MAGISTRATES COURT OF QUEENSLAND

CITATION: *Bell* v *Unimin Australia Pty Ltd (No 6) [2015] QMC .....*

PARTIES:	**Graham Bell**	**(complainant)**
	V	
	Unimin Australia Limited	**(defendant)**
FILE NOS:	**MAG 245636/09(1); MAG 245626/09(6)**	
ORIGINATING COURT:	**Brisbane Magistrates Court**	
HEARING:	**22 August 2014**	
DELIVERED ON:	**21 April 2015**	
DELIVERED AT:	**Toowoomba Magistrates Court**	
MAGISTRATE:	**G. Lee**	
ORDER:	**I find the defendant not guilty.**	

CATCHWORDS: **Energy and Resources - Prosecution - Holder of a mining lease to mine silica sand - Extracting undifferentiated mass from pit or quarry with a view to winning mineral Glass Grade sand from it - Whether activity of extracting that material from the pit or quarry authorised under the Mineral Resources Act 1989 - Whether "mining" under the Mineral Resources Act 1989 - Whether additional environmental authority required for extraction from the pit or quarry of that part of the undifferentiated mass that was not a mineral**

Energy and Resources - Prosecution - Holder of a mining lease to mine silica sand - Extracting undifferentiated mass from pit or quarry made up of various material with a view to winning mineral Glass Grade sand - Material processed offsite, separated & stockpiled into mineral Glass Grade sand and by-products including non-mineral B Grade sand - B Grade sand sold from stockpile - Whether additional environmental authority required in extracting B Grade sand from the pit or quarry

Magistrates- Jurisdiction and procedure generally – Procedure - Information and complaint – Offences –

Whether activity over time is a continuing offence or whether separate acts during that time constitute separate offences - Limitation period – When limitation period starts to run

COUNSEL: **Mr R Devlin QC (with him Mr R Byrnes) for the defendant**
Mr A Glynn QC (with him Ms K Mellifont QC) for the complainant

SOLICITORS: **HWL Ebsworth Lawyers for the defendant**
Litigation Unit, Department of Environment and Heritage Protection (formerly Department of Environment and Resource Management) for the complainant

Environmental Protection Act 1994, ss 18, 19, 20, 146, 147, 427; Schedule 3
Environmental Protection Regulation 1998, s 4; Schedule 1 ERA 20
Environmental Protection Regulation 2008, s 16; Schedule 2
Integrated Planning Act 1997, ss 1.3.2, 1.3.5, 4.3.1and Schedule 8 Table 2
Mineral Resources Act 1989, ss 6, 6A, 234, 236, 319

The following cases were cited:

Allina Pty Ltd v Commissioner of Taxation (1991) 28 FCR 203
Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436
Cohen v Macefield Pty Ltd & Ors [2010] QCA 95
Commonwealth v Baume (1905) 2 CLR 405
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 35 ALR 151
De Bray v Cohen; Macefield Pty Ltd v Cohen [2008] QDC 275
Dendy v Brinkworth (2006) 97 SASR 407
Deputy Commissioner of Taxation v Dick (2007) 226 FLR 388; [2007] NSWCA 190
Environment Protection Agency v CSR Ltd t/a CSR Woodpanels (2001) 114 LGERA 217
Gonzo Holdings No 50 Pty Ltd v McKie [1966] 2 QdR 240
Grain Elevators Board (Vic) v Dunmunkle Shire (1946) 73 CLR 70
Jemison v Priddle [1972] 1 QB 489
K & S Lake City Freighters Pty Ltd v Gordon & Gotch (1985) 60 ALR 509
Lend Lease Real Estate Investments Ltd & Anor v GPT RE Ltd [2006] NSWCA 207
Project Blue Sky Inc v Australia Broadcasting Authority (1998) 194 CLR 355
R v Garget-Bennett [2013] 1 QdR 547
R v Industrial Appeals Court ex parte Barelli's Bakeries Pty Ltd [1965] V.R. 615

Unimin Australia Limited v State of Queensland [2009] QSC 384
Unimin Australia Limited v State of Queensland (No 2) [2010] QSC 23
Unimin Australia Limited v State of Queensland [2010] QCA 169

1. Unimin Australia Limited (Unimin) is charged with one offence under the *Environmental Protection Act 1994* (EPA) and one offence under the now repealed *Integrated Planning Act 1997* (IPA)[1] in respect of its mining operations of silica sand on Mining Leases 1108 and 7064 on North Stradbroke Island in Queensland.

2. After a summary trial in which the defendant elected to give evidence in its own defence I heard final submissions on 22 August 2014 which supplemented detailed written submissions by the parties[2]. All evidence proposed to be adduced has been adduced and legal arguments have now been refined in the light of that evidence. The current task is to determine whether or not the prosecution have proved each charge beyond reasonable doubt[3]. The facts are substantially not in dispute. Rather, the outcome turns on statutory interpretation in light of those facts.

