LAND COURT OF QUEENSLAND

CITATION:	*Springsure Creek Coal Pty Ltd v Arcturus Downs Limited & anor (No. 2)* [2018] QLC 8
PARTIES:	**Springsure Creek Coal Pty Ltd** (applicant) v **Arcturus Downs Limited** (objector) **Chief Executive, Department of Environment and Heritage Protection** (statutory party)
FILE NOs:	MRA116-14 & EPA117-14 (MLA70486) MRA196-14 & EPA197-14 (MLA70502)
DIVISION:	General Division
PROCEEDING:	Hearing of applications for mining leases and objections; Objections to application for environmental authority
DELIVERED ON:	12 April 2018
DELIVERED AT:	Brisbane
HEARD ON:	22, 23, 24, 25 January 2018 and 26 March 2018
HEARD AT:	Brisbane
MEMBER:	PG Stilgoe

ORDERS:

1. **The General Application filed by Arcturus Downs Limited on 6 March 2018 is dismissed.**

2. **I make the following recommendations, pursuant to s 269(1) of the *Mineral Resources Act 1989*, to the Honourable the Minister administering the *Mineral Resources Act 1989* –**

    (a) I note the existence and application of the Strategic Cropping Land protection conditions dated 26 February 2014.

(b) Subject to the following recommendations in relation to the draft environmental authority being adopted, I recommend that mining leases 70486 and 70502 be granted over the application area, for the term and purpose sought by the applicant.

3. I make the following recommendations, pursuant to s 222(1) of the *Environmental Protection Act 1994*, to the Honourable the Minister administering the *Environmental Protection Act 1994* –

(a) Subject to the following recommendations in relation to the draft environmental authority being adopted, I recommend that the environmental authority be issued in the terms of the draft environmental authorities EPML00961613 and EPML01584713.

(b) I recommend that the draft environmental authority conditions relating to the standard of rehabilitation of Strategic Cropping Land be read subject to the requirements of the Strategic Cropping Land protection conditions.

(c) I recommend that the draft environmental authority conditions relating to the standard of rehabilitation of Strategic Cropping Land be amended to provide clarity about the standard of rehabilitation contemplated, in consultation with the Department of Environment and Heritage Protection.

(i) By 4:00pm on 4 May 2018, the Department of Environment and Heritage Protection must file in the Land Court Registry and serve on each other party a written advice on how the environmental authority conditions might be varied to provide clarity about the standard of rehabilitation contemplated.

(ii) By 4:00pm on 18 May 2018, Springsure Creek Coal Pty Ltd and Arcturus Downs Limited must each file in the Land Court Registry and serve on each other party their submissions about the proposed variations to the environmental authority conditions.

(d) I will, by further order, recommend the amended environmental authority conditions that identify the appropriate standard of rehabilitation to be achieved, not before 18 May 2018.

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – TITLES: RIGHTS, PERMITS, LICENCES AND LEASES ETC – where application for mining lease initially filed and approved by mining registrar varies from application for mining lease presently before the Land Court of Queensland for objection hearing – whether change in ownership of company applying for mining lease is sufficient to make the application substantially different – whether the application is so different that the application no longer complies with the requirements under the *Mineral Resources Act 1989* – whether these differences amount to failure to comply with the requirements under the Act – whether the applications are void – whether the Land Court has jurisdiction in the situation where the applications are considered to be non-compliant with the requirements under the Act

ENERGY AND RESOURCES – MINERALS – MINING FOR MINERALS – ENVIRONMENTAL PROTECTION LEGISLATION – where the areas under the mining lease and environmental authority applications are subject to the *Strategic Cropping Land Act 2011* – where environmental authority cannot issue until strategic cropping land protection decision has been made – where strategic cropping land decision has been made – whether the applicant for the environmental authority can meet the conditions imposed by the strategic cropping land decision – where strategic cropping land conditions refer to 'good quality agricultural land' – whether rehabilitation to 'best possible class of agricultural land' includes returning the land to its condition prior to the mining – whether this is possible in the circumstances – whether this is a requirement under the *Strategic Cropping Land Act 2011* – whether evidence led that the applicant cannot possibly return the land to this condition should result in a decision not to recommend the mining lease be granted

Environmental Protection Act 1994 (Qld) (Reprint no. 11A) s 3, s 147, s 149, s 155, s 156, s 210(8), s 222, s 223, s 225

Mining Act 1978 (WA) s 74

Mineral Resources Act 1989 (Qld) (Reprint no. 13C) s 2(d), s 245(1), s 252, s 252A, s 252B, s 269(4), s 271, s 286, s 286A

Regional Planning Interests Act 2014 (Qld) s 100(3), s 100(4), s 102(2), s 102(3), s 102(4)

Strategic Cropping Land Act 2011 (Qld) s 3, s 4, s 93, s 99(1)(a), s 103(3), s 230(3), s 290(4)

Cambridge Credit Corporation Ltd v Parkes Development Pty Ltd [1974] 2 NSWLR 590, distinguished

Deeley v Tucker [2008] QLC 93, applied

Forrest & Forrest Pty Ltd v Wilson (2017) 346 ALR 1, distinguished

Hancock Galilee Pty Ltd v Currie & Ors [2017] QLC 35, applied

Jones v Dunkel (1959) 101 CLR 298, applied

Mison v Randwick Municipal Council (1991) 23 NSWLR 734, distinguished

Project Blue Sky Inc v Australian Broadcasting Authority (1988) 194 CLR 355, applied

Re Kenneth James Willis [2001] QLRT 29, applied

APPEARANCES:

RA Anderson QC and S McLeod of Counsel (instructed by Sparke Helmore) for the applicant

DA Skennar QC (instructed by Alroe & O'Sullivan Solicitors) for the respondent

S Barclay of Counsel (instructed by In-house Legal, Department of Environment and Heritage Protection), for the statutory party

[1] Arcturus Downs sits about 47 kilometres south east of Emerald. The property is used for dryland cropping and breeding and fattening cattle. Springsure Creek Coal Pty Ltd has two mining lease applications and two draft environmental authorities over Arcturus Downs. MLA70486 is an application to develop a longwall thermal coal mine. MLA70502 is for a haul road and associated infrastructure from MLA70486 to the Bauhinia rail line. The Department of Environment and Heritage Protection ('DEHP'), as it then was, issued complementary draft environmental authorities on 21 February 2014[1] and 23 June 2014.[2]

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1 EPML00961613 relates to MLA70486.

2 EPML01584713 relates to MLA70502.

[2] The owner of the property, Arcturus Downs Limited ('Arcturus'),[3] has objected to the leases and draft authorities on a number of grounds. Two are preliminary points, raised in a General Application filed on 6 March 2018:

1. The application for MLA70486 did not comply with s 245(1) of the *Mineral Resources Act 1989* ('MR Act')[4] or, if it did, the circumstances of the application are now so changed that it represents a different application.

2. Springsure Creek should have made one application for the mining leases and one application for the environmental authorities.

[3] In considering whether to recommend the grant of the mining leases, I must consider the statutory criteria in s 269(4) of the MR Act. Arcturus submits I should recommend against the grant for three reasons:

1. Springsure Creek's past performance has been unsatisfactory (s 269(4)(g)).

2. There will be a substantial and unacceptable adverse environmental impact (s 269(4)(j)).

3. Mining is not an appropriate land use or sound land use management (s 269(4)(i)).

[4] Arcturus also submits the environmental authority conditions ('EA conditions') are inadequate and unrealistic.

Did the application for MLA70486 comply with s 245(1) of the MR Act?

[5] Section 245(1) of the MR Act sets out what is required for an application for the grant of a mining lease. Sections 245(1)(o)(iii)(c) and 245(1)(o)(iv) both require an applicant to provide a statement of its financial and technical resources, acceptable to the mining registrar. As Arcturus points out, the language of the section is mandatory; the provision of the statement is a pre-condition to the grant of a mining lease.

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3 In these reasons, a reference to Arcturus Downs is a reference to the land. 'Arcturus' means Arcturus Downs Limited.

4 (Reprint no. 13C. reprinted as in force on 19 October 2012).

[6] If the mining registrar is satisfied that an applicant is eligible for a mining lease, and has complied with the requirements of the Act, the mining registrar issues a certificate of application.[5]

[7] The mining registrar issued a certificate of application on 21 February 2014.[6]

[8] Arcturus points out that the certificate is in 'the barest of terms', identifying only the time and date when the application was made. It submits that the certificate cannot have a wider effect of certifying, for all purposes, that the application is valid.

