LAND COURT OF QUEENSLAND

CITATION: *New Acland Coal Pty Ltd v Ashman & Ors (No 6)* [2018] QLC 17

PARTIES: **New Acland Coal Pty Ltd**
(applicant)

v

Frank Ashman, Lynn Ashman, John Cook, Patricia Cook, Hazel Green, Paul Mason, Janet Schick, John Schick, Jane Scholefield, Max Scholefield, Desley Spies, Kevin Spies, David Vonhoff, Cheryl Vonhoff, Fay Wieck, Grant Wieck, Simon Wieck
(MRA level 1 objectors)

and

Glenn Norman Beutel, Darling Downs Environmental Council Inc., Angela Mason, Geralyn Patricia McCarron, Oakey Coal Action Alliance Inc., Merilyn Helen Plant, Sid Arthur Plant, Tanya Merilyn Plant, Steven Ward, Noel Wieck
(MRA level 2 objectors)

and

Frank Ashman, Lynn Ashman, Russell Byron, Clean Air Queensland, Christopher Cleary, Naomi Cleary, John Cook, Patricia Cook, Paul Evans, Karen Lavin, Carolyn Lunt, John Millane, Frances Scarano, Jane Scholefield, Max Scholefield, Loretta Smith, Desley Spies, Kevin Spies, David Vonhoff, Cheryl Vonhoff, Fay Wieck, Grant Wieck, Simon Wieck
(EPA level 1 objectors)

and

Glenn Norman Beutel, Pamela Aileen Harrison, Oakey Coal Action Alliance Inc., Merilyn Helen Plant, Sid Arthur Plant, Tanya Merilyn Plant, John Standley, Steven Ward, Noel Wieck
(EPA level 2 objectors)

and

Angela Mason
(EPA s 186(d) party)

and

Department of Environment and Science
(EPA statutory party)

FILE NOs:	EPA495-15 MRA496-15 MRA497-15
DIVISION:	General Division
PROCEEDING:	Directions upon remittal for further hearing
DELIVERED ON:	20 June 2018
DELIVERED AT:	Brisbane
HEARD ON:	5 June 2018, written submissions closed 19 June 2018
HEARD AT:	Brisbane
PRESIDENT:	FY Kingham
ORDERS:	**1. I make the directions set out in Attachment A to this decision.**
CATCHWORDS:	ENERGY AND RESOURCES – MINERALS – COURT EXERCISING JURISDICTION IN MINING MATTERS – applications for, and objections to, mining leases and related environmental authority – where the Member recommended the applications be refused – where Judicial Review of that decision by a Judge of the Supreme Court of Queensland remitted the matter back to the Land Court, before a different Member, on a limited basis – where an objector appealed the Judicial Review decision – where the miners cross-appealed the Supreme Court decision, contingent on the success of the objector's appeal – where, at the directions hearing for the remitted hearing, the objectors requested the remitted hearing be adjourned until the appeal is determined – whether proceeding with the remitted hearing would result in wasted effort and costs, and undue stress and uncertainty – whether delay in the remitted hearing would prejudice the miner – whether it is in the interests of justice to proceed with the remitted hearing – where the application for an adjournment was dismissed – where directions were made for the remitted hearing to proceed *Uniform Civil Procedure Rules 1999* r 761(1), r 761(2)

Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175
Croney v Nand [1999] 2 Qd R 342
Kowalski v Public Trustee (No. 2) [2011] QSC 384
New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4) [2017] QLC 24
New Acland Coal Pty Ltd v Smith [2018] QSC 088
New Acland Coal Pty Ltd v Smith (No 2) [2018] QSC 119

APPEARANCES: D Gore QC and B Job QC (instructed by Clayton Utz) for the applicant
C McGrath of counsel (instructed by Environmental Defenders Office) for Oakey Coal Action Alliance Inc.
S Barlow QC (instructed by the Department of Environment and Science) for the statutory party
T Plant, S Ward, S Plant, M Plant, J Standley, N Wieck, A Mason, A Harrison, G Beutel, G McCarron, respondents in person

Background

[1] This decision provides reasons for directions about the procedure for the remitted hearing of applications by New Acland Coal Pty Ltd for approvals relating to its proposed stage 3 of the New Acland mine, near Oakey.