3. The principal issue is whether the single activity of extracting sand on Mining Leases 1108 and 7064 can be both a Chapter 4 EPA activity and Chapter 5 EPA activity at the one time requiring separate environmental approvals. Chapter 4 as it stood during the charge period dealt with approvals and registration of non-mining activities. Chapter 5 as it stood during the charge period dealt with approvals for mining activities.

4. There is a subsidiary limitation issue in respect of the EPA complaint which will be dealt with before the principal issue[4].

5. After amendment Unimin is charged as follows:

---

[1] Repealed 18 December 2009 by the *Sustainable Planning Act 2009* but section 831 of that Act provides that the IPA continues for current purposes;
[2] Defendant's written submissions dated 3 January 2014; prosecution's written submissions dated 27 February 2014 (including Annexures "A" & "B"); defendant's written reply dated 27 March 2014;
[3] For a detailed history of this matter, refer to my previous judgments published at [2010] QMC 1; [2011] QMC 24; [2012] QMC 16; [2013] QMC 3 and [2013] QMC 7; see also [2009] QSC 384 (per Applegarth J.); [2010] QSC 23 (per Applegarth J.); [2010] QCA 169 (de Jersey CJ., Chesterman JA. & Atkinson J); [2013] QSC 270 (per Dalton J.) ; [2014] QCA 113 (Fraser & Gotterson JJA. , & Atkinson J.);
[4] Paras [88] to [99] submissions for Unimin; paras [28 to [30] submissions for the prosecution; paras [42] & [43] Unimin's reply;

Complaint 1

On dates unknown on or between 18 November 2006 and 18 December 2008 at North Stradbroke Island ...Unimin...did, in contravention of section 4.3.1. *Integrated Planning Act 1997*, carry out assessable development without an effective Development Permit for the development

PARTICULARS

1. **Assessable development**: Making a material change of use of premises for an environmentally relevant activity, namely extracting sand (other than foundry sand) from a pit or quarry using plant or equipment having a design capacity of 100 000t or more a year ....

Complaint 2

On dates unknown on or between 4 October 2004 and 18 December 2008 at North Stradbroke Island ...Unimin ...did, in contravention of section 427(1) of the *Environmental Protection Act 1994*, carry out a level 1 chapter 4 activity, not being a registered operator for the activity and not acting under a Registration Certificate for the activity

PARTICULARS

1. **Level 1 chapter 4 activity**: extracting sand (other than foundry sand) from a pit or quarry using plant or equipment having a design capacity of 100 000t or more a year

6. Further and better particulars of the EPA charge were provided prior to trial as follows[5]:

"It is alleged:

1. The contravention occurred over the period 4 October 2004 until 18 December 2008 and more specifically:

   - in conjunction with the Defendant's mining activity on Mining Lease 7064, between approximately 4 October 2004 and 18 December 2008, and

   - in conjunction with the Defendant's mining activity on Mining Lease 1108, between a commence date unknown between 11 March 2007 and 12 April 2007, and 18 December 2008.

2. During the offence period, the level 1 chapter 4 activity was Environmentally Relevant Activity 20, namely extracting sand (other than foundry sand) from a pit/s and/or quarry/ies using: (a) plant or equipment having a design capacity of 100 000t or more per year and/or (b) plant or equipment having a design capacity of between 5 000 and 100 000t per year.

[5] Dated 23 November 2012;

3. The Defendant was not a registered operator for Environmentally Relevant Activity 20 as it did not hold a registration certificate issued under section 73F *Environmental Protection Act 1994* ("EPA").

4. The Defendant was not acting under a registration certificate issued under section 73F EPA to carry out Environmentally Relevant Activity 20.

5. The sand extracted is described variously as 'B grade silica sand', 'construction sand', 'building sand', 'B grade glass', 'brickies loam', 'sandy loam', 'reject sand', 'fill sand', 'loam', and/or 'white sand'.

6. The pit/s and/or quarry/ies that the B grade silica sand was extracted from were those used by the Defendant to carry out mining activities on Mining Lease 1108 and Mining Lease 7064.

7. The plant or equipment used to extract the B grade silica sand was:

   - A Komatsu WA 480 front end loader; and/or
   - A Caterpillar 970F front end loader; and/or
   - A Volvo front end loader; and/or
   - Other model/s front end loader/s."

7. For the IPA charge, the further particulars provided before trial were:

"It is alleged:

8. The contravention occurred over the period 18 November 2005 until 18 December 2008 and more specifically:

   - in conjunction with the Defendant's mining activity on Mining Lease 7064, between approximately 18 November 2005 and 18 December 2008, and
   - in conjunction with the Defendant's mining activity on Mining Lease 1108, between a commence date unknown between 11 March 2007 and 12 April 2007 and 18 December 2008.