[9] Once the certificate of application issues, an applicant has public notice obligations.[7] Those obligations include giving a copy of the application and the mining registrar's certificate to the landowners the subject of the mining lease.[8]

[10] Springsure Creek complied with those obligations. The mining registrar issued a Certificate of Public Notice[9] and Springsure Creek filed Statutory Declarations of Posting and Advertising.[10]

[11] Arcturus submits that Springsure Creek did not give the mining registrar information about its financial and technical resources. It says that Springsure Creek submitted details of the financial and technical resources of its parent company, Bandanna Energy Ltd. Arcturus submits that the letter in support of Springsure Creek's application stated that Bandanna intended to make these resources available to Springsure Creek but there was no actual commitment to make those resources available and there was no evidence of any binding agreement between Bandanna and Springsure Creek. Arcturus submits that Springsure Creek did not provide any information about its own financial position or its own resources. Arcturus submits that, for these reasons, the mining registrar should not have accepted the application and, therefore, the application is invalid.

[12] In support of this proposition, Arcturus relies on *Forrest v Wilson*.[11] The case concerned the failure to lodge a mining proposal or a statement and a mineralisation report, a

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5 *Mineral Resources Act 1989* (Reprint no. 13C) s 252.
6 Ex 3, vol 1, tab 2.
7 *Mineral Resources Act* 1989 (Reprint no. 13C) ss 252A, 252B.
8 Ibid s 252A.
9 Ex 3, vol 3, tab 3 and vol 2, tab 7.
10 Ex 3, vol 1, tab 4 and vol 2, tab 8.
11 *Forrest & Forrest Pty Ltd v Wilson* (2017) 346 ALR 1 at [15].

mandatory requirement under s 74 of the *Mining Act 1978* (WA). Both the mining operations report and the mineralisation report were to be made available for public inspection. The applicant tried to cure the defect by lodging a mineralisation report at a later time.

[13] The High Court in *Forrest* took a very strict view of an applicant's obligations when seeking a mining lease:[12]

> "Regrettably, the Court of Appeal was not referred to, and did not consider, the line of authority which establishes that where a statutory regime confers power on the executive government of a State to grant exclusive rights to exploit the resources of the State, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant. When a statute that provides for the disposition of interests in the resources of a State "prescribes a mode of exercise of the statutory power, that mode must be followed and observed". The statutory conditions regulating the making of a grant must be observed. A grant will be effective if the regime is complied with, but not otherwise."

[14] I accept Acturus' submission that the grant of a certificate should not give rise to a presumption that the facts existed on which the mining registrar could make a decision.[13] But Springsure Creek did lodge a statement of financial and technical resources at the appropriate time and it contained some detail. It is not the case, as it was in *Forrest*, that Springsure Creek failed to provide a statement at all. The circumstances are quite different.

[15] The Western Australian *Mining Act* gave the mining registrar a discretion, albeit in the limited case where no objection had been lodged. The Queensland mining registrar has a significant discretion in issuing the certificate. The High Court recognised the difference between non-compliance with a mandatory requirement and the exercise of a discretion. The majority of the Court stated:[14]

> "It can also be seen that s 75(4a) stands in marked contrast to s 75(3), which was so expressed that its operation depended on the satisfaction of the mining registrar that certain facts exist. The different approach of the Act to decisions of the mining registrar is understandable given that the mining registrar is concerned only with applications which are unopposed."

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12 Ibid at [64] (citations omitted).
13 Ibid at [78] – [79].
14 Ibid at [80].

[16] Here, the mining registrar exercised the discretion after receiving a statement of financial and technical capability. The mining registrar was not exercising a discretion in a jurisdictional vacuum – where there was no statement.

[17] In challenging the mining registrar's certificate, Arcturus is inviting me to find the mining registrar exercised the discretion wrongly. That is a separate question, and not one of jurisdictional error.

Is the application so materially different that it cannot be identified with the original application?

[18] As I have already noted, Springsure Creek's statement of financial and technical capacity was prefaced on it being a wholly owned subsidiary of Bandanna and Bandanna providing the resources and expertise for the project. Bandanna has gone into liquidation so support from Bandanna is no longer available.

[19] Springsure Creek is now the wholly owned subsidiary of Adamelia Resources Pty Ltd. Arcturus submits that, because Springsure Creek is now a wholly owned subsidiary of a completely different entity, the applications are so different from the originals that they cannot be identified as the same applications. In support of this submission, Arcturus referred me to *Cambridge Credit Corporation Ltd v Parkes Development Pty Ltd*[15] and *Mison v Randwick Municipal Council.*[16]

[20] Both of these cases refer to applications under planning legislation. Advertising of planning applications gives the community notice of the type of developments proposed for the area. Any substantial change in a planning application is of interest to the community. So, it is not surprising that a 'substantially different development'[17] or a change which 'significantly altered the development'[18] which was not advertised, would render the application void.

[21] There are many decisions, including decisions in Queensland, where a planning and environment court has decided that the nature of a proposed development is so different that it should be readvertised. *Mison* adds nothing to that general proposition. Presumably, the importance of *Cambridge Credit* is that, like Bandanna, the applicant

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15 [1974] 2 NSWLR 590.
16 (1991) 23 NSWLR 734.
17 *Cambridge Credit Corporation Ltd v Parkes Development Pty Ltd* [1974] 2 NSWLR 590.
18 *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737.

went into liquidation but that fact was not relevant to the decision. Like all other planning cases involving a material change of use, the court was concerned with the nature of the development, not the identity of the developer.

[22] By analogy, the nature of the Springsure Creek application, so far as the community is concerned, has not changed because of a new holding company. The mining plan is the same. It will have the same effect on the environment, whether Bandanna or Adamelia is the holding company.

[23] In its reply submissions, Arcturus submits the fact the application is at the same site and for the same purpose places no emphasis on the public interest in the proper use of State assets and ensuring that all requirements for the grant of a mining lease have been met.[19]

[24] As counsel for Springsure Creek pointed out, the financial viability of an applicant, over the long period of time in which mining applications are often considered, is a moveable feast. That is why I have to consider Springsure Creek's financial and technical capabilities as at today's date,[20] and the Minister for Natural Resources, Mining and Energy must consider those matters as at the date the Minister makes the decision.[21] It is why I have to consider all matters relevant to the grant of the mining lease, as will the Minister, if I recommend the grant. In that context, it cannot be said that the public interest in the proper use of State assets will not be given due consideration.

[25] Arcturus also submits that allowing Springsure Creek to pursue its application in this 'new form' allows it to avoid further objections that might properly be made and objectors are precluded from considering what the applications 'might truly be'.[22] I could understand that submission if the change related to something connected with the physical use of the land – if the noise or dust criteria were affected, or the water management plan changed. It is harder to accept the submission when the issue is the financial viability of the applicant, the details of which are not provided to objectors. Further, as I have noted, an applicant's financial capacity is something that is subject to continual scrutiny and assessment.

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19 Objector's submissions in reply (General Application) filed 26 March 2018 at [8].
20 *Mineral Resources Act 1989* (Reprint no. 13C) s 269(4)(f).
21 Ibid s 271.
22 Objector's submissions filed 6 March 2018 at [33].

[26] Arcturus makes a similar submission about the environmental authorities. It submits that, in the assessment report,[23] the DEHP relied on: Bandanna's involvement in Wiggins Island Coal Export Terminal (WICET); mining taking place on Denlo Creek, a property owned by Bandanna; Bandanna investigating the potential for rehabilitation works along creek lines; and the involvement of Springsure Creek Agricultural Project.

[27] It is true that the DEHP referred to these matters in its report[24] but it is not correct to say that the DEHP relied on this information. Instead, the DEHP conducted its own investigations based on the standard criteria and environmental management considerations.[25] There is no substance to this aspect of Arcturus' submissions.

[28] The application is not void. Whether or not Springsure Creek has the financial and technical capabilities to carry out the project is a matter for me when deciding whether to recommend the grant of lease.

Should Springsure Creek have made one application for the mining leases and one application for the environmental authorities?

[29] Arcturus' submissions in support of the proposition that Springsure Creek should have applied for only one mining lease cite neither legislation nor cases. I will not respond to a mere assertion in the absence of a properly developed argument. I will, however, consider whether Springsure Creek should have made only one application for environmental authorities.

[30] The description of the project for MLA70486 included a reference to the construction of external infrastructure, a conveyor and haul road to the Bauhinia rail line. That infrastructure is the subject of MLA70502. There is no factual dispute that the 'project' in broad terms, consists of a mine and supporting infrastructure. There is also no dispute that Springsure Creek made two applications.

[31] Section 155 of the *Environmental Protection Act 1994* ('EP Act') provided that "… a person may only make a single application for 1 environmental authority (mining activities) for all mining activities that form the mining project."[26]

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23 Ex 3, vol 3, tab 11.
24 Ex 3, vol 3, tab 11, page 406.
25 Ex 3, vol 3, tab 11, page 407.
26 *Environmental Protection Act 1994* (Reprint no. 11A, reprinted as in force on 14 August 2012).