[2] To proceed with stage 3, NAC applied for two additional mining leases and an amendment to the environmental authority for the mine. On 31 May 2017, a Member of this Court recommended against NAC's applications.[1] NAC applied for judicial review of that decision.

[3] On 28 May 2018, Justice Bowskill set aside Member Smith's decision and remitted the matter to the Court for further hearing by a different member of the Court. Her Honour also made orders that significantly confine the scope of the remitted hearing.[2]

[4] On 30 May 2018, Oakey Coal Action Alliance Inc (OCAA) filed a notice of appeal against her Honour's orders. NAC has since filed a cross-appeal, but it is contingent on OCAA succeeding in its appeal.[3]

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1 *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4)* [2017] QLC 24*.

2 *New Acland Coal Pty Ltd v Smith* [2018] QSC 088; *New Acland Coal Pty Ltd v Smith (No 2)* [2018] QSC 119.

3 Notice of cross appeal filed 13 June 2018, [2].

[5] I listed the matter for directions for the remitted hearing on 5 June 2018. In preparing for the directions hearing, some of the parties exchanged proposed directions.

[6] A key difference between the parties is whether the Court should adjourn the remitted hearing until the appeal is determined. That option was included in one version of proposed directions circulated by OCAA (version A) which other objectors supported, and NAC and the statutory party opposed.

[7] Assuming the Court does not adjourn the remitted hearing, there were differences between the parties about the order in which the parties should make submissions, what those submissions should address, and a number of other procedural matters.

[8] I have addressed the issues raised by the parties under the following headings:

1. Should the Court adjourn the remitted hearing pending the outcome of the appeal?

2. If the Court does not adjourn the remitted hearing, what directions should the Court make?

Should the Court adjourn the remitted hearing pending the outcome of the appeal?

[9] Proceeding with a remitted hearing is the usual course for a Court to adopt. To delay it, the Court would have to be satisfied that it is in the interests of justice to do so. The just resolution of litigation includes, but extends beyond, the needs of the immediate parties. The Court's role in resolving disputes serves the public as a whole, not just the parties. There is a substantial public interest in reducing cost and delay so as to facilitate access to the system for other litigants.[4] Finality in litigation is an important public interest consideration, particularly in a remitted hearing.

[10] As I understand their submissions, OCAA and other objectors who supported an adjournment made the following arguments.

[11] Firstly, depending on the outcome of the appeal, the remitted hearing may involve wasted effort and cost. This will affect the objectors disproportionately, because of the stress of participating in the remitted hearing and the uncertainty about the outcome.

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4 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, [23].

[12] Secondly, adjourning the remitted hearing will not prejudice NAC because there is no urgency. NAC still has coal in reserve and other areas in Stage 2 it can explore. Member Smith made findings about NAC's responsibility for delay of the original hearing. NAC has not concluded other processes necessary for the mine to proceed.

Wasted effort and cost and undue stress and uncertainty for the objectors

[13] The Court has the power to adjourn the remitted hearing until the outcome of the appeal. Although OCAA's proposed directions version A provided for the Court to adjourn the remitted hearing, counsel for OCAA did not strongly urge that course at the directions hearing.

[14] The other objectors are representing themselves and were more forceful in their argument that the Court should adjourn the remitted hearing. They referred to the stress they experienced during the original hearing and in responding to a further process conducted by the Department of Environment and Science after this Court's recommendation to refuse the application to amend the environmental authority.

[15] They participated in the longest mining objection hearing in this Court. It went for 99 days and raised 19 key issues, all of which involved expert evidence to some extent. There were thousands of exhibits and voluminous material for the objectors to comprehend and respond to. It is hardly surprising they are reluctant for the remitted hearing to proceed if there is even the slightest prospect that it will be a waste of effort and costs.

[16] The prospect of a further hearing is a legitimate concern for people who must devote precious time from their work and family responsibilities to make their case in the Court. That is particularly so for those objectors who do so with limited resources or no legal advice.

[17] It seems to me that there may be some misapprehension about the scope of the remitted hearing. Although there will be some difficulty in formulating submissions, the remitted hearing will not be a rerun of the original hearing. Justice Bowskill gave close attention to her Honour's orders and consulted with the parties to the appeal to ensure the remitted hearing was as limited in scope as it could be.