9. The assessable development consisted of a material change of use of land (Mining Lease 1108 and Mining Lease 7064) for Environmentally Relevant Activity 20.

10. The Defendant did not possess any development permit issued under section 3.5.15 of the *Integrated Planning Act 1997* ("IPA") for the assessable development that was effective under section 3.5.19 of the IPA.

11. The material change of use of land known as Mining Lease 1108 and Mining Lease 7064 was the continuation of Environmentally Relevant Activity 20 where there was no development approval for the activity and it was, at any

time before 4 October 2004, carried out without an environmental authority as required under the EPA. (Applying definition 1.3.5(c) (ii) of the IPA).

12. The sand extracted is described variously as 'B Grade silica sand', 'construction sand', 'building sand', 'B grade glass', 'brickies loam', 'sandy loam', 'reject sand', 'fill sand', 'loam' and/or 'white sand'.

13. The pit/s and/or quarry/ies that the B grade silica sand was extracted from were those used by the Defendant to carry out mining activities on Mining Lease 1108 and Mining Lease7064.

14. The plant or equipment used to extract the B grade silica sand was:

- A Komatsu WA 480 front end loader; and/.or
- A Caterpillar 970F front end loader; and/or
- A Volvo front end loader; and/or
- Other model/s front end loader/s."

LEGISLATIVE SCHEME

EPA

8. Relevant to the charge period (4 October 2004 to 18 December 2008) section 427 in Part 1 "Offences relating to environmentally relevant activities" of Chapter 8 EPA entitled "General environmental offences" (Reprint 5G[6]) provided:

> ***427 Only registered operators may carry out chapter 4 activities***
>
> *(1) A person must not carry out a level 1 chapter 4 activity, unless the person is a registered operator for the activity or is acting under a registration certificate*
>
> *Maximum penalty – 400 penalty units ...*
>
> *(3) This section is subject to section 73T.*

9. "Chapter 4[7] activity" is defined in Schedule 3 EPA from Reprint 5G:

---

[6] EPA reprinted as in force on 4 October 2004; s 427 remained unchanged throughout the charge period;

[7] Chapter 4 is entitled "Chapter 4 Development approvals and registration (other than for mining or petroleum activities)";

> ***chapter 4 activity*** *means an environmentally relevant activity, other than a mining activity or a petroleum activity.*

10. "Environmentally relevant activity" is defined in sections 18 & 19 EPA from Reprint 5G[8]:

> ***18 Meaning of environmentally relevant activity***
>
> *An* ***environmentally relevant activity*** *is—*
> *(a) a mining activity; or*
> *(b) another activity prescribed under section 19 as an environmentally relevant activity.*
>
> ***19 Environmentally relevant activity may be prescribed***
>
> *A regulation may prescribe an activity, other than a mining activity, as an environmentally relevant activity if the Governor in Council is satisfied—*
> *(a) a contaminant will or may be released into the environment when the activity is carried out; and*
> *(b) the release of the contaminant will or may cause environmental harm.*

11. Section 20 EPA provided for two levels of chapter 4 activities – level 1 and level 2[9]. It relevantly provided:

> ***20 Levels of environmentally relevant activities***
>
> *(1) An environmentally relevant activity, other than a mining activity, must be prescribed under a regulation as a level 1 or level 2 environmentally relevant activity, depending on the risk of environmental harm. ...*

12. Section 4 and of the *Environmental Protection Regulation 1998*[10] in force during the charge periods provided:

> ***4 Levels 1 and 2 prescribed environmentally relevant Activities***
>
> *(1) An activity mentioned in schedule 1, column 1, is an environmentally relevant activity of the level set out opposite the activity in schedule 1, column 2. ...*

---

[8] In Part 3 "Interpretation" of Chapter 1 "Preliminary" EPA;
[9] In Part 3 "Interpretation" of Chapter 1 "Preliminary" EPA;
[10] These regulations were repealed and replaced by the *Environmental Protection Regulation 2008* with effect from 1 January 2009 which is outside the charge periods;

13. Schedule 1 of those regulations provided for a number of environmentally relevant activities (ERA's). Of relevance is ERA 20 under the heading "Extractive activities" which provided:

> ***20 Extracting rock or other Material*** *—extracting ... sand (other than foundry sand), ... from a pit or quarry using plant or equipment having a design capacity of—*
>
> *(a) not more than 5000t a year 2b*
> *(b) 5000t or more, but less than 100000t, a year 1*
> *(c) 100000t or more a year . . . . . 1*[11]

14. "Extracting" is not defined in the EPA or those regulations but the regulations provided for what is not "extracting":

> ***extracting****, for schedule 1, item 20, does not include –*
>
> *(a) Extracting material from land if –*
>
> *(i) The primary purpose of the extraction is not to gain the material; and*
>
> *(ii) Less than 1500 m3 of materials is extracted of the surface area of the land is less than 5200 m2; or ...*

15. "Pit" and "quarry" are not defined in the EPA or regulations. Dictionary meanings have been provided by the defence: "pit" - a hole or cavity in the ground, formed either by digging or by some natural process; an open deep hole or excavation made in digging for some mineral deposit; "quarry" - an open air excavation from which stone for building or other purposes is obtained by cutting, blasting, or the like; a place where the rock has been, or is being, cut away in order to be utilized[12].

