SUPREME COURT OF QUEENSLAND

CITATION:	*Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184
PARTIES:	**OAKEY COAL ACTION ALLIANCE INC** (appellant/cross-respondent) **v** **NEW ACLAND COAL PTY LTD** ACN 081 022 380 (first respondent/cross-appellant) **CHIEF EXECUTIVE DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (second respondent) **PAUL ANTHONY SMITH, MEMBER OF THE LAND COURT OF QUEENSLAND** (third respondent)
FILE NO/S:	Appeal No 5751 of 2018 SC No 6002 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 88; [2018] QSC 119 (Bowskill J)
DELIVERED ON:	10 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2019; 28 February 2019; 1 March 2019
JUDGES:	Sofronoff P and Philippides JA and Burns J
ORDERS:	
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FOR BIAS IN JUDICIAL PROCEEDINGS – where applications for mining leases and an amendment to an environmental authority to expand a mine owned by Acland were referred to the Land Court – where the Land Court hearing commenced on 7 March 2016 and recommendations were reserved on 7 October 2016 – where Acland filed an application on 16 December 2016 to reopen the hearing to tender new evidence – where a hearing was listed on 2 February 2017 to determine the application to reopen and address errors with the e-trial software – where the Member arranged to go on leave in February and March 2017 as long as a year before – where media reports in January 2017 commented on the delay of the Land Court's recommendations and concern that it would impact upon jobs at the mine – where

the Member interpreted the media reports as Acland criticising the Member for taking leave as it would delay the delivery of the recommendations and affect jobs – where the Member considered that the comments about his leave could be regarded as contempt of court – where the Member asked Acland at the 2 February 2017 hearing to explain the media reports – where Acland's counsel submitted that the comments about the Member's leave in the media reports were not attributed to Acland nor could they be interpreted as being in contempt of court – where at the end of the hearing the Member stated that he considered "the matter closed" and that he would not refer it for contempt of court proceedings – where Acland's counsel did not make an application for the Member to disqualify himself for apprehended bias – where the Land Court delivered the recommendations and reasons on 31 May 2017 – where Acland applied for judicial review of the recommendations on various grounds including apprehended bias – where the learned primary judge concluded that there were reasonable grounds upon which to apprehend bias but Acland had waived its right to complain at the 2 February 2017 hearing and the Member's reasons did not "re-enliven" that apprehension – where Acland filed a cross-appeal that the learned primary judge erred in failing to conclude that a fair minded lay observer would reasonably apprehend from the reasons that the Member might still be affected by his personal offence, feelings and views formed at the 2 February 2017 hearing – where claims of apprehended bias strike at the validity of the hearing and outcome below and should be dealt with before other substantive issues are decided – where Acland accepts that it elected to waive its right to make an application for the Member to disqualify himself following the 2 February 2017 hearing – whether the Member's reasons for the recommendations raise a fresh apprehension of bias

ENERGY AND RESOURCES – WATER – WATER MANAGEMENT – SUBTERRANEAN WATER – where applications for mining leases and an amendment to an environmental authority to expand a mine owned by Acland were referred to the Land Court – where s 269(4) of the *Mineral Resources Act* 1989 (Qld) and s 191 of the *Environmental Protection Act* 1994 (Qld) provide the relevant considerations the Land Court is required to take into account – where the Member determined that the Land Court's jurisdiction permitted it to consider the effect of the proposed mining operations upon groundwater in the area – where there is a separate provision under s 206 of the *Water Act* 2000 (Qld) to apply for a licence that would permit the holder of a mining tenement to interfere with water under the relevant land – where the learned primary judge, on judicial review, found that due to the separate statutory authority concerning the interference of groundwater, the Land Court did not have jurisdiction to consider the impacts upon groundwater – where

the statutory regime has been amended following Acland's application for judicial review so as to include interferences with groundwater as a relevant consideration under referrals to the Land Court from the *Mineral Resources Act* and *Environmental Protection Act* – whether the Land Court, in this matter, had jurisdiction to consider the impact of the proposed mining operation on groundwater

Environmental Protection Act 1994 (Qld), s 190, s 191
Mineral Resources Act 1989 (Qld), s 269
Water Act 2000 (Qld), s 206

Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577; [2006] HCA 55, cited
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, applied
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427; [2011] HCA 48, cited
Vakauta v Kelly (1989) 167 CLR 568; , applied
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, applied

COUNSEL: S Holt QC, with C McGrath, for the appellant/cross-respondent
D G Gore QC, with D Clothier QC and N Andreatidis QC, for the first respondent/cross-appellant
K A Barlow QC for the second respondent

SOLICITORS: Environmental Defenders Office Queensland for the appellant
Clayton Utz for the first respondent
Crown Solicitor for the second respondent

[1] **SOFRONOFF P:** For some years, the first respondent to this appeal, New Acland Coal Pty Ltd ("Acland"), has been operating an open cut coalmine near Oakey in the Eastern Darling Downs. The existing mine is the subject of two mining tenements issued under the *Mineral Resources Act* 1989 (Qld). Acland wishes to expand its mine and, for that purpose, submitted mining lease application 50232. The expanded mine will be located within that tenement if it is issued. Acland also wishes to construct a rail spur to link the new area of mining to an existing rail line. To that end it has submitted mining lease application 700002.[1] The proposed spur will be located within that tenement, if it is issued.

[2] Various statutes protect public interests that might be affected by mining operations in Queensland. The *Mineral Resources Act* requires mining activities to be authorised under its terms. Before mining can begin, a proposed operator must make an application for a tenement under that Act. Such an application is subject an elaborate regime of scrutiny and there must be public notification. Members of the public may submit objections to the grant of a mining tenement. If not resolved, the Act provides that disputes between applicants, the statutory authority and objectors are to be decided by the Land Court.

[3] The *Environmental Protection Act* 1994 (Qld) contains another statutory regime of applications, authorisations and objections. The Act is concerned to ensure that

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1 Initially numbered MLA 700001.

activities that might affect parts of the natural environment are either not undertaken at all or, if they are to be permitted, are governed by strictures to prevent or minimise environmental harm. In order to conduct its existing mining operation, Acland had been required to obtain, and did obtain, an Environmental Authority issued under the Act. In order to conduct its intended new operations it had to undergo that process once again by way of an application to amend its existing authority.

[4] In Queensland there has been legislation since at least 1910 to regulate water.[2] The current Act is the *Water Act* 2000 (Qld).

[5] Mining activities of the kind that Acland wishes to undertake may affect groundwater. Consequently, the provisions of the *Water Act* have been engaged. Subject to limited exceptions, that Act makes it an offence for a person to "take or supply" or "interfere with" water to which the Act applies unless the person is authorised under the Act to do so.[3] The Act creates a scheme by which such authority might be obtained. The Act has particular provisions concerned with the effect of mining upon groundwater.[4]

[6] Each of these three statutes is directed to particular matters that might arise by the grant of a mining tenement. Each Act contains elaborate provisions that direct the attention of the relevant statutory authority, as well as the attention of potential and actual objectors, to particular issues. In the same way, each statute confers jurisdiction upon the Land Court to determine disputes that might arise concerning such matters. For many years these three statutes proceeded along parallel paths on which each Act took some account of the others. It cannot be said that total harmony has ever been achieved between the operation of these Acts (or between these and others that pertain to related matters[5]). However, from time to time amendments have been made that have sought to achieve legislative coherence.

[7] In this case questions have arisen whether, and to what extent, these Acts overlap. None of these three Acts has an overarching scope across all possible issues that might arise when an application is made for the issue of a mining tenement.

[8] There is another statute that bears upon the grant of various permissions under the three Acts that have been referred to. Section 26 of the *State Development and Public Works Organisation Act* 1971 (Qld) empowers the Coordinator-General to "declare a project to be a coordinated project". On 18 May 2007 he declared Acland's proposed new mine and rail spur to be such a project.

[9] Despite this intervention, Acland's proposal proceeded very slowly. The Coordinator-General declared the project under s 26 of the Act in May 2007. After public consultation, he finalised terms of reference for the environment impact statement ("EIS") in October 2007. However, due to certain political issues that arose, Acland had to modify its original proposal in November 2012 and so fresh terms of reference were promulgated in March 2013. Acland produced a draft EIS in 2009 but this had to be redrawn and it was released for public comment only in early 2014. The issues raised for consideration in that document included, among other

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2 *The Rights in Water and Water Conservation and Utilization Act* 1910 (Qld); repealed and replaced by *Water Act* 1926 (Qld).

3 s 808.

4 see Chapter 3 of the *Water Act*.

5 *eg Integrated Planning Act* 1997 (Qld), *Electricity Act* 1994 (Qld), *Petroleum and Gas (Production and Safety Act)* 2004 (Qld), as well as others.

things, the effect of the proposed mine upon groundwater and noise. In April 2014 the Coordinator-General requested further information. He invited public comment in August of the same year and published his report on 19 December 2014.

[10] The Coordinator-General determined that 18 conditions (each of which contain multiple sub-conditions) had to apply to the project and he exercised his power under s 54B of the Act to impose them. These conditions were contained in Appendix 1 to his report. Three of these conditions, contained in Schedule E, relate to groundwater. They required Acland to establish a system of monitoring of groundwater that must be "developed and certified by an appropriately qualified person" and that must be approved by the administering authority for the *Water Act* "in accordance with the requirements of the baseline monitoring program in relevant conditions of the project's EA". That is a reference to the terms of a draft environmental authority that is also part of the report.

[11] The Coordinator-General exercised his power under s 47C of the Act to "state conditions for the proposed environment authority". The conditions are highly technical and are evidently based upon the content of underlying materials that are comprehensive in their scope. Appendix 2 to the report is a 35 page document that constitutes a draft environmental authority for the project and contains the conditions.

[12] Schedule A of the draft authority contains general conditions.

[13] Schedules E and F concern water. Schedule E, which is concerned with groundwater, requires Acland to engage an "appropriately qualified person" to undertake groundwater monitoring in conformity with an elaborate schedule that sets out the locations for monitoring both quantity and, by reference to levels of particular elements and compounds, the quality of groundwater. Condition E6 prohibits contaminants exceeding certain limits set out in a table.

[14] Acland applied for two mining leases[6] and for an amendment to its existing environmental authority to incorporate the conditions proposed in the Coordinator-General's report. The application for an amended environmental authority was assessed and a draft authority was issued.