[32] 'Mining activities' was defined to include an activity over land that was required for access to the mining project.[27] 'Mining project' means all mining activities carried out, or proposed to be carried out, as a single integrated operation.[28]

[33] I agree with Arcturus that MLA70486 contemplated a transport corridor and infrastructure would be required, that these components were a mining activity proposed to be carried out as a mining project, that they were necessary for the mine to function, and the overall plan for the mine involved both MLA70486 and MLA70502. It would seem that, by failing to make one application for an environmental authority, Springsure Creek did not comply with the EP Act.

[34] The DEHP's delegate, Mr Loveday, told the court that a decision was made to assess it as two separate applications.[29] That information, although interesting, does not determine the approach I should take.

[35] Springsure Creek has four responses to Arcturus' submission. Firstly, it says that s 155 is permissive, not directive.[30] Secondly, it says there were good reasons why it made separate applications, and I should accept those reasons.[31] Thirdly, it says that Arcturus did not raise the question of validity in its objections and, therefore, cannot raise it now. Fourthly, it says the time for challenging the validity of the underlying decision to issue the draft EA conditions has passed.[32]

[36] Section 155 states that a person 'may only make a single application'. While the word 'may' is usually permissive, the phrase 'may only' must mean that there is only one way to make an application. It is, in effect, a mandatory requirement.

[37] Section 156 deals with the situation where an environmental authority has issued. Section 156(2) states that the holder of an authority 'can not' (sic) apply for a separate environmental authority for an additional mining activity proposed to be carried out as part of the mining project. That section would support Arcturus' interpretation of s 155.

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27 Ibid s 147.
28 Ibid s 149.
29 T1-50, lines 6 to 26.
30 Applicant's submissions filed 19 March 2018 at [129].
31 Applicant's submissions filed 19 March 2018 at [129].
32 Applicant's submissions filed 19 March 2018 at [117].

[38] The EP Act is silent as to the consequences of non-compliance. Arcturus submits, relying on *Forrest*, that because the legislation is mandatory I should recommend against the grant. Springsure Creek submits that this is not a case like *Forrest* because the EP Act is not legislation that creates a statutory regime for the protection of commercially valuable resources against exploitation through which compliance is essential for the grant.[33]

[39] The object of the EP Act is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[34] That protection is to be achieved by an integrated management program that is consistent with ecologically sustainable development.[35] To submit that the EP Act does not create a statutory regime for the protection of commercially valuable resources against exploitation is, I think, a stretch.

[40] The High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* stated that an act done in breach of a condition regulating the exercise of statutory power will not necessarily make the act invalid. Whether the act is invalid depends on whether there is a legislative purpose to invalidate it.[36]

[41] There are numerous opportunities within the EP Act regime for the imposition of conditions. The mining registrar has a discretion. I may make recommendations and the Minister for Environment and Science retains a discretion to refuse or allow the issue of the environmental authority.[37]

[42] Section 156(4) of the EP Act states that nothing in the section prevents the holder from applying to amend or replace the authority. Once an environmental authority issues it is not necessarily set in stone.

[43] These provisions indicate that the legislative purpose of the EP Act is to enable the DEHP to respond to environmental issues as they arise. Although the intention is that all issues relevant to mining should be the subject of only one application, the regime has a flexibility that suggests non-compliance would not render an application void if the

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33 Applicant's submissions filed 19 March 2018 at [125].
34 Ibid s 3.
35 Ibid s 4(1).
36 (1988) 194 CLR 355 at [91].
37 *Environmental Protection Act 1994* (Reprint no. 11A) s 225.

mischief can be otherwise addressed. I agree with Springsure Creek that, given the statutory regime that exists under the EP Act, there is no legislative purpose in finding that non-compliance with s 155 results in invalidity.

[44] Section 93 of the *Strategic Cropping Land Act 2011* ('SCL Act') states that an environmental authority cannot be issued until an SCL protection decision has been made. 'Environmental authority' is defined by reference to the EP Act. The EP Act makes a clear distinction between a draft environmental authority, which is what has issued here, and an environmental authority. No environmental authority was issued prior to the SCL decision.

[45] Arcturus say that this distinction doesn't matter, because Mr Tarlington's evidence highlights the lack of appropriate consideration to relevant matters.[38] As with Arcturus' argument about the decision on the mining registrar, this is no longer an argument about the validity of the draft environmental authority because of a failure to comply with legislative requirements. It is an attack on the substance of the DEHP's decision. Whether or not the draft environmental authorities are appropriate is a matter I must consider in light of Arcturus' objections.[39]

[46] Both Springsure Creek and the Chief Executive submit that the project was not one mining project. Section 113 of the EP Act defines a 'single integrated operation' by reference to four pre-conditions. The first of those pre-conditions is that the activities are carried out under the day to day management of a single responsible individual.

[47] Robert Johansen is the managing director and company secretary of Springsure Creek. He gave evidence that Springsure Creek decided the best way to manage the transportation of the coal was by an independent contractor.[40] Springsure Creek asked Toll Mining Services to provide a proposal for the provision of those services. In cross-examination, Mr Johansen stated that he expected that the transport operator would be responsible for that part of the operation, that it would appoint a supervisor, and that Springsure Creek would not interfere in the management of that aspect of the operation.[41] His evidence was not challenged.

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38 Objector's submissions in reply filed 26 March 2018 at [32].
39 Ibid ss 222 and223.
40 Ex 3, vol 5, tab 34, page 1170.
41 T3-30, lines 5 to 40.

[48] Arcturus submitted that I should not accept Mr Johansen's evidence because Springsure Creek knew that it needed a separate mining lease application before it submitted the first environmental authority application. That may be true, but Springsure Creek also knew that it did not intend to operate as one single integrated operation and Arcturus provided no basis for rejecting that evidence. I accept that the proposed mine was not a 'single integrated operation' within the meaning of s 113 of the EP Act. Therefore I find that Springsure Creek did not have to make a single application for an environmental authority.

[49] I now turn to the question of whether or not I should recommend the grant of the mining lease applications to the Minister for Natural Resources, Mines and Energy. In these considerations, I am guided by s 269(4) of the MR Act, and in particular, subsections (a) to (m). I will deal with each in turn.

Section 269(4)(a) – compliance with provisions of the MR Act

[50] I have recorded that the mining registrar issued a certificate of application and a certificate of public notice. Despite Arcturus' objections, I find that those certificates are sufficient evidence that Springsure Creek has complied with the MR Act.[42]

Section 269(4)(b) – the land is mineralised or there is another appropriate use

[51] According to Springsure Creek's application for the leases, the project contains an estimated total resource of 309 million tonnes of coal.[43] MLA70468 relates to mineralised land. MLA70502 is the transport corridor that enables extraction of the coal in MLA70468. It is an appropriate use of that land.

Section 269(4)(c) – acceptable level of development and utilisation of the mineral resources within the area applied for

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42 See, for example, *Hancock Galilee Pty Ltd v Currie & Ors* [2017] QLC 35.

43 Ex 3, vol 1, tab 1, page 151.

[52] Springsure Creek proposes to extract 5 million tonnes per annum (Mtpa) initially, and 11Mtpa thereafter for a 30 year period.[44] Assuming a five-year 'initial' period, the proposed rate of production indicates that the mineral resources will be developed and utilised to an acceptable level.

Section 269(4)(d) – the land and surface area is appropriate

[53] The area subject to the mining lease applications is 10,736 ha.[45] The mine plan shows that all of that land will be the subject of mining activity.[46] The application states that the proposed area and shape is appropriate for successful extraction of the resource and a sufficient mine life to give a reasonable assurance of financial return while taking into account land use and land management requirements[47] and I have no reason to form a contrary view.

[54] The surface area applied for is appropriate.

Section 269(4)(e) – the term is appropriate

[55] Springsure Creek has applied for a 30 year term[48] but the operational life of the mine is 40 years.[49] The Department of Natural Resources and Mines ('DNRM'), in the SCL protection conditions reasons, expressed some concern about whether the mine will be decommissioned and the land restored within the 30-year period:[50]

> "The application states that the mine will be decommissioned and all impacts restored within 30 years. This does not seem a likely duration for the mining activity and particularly the duration of its impacts given the estimated life of the resource extraction, the years required to achieve site rehabilitation following mine closure and also the potential for the mining period to be prolonged as a result of fluctuating market conditions and climactic events."

[56] In fact, the DNMR states that the duration of the mining activity cannot be established with any certainty.[51]

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44 Ex 3, vol 1, tab 1, page 18.
45 Ex 3, vol 1, tab 1, page 3.
46 Ex 3, vol 1, tab 1, page 107.
47 Ex 3, vol 1, tab 1, page 100.
48 Ex 3, vol 1, tab 1, page 3.
49 Ex 3, vol 7, tab 37, page 1488.
50 Ex 3, vol 4, tab 17, page 606.
51 Ibid.

[57] Mining leases can be renewed.[52] In considering whether to renew a lease, the Minister has to be satisfied, largely, of the factors that apply when considering the initial grant.[53] Because of the uncertainty in the rehabilitation criteria and methodology, there may be sound reasons to limit the initial grant of the mining lease. Further, a renewal of a mining lease triggers a fresh right of compensation, and both Arcturus and Springsure Creek are likely to be in a better position to assess compensation after the mine has been operating and the extent of subsidence is known.