16. The phrase "mining activity" in the above provisions is defined in section 147 Chapter 5 "Environmental authorities for mining activities" in Part 1 Division 2 "Key definitions for ch 5" EPA. For completeness sections 146 & 147 provide:

---

[11] For the purposes of these proceedings only Unimin has formerly admitted the design capacity of equipment was 100000t or more per year (exhibit 84);
[12] Para [53] submissions for the defence;

> ***146 Purpose of ch 5***
> *(1) The purpose of this chapter is to provide for environmental authorities for mining activities.*
> *(2) An authority issued under this chapter for a mining activity is called an* ***environmental authority (mining activities)****.*
>
> ***147 What is a mining activity***
> *(1) A* ***mining activity*** *means an activity mentioned in subsection (2) that, under the Mineral Resources Act, is authorised to take place on—*
> *(a) land to which a mining tenement relates; or*
> *(b) land authorised under that Act for access to land mentioned in paragraph (a).*
> *(2) For subsection (1), the activities are as follows—*
> *(a) prospecting, exploring or mining under the Mineral Resources Act or another Act relating to mining;*
> *(b) processing a mineral won or extracted by an activity under paragraph (a);*
> *(c) an activity that—*
> *(i) is directly associated with, or facilitates or supports, an activity mentioned in paragraph (a) or (b); and*
> *(ii) may cause environmental harm; ...*[13]

17. The phrases "registered operator" and "registration certificate" which appear in section 427(1) are defined in Schedule 3 EPA (Reprint 5G):

> ***registered operator*** *means the holder of a registration certificate, for a chapter 4 activity, issued under section 73F and in force.*
>
> ***registration certificate*** *see section 73F.*

18. Section 73F in Part 2 "Registration" of Chapter 4 "Development approvals and registration (other than for mining and petroleum activities)" EPA provides for the granting of authorities for activities other than for mining or petroleum activities. Section 147 EPA above defines "mining activities".

19. Finally, section 427(1) is subject to section 73T which deals with activities that are not Chapter 4 activities but which become Chapter 4 activities because of a change in the law. It provides that section 427 does not apply to a person carrying out that activity for 4 months after that activity becomes a Chapter 4 activity. ERA 20 came into force 6 July 1998. ERA provisions for approvals

---

[13] Paras [d], [e] & [f] are not relevant;

and authorities for activities other than mining activities were not inserted into Chapter 4 EPA until 2 January 2001. This sufficiently predates the periods of the current charges so section 73T does not apply[14].

20. In its submissions the prosecution referred to section 619 EPA which deals with the carrying over of certain environmental authorities in place under a former system of approvals to remain in force as if they were registration certificates under the current system of approvals[15]. It was concluded that section 619 does not apply. The defence have not disputed this.

LEGISLATIVE SCHEME

IPA

21. For the charge period (18 November 2006 to 18 December 2008) section 4.3.1 IPA provided[16]:

> ***4.3.1 Carrying out assessable development without permit***
>
> *(1) A person must not carry out assessable development unless there is an effective development permit for the development.*
>
> *Maximum penalty – 1665 penalty units*

22. "Development" is defined in section 1.3.2 IPA[17]:

> ***1.3.2 Meaning of development***
>
> ***Development*** is any of the following—
> ...
> (e) making a material change of use of premises.

23. "Material change of use" is relevantly defined in section 1.3.5 IPA[18]:

> ***material change of use***, of premises, means—
>
> ...

---

[14] Annexure B pages 8 & 9 prosecution's submissions. This is not contested by the defendant.
[15] At pages 12 to 20 Annexure B to Prosecution's submissions;
[16] In Part 3 "Development offences, notices and orders" Chapter 4 (Appeals, offences and enforcement); taken from Reprint 9F as in force on 11 December 2008 (from folder of statutes and authorities provided by the parties); the remaining subsections to section 4.3.1 IPA do not apply;
[17] Division 2 "Key definitions" of Part 3 "Interpretation" IPA;
[18] Division 3 "Supporting definitions and explanations for key definitions" of Part 3"Interpretation" IPA;

(c) the continuation of an environmentally relevant activity on the premises if—

...

(ii) there is no development approval for the activity and it was, at any time before 4 October 2004, carried out without an environmental authority as required under the Environmental Protection Act 1994.

24. The meaning of "environmentally relevant activity" in the IPA has the same meaning as in section 18 EPA cited at [10] above: see schedule 10 IPA definitions.