[15] The appellant had standing under s 182 of the *Environmental Protection Act* to object to that decision and it did so. Other people also objected. In such a case, s 185 obliges the authority to refer the application to the Land Court for a decision and the authority did so. Section 186 provides that the parties to the proceeding in the Land Court are the administering authority, the applicant, any objector and "anyone else decided by the Land Court". There were also objections to the grant of mineral leases. These were also referred to the Land Court under the *Mineral Resources Act*. Section 188 the *Environmental Protection Act* requires a hearing of the matter under that Act to take place at the same time as any hearing under the *Mineral Resources Act* for the relevant tenure. That provision was engaged with the consequence that the Land Court became seized of jurisdiction to make "decisions" under the *Environmental Protection Act* and also under the *Mineral Resources Act*.

[16] Section 190 of the *Environmental Protection Act* confers jurisdiction upon the Land Court to make a recommendation to the authority that, relevantly, the application be

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6 The applications are MLA 50232 (for the site of the proposed mine) and MLA 700002 (for the site of a proposed rail spur).

approved on certain terms and conditions or that it be refused. Upon receiving such a recommendation, the authority must decide whether to approve the application and, if so, whether to do so upon particular conditions, or whether to refuse the application.

[17] Section 268 of the *Mineral Resources Act* confers power upon the Land Court to "hear the application and the objections thereto and all other matters that pursuant to this Part are to be heard". The outcome of that process is a recommendation by the Land Court to the Minister under s 269. That section provides that a recommendation can be to grant or to reject the application. A recommendation may require that there be conditions attached to the lease.

[18] Section 191 of the *Environmental Protection Act* prescribes the matters that the Land Court must take into account under that Act and s 269(4) of the *Mineral Resources Act* prescribes the matters relevant to be considered under that Act.

[19] The Land Court was established as a court of record by s 4 of the *Land Court Act* 2000 (Qld). Section 7 provides that the Court is not bound by the rules of evidence but may inform itself in any way that it considers is appropriate. It is obliged by that section to act "according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts". Under s 17 the Governor in Council may appoint members of the Court and under s 14 a single member may constitute the Court. The jurisdiction of the Court is that which is conferred by the *Land Court Act* itself or which is conferred by another Act.

Apprehended Bias

[20] As a court of record, and notwithstanding that it is an inferior court, the Land Court must have and must maintain the characteristics of an Australian Court.[7] The most fundamental of these characteristics are independence and impartiality.[8] It follows that there will be occasions when a judge will be disqualified from hearing a case.[9] Those occasions will include cases in which it is not asserted that the judge is actually biased but, rather, it is said that there is an appearance of bias. The accepted test to determine whether or not a judge is disqualified on that ground is whether, in all the circumstances, a fair-minded lay observer with knowledge of the objective facts might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question.[10] Several categories of case have been identified in which such a question may arise for consideration. These include disqualification by interest in the proceedings, by conduct, by association or by the possession of extraneous information.[11] In each category, the relevant facts must be facts that, in terms of the applicable test, give rise to a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to bear upon the determination of the case. These categories are not closed[12] and they may overlap.[13] In the context of a discussion of apprehended bias on the ground of interest, the

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7 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

8 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

9 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, at [22] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

10 *Webb v The Queen* (1994) 181 CLR 41, at 67 per Deane J; *Ebner*, *supra*, at [33] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

11 *ibid*, at 74 per Deane J.

12 *Ebner*, *supra*, at [24].

13 *Webb*, *supra,* at 74.

plurality in *Ebner* said that the application of the principle required an articulation of the alleged connection between the asserted interest and the disposition of the cause.[14]

[21] In this case an issue about apprehended bias arose in the following way.

[22] Acland's applications for a mining lease and for an environmental authority were referred to the Land Court on 14 October 2015. About 40 objectors submitted over 60 objections. Acland submitted to the Land Court that the matter should proceed urgently because, it said, delay posed a risk to jobs on the project. The Court made orders to ensure that the hearing could begin promptly in March 2016 and, indeed, it began on 7 March 2016. The hearing was expected to run for 10 weeks. On 12 July 2016, while the hearing was under way, the Courier Mail newspaper published a story under the headline: "Queensland Economy: Acland mine jobs rest on legal delays". The story said:

> "The delays in what was expected to be a 10-week case puts a question mark over the ability of New Hope to maintain jobs at the Darling Downs mine …
>
> The company last week lodged an affidavit of urgency to inform the court of the pressure, and sittings have been held well into the night to hear evidence.
>
> [The presiding Member of the Land Court] told the court on Friday how galling it was for the court to be criticised over the delays when he had been hearing matters while so ill he had resorted to keeping a sick bucket under the bench."

[23] On 7 August 2016 the hearing was still underway. The Chief Operating Officer of Acland's parent company was giving evidence. The Member questioned him about the company's claims of urgency. The member said:

> "It is a matter of deep personal concern to me how much personal resources I put into completing this matter.
>
> Can you see why it becomes galling for this court, and I'm speaking personally now and certainly not on behalf of the [president] or other members of this court, why this court receives indirect criticism from your evidence as to the time that the process is taking and particular criticism from other areas, not just even under print media, but also it would seem in other areas of Government, that it's the Land Court that is the holder of these approval processes when we come at the end of the chain after over 12 years and move heaven and earth to get a process through as quickly as possible with hundreds of thousands of pages of documents and working long hours, to be told it is the court, not the process, but the Land Court and these proceedings which is the cause of the delay and the cause of a loss of jobs potentially because of this court process. Can you see why personally when I've had to keep a bucket below the bench here so I could sit for a week when I was sick in the stomach to throw up in, why it becomes personally [galling] to receive that criticism?"

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[14] *Ebner*, *supra,* at [55].

[24] The tendering of evidence ended on 12 August 2016 and closing submissions were made between 5 and 7 October 2016 and judgment was then reserved. On 14 December 2016, Acland received some further reports about an issue and on the next day its solicitors informed the Land Court by email about these further reports. On 16 December 2016 the Court Registrar directed the parties to appear before Member Smith. There were two reasons for the proposed appearance.

[25] The first reason concerned a need to address a problem that had arisen on the Court's e-trial site. The second reason, as related by the Registrar to the parties, was to deal with Acland's new evidence. Accordingly, on 19 December 2016, Acland filed an application to reopen the hearing to enable it to tender its reports. A hearing was set for 12 January 2017. On that day, the Member explained to the parties that after he had completed a substantial amount of work in writing his reasons he had discovered that, just before Christmas, the computer search function was unreliable. That meant that the Member could not be sure that he had comprehensively dealt with all of the evidence relevant to any particular issue. It also meant that, to the extent that any of the parties had relied upon the same software to formulate final submissions, as some had, then their written submissions might not do justice to their case. The hearing had involved voluminous written evidence and a massive transcript of oral evidence. The Member offered the parties further time within which to furnish him with revised written submissions based upon an accurate and reliable search function. As a result, the Member said, he would not be able to deliver his recommendations before 30 January, as he had previously hoped.

[26] The parties agreed upon directions to ensure that the Member received an accurate amended form of their submissions. This technical problem meant that the Member had to repeat much of the work that he had already done in the three months since hearing the parties' final submissions in early October 2016.

[27] The Member then heard submissions to deal with Acland's proposed application to reopen the evidence in the case. All of the objectors said that they would oppose a reopening. A number of objectors had conducted their cases in person during the long hearing and, naturally, they bitterly opposed the threatened further disruption to their lives that would be the result of a reopening of the case. The Member himself was also being placed into an unenviable position. He had already devoted a substantial amount of time and effort into completing his work within a short timeframe because it had been said that the case was urgent. Now, apart from the further work required because of computer problems that were not the fault of the parties (or of the Member), he was being asked to receive and consider further evidence. That proposed evidence related to one of the most crucial issues in the hearing, namely the effect of Acland's proposed new activities upon groundwater.

[28] In a civil trial in the Supreme Court, the exercise of the discretion whether to allow a reopening would not have been very difficult. It would have required the applicant to explain its failure to lead the evidence at the appropriate time and why the evidence was said to be significant enough to warrant a disruption to the ordinary processes. In the Land Court the position was not so straightforward because the result of the exercise by the Court of its jurisdiction would not be a binding decision; it would be two recommendations. Those recommendations would be made to the Minister responsible for the administration of the *Mineral Resources Act* and to the administering authority under the *Environmental Protection Act*, respectively. The Minister would have to consider the reasons and recommendations of the Member,

as well as other materials, before coming to a decision. If the Minister thought that there was evidence that was relevant, but which had not been considered by the Member in formulating his recommendation, such as Acland's proposed new evidence, the Minister might refer the whole matter back to the Land Court for its consideration of the further evidence. For this reason, unlike a proceeding in the Supreme Court, there is no inevitable finality to the Land Court's exercise of discretion to refuse to admit further evidence. A balance has to be struck between the delay occasioned by the reopening of the case and the delay that might be occasioned anyway if a reopening were refused but the Minister later decided that the Land Court should consider the later information.

[29] The Member was acutely aware of this dimension to the issue.

[30] After hearing the parties' submissions, the Member made directions for the delivery of the parties' submissions on the application and he made other directions to enable the application to reopen to be heard. Directions were also made to solve the e-site issue. A hearing of the reopening application was set for 2 February 2017. During the course of the directions hearing on 12 January 2017, Member Smith observed that he had arranged to go on leave as long ago as a year before. These plans had been made upon the reasonable assumption that the matter would have been concluded in the time allotted to it. The Member's leave would now affect the pace of the progress of the matter but, he said, he was willing to sit late hours to accommodate the parties and to ensure that the application would be heard before he went on leave.

[31] On 18 January 2017 WIN News broadcast a news story as follows:

> "ANCHOR: It's 10 years since the New Hope Group first applied to expand its New Acland Coal Mine. You'd think in all that time things will be pretty well sorted but no. A decision on stage 3 has been delayed again. After 6 months in the Land Court we don't expect to get the recommendations until April.
>
> REPORTER: A decision was expected at Christmas then by January. Now we understand the judge's recommendations on Acland Stage 3 are a further 3 months away.
>
> MACFARLANE: Every day that it takes extra is a day closer to the mine closing and all of those jobs, the permanent jobs, the contractors you know you're talking in excess of 6 or 700 jobs, will be lost to this area forever.
>
> REPORTER: A spokesperson for New Hope told Win News today it's exploring every avenue to ensure continuity of employment for staff in the transition to Stage 3 but it's no secret they're running out of coal. Once the court decision comes back State and federal ministers will have the final say on its approval.
>
> KING: It's extremely frustrating. New Acland Coal at a very late stage just before Christmas has sought to introduce new water evidence into the proceedings, long after evidence has closed.
>
> REPORTER: The company say the judge called everyone back and requested more information and now the judge is taking leave. All of that leaves workers around Oakey uncertain about their future.