[18] As I read her Honour's orders, their effect is that:

(a) There can be no further evidence filed during the remitted hearing;
(b) This Court is bound by all Member Smith's findings and conclusions on all key issues, except groundwater, inter-generational equity as it relates to the issue of groundwater, and noise;
(c) The remitted hearing cannot consider the issues of groundwater and inter-generational equity as it relates to the issue of groundwater; and
(d) This Court is bound by Member Smith's findings on noise.

[19] The Court will need to consider:

(a) What conclusions should it draw on the key issue of noise; and
(b) What recommendations should it make on NAC's applications, taking into account Member Smith's findings and conclusions (as described above) and any further conclusions it reaches on the key issue of noise.

[20] That will involve written and oral submissions only, based on the material already before the Court.

[21] While I do not underestimate the difficulty of the exercise involved in making those submissions, this is not a rehearing and I have formulated directions that take account of and, to the extent possible, limit the demands made of the objectors.

[22] Some objectors also referred to the ongoing stress they were experiencing because of the uncertainty about the mine. Uncertainty affects all the parties. Delaying the remitted hearing will do nothing to remedy that. The outcome of the appeal will still be uncertain. If OCAA fails in its appeal, delaying the remitted hearing will only serve to extend the period of uncertainty.

[23] Another factor is whether this Court should even entertain an adjournment because of the appeal. NAC argued this is an indirect way of seeking a stay of Justice Bowskill's orders without making an application and justifying it in the proper forum. A party wanting to stay a court's orders must apply to the court that made the orders or to the court hearing the appeal.[5] OCAA has not applied to stay Justice Bowskill's orders.

[24] If OCAA had applied for a stay, it would have borne the onus of proof.[6] The fact the orders are subject to appeal is not sufficient.[7] The court hearing the application would have to consider whether:

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5 *Uniform Civil Procedure Rules 1999* r 761(2).
6 *Croney v Nand* [1999] 2 QdR 342 [33].
7 *Uniform Civil Procedure Rules 1999* r 761(1).

(a) There is a good arguable case on the appeal;
(b) The applicant will be disadvantaged if a stay is not ordered; and
(c) There is some competing disadvantage to the respondent should the stay be granted, which outweighs the disadvantage suffered by the applicant if the stay is not granted.[8]

[25] The first consideration on a stay application, then, is whether the appeal raises a good arguable case. The argument that the remitted hearing might involve wasted effort and costs raises the merits of the appeal. Whether there will be wasted effort and costs depends on the outcome of the appeal.

[26] There are several possible outcomes of the appeal (and cross-appeal). Some, but not all, of them may affect the result of the remitted hearing. If OCAA fails wholly in its appeal, there would be no wasted effort or cost in a remitted hearing proceeding before the appeal was determined. That course also has the advantage of not wasting time while the appeal is in progress. There are other potential scenarios on the appeals and cross-appeals where it is impossible to predict whether there will be any wasted effort and cost.

[27] The only scenario in which it is certain there will be wasted effort and cost is if OCAA wholly succeeds in its appeal and NAC fails wholly in its cross-appeal. If the Court attempts to assess the prospect of that occurring, it risks considering the merits of the appeals. It is not appropriate for this Court to engage in that exercise. This is a directions hearing about a matter remitted to this Court for further hearing, it is not an application to stay her Honour's orders pending appeal.

[28] There was some discussion of what could happen if the appeal succeeds and decisions have already been made on the Court's recommendation about NAC's approvals. The outcome of the appeal, then, could have a bearing on decisions already made.

[29] The submissions identified a myriad of possible scenarios involving speculation about numerous decisions:

(a) The recommendations by this Court on NAC's applications following the remitted hearing;
(b) The decision by the Chief Executive of the Department of Environment and Science on the application to amend the environmental authority;
(c) The decision by the Minister for Natural Resources, Mines and Energy whether to grant the mining leases applied for; and

[8] *Kowalski v Public Trustee (No. 2)* [2011] QSC 384.

(d) The decision of the Court of Appeal on OCAA's appeal and, if it needs to be considered, NAC's cross-appeal.