25. "Premises" is defined in Schedule 10 IPA:

***premises** means—*
(a) a building or other structure; or
(b) land (whether or not a building or other structure is situated on the land).

26. "Assessable development" is relevantly defined in Schedule 10 IPA (dictionary)

***assessable development**—*
1 Generally, assessable development means development stated in schedule 8, part 1, ...

27. Schedule 8 IPA "Assessable development and self-assessable development" Part 1 "Assessable development" Table 2 "Material change of use of premises" relevantly provides:

Table 2: Material change of use of premises
For an environmentally relevant activity

1 Making a material change of use of premises for an environmentally relevant activity, other than—
(a) a mining activity; or
...

28. The meaning of "mining activity" in the IPA imports the meaning in section 147 EPA cited at [16] above: see Schedule 10 IPA (dictionary).

29. "Development approval" is defined in Schedule 10 IPA:

development approval means a decision notice or a negotiated decision notice that—
(a) approves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it); and
(b) is in the form of a preliminary approval, a development permit or an approval combining both a preliminary approval and a development permit in the one approval.

30. Sections 3.5.15 and 3.5.17 IPA provide for a decision notice or negotiated decision notice respectively to be given to the applicant for approval.

31. Relevantly, section 3.1.5 (3) IPA provides that a development permit authorises assessable development subject to conditions therein. Although there is no definition of "effective development approval" or "effective development permit" as per the wording in section 4.3.1 IPA, section 3.5.19 IPA provides for when an approval takes effect.

BACKGROUND

32. A convenient summary, which accords with the evidence in this case, is partly set out at paragraphs [9] to [21] in *Unimin v State of Queensland* [2009] QSC 384 per Applegarth J. and adopted by the Court of Appeal at [2010] QCA 169.

33. Relevantly, at all material times Unimin conducted mining operations under mining leases 1108, 7064 and 1124 on North Stradbroke Island. Mining operations had been running since 1969 by Unimin's predecessors[19].

34. Mining Lease 1108 was originally granted to Unimin as lessee from 10 November 1973 for 10 years for the purpose of mining garnet, ilmenite/leucoxene, monazite, platinum, rutile, tin ore and zircon. The lease was renewed from time to time the last being for 21 years from 23 November 2006. The purpose of the lease was amended to include mining for "silica sand" on 26 November 2003.

35. Mining Leases 7064 and 1124 were granted to Unimin's predecessor ACI Operations Pty Ltd (ACI) as lessee for the purpose of, among other things, mining for silica sand. Lease 7064 was for 10 years from 1 June 2001. Lease 1124 was originally for 13 years commencing 1 May 1975. It was later renewed on 17 March 1988 for 21 years commencing 1 May 1990. ACI had contracted Unimin to conduct mining operations on these leases.

36. Briefly, the mining process adopted by Unimin commenced with the removal of topsoil at the mine face on Mining Leases 1108 and 7064 followed by the

[19] Exhibit 30 - Record of Interview at page 3, response number 30;

digging up of an undifferentiated mass from the mine face on those leases. It is a dry mining operation above the water table. This undifferentiated mass is loaded into a hopper to remove organic objects. Water is then added to the sand to form a slurry which is pumped to a processing plant on Mining Lease 1124 to undergo gravity separation resulting in the separation of high quality silica sand for glass manufacture, heavy metals, and reject material which has been called many things including B Grade sand[20]. They were stockpiled separately on Mining Lease 1124. The processing plant on ML 1124 had always been set up specifically for glass grade sand.

37. Unimin's principal purpose in mining silica sand on Mining Leases 1108 and 7064 was to extract high grade silica sand suitable for glass manufacture. As part of the treatment process, a by-product of a lower purity silica sand referred to as B Grade silica sand has always been produced as a direct consequence of the production of glass grade silica sand by gravity separation. During the charge periods this treatment process occurred on Mining Lease 1124. High grade sand is sold off for glass manufacture. B Grade sand was sold being removed from the stockpile on Mining Lease 1124. There is evidence that B Grade silica sand had been sold off a stockpile at least as early as 1985-86 by ACI and later, by Unimin[21]. Although Unimin stopped selling the B Grade sand after the execution of the warrant by Deanne Caruso (then an officer of the Environmental Protection Agency) on 16 December 2008, it did not change its mining operation in the way it removed the undifferentiated mass from the mine face on Mining Leases 1108 and 7064.

38. There is no dispute that Unimin was entitled to ultimately sell high grade sand for glass manufacture after gravity separation on ML 1124 pursuant to its mining leases under Chapter 5. This constituted the majority of the sand obtained. Unimin also sold B Grade sand from stockpiles on Mining Lease 1124 for other purposes. In respect of the B Grade sand the issue is whether it was required to hold a Chapter 4 approval in addition to its mining lease

[20] See paras [12], [18], [62], [65] submissions for Unimin; para [15] submissions for prosecution;
[21] Para [116] submissions for Unimin citing evidence from various witnesses;

approval under Chapter 5 for digging up that part of the undifferentiated mass made up of B Grade sand from the pit or quarry.