> MACFARLANE: That mine has won an Australian award as the best rehabilitation mine in Australia. It’s done to the best environmental standard and we need to just get on with it because Queensland needs the money, the royalties and the incomes.”

[32] Mr Ian Macfarlane was a representative of Acland.

[33] Then, on 23 January 2017 the following story was published in the Courier Mail:

> “**Miner urges limits on state Land Court hearing times**
>
> The New Hope Group has called for time limits on Land Court actions as the case over its Acland coal mine expansion extends past a year.
>
> A court software glitch, judge’s holiday and new evidence combined to put back a decision on the controversial case until April, 13 months after what was supposed to be a 10-week hearing began.
>
> The extension is likely to weigh on jobs at Acland mine because resources are depleted. The company said it won’t know the full impact until its May budget reckoning.
>
> The Federal Government approved the mine expansion last week and scientific evidence in that decision will be presented to the Land Court.
>
> Grazier Frank Ashman, who has led the Oakey Coal Action Alliance, said his group was devastated by the Federal Government’s approval.
>
> New Hope managing director Shane Stephan said all stakeholders could see there had to be a better way of handling disputes because the current system allows for ‘almost endless’ delays. ‘There has to be limitations on time,’ he said.”

[34] The New Hope Group is a group of companies to which Acland belongs.

[35] On the same day, one of the objectors, Ms Merilyn Plant, sent an email to the Land Court and to the parties. That email dealt with Acland’s application but it also said:

> “Also, as recently as the last few days we saw a media report on TV with Mr Macfarlane and during that report it was suggested “his honour” by taking holidays was holding up the case.”

[36] At the direction of the Member, the Deputy Registrar of the Land Court sent an email to the parties on 25 January 2017:

> “I am very concerned about recent media stories which appear to emanate from New Acland Coal (NAC). These stories at worse amount to a diminution of my own reputation and an attack upon the integrity of the Land Court. The effect may lead to undermine public confidence in the judicial process.
>
> A Courier Mail article dated 23 January 2017 identified NAC as calling for time limits on Land Court hearings. In the article my February/March 2017 leave has been identified as one of the causes of the delay in my decision in this matter not being handed down until April 2017. There is no mention in this article (as I stated in open court)

> of my booking my family holiday some 12 months ago when the matter was thought to last 10 weeks, or that it is NAC's application to reopen the proceedings which is paramount to the April estimate. Nor is there any mention of the effort myself and court staff have put in to have this matter dealt with as quickly as possible (ie sitting at night etc).
>
> There has also been a recent WIN TV News report on the delay of the NAC decision. At one point the reporter commented on information supplied by NAC regarding the delay and then said, And now the Judge is taking leave. Again I view these comments very seriously as not only an attack on my integrity but an attempt to erode public confidence in the Land Court itself.
>
> In my view these comments could be regarded as contempt of court and dealt with accordingly. However prior to dealing with the matter and holding a formal contempt hearing, I will provide NAC with an opportunity to explain its actions. Accordingly, irrespective of whether or not any party requests an oral hearing of the reopening issue, the parties are required to attend Court on 2 February 2017. I trust that this sufficiently communicates the manner in which I view the seriousness of the situation, particularly as on its face it may be construed as an attempt by NAC to distort the facts and erode public confidence in this Court. I will not allow any question of that nature to remain unexplored and unanswered. Put bluntly, any delay in this matter has resulted from the etrial computer issue (outside the control of this Court – within the control of the Department of Justice and Attorney-General) and, perhaps, more significantly, the application by NAC to have fresh evidence/reopening of the case."

[37] On the morning of 2 February 2017, Acland filed two affidavits to respond to the Member's concerns. One was an affidavit of Ms Catherine Uechtritz, who held the position of Senior Communications Adviser at Acland's holding company.

[38] She swore as follows. She had received a request for information by a reporter working for WIN TV News in Toowoomba. Ms Uechtritz and the reporter spoke by phone on 18 January. The reporter had learned that a decision would not be made very soon because Acland had offered further evidence. Ms Uechtritz told the reporter that a decision had been expected by Christmas of 2016 but that two things had arisen to prevent that. One was a technical issue concerning computer systems and the Member had invited the parties to address that problem. The second was Acland's desire to tender more evidence. That was a question that the Member would consider on 2 February. Ms Uechtritz made some further observations about these two matters and told the reporter that, even after the Member handed down his recommendation, the actual decision whether to approve the applications would be made by the Minister, who had already stated publicly that the decision would take between eight and 12 weeks. That meant that there would be no decision before April. In any case, she said, a further approval by the Commonwealth was required.

[39] The reporter and Ms Uechtritz then discussed how hard the uncertainty must be for employees of Acland. They discussed how long the whole process had taken and how a number of governments had come and gone during that time. The reporter inquired why it would take so long for Acland to make submissions about the new evidence. Ms Uechtritz told her that the Member was going on leave and that the

submissions would be ready for his consideration upon his return. The reporter had evidently been unaware that the Member was going to take leave. Ms Uechtritz told her that that was why the decision could not be made before April. Ms Uechtritz denied using the words that appeared in the article, "and now the judge is taking leave".

[40] The second affidavit filed by Acland was that of another of Acland's representatives, Mr Shane Stephan. He said that Acland had received a text message from a journalist inquiring about the delay due to "new evidence, judge's holidays and some software glitch". He responded by a telephone call. After a discussion about the software problem, the journalist referred to the Member's intention to take leave. Mr Stephan said words to the effect that "everybody is entitled to their holidays". In his affidavit he said that he had made no criticism of the Member or the Court itself.

[41] The anticipated hearing began on 2 February 2017 at 4.30 pm. The Member first dealt with Acland's application to reopen. That application was granted and orders were made for the filing of material. The Member then said:

> "I now turn to one of those issues which, in one's judicial career, one hesitates greatly in raising, but I do so out of concern for the reputation of the Land Court, not out of any personal concern".

[42] The Member then read out in full the content of the email of 25 January 2017 and said that the parties were "all here today now to deal with this issue" and continued:

> "Questions of contempt of court and bringing a court into disrepute or undermining public confidence in a court is a serious matter. There have been cases in the past where contempt orders have been made almost on the spot when something has been said or done, particular in court. Those have always received – normally received judicial condemnation as a pre-judgment of the issue before allowing a party an opportunity to address the issue of concern. In my view, the authorities and common sense and natural justice clearly dictate that the appropriate way to proceed is to bring to all parties' attention in a matter a concern held by the court and to give the party against who that concern is expressly addressed by the court an opportunity to explain the situation and it may be that the circumstances are not as they appear from the media. It would not be the first time that circumstances are different in the media to what they are in fact. So I have given this opportunity. It may be that the matter can be resolved and put to bed tonight. It may be that additional steps will have to be taken. It may be that I have to direct the registrar to institute contempt proceedings against NAC in this matter, but they are the three options that I see as possible at this stage. I thought I should outline my preliminary views as how we should proceed. Mr Ambrose."

[43] After hearing some submissions from Mr Ambrose QC, who appeared for Acland, there was the following exchange:

> "HIS HONOUR: The statement in the article relating to my leave, did he convey that to the journalist or not?
>
> MR AMBROSE: Your Honour ---

HIS HONOUR: I don’t care what he intended or didn’t intend to do; that would be a matter for a hearing. Did he convey the words to the journalist?

MR AMBROSE: No.

HIS HONOUR: So, therefore, could you please hand me the letter that has obviously been written by NAC saying they had been misquoted by the Courier Mail?

MR AMBROSE: That hasn’t been written.

HIS HONOUR: I am serious, Mr Ambrose.

MR AMBROSE: Excuse me, your Honour. That has not been written.

HIS HONOUR: Why not?

MR AMBROSE: I haven’t sought instructions.

HIS HONOUR: So does NAC abuse [*sic*] itself of the comments in The Courier Mail or not?

MR AMBROSE: Your Honour needs to read the affidavit so that you understand the evidence.

HIS HONOUR: I asked you a specific question about that affidavit: if the person concerned stated those words to The Courier Mail and if The Courier Mail accurately reported them.

MR AMBROSE: I will read the affidavit so that you fully understand it.

HIS HONOUR: Well, at least you understand now the nature of the question I am asking.

MR AMBROSE: Yes, but ---

HIS HONOUR: Either they are statements which are properly attributable to NAC or they are a misrepresentation by the press. If they are statements attributable to NAC, then, to me, they pass the threshold, without have [*sic*] read the material, of tending to bring the court into disrepute.

MR AMBROSE: Your Honour ---

HIS HONOUR: If they are not words as properly stated by NAC, then The Courier Mail has to answer for its actions both to NAC in misrepresenting the position of NAC and to the court, and I will have no hesitation in including The Courier Mail in these proceedings, but I would expect, given the seriousness of this matter, that NAC would’ve taken its own defamation proceedings against The Courier Mail had they been misreported.

MR AMBROSE: Your Honour, with the greatest respect, it is not my understanding that we are here today conducting a hearing into contempt of court.

HIS HONOUR: That is absolutely correct.

> MR AMBROSE: And what this is is you affording us an opportunity to explain our actions.
>
> HIS HONOUR: And answer my questions.
>
> MR AMBROSE: Well, answering your questions is tantamount to conducting a trial into contempt of court.
>
> HIS HONOUR: No. It's helping me inform myself as to whether or not I should issue a direction to the registrar to issue contempt proceedings."

[44] After some further exchanges, at 6.15 pm the Member adjourned to read the material that had been placed before him. Before leaving Court he said:

> "HIS HONOUR: Of course. Before I adjourn, perhaps, at my own peril, I will make a further statement to help inform the parties. I am trying my best to remove personal thoughts in this matter from questions of the justice in this state and the perception of justice being undertaken by the courts, but to put the matter into some perspective from a personal nature. The leave that I am taking is a mixture of time to completely get away from everything, and jurisprudential leave where I am lecturing at a university and doing other matters. That was meant to occur last year. That was cancelled and rearranged because of this case.
>
> The trip that I am going on for personal reasons, I have had family members desperate to go to a remote part of this planet which you can only really get to in an easy way once per year. I was meant to do that trip in February 2016; I got rid of that trip because of this case; I got rid of all leave last year because of this case; I have sat at night because of this case, as have the parties. I wrote the draft judgment that you received today at 3 am on Monday morning in this matter. I believe that from a personal matter, I have gone far beyond what any normal judicial officer, as committed as they all are, to put himself to one side to meet the demands of a case.
>
> At a personal level then, it cut deep when I heard and read what was stated, but putting my judicial hat on, I have to leave the personal cut to one side. I normally don't deal in personal matters, but leaving all of what I have just said from a personal perspective to one side, I now worry more about the reputation of this court and it pains me, having been an officer of this court for 13 years, to see questions of its integrity and the manner in which its members operate brought into public disrepute and I am absolutely determined to have that question resolved in the affirmative, in the negative or in the need to be examined as much as I can tonight. Yes. Adjourn the court."