[58] An entity proposing a major investment in a mining operation is entitled to some certainty that it will have enough time to realise its investment. It seems odd that Springsure Creek does not want a lease that covers the life of the mine. It may be that a longer term is appropriate but it is Springsure Creek who has requested the shorter term and bears the financial risk of the term being insufficient to extract the resource.

[59] I do not have to find that each element of s 269(4) has been satisfied in order to recommend that a mining lease be granted.[54] The difference between the term sought and the potential life of the mine is not a reason to recommend against grant.

Section 269(4)(f) – Springsure Creek's financial and technical capabilities

[60] There was no challenge to Springsure Creek's technical capability but Arcturus questions whether Springsure Creek has the necessary financial capabilities to carry on the mining operations under the proposed mining lease.[55]

[61] I received and read details of Springsure Creek's financial arrangements, the redacted version of which was available to Arcturus.[56] Mr Johansen also gave evidence about Springsure Creek's financial capability.[57] I am satisfied that Springsure Creek does have the financial capability to carry on the mining operations under the proposed leases.[58]

Section 269(4)(g) – past performance

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52 *Mineral Resources Act 1989* (Reprint no. 13C) s 286.
53 Ibid s 286A.
54 *Re Kenneth James Willis* [2001] QLRT 29 at [43].
55 Objector's submissions in support of General Application filed 6 March 2018 at [15].
56 Ex 21.
57 T3-18 to T3-19.
58 *Mineral Resources Act 1989* (Reprint no. 13C) s 269(4)(f).

[62] Arcturus points to a number of matters which, it says, means that Springsure Creek's past performance has not been satisfactory:

1. It was prejudiced through the time and cost of challenging the issue of the mining registrar's certificate for MLA70461 through judicial review.

2. Arcturus suffered economic and personal prejudice due to Springsure Creek's failure to plug drill holes.

3. Springsure Creek's explanation of its defaults deflects and trivialises Arcturus' complaints, instead of recognising that it has persistently failed to act in a manner commensurate with significant rights to exploit public assets.

4. Springsure Creek's explanations cannot satisfy me that it will comply with its statutory obligations in the future.

[63] In 2012, Springsure Creek lodged MLA70461 over property owned by five different landowners, one of which was Arcturus. One owner filed an application for judicial review of the mining registrar's decision to issue a certificate of application. Arcturus was not a party to the proceeding and did not provide any affidavits in support of the application.[59]

[64] The application was settled and the mining registrar repealed the decision to issue the certificate. The mining registrar rejected the application because: the application did not say whether any of the properties were subject to erosion control works; Arcturus was not listed as the owner of one of the affected properties; the list of affected properties was not consistent with the map of the mining lease as pegged; and the application did not contain a description or location of restricted land by compass bearing and distance.[60]

[65] Arcturus has not provided any evidence of the time and money it spent challenging the issue of the mining registrar's certificate for MLA70461 and it is difficult to see how it could have incurred any loss, given it was not a party to the application.

[66] Arcturus now says that Mr Johansen's explanation of the 'serious omission' – the failure to identify whether the land was subject to erosion control works – is self-serving and

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59 Ex 3, vol 5, tab 34, page 1158 at [67].
60 Ibid at [71].

not a proper explanation of why Springsure Creek failed to comply with its statutory obligations in the first place.[61] It further notes that, Mr Johansen appears to divert blame for the omission to officers who are no longer employed by Springsure Creek. Arcturus says that Mr Johansen does not directly state that unacceptable performance has been proactively dealt with and ignores the fact that Springsure Creek went into voluntary administration in 2014.

[67] None of this was put to Mr Johansen in cross examination. It is true that the employees and officers of Springsure Creek responsible for the preparation of the rejected MLA70461 are no longer employees or officers of Springsure Creek.[62]

[68] Springsure Creek made a mistake in its earlier application. The mistake was challenged, the mining registrar withdrew the certificate and Springsure Creek had to start again. Arcturus' pejorative comments, by themselves, do not elevate an error into wilful and dismissive behaviour. Something more is required and Arcturus did not provide any evidence that persuaded me to take a different view.

[69] Springsure Creek carried out exploration on Arcturus Downs in 2008. Samuel Bradford, who is the manager of Arcturus, exhibited a copy of a complaint he made in 2012 about Springsure Creek's operations.[63] Arcturus says the complaint is notable because, firstly, a report was necessary, secondly, the number of breaches and, thirdly, Springsure Creek's apparent lack of concern. It says that the breaches were significantly serious for the DEHP to issue a warning.[64]

[70] Mr Johansen gave evidence that 12 of the offending bore holes were drilled by others, before Springsure Creek was involved in the land.[65] He gave uncontradicted evidence that Springsure Creek attended to the 2012 complaints.[66] Arcturus says this is not good enough, because Mr Johansen does not acknowledge the seriousness of the lack of past performance and that Springsure Creek only attended to the remediation after the complaints were made.

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61 Objector's submissions filed 28 February 2018 at [55].
62 Ex 3, vol 5, tab 34, page 1159 at [72] and[73].
63 Ex 3, vol 4, tab 25 at page 792.
64 Objector's submissions filed 28 February 2018 at [55].
65 T3-15, lines 12 to 28.
66 T3-37, lines 30 to 33.

[71] Mr Johansen was asked to explain why there was a delay. He offered this response: "I can't give a detailed explanation. I can give you some circumstances that occurred at that time which I infer may have had some bearing on why that happened. I can do that if you like?"[67]

[72] Counsel for Arcturus did not want to hear what Mr Johansen wanted to say.[68] Applying the rule in *Jones v Dunkel*[69] I am entitled to infer that Mr Johansen's answer would not support Arcturus and the evidence shows this to be the case. Arcturus did not respond to messages left for Mr Bradford[70] and denied access to Springsure Creek for some time.[71] Springsure Creek's response to the complaints was also delayed by the weather, as Mr Bradford conceded.[72]

[73] The DEHP's warning notice is also instructive. It notes an aggravating circumstance that the complainants (including Arcturus) made it difficult for Springsure Creek and the DEHP to access the property to rehabilitate the drill holes. It noted, as mitigating circumstances, that the complaints were not made until three years after the holes were drilled. It noted that the breaches did not result in environmental harm. The DEHP also recorded that Bandanna was enthusiastic about resolving the issue immediately it was aware of the problem and before the 2012 complaint.[73] That does not indicate a lack of concern.

[74] In light of these comments, it is difficult to accept that the breaches were serious. Mr Bradford confirmed this to be the case in his oral evidence:[74]

> "…there wasn't much significance in terms of your concern about the remediation or the rehabilitation of the boreholes?--In answering that question, it was more to do with – we were concerned about the running of the business. We were happy to let them – exploration company – Bandanna do what they had to do to fulfil their obligations. We were focusing on what was important to – or what I'm employed to do is – is focus on – and my – my main in – main focus is to run the business, grow crops and [indistinct]".

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67 T3-37, lines 22 to 25.
68 T3-37, line 27.
69 (1959) 101 CLR 298.
70 Ex 4.
71 Ex 24.
72 T1-66, lines 28 to 29.
73 Ex 4.
74 T1-68, lines 15 to 23.

[75] Arcturus also points out that Springsure Creek was late in sending its annual reports to the DEHP. It says that this breach, together with the other breaches, indicates a 'cavalier attitude'. It points out, once again, that Mr Johansen has not tried to explain how the breaches occurred, or how inappropriate conduct will be avoided in the future. It notes that Mr Johansen has not provided any detailed information on the systems that existed in 2008, or 2012, or now, which address the issue of compliance.[75]

[76] Mr Johansen was appointed as director and secretary to Springsure Creek in June 2016.[76] He was a non-executive director of Springsure Creek and Bandanna from October 2008 to January 2015.[77] It is apparent from the ASIC extracts for both Springsure Creek and Bandanna that the companies experienced significant change between 2008 and today, with multiple appointments of administrators and office bearers. Mr Johansen prepared his affidavit from personal knowledge and the company records that existed[78] which, he said, were very disorganised.[79] He said that he was unaware of any notification to the applicant based on these company records and his own knowledge as a non-executive director at the time.[80] It would be surprising, in those circumstances, if Mr Johansen was able to detail Springsure Creek's past practices or better explain how the breaches occurred.

[77] Mr Johansen does, however, confirm that Springsure Creek can, and will, comply with its obligations under the mining leases, environmental authorities and the Strategic Cropping Land decision.[81] Again, I note that there was no direct attack on Mr Johansen's credibility.

