales v Kable* (2013) 252 CLR 118 at 134 [36].

authority then the State of New South Wales would have been liable for the false imprisonment of Mr Kable. By analogy, New Acland Coal argued that until order 5 is set aside, it is a source of authority for the Land Court, specifically Kingham P, to have proceeded on the basis of the findings and conclusions reached by the Member other than in respect of the "groundwater, intergenerational equity (as it relates to groundwater) and noise" issues. The decision of Kingham P can also be a potential source of authority for other acts.

88 New Acland Coal's submission is correct, so far as it goes. "Acts done according to the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice, which are compulsive'"[88]. But from the moment that the order is set aside it "can no longer provide the lawful justification for further action" and, depending upon the nature and statutory basis for any action taken in the interim, it will sometimes be appropriate for "what has been done [to] be undone"[89]. While order 5 is extant, the decision of Kingham P remains a valid act. But once order 5 is set aside, as it should be, the decision of Kingham P must be treated as lacking any legal force and acts for which the validity of the decision is a precondition must also be invalid, at least in their future effect.

89 An example can illustrate this point. Suppose that the provisions of the invalid *Community Protection Act 1994* (NSW) considered in *Kable v Director of Public Prosecutions (NSW)*[90] had empowered the State's Supreme Court to order payment of a fine by Mr Kable to the State as well as his detention and that the court order for his detention also required him to pay a fine to the State. Although the court order provided lawful authority for the detention of Mr Kable in the interim before the order was set aside[91], it could not provide continuing authority for the State to retain the benefit of the fine paid by Mr Kable[92]. Similarly, once order 5 of Bowskill J's orders is set aside then that order cannot provide any continuing authority for the decision of Kingham P or any acts which are dependent upon the validity of that decision.

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88 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225, quoting *Dr Drury's Case* (1610) 8 Co Rep 141b at 143a [77 ER 688 at 691].

89 *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590 at 603.

90 (1996) 189 CLR 51.

91 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and *New South Wales v Kable* (2013) 252 CLR 118.

92 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 52-53 [41]-[42]. See also *The Commonwealth v McCormack* (1984) 155 CLR 273.

(3) The validity of the decision of Kingham P is a condition for the valid operation of the decision of the Chief Executive

90 New Acland Coal asserted that the decision of the Chief Executive under s 194 of the *Environmental Protection Act* is valid even if order 5 is set aside and the decision of Kingham P has no legal force. It submitted that the factual existence of the decision of Kingham P is sufficient to support the continuing effect of the Chief Executive's decision. New Acland Coal also submitted that any future decision by the Minister under s 271A of the *Mineral Resources Act* will be valid notwithstanding the invalidity of the decision of Kingham P. Since no decision has been made under the *Mineral Resources Act*, this latter issue does not arise on this appeal.

91 The following is the relevant part of the scheme by which the Chief Executive makes a decision under s 194 of the *Environmental Protection Act* concerning an application for environmental authority for a mining activity relating to a mining lease. For a standard application for an environmental authority, including amendment to an environmental authority, the applicant gives public notice of the application[93], and submissions can be made by the public to the Chief Executive[94]. The Chief Executive makes a preliminary decision in relation to the conditions upon the application[95]. If non-standard conditions are imposed on an application for a mining activity relating to a mining lease then a notice, which includes the decision, must be given to the applicant and those who made the submissions[96]. Any of those "submitters" may then give an objection notice[97]. If an objection notice is given, then s 185 requires the Chief Executive to refer the application to the Land Court to make an "objections decision".

92 Section 194(2) provides for the final decisions that the Chief Executive can make, including approving or refusing the application. But that decision-making power is subject to conditions precedent in s 194(1). By s 194(1)(a), the decision-making power is enlivened where there is "an objections decision ... made about the application" by the Land Court.

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93 *Environmental Protection Act*, Ch 5, Pt 4, Div 2.

94 *Environmental Protection Act*, Ch 5, Pt 4, Div 3.

95 *Environmental Protection Act*, s 170.

96 *Environmental Protection Act*, s 181.

97 *Environmental Protection Act*, s 182.

93 New Acland Coal submitted that the decision of the Chief Executive remains valid even if the objections decision by the Land Court has no legal effect because the relevant precondition to a decision of the Chief Executive under s 194(2) is only that as a matter of "fact" an objections decision is made by the Land Court. Hence, if the Land Court were to give an objections decision without jurisdiction then that decision would still suffice for the validity of the decision of the Chief Executive because there was still a decision "in fact".

94 In some instances where a legislative provision requires that a second act depends upon the existence of a first act the provision might be construed to require only that the first act is performed in fact, not that it is validly performed in law[98]. As New Acland Coal put it, this reasoning reflects what Professor Forsyth called the "theory of the second actor", which he explained as follows[99]:

> "the validity of these second acts does not depend upon any presumption of validity or judicial exercise of a discretion to refuse a remedy to an applicant in particular proceedings. It depends upon the legal powers of the second actor. Did that second actor have power to act even though the first act was invalid?"

New Acland Coal sought to apply that reasoning by submitting that s 194(2) requires only the factual existence, not the validity, of a decision of the Land Court (the first act) as a precondition for the decision of the Chief Executive (the second act).