[45] Upon resuming the hearing at 7.07 pm, there was the following exchange:

> "HIS HONOUR: Now I've read the affidavit, Mr Ambrose. Is there anything you wish to say or add? The affidavits.
>
> MR AMBROSE: I repeat my submission, that the proper course would be for your Honour to proceed with your report of

recommendation and then at the conclusion of that if you still thought that there may be an issue, that there be a hearing that is conducted.

HIS HONOUR: Well, let's move past that, because I've given you a response to that.

MR AMBROSE: So you reject my submission that that's the proper course?

HIS HONOUR: To wait until after the recommendation, yes. You were brought here to show cause why ---

MR AMBROSE: No.

HIS HONOUR: --- something shouldn't occur.

MR AMBROSE: Well, no, with the greatest request [*sic*], that's not what we prepared for."

[46] The Member then questioned Mr Ambrose about the reason for filing Acland's affidavits in a way that "depart[ed] from every tenant [*sic*] of the common law justice in this world, in common law terms, by seeking to approach a judicial officer directly with filed material without filing it in the court". Mr Ambrose explained that the material had been filed electronically in the usual way but that the other parties had not been served because Acland regarded the issue as one that did not involve the other parties. He was undoubtedly correct in that submission.

[47] The Member then said:

> "Well, I've made the comments as to what my understanding form [*sic*] the deputy registrar and registrar is, as occurred today in this court. I won't mention it any further. You see, Mr Ambrose, I had wondered about something like, "NAC is sorry with what has happened and in no way intended to do anything which may bring the court into disrepute." Perhaps something like that would have been nice at the start of this. But I'll tell you an impression that could exist out there in public-land, particularly when they read paragraphs 4 and paragraph 10 of this affidavit which apparently I completely misconstrued in reading the affidavit. The rest of the affidavit is very well written, but paragraphs 4 and 10, when combined together, are an issue for concern, which on its face, NAC could have corrected.
>
> Even if NAC did not intend for any of this to get in the public domain, it did. It did, after contact with [*sic*] made with their spokesman. It saw a concern by the court regarding the court being brought into disrepute, the court has in communications made to this court in various elements of the community been brought into disrepute by the reports that have occurred, and I can get affidavit evidence if we have to go down that trail in that respect, and it creates a flavour in the community of the judge is taking holidays and costing lots of jobs. That's the impression that is out there in punter-land, and perhaps in some warped universe, Mr Ambrose, I don't know, that may suit your client to have that false impression out there, because this evening you have gone to great lengths to have anybody read these affidavits, to have me have a precis of the affidavits, to have anything done in any

way to openly distance your client from that out-there perspective, which is the very heart of the perception as to the reliability of justice in this state that I am concerned about."

[48] Mr Ambrose then submitted that, as Mr Stephan had sworn, Acland had not conveyed any imputation that could be construed as an attack upon the Court. There was then the following exchange:

> "HIS HONOUR: And so NAC is not happy that that was attributed as an attack on the court.
>
> MR AMBROSE: Excuse me. NAC did not so, and does not read that article in that way.
>
> HIS HONOUR: So the article in the newspaper is not read by NAC as bringing the court into disrepute?
>
> MR AMBROSE: Absolutely not.
>
> HIS HONOUR: Well, we operate in a different universe, Mr Ambrose. "Judge's holidays have put back a decision on a controversial case until April."
>
> MR AMBROSE: Sorry, where are you reading from?
>
> HIS HONOUR: "A court software glitch." Let's throw that one out and forget that. "New evidence". Apart from the fact that it was your client that sought it, let's throw that one out. And I'm just reading, "a" – dot dot dot – "judge's holiday put back a decision on the controversial case until April." There are three factors which put back, from the article, and you're so happy – you have just said, remarkably, that your client is happy with what is contained in that article.
>
> MR AMBROSE: I didn't say that at all.
>
> HIS HONOUR: Well, we'll check the transcript.
>
> MR AMBROSE: We can check the transcript. If you look at the second paragraph that is concerning you, one, it doesn't attribute those reason[s] to NAC or NAC spokesman. On its face it does not. Am I wrong?
>
> HIS HONOUR: Mr Ambrose, you're misrepresenting the question that I asked you that you answered. I said, does – is NAC upset that that message was conveyed?
>
> MR AMBROSE: We're dealing with ---
>
> HIS HONOUR: That's what I asked you, and the transcript will show. I didn't say NAC said these exact words.
>
> MR AMBROSE: Excuse me ---
>
> HIS HONOUR: I referred to paragraph 10 and paragraph 4.
>
> MR AMBROSE: --- with the greatest respect – with the greatest respect, you're asking NAC for an explanation of its contribution to the article in order to determine whether NAC has been in any way in

contempt of court. That is what we're dealing with. A matter of law. One, that paragraph is not attributed to NAC. Two, that paragraph, even on its face, does not involve any disrespect to the court. Three, Mr ---

HIS HONOUR: How can you say that? How can you possibly say that that paragraph does not show disrespect to the court? A long-running urgent matter with jobs it effects, and now the judge is going on holidays, which is exactly what the WIN TV article said.

MR AMBROSE: Well, we will deal with the WIN TV article later.

HIS HONOUR: How – I thought I had a thick skin, and for the last 17 years I've had to have a very thick skin a lot of times, but maybe I've just got too thin, I'm too old, and I should just retire, say that I'm biased in this matter and let you start again with a new member. Is that what you want?

MR AMBROSE: It's a matter for your Honour's decision about that.

HIS HONOUR: No, no, it's a matter ---

MR AMBROSE: I'm not making an application ---

HIS HONOUR: It's a matter that can be an application by a party.

MR AMBROSE: I am not making an application.

HIS HONOUR: Well, it sounded like it.

MR AMBROSE: Well, again, with the greatest respect it's very difficult for me to understand how you can draw that imputation.

HIS HONOUR: Just excuse me for a second. Mrs Plant, I think it was you who started this ball rolling. Am I correct in your submissions you referred specifically to a WIN TV article which alerted me to what was occurred.

MS PLANT: I did – I did say that, because I saw a WIN article, and ---

HIS HONOUR: Just to help my objectivity, do you have the view of the article and the WIN article that Mr Ambrose has, or I have. Just so that I can have a third view as to this.

MS PLANT: I'm afraid I agree with you. I think Mr Ambrose is quite wrong and, to me, it's really, just gone with everything that's happened in the past. I mean, myself ---

HIS HONOUR: I don't want to go into other things.

MR PLANT: No, okay.

HIS HONOUR: I don't want to ---

MS PLANT: Okay.

HIS HONOUR: Because, you see, that's when I am trying so hard not to look at the personal side but at the court disrepute side so that there cannot be an application that I am biased. That is so to show the

elephant in the room that's what I'm concerned about, and that's what I raised without saying it to Mr Ambrose earlier this evening.

MS PLANT: No, I saw the – that WIN TV show – and that's exactly how I felt; that it was saying it was your fault.

HIS HONOUR: Well, you, obviously, are the same lesser intellect as I am, Mrs Plant.

MS PLANT: Probably. Probably.

HIS HONOUR: I'm sorry, Mr Ambrose, I have thrown out many lifelines to make this easier, and all I get is knocked down each time.

MR AMBROSE: Your Honour ---

HIS HONOUR: I am not going to delay dealing with this until after the recommendation is made so that you can then judicially review me on the basis of bias if a recommendation is against your client. I'm not going to do that. And that is a legal tactic which I know is open to you. You can frown as much as you want. I practised for a long time and I have pulled all the tricks that were in the book, as well. I'm not playing that game.

MR AMBROSE: I'm not pulling tricks. I'm simply responding. And our principal submission is that in no way, shape or form did NAC attribute your Honour's holiday to a cause for the delay, and that's apparent on the face of Mr Stephan's affidavit. And Mr Stephan goes on in paragraph 3 to speak about the deep respect he had – 23 – the deep respect he had for the law and the course it administer, and he said he has not sought to engage in any conduct which is critical of the court or your Honour, nor the conduct of this matter. He particularly explains how your Honour quite rightly acted in a certain way.

HIS HONOUR: And all I have asked is for you to make a public comment saying that this was not in any way New Acland's intention for that to occur, and I have said that now five times and cannot get it out of you. I am going to adjourn the court now ---

MR AMBROSE: I can give you the ---

HIS HONOUR: --- to allow you to ---

MR AMBROSE: I can give you the ---

HIS HONOUR: --- get instructions.

MR AMBROSE: I have those instructions.

HIS HONOUR: --- formally, having heard from me ---

MR AMBROSE: I have those formal instructions.

HIS HONOUR: Well, you've taken a long time in saying them.

MR AMBROSE: Well, with the greatest respect, let me make it very clear. It was never NAC's intention to convey any disrespect of your Honour or the court in its communication with any media outlet.

> HIS HONOUR: And NAC going to communicate back to the two media outlets involved?
>
> MR AMBROSE: Well, we can.
>
> HIS HONOUR: I could get in a space shuttle if they built one. It doesn't mean I'm going to. I'd like to know, and I'd like you to get instructions if that's what you intend to do or not.
>
> MR AMBROSE: We will, your Honour. We will convey that, in no uncertain terms.
>
> HIS HONOUR: Sorry? You will convey that or you will get instructions?
>
> MR AMBROSE: No, we have the instructions. I have those instructions just then to say to you we will convey that – what I have just said – that it was never any intention to imply that your Honour's leave has contributed to the delay, or in any way to bring your Honour or the court into disrepute.
>
> HIS HONOUR: Mr Ambrose, if I'd have heard that two hours ago, the course of the afternoon may have gone somewhat differently. With that, having read the affidavits of Mr Stephan and Ms Uechtritz and being – I will use the words, advisedly delighted with the content of Ms Uechtritz' affidavit and, apart from my concern which I remain, regarding paragraph 10 and paragraph 4, otherwise, very satisfied with the affidavit of Mr Stephan with the statements that you have now made on the public record to the court, I consider the matter closed, and will not be making a directive to the registrar to issue any contempt proceedings in this matter."