39. Originally, the then Department of Mines collected royalties from ACI for the B Grade sand and glass grade sand for many years. When Unimin took over, it paid royalties on B Grade sand as well as glass grade sand from June 2001 until the last quarter in 2008 after the search warrant was executed on 16 December 2008[22]. This is clearly itemised in each quarterly royalty return in which royalties for B Grade sand were paid at the same rate as for high grade sand[23]. It is also clear from those royalty returns that at least 80% of the royalties were for Glass Grade sand supporting the view that Unimin's principle purpose was to win the mineral, Glass Grade sand[24].

40. The issue as to whether royalty for B Grade sand should have been paid was said to be addressed in 1995 when Ministerial approval was given to continue to collect royalties for B Grade sand[25]. Also, in 1993 the regulator at relevant times, the Redland Council, regarded the selling of by-product sand as "incidental to the current extraction of resources" and did not require an additional permit[26]. The prosecution disputes this but says this does not make the extraction of B Grade sand from ML 1108 and ML 7064 lawful in any event[27].

41. In 2009 Unimin launched civil proceedings in the Supreme Court of Queensland seeking certain declarations. Applegarth J. summarized the nature of the dispute before him in *Unimin Australia Limited v State of Queensland* [2009] QSC 384 at [2]:

> *[2] The parties are in dispute over whether the B Grade silica sand can be sold by [Unimin] for use in white mortar and white renders. [Unimin] contends, and the respondent disputes, that silica sand that is mined for such a use, or which is a by-product of the mining of Glass*

---

[22] Exhibit 116 – Unimin's royalty returns;
[23] For example, for the quarters ending 30 September 2007, 30 June 2008 and 31 December 2008 the rate per tonne was $0.90;
[24] Transcript dated 22 August 2014: p 1 - 18 (from line 5) to p 1 - 19 (to line 47);
[25] Exhibit 117 – email from Johnson (officer of then Department of Mines and Energy) to Harris (Unimin);
[26] Paras [196] to [200] submissions for Unimin;
[27] Para [32] submissions for the prosecution;

> *grade sand, is a "mineral" within the meaning of the Mineral Resources Act 1989 (MR Act). Section 6 of the MR Act is to the effect that silica sand is only a mineral "if it is mined for use for its chemical properties".*

The declarations in the form proposed by Unimin were not made.

42. An appeal by Unimin to the Court of Appeal was unsuccessful: *Unimin Australia Limited v State of Queensland* [2010] QCA 169. The parties have relied on passages in the judgements at first instance and on appeal in this case.

43. I shall deal firstly with the limitation point with respect to the EPA charge.

TIME LIMITATION FOR THE EPA COMPLAINT

44. Section 497 EPA provides for statutory time limits for commencing proceedings for an offence under the EPA:

> ***497 Limitation on time for starting summary proceedings***
> *A proceeding for an offence against this Act by way of summary proceeding under the Justices Act 1886 must start—*
> (a) *within 1 year after the commission of the offence; or*
> (b) *within 1 year after the offence comes to the complainant's knowledge, but within 2 years after the commission of the offence.*

45. The EPA complaint alleges an offence under section 427(1) between 4 October 2004 and 18 December 2008. It was averred in the complaint that the offence came to the complainant's knowledge on 1 December 2009. The complaint was made on 1 December 2009.

46. The thrust of Unimin's submission is that the complaint alleges a course of conduct occurring on unknown dates during the alleged period. The particulars refer to conduct of extracting sand from a pit or quarry from day to day which constitutes a separate and distinct offence each day the conduct continues so that the limitation period runs from each day the conduct continues. It is not conduct of a passive character which can constitute a continuing offence. The submission continues that it is incorrect for the prosecution to allege the offence as a continuing offence to enable it to charge for the entire period provided that one day of it falls within the time limit[28].

---

[28] Paras [88] to [99] submissions for Unimin;

47. It was submitted for Unimin that the complaint should be amended to restrict the start of the charge period to 1 December 2007. This is the date of the earliest commission of an EPA offence in the two year period referred to in section 497(b) i.e. the complaint must be made within two years after the commission of the offence. The complaint was made on 1 December 2009.

48. This submission is similar to submissions made by the defence in *Environmental Protection Authority v CSR Ltd t/as CSR Woodpanels* [2001] NSWLEC 217 at [32]-[41] ('Woodpanels') in respect of a charge of negligently causing a substance to leak in an manner which harmed or was likely to harm the environment without lawful authority[29]. In that case an application was brought by the prosecution to amend its pleadings before trial. Pearlman J said the question of whether the offence was a continuing one depended on findings of fact after a trial. In referring to a decision of the New South Wales Court of Criminal Appeal at [33], he noted that the offence "may' be a continuing one; and if so, time would run for limitation purposes from when the continuing conduct ceased[30].