[78] That Springsure Creek will comply with its commitments has support from its actions since June 2016. Springsure Creek has drilled other bore holes which have been promptly and properly rehabilitated.[82] There have been no further complaints.[83] The DEHP's inspection in October 2015 identified no areas of non-compliance.[84]

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75 Objector's submissions filed 28 February 2018 at [61].
76 Affidavit of Damien John Alroe filed 6 March 2018, Ex DJA1
77 Ex 3, vol 5, tab 34, page 1147 at [11] – [12].
78 Ex 3, vol 5, tab 34, page 1147 at [13].
79 T3-37, lines 1 to 13.
80 T3-36, lines 38 to 45.
81 Ex 3, vol 5, tab 34, page 1152 at [40].
82 Ex 3, vol 5, tab 34, page 1161 at [83]; and Ex 4.
83 Ex 3, vol 5, tab 34, page 1161 at [83].
84 Ex 3, vol 5, tab 34, page 1161 at [80].

[79] Springsure Creek's past conduct may not have reached the highest standards, but it does not have to be perfect.[85] I am not convinced that the minor breaches detailed by Arcturus, even when viewed cumulatively, are sufficient to justify a recommendation to refuse a mining lease application.

Section 269(4)(h) – any existing permits

[80] I have not been directed to any holders of existing exploration permits or mineral development licences that would be affected by these mining leases.[86]

Section 269(4)(i) – sound land use management

[81] Arcturus submits that I cannot be satisfied the land use is appropriate because there will be a permanent impact on strategic cropping land. Its submissions conflate and confuse questions of sound land use management and adverse environmental impact. To the extent it is possible, I will deal with each issue separately.

[82] A principal objective of the MR Act is to encourage and facilitate the mining of minerals and responsible land care management.[87] My task is to weigh up the advantages and the disadvantages of each potential use and decide whether, on balance, the mining use is to be preferred.

[83] The parties agree that Arcturus Downs is strategic cropping land. Mr Bradford described his current farming practice as large scale extensive grain cropping using wide machinery. The spray rig he uses has a 100ft boom, the air seeders are 60ft wide and the two new harvesters have 40ft wide cutting fronts. His aim is to cover as much ground as possible in the shortest possible time and he says that even the existing contour banks make that difficult.[88] The expert witnesses concede steeper and less even slopes, and longer and more contour banks, that will result from the proposed mine may change farming operations.[89]

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85 See, for example, *Deeley v Tucker* [2008] QLC 93 at [28] to [35].
86 *Mineral Resources Act 1989* (Reprint no. 13C) s 269(4)(h).
87 Ibid s 2(d).
88 Ex 3, vol 4, tab 25, pages 790-791.
89 T2-73, line 46 to T2-74, line 12.

[84] Obviously, Arcturus would prefer to continue its dry cropping operations undisturbed and unchanged. However, the land is also a significant coal resource which Springsure Creek believes can be mined economically.

[85] An environmental authority for a resource activity cannot issue until an SCL protection decision has been made.[90] An SCL protection decision must identify the permanent and temporary impact on the land of carrying out the resource activity.[91]

[86] The DNMR issued an SCL protection decision on 26 February 2014.[92] It identified two areas of permanent disturbance: 62 ha related to mine surface infrastructure and mine surface facilities; and 7064 ha associated with subsidence in the area A on plan SCLRD2013/000146. That plan shows that most of Arcturus Downs is within area A.[93]

[87] Because there would be a permanent impact on the strategic cropping land, the DNRM imposed a mitigation payment. It applied the mitigation rate of the Central Highlands Isaac of the Western Cropping Zone of $4750/ha. Springsure Creek will have to pay a mitigation payment of $33,848,500.[94]

[88] I accept that this money will not be paid to Arcturus but that is not the point of a mitigation payment.

[89] The purpose of the SCL Act is not just to protect land that is highly suitable for cropping.[95] If that was its sole purpose, then no development that adversely impacted strategic cropping land would ever be permitted. Another purpose of the SCL Act is to manage the impacts of development on strategic cropping land.[96]

[90] The SCL Act sets out the way that the two purposes could be achieved. Land would be identified as likely to be highly suitable for cropping (SCL).[97] Protection areas and management areas for strategic cropping land would be established.[98] Principles to

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90 *Strategic Cropping Land Act 2011* s 93.
91 Ibid s 99(1)(a).
92 Ex 3, vol 4, tab 17, page 581.
93 Ex 3, vol 4, tab 17, page 619.
94 Ex 3, vol 4, tab 17, page 582.
95 *Strategic Cropping Land Act 2011* s 3(a).
96 Ibid s 3(b).
97 Ibid s 4(1)(a).
98 Ibid s 4(1)(c)(i).

protect strategic cropping land, and manage the impacts of development on it, would be established.[99]

[91] Land in a protected area could not be developed unless there were exceptional circumstances.[100] To the extent that land is in a management area, and the impacts are permanent, the SCL Act requires mitigation for the land.[101]

[92] The inescapable conclusion is that the SCL Act specifically contemplated that, by allowing development, some strategic cropping land in management areas would be lost. Through the imposition of the mitigation payment, the Act acknowledges the permanent loss of productive capacity is the loss of a public resource for which the State should be compensated.[102] The Act also provided a strategy to minimise any loss by requiring parties to use their best endeavours to rehabilitate the land.

[93] It was never a function of the Act to require parties to return the land to its pre-existing state where the impacts were permanent, nor to prevent development in strategic cropping land if there were permanent impacts which meant the land could not be returned to its pre-existing state. The best result in those circumstances was that the State would receive compensation and land would be returned to the best possible condition, given the permanent impacts.

[94] Arcturus Downs was not in a protected area. It was in a management area. Strategic cropping land could be permanently affected by the proposed mine and still be an acceptable land use under the SCL Act.

[95] The loss of strategic cropping land does not mean that the mine is not sound land use management. The proposed mine will produce significant amounts of high quality coal which will generate income for the local area and the State of Queensland. Eventually, the land will be returned to agriculture. Although the method of production will be different, and perhaps more difficult, and the yield may be different, agricultural land will not be lost to the State. The State will be compensated for the loss of strategic cropping land through the mitigation payment.

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99 Ibid s 4(1)(c)(ii).
100 Ibid s 4(3)(a).
101 Ibid s 4(4).
102 *Strategic Cropping Land Act 2011* Chapter 5.

[96] The DNRM, being entrusted with the SCL decision, considered the loss of strategic cropping land was appropriate given the potential benefits. I have the same view.

Section 269(4)(j) – adverse environmental impacts

[97] The SCL Act was repealed by the *Regional Planning Interests Act 2014* ('RPI Act'). Section 100(3) of the RPI Act is in the same terms as s 290(3) of the SCL Act. It requires a holder to use all reasonable endeavours to rehabilitate all impacts on the land from underground coal mining.

[98] Arcturus submits that an analysis of the obligations under s 100(3) requires three steps. What is 'reasonable endeavours'? What is 'rehabilitation of the land'? What is 'all impacts'? [103] None of these terms is defined by the RPI Act.

[99] By applying the 'usual definitions' to these concepts, Arcturus submits that s 100(3) means that Springsure Creek is required to take all steps available (or to do whatever is necessary) to return the land to its former condition, rehabilitating *all* impacts, whether or not the impacts are permanent or temporary. It says that, because this is not possible, I should not recommend the grant of the mining leases.[104]

[100] Both the DNRM and the DEHP recognised this proposal may result in adverse environmental impacts. In the SCL protection conditions reasons for decision, the DNRM noted "...there are limited opportunities for the proponent to avoid its surface and underground activities from impacting on the SCL".[105] The DEHP noted that the proposal would result in a total of 7,050 ha of land being subsided.[106]

[101] Generally, the adverse environmental impact Arcturus complains of relates to the loss of strategic cropping land. The full extent of the environmental impacts are not yet known but both the DNRM and the DEHP have imposed conditions that require Springsure Creek to develop a number of management plans to limit, reduce or manage the environmental harm. Springsure Creek has acknowledged that if the objectives contained within the conditions and the management plans cannot be achieved mining should not

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103 Objector's submissions filed 28 February 2018 at [88].
104 Objector's submissions filed 28 February 2018 at [89] – [105].
105 Ex 3, vol 4, tab 17, page 616.
106 Ex 3, vol 3, tab 11, page 412.

proceed although Mr Johansen believes that the economics of the project are such that any rehabilitation requirements will be achievable.[107]

[102] Because I have found that the loss of strategic cropping land is not a reason to recommend against the grant under the criterion of sound land use management, it follows that it is not a reason to recommend against the grant under the criterion of adverse environmental impact. As no other significant adverse environmental impacts have been identified, there is no reason to recommend against the grant of a mining lease under s 269(4)(j).

[103] Arcturus submits that, even if I find that Springsure Creek can avoid restoring Arcturus Downs on the basis that no rehabilitation can ever achieve the outcome required by s 100(3) of the RPI Act, I should still recommend against the grant.[108]

[104] I have not found that Springsure Creek can avoid restoring Arcturus Downs on the basis that no rehabilitation can ever achieve the outcome required by s 100(3) of the RPI Act. So far, I have simply found that the submissions urging against a recommendation are unpersuasive.