[49] The Court adjourned at 7.28 pm.

[50] Further evidence was heard during April 2017 and the hearing concluded on 20 April 2017 when judgment was reserved. The Member gave judgment on 31 May 2017 and made the following orders:

> "1. I recommend to the Honourable the Minister responsible for the MRA that MLA 50232 be rejected.
>
> 2. In light of Order 1, I recommend to the Honourable the Minister responsible for the MRA that MLA 700002 be rejected.
>
> 3. I recommend to the administering authority responsible for the EPA that Draft EA Number EPML 00335713 be refused.
>
> 4. I direct the Registrar of the Land Court provide a copy of these reasons and access to the Land Court e-trail site to the Honourable the Minister administering the *Mineral Resources Act* 1989 and to the administering authority under the *Environmental Protection Act* 1994.
>
> 5. I will hear from the parties as to costs."

[51] Acland applied for judicial review of these orders and Bowskill J heard the application. A number of grounds were relied upon but, for the purposes of the

appeal, the relevant grounds were three in number. First, it was said that the Member erred in considering the issues concerning the effect of mining operations upon groundwater because the Land Court had no jurisdiction to do so. This error had a consequential effect upon his consideration of intergenerational equity. Second, it was contended that the Member's reasons were inadequate. Finally, it was said that there were reasonable grounds upon which to apprehend that the Member was biased.

[52] On 28 May 2018, after a trial, Bowskill J made orders setting aside the Member's recommendation to reject Acland's application for mining leases and the recommendations to refuse Acland's applications for amendment of its environmental authority. Her Honour remitted the matter back to the Land Court for consideration by a different member. Her Honour made ancillary orders that restricted the scope of the remitted hearing.

[53] Relevantly, her Honour concluded that:

1. When considering an objection to the grant of a mining lease or an objection to an amendment to an environmental authority for mining activities, under the legislative regime that applied to Acland's applications, the Land Court has no jurisdiction to consider or to base its recommendations upon the potential impacts of the mining operations upon groundwater;
2. The Member erred in law in considering the issues pertaining to groundwater as relevant to his decisions;
3. The issue of groundwater was, therefore, irrelevant to a consideration by the Land Court of the principles of intergenerational equity;
4. The Member erred in law in considering the issues pertaining to groundwater as relevant to his consideration of intergenerational equity;
5. The Member's reasons were inadequate;
6. There were reasonable grounds upon which to apprehend bias but Acland had waived its right to complain and the Member's reasons did not "re-enliven" that apprehension.

[54] The appellant now appeals against her Honour's orders upon the following grounds, as I restate:

1. The jurisdiction of the Land Court permitted it to consider the issue of groundwater and her Honour erred in coming to the contrary conclusion;
2. Her Honour was wrong to conclude that the Member's reasons were inadequate.

[55] Acland filed a cross-appeal and also a notice of contention. At the hearing of the appeal, Acland abandoned its notice of contention and it also abandoned all but the first two paragraphs of its grounds of cross-appeal. Those paragraphs are as follows:

> "2. In the event that the appellant's grounds of appeal are upheld and the first respondent's notice of contention is dismissed, the first respondent relies on the grounds set out below.
>
> 3. The learned primary judge erred in concluding that the decision by the third respondent was not made in circumstances where there was apprehended bias:

(a) by concluding that, by failing to take any action immediately following the 2 February 2017 hearing, the first respondent may be taken to have waived any objection to the third respondent continuing to hear and determine the matters;

(b) by failing to conclude that a fair minded lay observer might reasonably apprehend from the third respondent's reasons delivered on 31 May 2017 that the third respondent might then still be affected by the personal offence, feelings and views formed at the 2 February 2017 hearing; and

(c) by failing to conclude that the third respondent's reasons delivered on 31 May 2017 indicated an effective revival on the part of the third respondent of the personal offence, feelings and views formed at the 2 February 2017 hearing."

[56] As appears from the first of the paragraphs quoted above, Acland did not wish to raise apprehended bias as a ground of cross-appeal unless the Court proposes to allow the appellant's appeal. By adopting this course, Acland, as the respondent in this appeal, wishes to retain the benefit of the orders made by Bowskill J. If it makes out a case of apprehended bias, then it will lose that benefit. Consequently, it wishes to argue that her Honour's reasons for her orders were sound and that the appeal should be dismissed. The appellant does not challenge her Honour's conclusion about bias otherwise the orders her Honour made, which preserve some of the Member's findings while remitting the case as a whole, could not stand. It is only if it fails to uphold the orders that it wishes to change its position and argue instead that one of her Honour's reasons, to do with apprehended bias, is wrong.

[57] Allegations of bias, whether actual or ostensible, constitute a challenge to the very validity of a judicial decision. Such allegations involve an assertion that the administration of justice has failed.

[58] At least in the field of civil litigation, the primacy of private interests means that a party is usually at liberty to forego taking a point about bias at its sole discretion. However, that is not to say that a party may refrain from any election and yet retain a right to complain later. The interests of the other party and, in some cases, the interests of the due administration of justice have resulted in principles that govern how an affected party can proceed. One instance in which a party will be taken, in general, to have elected to abandon a right to claim bias is when the party takes steps that are consistent only with the continuation of the hearing or with maintaining the validity of a judgment. Such steps are inconsistent with an assertion of invalidity on the ground of bias and are, therefore, indicative of an election to abandon the right to complain.

[59] In a case like the present, the respondent's opposition to the appellant's attack upon the orders that are the subject of its appeal, and it submissions to the effect that the reasons of the trial judge that support those orders is inconsistent with a contention that the reasons are unsound in relation to bias and with seeking an order that the orders of her Honour should all be set aside. If the respondent were to seek to maintain its opposition to the appeal, it must be taken to have abandoned its right to maintain a cross-appeal on the ground that Bowskill J should have found that the Member's decisions were affected by a reasonable apprehension of bias.

[60] This conclusion can be explained simply on the basis of the principles concerning election between inconsistent rights. However, there is, in addition, a reason for this conclusion having to do with the due administration of justice.

[61] In *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd*[15] Kirby and Crennan JJ said that claims of actual bias or apprehended bias strike at the validity and acceptability of a trial and its outcome. For that reason, when such questions are raised on appeal they should be dealt with before other substantive issues are decided. Their Honours said that a party making such an allegation should be put to an election on the basis that, if the allegation is made out, a retrial will be ordered irrespective of possible findings on other issues.[16] The strictly legal correctness of the decision cannot justify or excuse a decision that is affected by bias.[17]

[62] If a party is not permitted to postpone until after judgment an application that a judge disqualify himself or herself, in order first to determine whether the judgment is favourable, we do not see how a party to an appeal can do so by asking an appellate court to postpone its consideration of a claim of actual or ostensible bias until it is known whether the result of the appeal on other grounds is favourable.

[63] Mr Clothier QC, who appeared for Acland, submitted that if the Court were to rule that his client was not able to keep its cross-appeal in reserve in the way that it wished, Acland would then wish to amend its notice of cross-appeal by deleting paragraph 2, which rendered the cross-appeal contingent upon the appellant's appeal and would rely upon the ground of apprehended bias immediately. We do not understand that the appellant opposed that course. It follows that the Court should first consider whether Acland succeeds on its cross-appeal.

[64] The test to be applied in determining whether a judge is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the questions the judge is required to decide.[18] The test is an objective one.

[65] Acland contends that the things said by the Member at the 2 February 2017 hearing raised a reasonable apprehension of bias.

[66] Towards the end of the hearing the Member expressly asked Acland's counsel, Mr Ambrose, whether he was applying for the Member to disqualify himself. Mr Ambrose answered that he was not. In the circumstances, that decision was understandable. The case had been prosecuted for over a year. There had been many days of hearing that, undoubtedly, had been preceded by many more days of preparation. The expense must have been enormous and the investment of time and effort must have been huge. It would have been a very large thing for Acland to seek to abandon all that had been achieved. After all, while actual bias cannot be corrected, apprehended bias can be. A party who might be affected by a perceived prejudice might decide that the partiality that has become apparent during the hearing of the case is not indicative of any actual bias and will not actually preclude the judge's bringing to bear the required professional skills in an impartial manner to decide the issues in the case.

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15 (2006) 229 CLR 577.

16 *ibid*, at [117]; Gummow A-CJ agreed with Kirby and Crennan JJ on this point, at [3].

17 *Antoun v The Queen* (2006) 80 ALJR 497, at [2] per Gleeson CJ; at [47] per Kirby J.

18 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, at [31] per Gummow A-CJ, Hayne, Crennan and Bell JJ.

[67] Moreover, a later statement that dispels the apprehension can remove an apprehension of bias.[19] In this case the choice that Acland made might have appeared to have been vindicated by the Member's final statement on 2 February 2017 that he considered "the matter closed" and that he would "not be making a directive to the registrar to issue any contempt proceedings in this matter". Just how the Registrar of the Land Court could possibly have issued such proceedings and thereby become a prosecutor need not be explored.

[68] Acland accepts that it waived its right to submit that the Member should not have continued to preside at the hearing after 2 February 2017 on the ground of a reasonable apprehension of bias. Acland is precluded from relying upon those statements because if a party is able to keep in abeyance its right to object, that would mean that that party would have the advantage of accepting the decision maker's judgment if it was favourable and challenging it on the ground of bias if it was not.[20] However, Acland's election did not mean that it had to accept the Member's decision despite anything else that might have happened after 2 February 2017. If a judge, having made remarks indicative of bias, but whose significance the party affected has waived, makes further similar statements in a reserved judgment, those later statements may give rise to a fresh apprehension of the continuation of the partiality that had been evidenced earlier.[21] In such a case no question of waiver arises because there has been no opportunity for the party affected to challenge what has been said in the judgment.[22] In this case, Acland submits that certain statements in the Member's reasons for judgment have that effect.

[69] It is necessary to consider the significance of statements made in the reasons for judgment in the context of other relevant facts. The starting point is the Deputy Registrar's email to the parties dated 25 January 2017. This was prompted by the publication by the Courier Mail of the article on 23 January 2017. That article asserted that the case was being delayed for three reasons: a "court software glitch", "judge's holiday" and new evidence. All of that was, seemingly, true. No part of the article attributed to Acland any statements blaming the Land Court or the Member for the delay. The effect of the judge's leave as a cause of delay was stated as a fact, which it was, and did not impute any culpability in the Member for taking leave at such a time. It was in those circumstances that:

1. the Member said that he regarded the story as "an attack on my integrity"; and
2. expressed his view the statements could be regarded as contempt of court; and
3. said that the statements in the story "may be construed as an attempt by [Acland] to distort the facts and erode public confidence in the Court"; and
4. offered Acland "an opportunity to explain its actions" and "required" the parties to attend before him.