49. A passage from the judgment of O'Bryan and Gillard JJ in *R v Industrial Appeals Court; Ex Parte Barelli's Bakeries Pty Ltd* [1965] V.R. 615 at 620 (Barelli) giving a general ex pose of continuing offences was cited in support of Unimin's submissions[31]:

> A continuous or continuing offence is a concept well known in the criminal law and is often used to describe two different kinds of crime. There is the crime which is constituted by conduct which goes on from day to day and which constitutes a separate and distinct offence each day the conduct continues. There is, on the other hand, the kind of conduct, generally of a passive character, which consists in the failure to perform a duty imposed by law. Such passive conduct may constitute a crime when first indulged in but if the obligation is continuous the breach though constituting one crime only continues day by day to be a crime until the obligation is performed. In such a case in measuring the period of limitation, if one is applicable, the right to lay an information is not barred if the breach has continued up to the day the information was laid or if the breach was cured before the information was laid, time counts from the day when the obligation was satisfied. The question

[29] Section 6(1) *Environmental Offences and Penalties Act 1989* (NSW);
[30] At [35] per Pearlman J;
[31] At [92[submissions for Unimin; A decision of the Full Court of Victoria with Smith J agreeing;

> whether an offence is of a continuing or continuous nature generally arises in the case of statutory offences, and the question is solved by ascertaining what is the precise nature of the charge. (my emphasis)

50. In *De Bray v Cohen; Macefield Pty Ltd v Cohen* [2008] QDC 275 (Wall QC DCJ) ('De Bray')[32], the complaints alleged that the defendants "damage[d]" or "permit[ted] to be damaged" certain trees contrary to vegetation laws[33]. The complaints were held duplicitous because they alleged two separate offences in contravention of the pleading rules in section 43 *Justices Act 1886*: see paras [66], [67], [85]-[87] in De Bray[34]. This is not alleged in this case.

51. After referring to paras [61] to [64] of the judgment, Unimin submitted that De Bray, which was upheld on appeal in *Cohen v Macefield Pty Ltd* [2010] QCA 95, confirmed the position in Queensland that for an offence comprising a number of acts, each capable of being a separate offence, time runs from the commission of each of those acts and not from the last of those acts[35].

52. For reasons that follow, I do not agree that this conclusion applies in this case.

53. Wall QC DCJ dealt with this issue at paras [54] to [65] under the heading "Duplicity" in considering the pleading rules in section 43 *Justices Act 1886*.[36] The applicable limitation period was 12 months to start proceedings from the commission of the offence[37]. The question was when does the limitation period start to run? The complaint was made 12 February 2004 alleging an offence "on a date between December 2000 and November 2003". His Honour ultimately found that the limitation period ran from 13 February 2003 being 12 months from when the complaint was made: at [12], [16] & [65].

---

[32] Also at [2009] QPELR 479; there were three complaints against three defendants;
[33] Section 24(1) of *Local Law 6* provided "A person must not damage or permit to be damaged protected vegetation";
[34] *Walsh v Tattersall* [1996] ALR 27 per Kirby J at 47-50 and 52-53 was referred to;
[35] Para [95] submissions for Unimin;
[36] Section 43 (1)(b)(ii) & (iv) *Justices Act 1886* provides to the effect that every complaint shall be for one matter only, and not for two or more matters except, for non-indictable offences, the matters of complaint "(ii) are alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose; or ... (iv) are, or form part of, a series offences or matters of complaint of the same or a similar character".
[37] Section 1080 (a) *Local Government Act 1993*;

54. In citing Woodpanels, the prosecution in De Bray submitted that this was a continuing offence so that the limitation period started to run from when the offending ceased (at [62] & [63]) undoubtedly in an attempt to capture the activity over the entire period pleaded[38]. Wall QC DCJ considered that the offence "could possibly be" a continuing offence "but only if confined to a series of acts done in the prosecution of a single purpose or a series of offences or matters of complaint ...of the same or a similar character as required by s 43(1)(b) ***Justices Act***" (at [63]). However, he appeared to have distinguished the offence in Woodpanels i.e. permitting a substance to leak over time without authority, to the offence before him[39].

55. In doing so, His Honour characterised the charge of "damage" as the act which causes the destruction or interference with the natural growth of the vegetation. The definition of "damage"[40] focussed on "the act" causing the destruction or interference (at [8], [13] & [14]). That is, there is the "act" followed by the consequence of that "act". The act there was poisoning. The gravamen of the charge was the "act" and not the subsequent consequence of that "act": at [14], [15]. Contrary to what would constitute a continuing offence, His Honour concluded at [65] that the allegations in that case were the poisoning of trees "by many separate acts" so that the limitation period commenced to run from 13 February 2003 i.e. 12 months prior the making of the complaint. The question then was whether there was evidence of any "act" of damaging i.e. poisoning etc. as opposed to the ultimate consequence of that "act" occurring within the limitation period: at [64]. There was not in that case: see also [2010] QCA 95 [33].