[30] The objectors' legitimate concern is whether the Court of Appeal could undo anything done consequential upon Justice Bowskill's orders. The concern there is not just the recommendations of this Court, but any decisions made by others after the Court has made its recommendations.

[31] NAC conceded this is an area of law that "bristles with difficulty".[9] This gives little comfort to the objectors who would like certainty that any decisions made or tenures granted could be set aside, if need be.

[32] However, as well as applying to stay the orders subject to appeal, there are other avenues open to the parties and at different stages of the lengthy decision-making processes these approvals must go through. An application to preclude grants or approvals should be made to a court properly seized of the issue, and which can give due consideration to the prospects of the appeal and the potential difficulties if decisions are made by others before the appeal is decided. A directions hearing on a remitted hearing is not the appropriate forum for that.

Adjourning the remitted hearing will not prejudice NAC

[33] NAC argued a delay in the remitted hearing would prejudice it. OCAA did not dispute NAC's estimate of nine months to hearing the appeal. Then there is the time taken to judgment. Although it could do so, OCAA has not applied to expedite the appeal.

[34] NAC's argument about prejudice led to some engagement between counsel for OCAA and NAC about delay. Counsel for OCAA argued NAC had contravened Justice Bowskill's orders by filing an affidavit of Mr Boyd, the Chief Operating Officer of the mine, because it referred to delay. Member Smith had made a finding about NAC's contribution to delays in the original hearing and that was untainted by the judicial review application.

[35] That argument is a distraction. It misconceives the purpose of Mr Boyd's affidavit, which addresses the impact of adjourning the remitted hearing.

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9 Applicant's further submissions filed 8 June 2018, [3].

[36] Not all the consequences identified in his affidavit would arise from a delayed hearing. For example, NAC cannot interfere with groundwater without a water licence under the *Water Act 2000*. Its application for that licence is in progress and this Court has jurisdiction to hear any appeal from a decision on the application. Delaying the remitted hearing does not appear to have any consequence for that process.

[37] A number of objectors argued there was no urgency about the approvals because stage 2 mining is not complete. Some referred to the potential to explore further areas within the stage 2 leases. Mr Boyd disclosed that NAC has coal reserves for approximately 2 years of supply. NAC's prejudice, though, is the delay in work necessary prior to active mining on stage 3, assuming, of course, they succeed in securing those tenures.

[38] NAC cannot undertake some significant works necessary for stage 3 to commence without the approvals subject to this hearing. The works include the on-site infrastructure for the mine and the railway facilities required by the conditions which will be imposed by the Coordinator-General, if NAC's applications succeed. Any delay in the Court delays the decision-making process overall.

Conclusion

[39] In deciding whether to proceed with the remitted hearing, the Court must bear in mind that it is engaged in only one stage of a larger decision-making process. The Court's recommendation is not a binding determination on NAC's applications.

[40] The decision-makers are the Minister for Natural Resources, Mines and Energy in the case of the mining leases, and the Chief Executive of the Department of Environment and Science in the case of the environmental authority. They will undertake their own independent assessment, taking into account the Court's recommendation.

[41] The remitted hearing and the Court's recommendation are necessary preconditions to their decisions on NAC's applications. This is not just a question of weighing the impact on the parties of proceeding with the remitted hearing now, or awaiting the outcome of the appeal. This Court is seized of the applications and has a statutory function to fulfil which serves the wider public interest. There is no constraint on the Court proceeding and the Court should not lightly defer fulfilling its function.

[42] NAC has secured orders setting aside Member Smith's recommendation and remitting the matter for further hearing by the Court. Justice Bowskill carefully considered what should happen next and made orders to limit the burden of a further hearing. No party to the judicial review hearing suggested that should be deferred.

[43] Her Honour's orders give full effect to any untainted findings and conclusions from Member Smith's decision. This greatly restricts the scope of the remitted hearing, which will involve only submissions on limited issues, on the evidence led during the original hearing.

[44] In all the circumstances, the Court should proceed efficiently and expeditiously in the remitted hearing.

If the Court does not adjourn the remitted hearing, what directions should the Court make?

[45] The directions deal with a number of procedural issues, some more contentious than others. These reasons deal only with those directions where there was some real disagreement or the Court needs to explain its approach.