[70] The first three contentions were not rationally open. The story contained no imputation against the Member's integrity but merely reported the true fact that the conclusion of the litigation would be delayed for the stated reasons. None of the statements in the story could possibly have grounded an arguable case of contempt of court by

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19 *Johnson v Johnson* (2000) 201 CLR 488, at 494; see also *ASIC v Rich* [2004] NSWSC 970, at [149] per Austin J.

20 *Vakauta v Kelly* (1989) 167 CLR 568, at 572 per Brennan, Deane and Gaudron JJ.

21 *ibid*, at 579 per Dawson J.

22 *ibid*, at 573 per Brennan, Deane and Gaudron JJ; at 588 per Toohey J.

anyone. Further, there was no basis whatsoever to impute to Acland a deliberate attempt to "distort the facts" or to "erode confidence in the Court". In these circumstances, the provision of "an opportunity" for Acland to "explain its actions" when no explanation was called for is indicative of the Member having formed an irrational animus against Acland.

[71] The hearing that followed exacerbated this impression. The Member began by reading the text of the email into the record. He then announced that contempt of court was a serious matter and that it would not be right for "contempt orders" to be "made on the spot" but that, instead, he would "give the party against who [*sic*] that concern is expressly addressed by the court an opportunity to explain the situation". It may be, said the Member, that the "matter can be resolved" and it may be that "additional steps will have to be taken" and that it "may be that I have to direct the registrar to institute contempt proceedings against [Acland] in this matter". During the hearing, the Member threatened that he *himself* might get affidavits "if we have to go down that trail".

[72] It must not be forgotten that all contempts of court are criminal in nature. These statements meant that, absent an explanation to satisfy him, the Member was of the opinion that criminal proceedings might be commenced against Acland for its contempt.

[73] In such circumstances, a reasonable lay observer might well conclude that the Member was, at that point of the proceedings, animated by an extreme and irrational animus against Acland. The remainder of the statements made during the hearing reinforce that conclusion. Having requested an explanation from Acland, upon receipt of affidavits offering an explanation, the Member refused at first to read them and, instead, engaged upon a wholly baseless criticism of Acland's legal representatives about the way in which they had filed the affidavit. Although Acland's lawyers had gone about that task in a perfectly orthodox and proper manner, the Member wrongly accused Acland of playing "games", offering "wormings and turnings" by way of submission and "depart[ing] from every [tenet] of the common law justice in this world".

[74] The statements also contained sarcasm directed at Acland. The Member was combative and argumentative. At one point during his argument with Acland's counsel, the Member recruited one of Acland's opponents to support his own position. He invited an opinion from a party, not a submission, and then sarcastically implied that he and the objector were of the same reasonable opinion but Acland was not. Throughout the hearing, the Member made it clear that he had taken the greatest personal offence at what he perceived was an attack upon him by Acland.

[75] Bowskill J rightly found that a fair-minded lay observer might reasonably apprehend that the Member had taken personal offence at the imputation he perceived in the newspaper story. Her Honour found that such an observer might reasonably conclude that the Member laid the responsibility for that imputation at the feet of Acland. Further, such an observer might reasonably conclude that the Member had formed the view that Acland was prepared to engage in inappropriate tactics, to engage in "games" and to pull "tricks", in order to advance its interests in the litigation. Her Honour found that such an observer might reasonably apprehend that, in that state of mind, the Member would not be able to be impartial as between the parties.[23] The appellant does not contend that this conclusion was wrong.

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[23] Reasons, at [140].

[76] Her Honour found that Acland elected not to rely upon its right to have the Member disqualify himself and thereby lost its right to do so. Acland does not challenge that conclusion. However, Acland submitted to Bowskill J, and again on this appeal, that the Member's reasons for judgment raise a fresh apprehension of bias. In order to determine whether that submission should be accepted it is necessary to consider the Member's reasons in some detail.

[77] In his reasons the Member first summarised his findings and conclusions and then set out an "Opening" in which he summarised some further aspects of the parties' dispute. In the course of doing so, the Member likened the position of one of the objectors, Mr Glenn Beutel, who had declined to sell his property to Acland, as being in a "position … far in excess of the fiction of the '*The Castle*'". The Member described this as a film about a "little person trying to protect his property from a corporate giant". This characterisation of the position of Acland vis-à-vis Mr Beutel connoted that Mr Beutel was a person who was at risk of suffering injustice because of his vulnerability to the power of a "corporate giant". It was suggestive of an unjust imbalance between the position of Mr Beutel and Acland. It is notorious that in "*The Castle*" it was the "little person" who ultimately won the litigation and that the "corporate giant" had behaved unethically and had lost. Whatever might be the respective financial power of litigants, it is the duty of a court to afford them equal justice and to favour neither of them, whether rich or poor, for irrelevant reasons. The Member's use of this simile was wholly inappropriate and conveyed partiality by reason of sympathy.

[78] The Member then set out the course of the proceedings and summarised the parties and their respective contentions. After listing the various witnesses who gave evidence, the Member embarked upon a subject he titled "Urgency". He quoted a passage from his reasons for reopening the hearing, delivered on 2 February 2017. In the course of those reasons, the Member had remarked that the reopening would cause delay in resolving the matter but said that that was "something which falls squarely at the feet of [Acland]". In the course of dealing with the subject of "Urgency", the Member identified the following matters:

1. Acland had pressed for the speedy resolution of the proceeding for reasons of urgency;
2. The Court sought to expedite the hearing;
3. Acland submitted that delay in the resolution of the proceeding would affect jobs and its own financial performance;
4. Notwithstanding its assertion of urgency, Acland sought to reopen the case to lead further evidence, thus causing inevitable delay;
5. Any "urgency in these matters has risen [*sic*] as a direct consequence of actions by" Acland;
6. The Member's ability to determine the matter in May 2017 "is rather extraordinary";
7. The Member felt "compelled to place [his] views in this regard … clearly on the public record so that there can be no further confusion as to the cause or causes of delay resulting in urgency";
8. Finally, the Member echoed what he had said on 2 February 2017, that "the underlying cause for any such job losses falls squarely at the feet of" Acland.

[79] These matters were entirely irrelevant to the issues that the Member had to decide. No party had complained that the Member's judgment had been delayed. Acland had merely pressed for as early a determination as possible and, in the course of so doing, had stated its reasons for urgency. In particular, there was no occasion for a contest between Acland and the Member as to who had been responsible for delay in deciding the dispute.

[80] Later in his reasons, in dealing with the issue of community and social impacts of the proposed project, the Member said:

> "In terms of community and social impacts they have been significant particularly for Mr Beutel, and one wonders whether the removal of the buildings in Acland has been a deliberate ploy by NAC to pressure him to leave. NAC may have acted within the letter of the law by their purchase and removal of Acland buildings, but as an example of engagement with the community, NAC has acted quite intentionally like a bull in a china shop."

[81] In a finding that has not been challenged, Bowskill J found that there was no evidence to support the supposition that Acland had engaged in pressure tactics of that kind and no such suggestion was ever put. The appellant submits that Acland's submission that these comments were gratuitous and unsupported by evidence should not be accepted. It points to Mr Beutel's witness statement in which he referred in heightened emotional language to the presence in the town of Acland's removalists and to the removal of buildings and trees. None of this is evidence that could support a rhetorical insinuation by the Member that Acland engaged in deliberate tactics to "pressure" local residents. In any case, if that was to be an inference that was going to be considered, it had to be put to Acland's witnesses or to its counsel in order to give an opportunity to lead evidence and to submit that that inference should not be drawn. It is true that the Member made no finding to the effect that Acland had actually engaged in such tactics; but the raising of a rhetorical question of that kind by a judicial officer without himself answering it correctly according to the evidence carries with it a powerful insinuation. The statement should not have been made. It evidences a lack of impartiality.

[82] Several of the witnesses for the parties gave affidavit evidence which bore the appearance of first hand evidence but which was shown later to be based upon hearsay. These included Mr John Cook, Mr Frank Ashman and Mr Max Scholefield, who were objectors. With respect to these witnesses, the Member merely observed that this evidence was really hearsay and he made no criticism of them for putting it forward in the form in which they did. The rules of evidence do not apply in the Land Court and so the evidence was admissible anyway. However, in the case of one of Acland's witnesses, the same kind of evidence resulted in the following:

> "[229] I do not accept the submissions of NAC in this regard. It is an extremely simple matter for an affidavit to be written in such a way as to make it abundantly clear when someone such as Mr Denney is relying upon the views of subordinates when expressing an opinion. Given that the rules of evidence do not apply in the Land Court, there was no danger of Mr Denney having his affidavit excluded on the basis of hearsay had it honestly and truthfully stated the position as it really was, instead of being drafted in a way to deceive the reader into

thinking that all of the statements expressed were Mr Denney's own opinion, at least in all those circumstances where he used the word "I" or the like.

[230] It is also noteworthy that my attention has not been brought to documentation or evidence that establishes the allegations made against Dr Plant and others.

[231] When I put all the factors outlined above together, I am extremely troubled by Mr Denney's evidence, to such an extent that I afford it little or no weight. Of course, documents annexed to Mr Denney's affidavits speak for themselves, and in the majority of circumstances the truth or otherwise of those documents has not been challenged, so I am able to rely upon those documents. That, however, does not include documents such as "BD27"."

[83] Acland points to the unexplained differing treatment of the respective witnesses as raising an apprehension of bias.

[84] Acland submits that in the following paragraphs the Member has used language indicative of lack of respect for Acland as a litigant:

"[523] I accept her evidence that NAC's Stage 1 and Stage 2 mining had a negative impact on her alpaca business at Bremar. NAC's submissions read almost as if they had done her a favour by causing her to move her alpaca business to a new location. It is a pity that NAC in its submissions could not accept the impacts that dust, noise, and overspill of light had on Mrs Harrison, her alpaca business and tourists that came to visit the alpaca business as a consequence NAC's Stage 1 and Stage 2 operations.

…

[1389] I also note with concern that actions that create divisions also come from pro-mine supporters. I note for example the evidence of Mr Beutel regarding his car probably being vandalised while he joined the court as part of its view of the mine and surrounds. Also I am concerned with the events described in Dr Plant's evidence (despite NACs attempts to ridicule Dr Plant over this) that someone has come onto her father's property and moved a large and heavy runway marker (witches hat and tyre) onto his runway while his plane was in the air. The Plants thought this serious enough to call the police and install security cameras. I also note a dead chicken was left in Mr Plant's gateway as possibly a message to not oppose the mine. While it has not been suggested that NAC was behind any of these instances, they concern me, especially what may happen if the mine expansion is not approved. The community division is certainly not coming just from those opposed to revised Stage 3.