[105] Arcturus complains that Springsure Creek has shifted its position. It says that Springsure Creek initially stated it would ensure no net loss of agricultural productivity and now it does not accept that it is required to return the land to a 3% slope. Arcturus submits that Springsure Creek's position changed after the expert meeting took place and it has now 'seized upon an entitlement to return the SCL to land with an 8% slope in direct contradiction of its previous statements and promises'.[109]

[106] The language of the submission is unnecessarily emotive. Springsure Creek has not 'seized' on anything. A careful reading of Springsure Creek's application shows that it did not commit to returning the land to a 3% slope. It committed to avoid, if possible, impacting land, to minimising the impacts of mining and to developing best practice land management techniques.[110] Mr Johansen said that Springsure Creek would be guided by experts in designing a soil conservation management plan:[111]

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107 T3-36, lines 1 to 23.
108 Objector's submissions filed 28 February 2018 at [106].
109 Objector's submissions filed 28 February 2018 at [111].
110 Ex 3, vol 2, tab 5, page 283.
111 T3-12, lines 29 to 31.

> "We will rely on…the preparation of a rehabilitation plan informed by expert opinion about what needs to be done, in order to rehabilitate the area, to comply with the conditions that are imposed on us".

[107] Any change in the experts' opinion is irrelevant. The information they had available changed through the course of preparing for the hearing and, as Springsure Creek implements the various management plans, the information available will change again. Experts must revisit their assumptions and advice as new information comes to hand. In any event, as the experts were informed, the extent of the rehabilitation obligation was a question for me to decide.[112]

[108] In oral submissions, counsel for Arcturus put this submission in a different way. She submitted that Arcturus is not saying that the land should be put back exactly, but it should be put back in its entirety so that, overall, Arcturus Downs remains strategic cropping land. Counsel submitted that meant that there could be no land on Arcturus Downs with a slope that exceeds 8% because the rehabilitation must refer to what existed before mining, that being the 'baseline reference'.[113]

[109] Arcturus Downs already has areas of land with slopes of between 4% and 6%. Some areas, around the watercourses, have slopes exceeding 10%.[114]

[110] The amount of land that will have a slope greater than 3% will increase after mining.[115] In some cases, the increase in slope occurs in areas where the slope is already greater than 3%.[116] If I adopt the 'baseline reference' suggested by Arcturus, then Springsure Creek's task cannot be to use reasonable endeavours to ensure that Arcturus Downs has no slope greater than 3% across the entirety of the land because the land does not currently exist in that state.

[111] I will consider the relationship between the SCL protection decision conditions and the draft EA conditions separately but I am still not persuaded that there is any adverse environmental impact that persuades me to recommend against the grant.

Section 269(4)(k) – prejudice of public right and interest

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112 T2-25, lines 13 to 14.
113 T4-4, lines 19 to 27.
114 Ex 3, vol 5, tab 31, page 1119.
115 Ex 3, vol 5, tab 31, page 1120.
116 Ex 3, vol 5, tab 31, pages 1103-1104.

[112] I have no evidence that any public right or interest will be prejudiced.

Section 269(4)(l) – any good reason to refuse the grant of a mining lease

[113] In its application, Springsure Creek referred to the agricultural co-existence committee:[117]

> "SCC intends to integrate mining and agriculture in a mutually beneficial and sustainable partnership. The objectives of SCC's coexistence policy are:
>
> …
>
> - To maintain or improve agricultural productivity on properties directly impacted by the Project.
>
> …
>
> SCC's commitments to coexistence include:
>
> - To establish and fund the Springsure Creek Agricultural Project which includes development of the Springsure Creek Agricultural Plan;
> - To invest in an Agricultural Coexistence Research Committee;
>
> …
>
> - To support the Agricultural Coexistence Research Committee as stewards of the Springsure Creek Agricultural Plan allowing the committee to govern the implementation of the Plan…"

[114] Arcturus submits that the committee has, in fact, given the project credibility and that the SCL decision maker relied on the existence of the committee when framing the SCL protection conditions. By inference, it submits that, because the committee is not meeting, that credibility is lost.

[115] Mr Bradford gave evidence that he perceived Springsure Creek intended that the establishment of the agricultural co-existence committee would reflect credibility on the project and deflect criticism from landholders.[118] At the same time, he criticises Springsure Creek for letting the committee lapse during the company's voluntary administration and for 'putting the cart before the horse' and 'encouraging a perception' that the project had already been approved.[119]

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117 Ex 3, vol 14, tab 38, page 24.
118 Ex 3, vol 4, tab 25, page 783.
119 Ibid.

[116] Mr Johansen gave evidence that the work of the committee was placed on hold while Springsure Creek was in voluntary administration and pending the outcome of these proceedings.[120] That is understandable in the circumstances. In any event, he has signalled Springsure Creek's intention to revive the committee if the mining leases are granted.[121]

[117] I do not agree that the SCL decision maker relied on the existence of the committee when making the decision. Certainly, the reasons for decision refer to the committee, but as an adjunct to the detailed reports and management plans required. There is no direct reference to the committee in any of the conditions and none of the conditions relies on its existence.[122]

Section 269(4)(m) – the proposed mining operation is an appropriate land use

[118] Progressively, Arcturus Downs will be unavailable for dry cropping farm activities for many years. It will may never return to the level of crop production that exists now. Arcturus will, likely, have to change the way it uses its land. But there is a significant coal resource to be extracted, which will have economic benefit to the State.

[119] Taking into consideration the current and prospective uses of the land, the proposed mining operation is an appropriate land use.

The conditions

[120] In deciding whether to recommend the grant of the mining lease applications, I must also consider the environmental conditions. Since Arcturus Downs is strategic cropping land, I must consider the EA conditions in light of the SCL decision conditions.

[121] The RPI Act repealed the SCL Act after the SCL decision was made. The purpose of the Act, and its structure, was broadly similar to the SCL Act.

[122] The RPI Act provides, in s 100(4), a power to impose other conditions on the lease or authority that are not inconsistent with the conditions in the Act. Section 290(4) of the SCL Act was in the same terms.

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120 Ex 3, vol 5, tab 34, page 1177.
121 Ibid pages 1177 and 1178.
122 Ex 3, vol 4, tab 17, pages 584 to 591.

[123] Under the transitional provisions of the RPI Act an SCL decision is taken to be a regional interests development approval.[123] An SCL protection condition is taken to be a regional interest condition[124] and stops being a condition of an environmental authority.[125]

[124] Arcturus submits that the SCL protection decision conditions and the draft EA conditions are inconsistent because the SCL decision's definition of 'rehabilitate' is inconsistent with the plain meaning of 'rehabilitate'.

[125] The SCL protection decision conditions, in broad terms, are:

1. By Condition 2, Springsure Creek must use all reasonable endeavours to rehabilitate all impacts on the land from underground coal mining carried out under the lease.[126] This condition was imposed by, and mirrors, s 230(3) of the SCL Act.

2. Condition 3(f) required Springsure Creek to 'progressively restore or rehabilitate any disturbed cropping land, with the necessary restoration or rehabilitation works being completed promptly following disturbance'.[127]

3. By Condition 5, prior to the commencement of mining operations, Springsure Creek had to submit a soil conservation management plan.[128]

4. By Condition 6, the objectives of the soil conservation management plan are to be:
   (a) No worsening of the existing levels of erosive soil loss from land within or downslope of the mining tenement;
   (b) Minimise, to the greatest possible extent, the degradation of soils or land within the mining tenement;
   (c) No degradation of soils or land outside the mining tenement.[129]

5. Condition 6 included a table of constraints and post-disturbance treatments. For area A, the post-disturbance treatment was to promptly rehabilitate all land affected by subsidence once that subsidence has occurred, with the rehabilitation of the affected areas to allow them to permanently support the best possible class of agricultural land.[130]

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123 *Regional Planning Interests Act 2014* s 102(2).
124 Ibid s 102(4).
125 Ibid s 102(5).
126 Ex 3, vol 4, tab 17, page 584.
127 Ex 3, vol 4, tab 17, page 585.
128 Ibid.
129 Ibid.
130 Ex 3, vol 4, tab 17, page 586.