[46] Firstly, during the directions hearing, there was some discussion about the objectors' exposure to costs on the remitted hearing. NAC undertook it would not seek costs from any objector who chose not to be an active party to the remitted hearing. The directions provide for objectors to elect to remain an active party. This is consistent with a recent Practice Direction about new mining objection hearings.[10] The effect of the direction is that an objector must inform the Court by the date specified if it elects to be an active party. If not, the Court will assume they have opted out. An objector who is not an active party is not required to participate further in the hearing.

[47] Some objectors suggested they should be able to opt out at any point. There is nothing in the directions which would prevent an objector who elects to be an active party, later deciding they did not wish to play any further part in the hearing.

[48] Secondly, the sequence for submissions was a point of disagreement. NAC proposed a date for both the company and the objectors to file and serve their written

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[10] Land Court of Queensland, *Practice Directions No 4 of 2018* – Procedure for Mining Objection Hearings, 30 April 2018.

submissions. The objectors opposed that course. The statutory party considered staggered submissions more appropriate and consistent with the approach adopted during the original hearing. I agree. The directions stagger the dates for submissions. They also allow the self-represented objectors to have both NAC and OCAA's submissions before theirs are due. This takes into account the particular difficulty they may have in preparing submissions without legal assistance.

[49] Thirdly, there were some differences in the level of prescription about the content of the submissions. OCAA's directions were the most explicit, but I understood both NAC and the statutory party to accept that the submissions must assist the Court identify the findings and conclusions it is bound by in making its recommendations. The directions are intended to identify any points of difference between the parties about those matters so the Court can resolve them in its decision.

[50] Given some matters raised at the directions hearing, I make the following observations for the benefit of the self-represented objectors. While they do not have legal representation, there is an objector, OCAA, which does. The Court encourages parties with similar interests to work together where they can.

[51] Further, it is open to any party to adopt the submissions made by another party, in whole or in part. It is not necessary for an objector to make separate submissions about any matter if they agree with the submissions made by another party.

[52] For example, the submissions made by OCAA may raise all the arguments another objector wishes to make. In that case, the objector may simply state they agree with the submissions made by OCAA. Or they may agree with those submissions and add submissions about a matter that OCAA has not addressed. Or they may wish to agree with only some arguments made by OCAA and make different arguments on other points. With any of those alternatives, the objector can be relieved of the burden of making written submissions on all matters.

[53] The Court is not expecting, and will not be assisted by, lengthy submissions that do not add anything to submissions already made. These observations apply to both written and oral submissions.

[54] Accordingly, although the directions allow the self-represented objectors to make written submissions, it does not require them to do so. The timing for their

submissions allows them some time to consider submissions made by OCAA before deciding whether they wish to make submissions. The self-represented objectors are also not required to provide the detailed submissions required of the parties represented by lawyers.

[55] Fourthly, the timing for written and oral submissions has been set taking into account the passage of time since the directions hearing, the scope of the remitted hearing, and the Court's intention to proceed fairly and expeditiously. The directions do not fix the date for oral submissions. After 2 July 2018, the Court will fix the date for oral submissions to be heard as soon as practicable after submissions close.

[56] Fifthly, there was some discussion of whether the remitted hearing should proceed as an eTrial and whether parties can file and serve documents in electronic format. Ultimately, that was not contentious and the directions address this issue.

[57] Sixthly, the directions reserve the costs of the directions hearing. That is not contentious. However, the issue of costs overall was.

[58] Some of the objectors raised their concern about exposure to costs. Member Smith declined to deal with the costs of the original hearing, because he perceived comments he made during the costs hearing about the application for judicial review might preclude him from determining that issue. It is not necessary for me to say more about that.

[59] The costs position is somewhat difficult as the law that applied to the costs of mining objection hearings changed after the original hearing commenced. Counsel for OCAA indicated his client might make an application for a protective costs order. Some other objectors used the same term. There is no application to the Court, however, the directions give the parties liberty to apply should they wish to.

[60] Finally, some submissions addressed the arrangements for the hearing. The directions allow the parties to advise their preferences for the date for hearing the oral submissions. The Court will notify the parties of the date fixed after considering the parties' preferences. Whether a site visit is required and any other arrangements for the hearing can be considered at the next review in August.