[1390] NAC has sought to portray the local objectors as bigoted individuals who are not interested in facts, only in spreading

misinformation about NAC. I do not believe this to be the case. As discussed previously in this decision, I find the majority of the objectors and the witnesses who supported them are honest, hardworking, regular folk whose character has been unfairly besmirched by NAC. In effect, NAC's treatment of objectors and their witnesses in these proceedings confirms their evidence that NAC has a tendency to treat anyone who disagrees with it in a dismissive and disrespectful manner."

[85] There was no indication in the transcript that Acland had tried to "ridicule" Dr Plant about evidence that somebody had placed an obstruction upon her father's runway in a position that would have endangered a plane that was landing. Rather, Acland's counsel's succinct cross-examination on this point was limited to establishing that there was no reason to think that Acland had been responsible. Nor was there any basis upon which the Member could have concluded that Acland had "sought to portray" objectors as "bigoted individuals" who were only interested in "spreading misinformation" about Acland. Indeed, the Member himself had concluded that some of the objectors were ready to make assertions without evidence,[24] to make submissions that were "scandalous and unsupported by any evidence"[25] and, as to one witness, to having such a "fixation of being anti-NAC" as to have that fixation "overflow into her evidence".[26]

[86] No instances of "unfair besmirching" of objectors' character by Acland were identified nor was any evidence referred to that might support the Member's conclusion that Acland had treated "anyone who disagrees with it in a dismissive and disrespectful manner".

[87] Acland points to these matters as contributing to a reasonable apprehension of bias.

[88] When the Member came to deal with the issue of groundwater, he made the following statements in his reasons:

"[1632] To begin with, some overarching observations should be made about the manner in which the evidence from the various IESC Advices have been presented to the Court.

[1633] As regards the 2014 and 2015 IESC Advices, it can be accepted that the IESC is critical in both reports of NAC's work undertaken with respect to groundwater. The IESC 2014 and 2015 Advices were tendered through expert witnesses put forward by OCAA. I am in no doubt that, but for the objections on groundwater in this matter, neither the 2014 nor 2015 IESC Advice would have been placed before this Court by NAC.

[1634] It could be said that is a natural consequence of the adversary system in which this Court operates. That may be so. However, it must also be considered in light of the evidence of Mr Denney and Mr Boyd for NAC that NAC now operates on a new form of openness and credibility compared to its former dealings at Acland. Just as Mr Boyd indicated that no one in the Acland

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24 Land Court Reasons, at [408] per Mr Frank Ashman.

25 Land Court Reasons, at [455] per Mr Noel Wieck.

26 Land Court Reasons, at [510] per Dr Tanya Plant.

community was informed of the opening up of west pit despite it being understood to be part of the revised Stage 3 operations because NAC was legally entitled to open west pit and did not have to tell anyone, then so to was the general disregard NAC demonstrated towards the 2014 and 2015 IESC Advices.

[1635] However, come the 2016 IESC Advice, the shoe is snuggly on the other foot. The 2016 Advice and subsequent letter was sufficient to cause the Federal Minister to give EPBC approval for the revised Stage 3. Absent all of the evidence that I have considered at the original hearing, my reading of the 2016 IESC Advice would certainly of itself appear to satisfy all requirements of the MRA and the EPA with respect to controlling issues of environmental harm which flow as a necessary consequence of mining operations. Once more, however, in this case, all is not as it appears. I will deal with a key shortcoming that I see in the 2016 IESC Advice later in this key issue.

…

[1663] NAC seeks this Court to accept that the independent experts of the IESC had in their own right access to exactly the same documents that the experts in these proceedings had access to including the new EIS, the AEIS and the documents provided with respect to the 2016 IESC Advice. I not only agree with the statutory party that that submission should not be accepted, but consider that it is in effect showing great disrespect to both this Court and the IESC. No reasoned and reasonable observer could possibly consider that the IESC had before it for the purposes of its 2016 advice the same material as the experts in this hearing. They did not have the benefit of any of the concessions or views of the various experts with respect to the various topics that the IESC had to consider. This Court would be lead [*sic*] into error if it were to assume that the IESC had all the information that this Court had to consider what is in many respects the same issue. This is but another example of the submissions by NAC taking an extreme stance in like manner to which they are critical or, indeed highly critical, of the stance taken by OCAA and a number of the objectors."

[89] Acland submitted below, and repeats its submission on this appeal, that in [1633] the Member was imputing to Acland a deliberate intention to conceal relevant information because of his conclusion that the 2014 and 2015 IESC[27] Advices would not have been disclosed by Acland "but for the objections on groundwater in this matter".

[90] That imputation is irrational because, but for there being an issue raised by the objectors about groundwater, the documents would have been irrelevant to any issue. Moreover, the objectors had them; indeed, it was one of the objectors, the appellant, who tendered them at the hearing. The failure of Acland to disclose the documents amounted, in the Member's eyes, to a "general disregard" towards, it seems, an ethical or legal obligation to disclose reports.

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27 Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development.

[91] The Member's criticism of Acland continued in his consideration of a submission by Acland that the writers of the IESC advices had access to the same source information as the witnesses who gave evidence before the Land Court. There is no challenge that that was the submission. However, the Member wrongly took the submission to be that the authors of the advices had before them exactly the same documents as the experts in the proceedings. There is no challenge to Bowskill J's finding that that conclusion was not open. The Member misconstrued Acland's submission and then rejected the submission that he had misunderstood. He went on to characterise the party (who had actually not made such a submission) as one who had shown "great disrespect to both this Court and the IESC" and that, had he accepted the submission, it would have meant that the "Court would be lead [*sic*] into error if it were to assume that the IESC had all the information that this Court had to consider". Acland was not given an opportunity to address these propositions.

[92] The Member's misunderstanding of a submission made to him, standing alone, is a mere error. However, the wrong criticisms of Acland's conduct in making the submission, including an imputation of acting disrespectfully to the Court and leading the Court into error, were not only unjustified even upon the mistaken assumption that the Member had made, but were mere gratuitous censure that was irrelevant to any task being undertaken.

[93] Having concluded his reasons to explain the orders that he intended to make, the Member then embarked upon a separate piece of writing, which he termed an "Epilogue", in the course of which he said:

> "[1866] Just as I do with every matter that I hear, when I was allocated this matter I had no idea of the issues involved or any preconceptions with respect thereto. Just like it always is, it was no more and no less than having the evidence speak for itself and applying the law to the best of my ability to my findings of evidence, and let the result sit wherever it fell, without fear or favour to anyone."

[94] Then, after writing about his school years, his mother's personal history and her character and her influence on the Member, and his previous engagement with Acland's holding company as an applicant for mining tenements, the Member repeated his assertion of impartiality:

> "[1873] I have simply done the best that I could with the evidence I had, applying my understanding of the law, in fearless independence without fear or favour for any party, issue or cause."

[95] The Member then turned to his efforts to avoid delay and said:

> "[1875] As I have indicated, I have done my upmost to deliver my decision in this matter as quickly as possible, in fact on many occasions working into the wee hours of the morning and whilst on annual leave. In my view, it has been a remarkable effort by the staff of the Land Court to support me in having this decision completed and handed down a mere twelve days after the close of the receipt of written submissions on the reopening. Those who work diligently behind the scenes in our courts are rarely provided with the recognition they deserve. In this particular

instance, the officers of the Land Court who have played a part in the delivery of this decision have done outstanding work.

[1876] Having said that, though, there are observations which I feel compelled to make. This decision is in my view far too long but, as I have quoted from Mark Twain in an earlier decision, 'I didn't have time to write a shorter decision'. Also, it needs to be borne in mind that this decision has been written in component parts over many months, since the original close of the hearing in October 2016. I apologise for those areas in which there have been duplications by myself in the reasoning. I could have easily taken another month to carefully check and review, put to one side, and then come back and check and review this decision in its entirety and still not go a great deal past scratching the surface. As I have indicated with respect to the urgency of my decision in this matter for the benefit of all concerned, I thought it more appropriate to deliver my decision as quickly as possible and live with the consequences of poor drafting."

[96] Acland points to these statements as a gratuitous *apologia*, put forward defensively against the possibility of an attack upon the Member's partiality and, therefore as indicative that the Member continued to harbour resentment against Acland. It cites the following passage from the reasons of Aickin J in *Re Lusink; Ex parte Shaw*[28] as encapsulating its point:

> "The critical question however is not whether a judge believes he or she has prejudged a question, but whether that is what a party or the public might reasonably suspect had occurred … In some circumstances repeated denials of prejudging might well convey the impression of 'protesting too much …'."

[97] The appellant submits that none of these statements, whether considered alone or together, give rise to an apprehension of bias. It points to the very numerous occasions upon which the Member found points in favour of Acland or accepted the evidence of Acland's witnesses or gave credit to Acland's position or its running of aspects of the case. It cited 183 paragraphs of the reasons to support that submission. It is true that the Member found that a number of Acland's witnesses were reliable. These included certain experts, certain independent lay witnesses and employees. It is also true that the Member made some findings in favour of Acland and that he also accepted some of Acland's submissions. These findings included some of the findings about the statutory criteria specified in s 269(4) of the *Mineral Resources Act*. The appellant points out that the Member also made criticisms of some of the objectors. The appellant submits that this shows that the Member was even handed in his treatment of the parties.

[98] Bowskill J considered each of the matters raised by Acland. Her Honour concluded that a fair-minded lay observer would not reasonably apprehend that the Member may not have brought an impartial and unprejudiced mind to the resolution of the questions that he had to decide.

[99] For the following reasons, I have come to the opposite conclusion. The characterisation of Mr Beutel as a "little person" who is trying to "protect" his property from Acland,

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[28] (1980) 55 ALJR 12, at 16; and *cf.* Hamlet, Act 3 Scene 2 "The lady doth protest too much, methinks."

characterised as a "corporate giant", was an indication of partiality. This sympathy for one party at the expense of the other was reinforced by the Member's remarkable rhetorical question concerning Acland's possible use of pressure tactics to achieve its commercial aims. The criticism of Acland's witnesses whose affidavits contained evidence based upon hearsay was discriminatory. In the case of the appellant's witnesses, the result was that the evidence was given less weight while in the case of Acland's witness the Member imputed to Acland a deliberate intention to deceive him. Prejudice against Acland is also evidenced by the Member's irrational findings about Acland's cross-examination of Dr Plant, about its treatment of objectors as mere bigots who were prone to spread misinformation and about Acland's purported disinclination to reveal the IESC advices and the imputation to Acland of behaviour showing disrespect to the Land Court.