[126] The glossary to the SCL protection decision defines some important terms:

1. 'Best possible class of agricultural land': When rehabilitating cropping land, all reasonable measures must be applied to return that land to a class of agricultural land equivalent to that prior to the subject development taking place. The applicable predevelopment class of agricultural land are analogous to the GQAL[131] classes (A,B, C1 & C2) depicted in Figure 6 of the *Springsure Creek Coal Mine Project Soils and Land Suitability Assessment*.[132]

2. Agricultural land class and subclass are as defined in Table 7 of the *Guidelines for Agricultural Land Evaluation in Queensland* (DNRM & DSITA, 2013) or a future edition of that publication.[133]

3. Degradation includes subsidence and an example of degradation is an increase in the slope gradient where the final gradient is still less that the applicable zonal threshold.[134]

4. Rehabilitate means the return of disturbed strategic cropping land or potential strategic cropping land to a stable, productive and self-sustaining condition that supports the best possible class of agricultural land.[135]

5. Restore means to return strategic cropping land or potential strategic cropping land that is altered or disturbed by a mining-related activity to its physical, chemical and biological condition prior to that alteration and disturbance.[136]

[127] The rationale for the conditions was:

1. The avoidance and minimisation SCL principles in s 11 of the SCL Act.

2. Post-disturbance treatments are in order to minimise the impacts and to restore the land to its pre-development condition for temporary impacts.[137]

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131 Good Quality Agricultural Land.
132 Ex 3, vol 4, tab 17, page 592.
133 Ex 3, vol 4, tab 17, page 593.
134 Ibid.
135 Ex 3, vol 4, tab 17, page 597.
136 Ibid.
137 Ex 3, vol 4, tab 17, page 601.

[128] The DNRM gave reasons for its decision. It decided that permanent impacts on strategic cropping land were potentially permissible to the extent that:

1. All reasonable endeavours are undertaken to rehabilitate all impacts on the land from underground mining (not necessarily to restore the land impacted by underground mining to its predevelopment condition);

2. Impacts of all resource activities are avoided or minimised to the greatest extent practicable;

3. Any unavoidable permanent impacts on the land are mitigated.[138]

[129] I have already found that the SCL Act specifically contemplated that, by allowing development, some strategic cropping land in management areas would be lost. The Act provides a strategy to minimise the loss by requiring parties to use their best endeavours to rehabilitate the land. If there were permanent impacts which meant the land could not be returned to its pre-existing state, the best result was that the land would be returned to the best possible condition.

[130] That was the effect of the SCL protection decision. The DNRM's reasons for decision confirm that it took this approach, consistent with the objects of both the SCL Act and the RPI Act:

> 1. "…slopes in areas of existing cropped land may be induced by subsidence to exceed 4% which is the tipping point for the conservation of soils under cropping.[139]
>
> 2. Impediments to cropping likely to be introduced by these expected changes include:
>
> - Increased difficulty and reduced efficiency in operating broad-width agricultural equipment on more irregular and complex slopes.[140]
>
> 3. Impediments to cropping likely to result from these impacts include:
>
> - Reduced long term productivity in areas subject to soil loss due to reduced topsoil depth and poorer quality of underlying subsoils.
>
> …

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138 Ex 3, vol 4, tab 17, pages 603-604.
139 Ex 3, vol 4, tab 17, page 608.
140 Ex 3, vol 4, tab 17, page 609.

- Reduced area of SCL available due to increase in the area of paddocks available occupied by soil conservation.

- Alienation of land from cropping where subsidence-induced tilt results in slopes approaching and exceeding 4%...

- Localised alienation of land from cropping where the disruptions to the predevelopment landform makes ongoing cultivation impractical:[141]

> 'It is evident from the impacts recognised in this report that subsidence will result in changes to the pre-development landform and drainage patterns across the MLA that will remain in perpetuity.
>
> It is evident from some of the approaches to remediation put forward in the application, that measures taken to minimise adverse impacts of subsidence on the soil resource and agricultural land uses will additionally result in irrevocable changes to the depth and quality of topsoil at particular sites.
>
> It is evident that post-mining cropping enterprises will face additional complexities and difficulties that are directly attributable to underground mining and consequent subsidence that will remain in perpetuity.
>
> It is evident that some areas of SCL that were previously available for cropping will no longer be available for cropping due to the re-engineering of drainage patterns and soil conservation measures that will need to be implemented in order to conserve the soil resource given the increases in erosion hazard attributable to subsidence-led slope increases and landform complexity'[142]

4. These changes to the landform, soils and drainage characteristics of the landscape are unable to be completely reversed by any conceivable means provided within the application. These changes therefore constitute a permanent impact on SCL… [and] will result in enduring complexities and difficulties for cropping enterprises that did not exist prior to the land being subsided. These enduring impacts will also constitute a permanent impact on the SCL. The underground mining activity proposed and the necessary approaches to remediating and minimising its adverse consequences…are therefore considered to result in permanent impacts on SCL.[143]

5. Given the pervasive extent of the SCL across the MLA70486, there are limited opportunities for [Springsure Creek] to avoid its…activities from impacting on SCL.[144]

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141 Ex 3, vol 4, tab 17, page 610.
142 Ex 3, vol 4, tab 17, page 611.
143 Ex 3, vol 4, tab 17, page 615.
144 Ex 3, vol 4, tab 17, page 616.

6. …the extent of SCL to be impacted by mine subsidence is unavoidable if the resource is to be extracted by the proposed extraction methods.[145]

7. The application report does list generalised approaches to remediating impacts, some of which themselves result in impacts which may be better avoided (for example, stripping topsoils from cropping lands to fill in depressions and reduce the steepness of the slopes long panel margins that have been induced by subsidence)".[146]

[131] The dispute between the experts centred around one paragraph in the SCL protection conditions: Springsure Creek has to promptly rehabilitate all land effected by subsidence once that subsidence has occurred, with the rehabilitation of the affected areas to allow them to permanently support the best possible class of agricultural land.[147]

[132] Rehabilitation to the 'best possible class of agricultural land' meant that all reasonable measures must be applied to return that land to a class of agricultural land equivalent to that prior to the mining taking place. The applicable predevelopment class of agricultural land is analogous to the GQAL classes in Figure 6 of the *Springsure Creek Coal Mine Project Soils and Suitability Assessment*.[148] Figure 6 was contained in the *Soils and Suitability Assessment*, produced for Springsure Creek by GT Environmental Services (GTES).

[133] Figure 6 is a map showing the existing land suitability – GQAL.[149] Most of Arcturus Downs is GQAL Class A. GTES also provided a map showing the likely land use suitability after mining as an 'SCL pass' or 'SCL fail'.[150] The areas of 'SCL pass' largely coincide with the GQAL class A, although the unsuitable areas around watercourses are larger.

[134] GTES set out a description of GQAL Class A in Table 4: Land suitability classes 1 – 3 being land that is suitable for current and potential crops with limitations to production that range from none to moderate.[151]

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145 Ibid.
146 Ibid.
147 Ex 3, vol 4, tab 17, page 587.
148 Ex 3, vol 4, tab 17, page 592.
149 Ex 3, vol 6, tab 36, page 1478.
150 Ex 3, vol 6, tab 36, page 1480.
151 Ex 3, vol 6, tab 36, page 1306.

[135] GTES also set out the criteria for identifying strategic cropping land by reference to the Land Suitability Assessment Techniques (LSAT).[152] The criteria include a maximum of a 3% slope in the Western Cropping Zone. Everyone agrees that mining will produce slopes in excess of 3% in areas previously unaffected.[153]

[136] The experts agree that the land should be rehabilitated to mainly GQAL Class A.[154] They don't agree about what that means.

[137] The experts engaged by Arcturus took the view that by applying LSAT, GTES determined that, to satisfy GQAL criteria for Class A, the slopes had to be less than 3%. The experts engaged by Springsure Creek took the view that slopes of up to 8% were permissible. That view was based on two factors. The first was a discussion about the meaning of GQAL. The second was a complicated analysis of the slopes and 'K factor' of the soil.

[138] I do not need to resolve the conflict between the experts here. Their collective wisdom is, however, important for the future. Analysis of the existing topography of Arcturus Downs show that the topsoil tends to be lost from steep unprotected slopes during periods of very heavy rain,[155] that the side of contour banks, with less topsoil, has a lower yield and that, once erosion occurs, it is difficult to rehabilitate the soil.[156] These are matters that will be the subject of a topsoil management plan and an agricultural management plan.

[139] The SCL protection decision conditions do not require the slope of the land post mining to be less than 3%. In fact, the conditions do not refer to a particular percentage at all. Nor do the conditions require the land be returned to strategic cropping land. The only requirement is that the land returns to the best possible class of agricultural land.

[140] The best possible class of good agricultural land, Class A, can include moderate limitations to production.

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152 Ex 3, vol 6, tab 36, page 1351.
153 See Figure 3 in Mr Shield's report (Ex 3, vol 5, tab 31, page 1120).
154 Ex 3, vol 5, tab 35, page 1224.
155 T2-96, lines 25 to 43.
156 T2-97, line 23 to T2-98, line 30.

[141] As Mr Bradford says, increased slopes will present limitations to production[157] but it is not suggested that increased slopes will be a severe limitation to production. Mr Bradford may need different equipment, and cropping may be more labour intensive and expensive, but these are matters for compensation, not grounds for recommending against the grant. There will be solutions.

[142] In making a decision about the EA conditions I must consider, among other things, the standard criteria, any suitability report for the application and the status of any application under the MR Act.[158] 'Standard criteria' is defined in Schedule 4 of the EP Act.