FY KINGHAM
PRESIDENT OF THE LAND COURT

LAND COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: EPA495-15
MRA496-15
MRA497-15

Applicant:	**New Acland Coal Pty Ltd ACN 081 022 380**
	AND
Respondents:	**Frank and Lynn Ashman & Ors**
	AND
Statutory Party:	**Chief Executive, Department of Environment and Science**

BEFORE: President Kingham

BRISBANE

The Twentieth Day of June 2018

The Court **ORDERS** that:

1. By **4.00pm on Monday, 2 July 2018**, each objector who wants to remain an active party to the remitted hearing must inform the Court, by email or letter. If any objector does not do so, the Court will proceed on the basis that they have elected not to be an active party to the remitted hearing. In that case:

   (a) the Court will advise the objector of the outcome of the hearing but will not otherwise communicate about the hearing with the objector;
   (b) the objector will not participate further in the remitted hearing and is not required to comply further with directions made in the remitted hearing.

2. By **4:00pm on Monday, 2 July 2018**, each active party, except Mr Glenn Beutel, must advise their address for service by email, by sending an email to the lawyers for the applicant c/o mgeritz@claytonutz.com.

3. By **4.00pm on Tuesday, 3 July 2018**, the lawyers for the applicant must collate and distribute to all active parties and the Court a list of the active parties' email addresses for service.

4. Subject to order 5, any material that must be served during the remitted hearing may be served by email:

(a) if the material is less than 5 megabytes, as an attachment to the email; or
(b) if it is 5 megabytes or greater, by including a hyperlink in the email to the material.

5. Unless otherwise arranged in advance with Mr Beutel, if any party is required to serve material on him they must do so under cover of a letter describing the material and upon whose behalf it is served, sent by ordinary or express post addressed to 19 Allen St, Acland or, if a large parcel of material, by leaving it at the front door at that address.

6. The remitted hearing will be conducted electronically using the document identification numbers, exhibit numbers, and protocol used in the original hearing.

7. Any document that must be filed during the remitted hearing must be provided as a text-searchable PDF file and must be filed:

(a) if the material is less than 10 megabytes, as an attachment to an email to landcourt@justice.qld.gov.au; or
(b) if the material is more than 10 megabytes, in person or post by USB or DVD.

8. By **4.00pm on Tuesday 17 July 2018**, the applicant must file in the Land Court Registry and serve on the other active parties its Outline of Submissions.

9. By **4.00pm on Tuesday 31 July 2018**, Oakey Coal Action Alliance Inc. must file in the Land Court Registry and serve on the other parties its Outline of Submissions.

10. By **4:00pm on Tuesday 14 August 2018**, any other objector who is an active party may, but is not required to, file in the Land Court Registry and serve on the other active parties their Outline of Submissions.

11. By **4.00pm on Tuesday 21 August 2018**, the Statutory Party must file in the Land Court Registry and serve on the other active parties its Outline of Submissions.

12. The Outline of Submissions filed by each of the applicant, the Oakey Coal Action Alliance Inc., and the Statutory Party must:

(a) identify all findings and conclusions from the decision of this Court dated 31 May 2017 which they say bind the Court on the remitted hearing;

(b) specify what conclusions they argue the Court should draw from the findings on the key issue of noise; and
(c) specify what recommendations they say the Court should make on the applications before the Court, identifying the evidence from the original hearing and the findings and conclusions that support those recommendations.

13. The remitted hearing is listed for one day for oral submissions at Brisbane Magistrates Court as soon as practicable after 28 August.

14. That date will be fixed by the Court after considering the parties' preferred dates, which they may do in writing to the Court by **4:00pm on Monday 2 July 2018**. The Registrar will advise the date fixed as soon as practicable.

15. The remitted hearing is listed for review on **Monday 20 August 2018 at 10:00am**.

16. Any party may apply for further review or further orders by giving at least two (2) business days' written notice to the Land Court Registry and to the other active parties of:

(a) The proposed date for the review;
(b) The reasons for the request; and
(c) The proposed directions or orders.

17. Costs of and incidental to the directions hearing are reserved.

By the Court

Registrar