

‘Inherited’ apprehended bias - a minefield for jurisdictional error

Hayden Fielder reports on *Oakey Coal Action Alliance Inc v New Acland Coal Pty Limited* [2021] HCA 2



Photograph by Adam Head, Newspix



The High Court has found that a decision of the Queensland Land Court involved jurisdictional error as the decision adopted the conclusions of a prior decision of the Land Court in the same matter which was found to have been affected by apprehended bias. The High Court found that the apprehended bias in the prior decision was inherited into the second decision of the Land Court which constituted a breach of procedural fairness.

Background

New Acland Coal Pty Limited (New Acland) operates a coal mine near

Oakey, Queensland.

In an attempt to expand the mine, New Acland made two applications, namely:

- for additional mining leases under the *Mineral Resources Act 1989* (Qld) (MRA); and
- to amend its existing environmental authority under the *Environmental Protection Act 1994* (Qld) (EPA).

The Oakey Coal Action Alliance (Alliance), representing a group of farmers and community members, was one of the objectors to the two applications.

The objection led to the referral of

both applications to the Land Court in Queensland. This process required the Land Court to hear both proceedings and provide its recommendation to the relevant decision-makers under the MRA and EPA respectively as to whether New Acland's applications should be granted or refused.

Member Smith of the Land Court heard both proceedings and found that, while the mine would provide a significant economic benefit to the local region, both applications should be refused on the basis of 3 findings concerning:

- Noise issues;
- Groundwater issues; and
- Intergenerational equity issues.

New Acland applied to the Supreme Court for a statutory order of review of the recommendations under ss 20 and 21 of the *Judicial Review Act 1991* (Qld) (JRA) and for non-statutory judicial review pursuant to the Court's jurisdiction under s 58 of the *Constitution of Queensland 2001* (Qld) on grounds which included that:

- the recommendations were affected by apprehended bias on the part of Member Smith; and
- Member Smith erred in law on each of his 3 findings.

The judicial review application was heard by Bowskill J who found that Member Smith's recommendations were not affected by apprehended bias but that he had erred in law on each of his 3 findings.

Consequently, Bowskill J set aside the recommendations of Member Smith and referred the matter back to the Land Court to be heard by a different Member. However, Bowskill J made qualifying orders requiring that the new Member be bound by the findings and conclusions of Member Smith other than in respect of the 3 findings upon which his recommendations were based (Qualified Order).

Kingham P of the Land Court heard the matter for a second time and was bound by the Qualified Order. Concurrently, both parties had appealed/cross-appealed to the Court of Appeal in relation to the orders

made by Bowskill J. Before the matter was heard by the Court of Appeal, Kingham P delivered her recommendation that New Acland's two applications be approved subject to conditions concerning noise. This led to New Acland's EPA application being granted by the relevant decision-maker (while the MRA application was yet to be determined).

The Court of Appeal

In the Court of Appeal, Oakey challenged Bowskill J's finding that Member Smith's recommendations were affected by errors of law and New Acland challenged the finding that Member Smith's recommendations were not affected by apprehended bias.

The Court of Appeal, dismissing Oakey's appeal and allowing New Acland's cross-appeal, found that Member Smith's recommendations were affected by both apprehended bias and errors of law.

The Court of Appeal indicated that the appropriate orders were to set aside the Qualified Order and order that the matter be referred back to the Land Court for full consideration. However, since the Qualified Order had already been spent by Kingham P delivering her decision, the Court of Appeal found that it was not open for it to interfere with Kingham P's orders, unless those orders were appealed – which they were not. As a result, the Court of Appeal made consequential orders limited to a declaration that Member Smith failed to observe procedural fairness.

High Court

Before the High Court, no issue was taken with the Court of Appeal's finding that first decision of the Land Court was affected by apprehended bias. The issue before the High Court was whether, after finding that the first decision of the Land Court was affected by apprehended bias, the Court of Appeal ought to have referred to entirety of the matter back to the Land Court for full consideration, instead of making the consequential orders.

Oakey contended that the decision of Kingham P was affected by the same

apprehended bias of Member Smith, since Kingham P's recommendations were based, in part, on the findings and conclusions of Member Smith in accordance with the Qualified Order. Oakey sought orders setting aside Kingham P's recommendations. On that basis, Oakey submitted that the original orders contemplated by the Court of Appeal should have been made (i.e. the order referring the matter back to the Land Court for full consideration in the absence of the Qualified Order).

New Acland maintained that the recommendations made by Kingham P were binding on Oakey by force of the Qualified Order.

The High Court found that Kingham P's recommendations did not bind the parties by force of Bowskill J's orders for two reasons:

- the power conferred by section 30(1) of the JRA did not extend to authorise a decision-maker to proceed in a manner inconsistent with the statute that governs the making of a decision referred back for further consideration; and
- the Qualified Order was the very order under appeal to the Court of Appeal and should have been set aside (and would have been if the order had not been spent by the delivery of Kingham P's decision).

The High Court (Kiefel CJ, Bell, Gageler and Keane JJ; Eldelman concurring in separate reasons) held that on the basis that the decision of Member Smith was affected by apprehended bias, in adopting the findings and conclusions of Member Smith, the decision of Kingham P involved jurisdictional error for failing to observe the requirements of procedural fairness by reason of apprehended bias.

Accordingly, the High Court made orders setting aside the Qualified Order, the declaration made by the Court of Appeal and the decision approving New Acland's EPA application. New Acland's EPA and MRA applications were referred back to the Land Court – for a third time – to be reconsidered according to law. **BN**