[143] There are 20 EA conditions under the heading 'Land and rehabilitation' that may be relevant to the rehabilitation of the land. Condition J1 of the draft EA states that in the event of any inconsistencies between the two documents, the SCL protection decision prevails over the EA.[159] That is unexceptional because the SCL protection decision conditions will always prevail over the EA conditions to the extent of any inconsistency.[160]

[144] EA condition J5 states that land disturbed by mining must be rehabilitated in accordance with *Appendix 1: Rehabilitation Requirements* and *Figure 2: Springsure Creek Coal Project Rehabilitated Final Landform.*[161] Appendix 1 requires certification that the final landform represents the equivalent good quality agricultural land criteria as the pre-mining condition and refers back to the SCL approval conditions.[162] Figure 2 shows that most of the land is classed as GQAL Class A.[163] So far, there is no inconsistency between the SCL conditions and the EA conditions.

[145] Arcturus draws my attention to the rehabilitation section of the assessment report and, in particular, these words as support for a submission that the EA conditions are unachievable or inconsistent:

> "The certification will also ensure that rehabilitated areas do not differ significantly from reference sites and baseline studies, and there is evidence that

157 T1-58, line 43 to T1-59, line 33.
158 *Environmental Protection Act 1994* (Reprint no. 11A) s 223.
159 Ex 3, vol 3, tab 11, page 411.
160 *Strategic Cropping Land Act 2011* s 103(3).
161 Ex 3, vol 3, tab 12, page 452.
162 Ex 3, vol 3, tab 12, page 457.
163 Ex 3, vol 3, tab 12, page 496.

> the landform design, including engineered structures such as dams, channel, contour banks, rock armour, are effective at controlling erosion, water flows and quality".[164]

[146] It is unfortunate that Arcturus' submissions do not reflect all the relevant information in the assessment report. The assessing officer recorded that there will be permanent impacts on the land and that the land is exempt from the permanent impact restrictions in the SCL Act. The assessing officer also acknowledged the SCL protection decision and the maximum disturbance areas.

[147] The assessing officer understood that the land would not be returned to the same use but that Springsure Creek intended to ensure the land was returned to high value agriculture. The assessing officer recorded the need for a subsidence management plan, topsoil management plan, and an agricultural management plan. The assessing officer knew that there was no suitable rehabilitation information for subsidence impacts and that further information was required through the various plans.[165]

[148] I agree, however, that the draft EA conditions, by using different language, appear to conflict with the SCL protection conditions, although I suspect that was not the officer's intention. Appendix 1 requires certification that the final land form represents the equivalent good quality agricultural land criteria as per the pre-mining condition.[166] Obviously, the permanent effects from subsidence will make compliance with this condition very difficult.

[149] There are useful and detailed conditions in the draft EA but their apparent inconsistency with the SCL protection decision conditions tends to render them inoperative. The only solution, and one apparently contemplated by the DEHP, is to read down the EA conditions in any situation where there is a conflict with the SCL protection decision conditions.

[150] Sam Tarlington was the officer who approved the draft EA conditions. Arcturus submits that he approved the draft EA conditions on the basis that Springsure Creek was required to use all reasonable measures to return the land to the best possible use of agricultural land.[167] Arcturus submits that Mr Tarlington said he did not know whether he would

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164 Ex 3, vol 3, tab 11, page 412.
165 Ibid.
166 Ex 3, vol 3, tab 12, page 457.
167 T1-35, lines 24 to 39.

have approved the draft EA conditions if he had known that the land could not be returned to the class of land equivalent to that prior to the development taking place.[168]

[151] But Mr Tarlington must have known that the land could not be returned to the class of land equivalent to that prior to the development taking place. He had access to the SCL protection conditions which made that point clearly. His assessing officer reported that the effects of the subsidence were not yet known and further modelling and testing was required. There is a specific condition (J1) that gives precedence to the SCL protection conditions. I am not prepared to assume that Mr Tarlington's admission under cross-examination means that he would never have issued draft EA conditions if he was aware of the 'true situation'. In re-examination, this was addressed by counsel for Springsure Creek:

> "And finally, the issuing if an environmental authority, is it fair to say that it's an outcome based outcome based process rather than effectively prescribing conduct?---Yes, that's correct, and that's the – the intent of the – the way the conditions are framed, to not be prescriptive but to allow the EA holder to determine their own methodologies and approaches to how they comply. What the department's interested in is the outcome".[169]

[152] Section 210(8) of the EP Act states that the draft conditions must include conditions about rehabilitation objectives, indicators and completion criteria. Arcturus submits that the draft EA conditions are inadequate because they do not cover the period before subsidence is complete.

[153] I do not understand Arcturus' submission. The conditions require a subsidence management plan three months before mining activities start. There will be no subsidence on Arcturus Downs before the mining starts. The SCL protection conditions require a subsidence management plan that must establish, to the satisfaction of the Chief Executive, the baseline conditions of soils and the land within the tenement including but not limited to pre-disturbance soil erosion, degradation, and soil conservation works.[170] All of the matters identified by the experts as being necessary for a baseline assessment, and identified at paragraph 146 of Arcturus' submissions are dealt with by the comprehensive draft EA conditions. It is plainly wrong to suggest that there is no condition that deals with rehabilitation objectives, indicators and completion criteria.

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168 T1-35, lines 41 to 46.
169 T1-42, lines 8 to 13.
170 Condition 8(b) (Ex 3, vol 4, tab 17, page 587).

[154] Springsure Creek points out that it is not my role to pre-judge whether or not the SCL protection conditions, or the draft EA conditions can be met or to evaluate the adequacy of the SCL protection conditions. It points out that, once the conditions are set, as they have been, Springsure Creek cannot start mining unless it does comply with the conditions.

[155] However, the significant conflict between the experts exposes a real issue: what is the standard of 'rehabilitation' the DEHP expects? Several options have been identified but none have been agreed upon.

[156] Springsure Creek is not required to prepare the various management plans referred to in the EA conditions until three months before mining starts on Arcturus Downs. Those plans will be informed by mining that has already occurred on adjacent land but, today, there is no clear idea about the extent of the subsidence, the proposed rehabilitation measures or the way in which Arcturus will have to change its farming methods.

[157] This uncertainty means that an assessment of compensation due to Arcturus will be almost impossible in the near future unless, with the assistance of the statutory party, the parties can agree on a theoretical framework against which actual conditions will be assessed and monitored.

[158] Pursuant to paragraph 6 of the *Protocol: Statutory Party and Objections Hearings*,[171] it is appropriate that I ask the statutory party to advise on how the EA conditions might be varied to provide clarity about the standard of rehabilitation contemplated.

[159] Otherwise, subject to the amendments relating to rehabilitation, I recommend that the draft EA conditions in EPML00961613 and EPML01584713 be issued in their existing terms. Likewise, in light of my findings under each of the s 269 considerations above, I recommend that MLA70486 and MLA70502 be granted for the area, term and purpose sought by Springsure Creek.

Orders:

1. The General Application filed by Arcturus Downs Limited on 6 March 2018 is dismissed.

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[171] 15 March 2018.

2. I make the following recommendations, pursuant to s 269(1) of the *Mineral Resources Act 1989*, to the Honourable the Minister administering the *Mineral Resources Act 1989* –

   (a) I note the existence and application of the Strategic Cropping Land protection conditions dated 26 February 2014.

   (b) Subject to the following recommendations in relation to the draft environmental authority being adopted, I recommend that mining leases 70486 and 70502 be granted over the application area, for the term and purpose sought by the applicant.

3. I make the following recommendations, pursuant to s 222(1) of the *Environmental Protection Act 1994*, to the Honourable the Minister administering the *Environmental Protection Act 1994* –

   (a) Subject to the following recommendations in relation to the draft environmental authority being adopted, I recommend that the environmental authority be issued in the terms of the draft environmental authorities EPML00961613 and EPML01584713.

   (b) I recommend that the draft environmental authority conditions relating to the standard of rehabilitation of Strategic Cropping Land be read subject to the requirements of the Strategic Cropping Land protection conditions.

   (c) I recommend that the draft environmental authority conditions relating to the standard of rehabilitation of Strategic Cropping Land be amended to provide clarity about the standard of rehabilitation contemplated, in consultation with the Department of Environment and Heritage Protection.

      (i) By 4:00pm on 4 May 2018, the Department of Environment and Heritage Protection must file in the Land Court Registry and serve on each other party a written advice on how the environmental authority conditions might be varied to provide clarity about the standard of rehabilitation contemplated.

      (ii) By 4:00pm on 18 May 2018, Springsure Creek Coal Pty Ltd and Arcturus Downs Limited must each file in the Land Court Registry and serve on each other party their submissions about the proposed variations to the environmental authority conditions.

4. I will, by further order, recommend the amended environmental authority conditions that identify the appropriate standard of rehabilitation to be achieved, not before 18 May 2018.

PG STILGOE
MEMBER OF THE LAND COURT