95 An interpretation of such wide power, or such a narrow condition precedent to power, of the second actor is unlikely to be common[100]. Against "the background of the familiar proposition that an unlawful act is void"[101], when a step in a decision-making process is mandatory, an interpretation that permits the step to be

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98 *Boddington v British Transport Police* [1999] 2 AC 143 at 172, quoting Forsyth, "'The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law", in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) 141 at 159; *Wintawari Guruma Aboriginal Corporation RNTBC v Wyatt* [2019] WASC 33 at [78]-[84].

99 Wade and Forsyth, *Administrative Law*, 11th ed (2014) at 252.

100 See, eg, *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 at 529 [64].

101 *Boddington v British Transport Police* [1999] 2 AC 143 at 172, quoting Forsyth, "'The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law", in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) 141 at 159.

performed in any invalid way will often defeat the intention of Parliament. But New Acland Coal had two submissions in support of this unusual interpretation. First, in relation to decisions of the Land Court made under s 269 of the *Mineral Resources Act*, New Acland Coal submitted that there was a release valve or safeguard in s 271A(1)(c), which provided for the power of the Minister to refer the matter back to the Land Court. But there is no such safeguard for the Chief Executive in the *Environmental Protection Act*. Secondly, New Acland Coal relied upon the inconvenience that would result if any jurisdictional error in a decision of the Land Court could invalidate a mining lease granted by the Minister after vast expenditure had been made in relation to that lease. But it is impossible to know the force of these practical considerations when weighed against the short time period of 28 days within which to make an application for a statutory order of review in relation to a decision of the Land Court[102]. Although that period can be extended by the Supreme Court[103], any extension would require consideration of matters including the extent of delay and any expenditure in the meantime. The practical considerations do not detract from the usual conclusion that the mandatory condition precedent to the decision by the Chief Executive, and to its continuing effect, is a valid objections decision of the Land Court.

96 In contrast with New Acland Coal's submissions, three aspects of the terms and structure of the *Environmental Protection Act* militate against the conclusion that the precondition for the Chief Executive to make a decision under s 194 is the mere "fact" of an objections decision being made, even if that decision is not valid.

97 First, one of the matters to which the Chief Executive is required to have regard is the objections decision of the Land Court[104]. This requirement clearly means the content of the decision and not merely the fact that it has been made. Secondly, it would neuter the elaborate scheme – including public notice, application, submissions by the public, preliminary decision, notice to submitters, and referral to the Land Court – if the only condition for a valid decision by the Chief Executive were a decision in fact of the Land Court. Thirdly, the importance of the content of an objections decision of the Land Court is reinforced by the object of the *Environmental Protection Act*: "to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends"[105].

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102 *Judicial Review Act*, s 26.

103 *Judicial Review Act*, s 26(1)(b).

104 *Environmental Protection Act*, s 194(4)(a)(i).

105 *Environmental Protection Act*, s 3.

98 The validity of the decision of Kingham P in the Land Court is therefore a condition for the immediate and continuing validity of the decision of the Chief Executive under s 194 of the *Environmental Protection Act*. Unless there are discretionary reasons not to do so, the decision of the Chief Executive should be set aside.

(4) Discretionary factors do not support a refusal of a new trial

99 Oakey Coal Action submitted that there was no discretion to refuse to order a retrial when the ground of relief is related to an apprehension of bias. The forceful remarks of Kirby and Crennan JJ in *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*[106], upon which Oakey Coal Action relied, serve to emphasise the danger that apprehensions of bias present to the administration of justice. But nothing in those remarks requires that a court be deprived of its residual discretion to refuse relief in every instance involving jurisdictional error based upon an apprehension of bias, including in the grant of relief under ss 30 and 47 of the *Judicial Review Act*. A fortiori, the residual discretion must also exist where the decision (here, of the Chief Executive) sought to be set aside is one step removed from the apprehended bias, involving an invalid condition precedent which was the subject of apprehended bias.

100 New Acland Coal pointed to numerous matters militating in favour of refusal of orders for a rehearing by the Land Court: (i) the nature of Kingham P's decision as a mere step in the process towards a final decision; (ii) the benefit of stringent noise conditions that Oakey Coal Action (and the other objectors) obtained as a result of Kingham P's decision; (iii) New Acland Coal's reliance upon Kingham P's decision resulting in the parties abandoning particular grounds of appeal and cross-appeal; (iv) New Acland Coal having spent more than $25 million to ensure that the expansion could proceed immediately upon the receipt of final approvals; and (v) the long delays that have already occurred, during which period Oakey Coal Action "had its day in court", including with more than 100 days of Land Court hearings, and lost all of its grounds of objection.

101 On balance, these matters are insufficient to justify the highly exceptional course of this Court refusing a rehearing for a party whose hearing was decided other than independently and impartially. Indeed, it cannot be said that Oakey Coal Action has "had its day in court" or had lost all of its grounds before an independent and impartial tribunal. And as for reliance upon the decision of Kingham P by New Acland Coal, it is pertinent that one cause of any rehearing will be the decision of New Acland Coal itself to persist with what Sofronoff P described at the hearing as the "nuclear" option of a cross-appeal seeking to set aside the decision of the Land Court.

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106 (2006) 229 CLR 577 at 611-612 [117].

Conclusion

102 The appeal should be allowed and a new hearing ordered before the Land Court. I agree with the orders proposed in the joint judgment.