[100] I respectfully agree with Bowskill J that the so-called "Epilogue" was written in terms that, to a fair-minded lay observer, might appear to be inconsistent with the role of a judicial officer as a dispassionate, objective decision maker. A defensive explanation for the reasons for judgment raises a real question about why the Member saw a need for a defence. The whole content of the "Epilogue", being a recitation of the Member's personal life circumstances and how he has applied himself to the difficulties he saw in his judicial task, compromises the impartiality of the reasons for judgment that preceded it. The "Epilogue" implies strongly that the whole process was carried on by the Member with his personal concerns at the forefront of his thinking. The reasons for judgment as a whole strongly imply that the Member was unable to overcome the deep hurt and resentment that he had expressed to Acland's counsel on 2 February 2017.

[101] In my view, a fair-minded lay observer might reasonably conclude as follows. The article that was published by the Courier Mail deeply offended the Member. He saw in that article an implication that, by taking his long-planned and justifiable leave, the Member would improperly delay a decision in the case and that the delay that he had caused would result in people "losing jobs". He immediately pinned the blame for this imputation upon Acland and summoned Acland to appear and to explain the actions which he had assumed had led to the publication of the article and to the impugning of his integrity. During the ensuing hearing, the Member's agitation was so great that he refused in the first instance even to read the explanation that he had asked for and had, instead, made an unjustified criticism of Acland for the manner in which its lawyers had put the affidavits before him. He responded to Acland's submissions with tendentious and argumentative questions about the legal remedies he expected Acland should have pursued against the Courier Mail if its counsel's submissions were *bona fide*. He employed sarcasm to belittle its position.

[102] Having said that the "matter" was closed, the Member's reasons for judgment gave a prominent place to the supposed non-issue of delay at both the beginning[29] and at the end[30] of his reasons. That is to say, even after he had completed his judicial task, the Member returned in his "Epilogue" to the delay – the very matter that had agitated him at the February hearing. The reasons also incorporated unnecessary, unsupportable and irrational criticisms of Acland's commercial behaviour and its litigious behaviour. It included discriminatory treatment of one of Acland's witnesses in connection with an issue common to a certain number of the objectors. The reasons contained wrong findings that then served as a basis for unjustified criticism.

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[29] Reasons, at [114]-[130].

[30] Reasons, at [1875]-[1878].

[103] The fact that the Member decided some issues in favour of Acland is a factor that must be taken into account. However, the Member could hardly have decided every issue against Acland. If there are facts that raise an inference of ostensible bias, then it is not necessary for the affected party to show that every issue, or even that most of the issues, were decided adversely to it. In this case the matters to which Acland has drawn attention are inextricably linked to the issues of ostensible bias raised at the February hearing. They constitute matters that would give rise to a reasonable apprehension in an objective lay observer that the Member might not have brought an impartial and dispassionate mind to bear upon his task.

Groundwater

[104] There was a controversy in the Land Court about whether that Court's jurisdiction permitted it to consider the effect of Acland's proposed mining operations upon groundwater in the area. The learned Member decided that it did. The Member's findings in relation to the issue of groundwater constituted the substantial ground upon which Acland lost at first instance and upon which it won when Bowskill J reviewed the decisions. Her Honour decided that the jurisdiction of the Land Court did not permit consideration of that issue. The appellant's first ground of appeal challenges that conclusion. Because the cross-appeal must be allowed, it is strictly unnecessary for this issue to be determined.

[105] However, the parties were at one in inviting the Court to consider the appellant's first ground of appeal even if Acland's cross-appeal is allowed. As a general proposition, an appellate court in a civil appeal should confine itself to the issues that are necessary for the disposition of the case. However, there are exceptions. One common exception is the case in which a plaintiff in a torts claim fails on liability but the court goes on to consider quantum to cover the possibility that an appellate court might take a different view. In this case, the result of the cross-appeal means that the case will have to be reheard. In the long and unhappy circumstances of this case, it is desirable for the Court to decide the point so as to avoid any more litigation than is absolutely necessary. For that reason, we now turn to consider that issue.[31]

[106] The provisions of the legislation that gave rise to this issue have been amended since Acland made its application and so the question now in dispute can no longer arise[32] in future applications. It is common ground, however, that Acland's applications had to be considered under the terms of legislation that did give rise to arguments about the scope of the jurisdiction of the Land Court.

[107] A person may apply for the grant of a mining lease under s 245 of the *Mineral Resources Act*. Pursuant to s 245A of the Act, the applicant must publicise the fact of the application having been made. Section 260 permits certain persons to object to the grant of a mining lease and s 265 provides for an application which to which objection has been made to be referred to the Land Court.

[108] Section 426 of the *Environmental Protection Act* makes it an offence for a person to carry out "an environmentally relevant activity" unless the person holds, or is acting under, an environmental authority for the activity. A "resource activity" is an environmentally relevant activity.[33] A "resource activity" is an activity "that involves

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[31] See eg. *Markby v The Queen* (1978) 140 CLR 108, at 114 per Gibbs CJ.

[32] Bowskill J examined in detail the provisions that applied to Acland's applications and also the new provisions that have supplanted them and it is therefore unnecessary to repeat that task: see [184]-[243].

[33] s 18.

… a mining activity”.[34] A “mining activity” is an “authorised activity for a mining tenement under the *Mineral Resources Act* 1989.[35] It followed that Acland required an environmental authority to conduct its operations that are authorised under its mining leases. The *Environmental Protection Act* required Acland to seek an amendment to its current environmental authority in order to obtain statutory authorisation to undertake work that is authorised under the mining leases for which it has applied.[36] This process also required public notification of the application and made provision for objections to be made to the amendment.[37] The decision whether to grant the amendment is one made by the administering authority established under the Act.[38] If the decision is one to approve the amendment, objectors must be notified and they then have a right to have the application referred to the Land Court.[39] The Land Court may hear objections taken under each Act at a single hearing.[40]

[109] Section 269 of the *Mineral Resources Act* is central to the present dispute. Relevantly, s 269(4)(i) provides that the Land Court must “take into account and consider whether … the **operations to be carried on under the authority of the proposed mining lease** will conform with sound land use management”. Section 269(4)(j) provides that the Land Court must take into account and consider whether “there will be any adverse environmental impact caused by **those operations** and, if so, the extent thereof”.

[110] It is fundamental that the *Mineral Resources Act*, including to the extent that it operates in tandem with the *Environmental Protection Act*, is concerned only with the significance of activities that are prohibited unless authorised by a mining lease or an environmental authority. It is axiomatic that the provisions of these Acts have nothing to say about any activities which are prohibited by other laws and which these Acts cannot authorise. That is why s 269(4)(i) uses the expression “operations to be carried on under the authority of the proposed mining lease” and why s 269(4)(j) refers back to that expression. Activities that are prohibited by other laws cannot be undertaken whether or not a lease is granted or an environmental authority is issued.

[111] For this reason, when considering a referral to it, the Land Court is also concerned only with those activities in which an applicant proposes to engage lawfully because they will be permitted under the proposed statutory instruments or, not being generally prohibited, will be freely undertaken as part of the mining activities that would be authorised.

[112] Once it is appreciated that, without a special statutory authority to do so, the holder of a mining tenement has no right to interfere with groundwater, it follows that the grant of a mining lease cannot possibly, as a matter of practicality, impinge upon groundwater. If, as a matter of practical fact, proposed mining operations would have no effect upon groundwater, then the issue is irrelevant. If mining operations would interfere with groundwater, then those mining operations cannot be undertaken until a further authorisation, permitting interference with groundwater, is obtained. A mining lease would not, on its own, then be enough for such mining operations to be undertaken lawfully.

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[34] s 107.
[35] s 110(a).
[36] ss 118, 119, 224.
[37] ss 160, 161.
[38] s 170.
[39] s 183; separate, but similar, provision is made for applications involving mining activities that are already the subject of referral under the *Mineral Resources Act*, see s 185.
[40] s 265.

[113] In this case, the *Water Act*, in its applicable form, vested all rights to the use, flow and control of water in the State.[41] "Water" was defined to include "underground water".[42] Section 808(2) made it an offence for a person to "interfere" with water unless authorised to do so under the Act or under another law. A person could obtain such an authority under the *Water Act*. Section 206(1) allowed the holder of a mining tenement to apply for a licence that would permit such a holder to interfere with water "under" the relevant land. The process for the grant of a licence follows the usual form of requiring public notification and requiring the decision maker to take into account statutory criteria.[43] The whole of Chapter 3 of the *Water Act* is concerned with mining activities and their "impacts" on groundwater.

[114] The separation of the consideration of issues concerning groundwater from other environmental issues relating to an intended mining project was inconvenient. For this reason, amendments have been enacted so that interference with groundwater is now one of the rights of the holder of a mining lease. The consequence is that interference with underground water, of the kind in issue in this case, now constitutes part of the "operations to be carried on under the authority of the proposed mining lease" and is, for that reason, a matter to be taken into account by the decision maker. However, those amendments do not apply to this case.[44]

[115] It follows that, in my respectful opinion, Bowskill J was right in her conclusion that it was outside the jurisdiction of the Land Court in this case to consider the effects of the proposed mining activities upon groundwater.

[116] Grounds 1 and 2 of the appellant's grounds of appeal must be rejected. Grounds 4 must be rejected for the same reason. Having regard to Acland's success on its cross-appeal, it is unnecessary to consider grounds 3, 5 and 7. Ground 6 was abandoned at the hearing.

[117] Bowskill J had set aside the Member's order and had remitted the referrals back to the Land Court. Having regard to her Honour's rejection of the respondent's case on apprehended bias, her Honour made orders that would have permitted some of the findings of the Member to be maintained when the matter was to be reheard. That is no longer possible. Consequently, the orders should be:

1. Orders 4 to 8 of the orders made by Bowskill J on 28 May 2018 be set aside.
2. The first respondent's applications be referred back to the Land Court.
3. The appellant pay the first respondent's costs of the appeal.

[118] **PHILIPPIDES JA:** I agree with the reasons of Sofronoff P and the orders proposed by his Honour.

[119] **BURNS J:** I agree.

41 s 19.
42 Schedule 4.
43 ss 208, 210.
44 see s 839 of the *Mineral Resources Act*, which was enacted as a transitional provision.