56. After referring to the various provisions in section 43(1) *Justices Act 1886* at [22] on appeal, Holmes JA[41] explained the context of comments by Wall QC DCJ at [23] (footnotes omitted):

---

[38] There was no evidence of any "act" of damage from 13 February 2003 to 12 February 2004. There was some evidence from experts of possible acts of damage from December 2000 which, as Wall QC DCJ found, did not discharge the prosecution's onus of proof in any event: at [52];
[39] The difficulty was that there were no findings of fact as first instance as to whether the offence was a continuing one;
[40] Section 3 *Local Law 6*;
[41] With whom Chesterman JA & Daubney J agreed;

> Having said that, I do not think that the learned judge did conclude (as the applicant asserted) that the complaint was bad because a series of acts was charged in one count. What he said was that, depending on appropriate findings (not made by the Magistrate in this case) it might be possible to charge a series of acts as a single offence, which —could possibly be described as 'continuing'. In the passages in the judgment with which the applicant took issue, his Honour distinguished *Environment Protection Authority v CSR Ltd t/as CSR Woodpanels*, in which it was held that the limitation period commenced to run from the last day of a continuing offence, of negligently causing a substance to leak. His Honour's reasons in this regard concerned, not questions of duplicity, but whether the limitation period should be approached as it was in that case, given the different nature of the offence involved there. It was duplicity in the allegation of damaging or permitting to be damaged which caused the learned judge to find that the complaint and the conviction were bad. The Magistrate had drawn no distinction between the two, and it was uncertain of what criminal act each had been convicted.

57. It is clear that Wall QC DCJ distinguished the nature of the charges in Woodpanels to the charges before him: at [64] & [65]. He did not apply the limitation period applicable to continuing offences as in Woodpanels because he appears to have rejected the submission that the charges before him were continuing in nature. The upshot was that he treated the charges as separate offences "by many separate acts" because he determined that the limitation period ran from 12 February 2003 and not from November 2003 when the conduct ceased. Contrary to Unimin's submissions, in my view His Honour did not state a general proposition of law that for all offences comprising separate acts in Queensland, each capable of being a separate offence whether or not constituting a course of conduct, time runs from the commission of each of those acts in all cases. His Honour allowed the appeal on the basis of duplicity and that there was no evidence of acts causing damage within the limitation period he applied in that case: see also paras [13] & [33] of the judgment of Holmes JA (with whom Chesterman JA and Daubney J agreed) in *Cohen v Macefield Pty Ltd* [2010] QCA 95.

58. For the EPA charge in the present case, the evidence supports the view that what is alleged is a series of similar acts done in the prosecution of a single purpose of a mining operation by the digging an undifferentiated mass of sand out of the

ground on Mining Leases 1108 and 7064 and not "many separate acts" as in De Bray.

59. The prosecution in this case submitted that the EPA offence is continuing offence. If so, the activity over the period pleaded would be appropriate. They are not limited to breach of duty constituted by continuing omission. The EPA offence is constituted by a series of acts in the prosecution of a single purpose i.e. the extraction of sand. It is a continuing offence and time runs from the last date in the charge period. If it were not a continuing offence, "the prosecution would have to proffer a charge for each scoop of the bucket of the front end loader"[42].

60. It was submitted this is not a case where a number of acts are each capable of amounting to separate offences. The submission follows that the offence provision permits the charging a course of conduct as an offence.

61. The prosecution submit that the offence is in taking the sand without proper authority. The activity here is the carrying out of the activity without the required certificate i.e. it is an active/passive type of offence. It was submitted that until Unimin obtains a registration certificate, it continues to commit the offence. When it obtains a registration certificate, it ceases to commit the offence[43]. Characterised in this way, it falls within the description in Barelli.

62. In *Jemmison v Priddle* [1972] 1 QB 489 where it was held that the shooting of two deer without a licence[44] was properly charged as a single activity of killing game, Lord Widgery CJ[45] (with whom Ashworth and Griffiths JJ agreed) said at 495:

> ...it is legitimate to charge in a single charge one activity even though that activity may involve more than one act. One looks at this case and asks oneself what was the activity with which this man was being

---

[42] Paras [28] to [30] submissions for prosecution;
[43] Transcript 1-41 lines 7 – 24 (22 August 2014);
[44] The *Game Licences Act* 1860 (UK) required a licence to take and kill game; the defendant was charged "That he on February 6, 1971, at [the location] unlawfully did take and kill and pursue certain game, to wit two red deer without having ...a licence...";
[45] Adopting comments by Lord Parker C.J. in *Ware v Fox* [1967] 1 WLR 379 at 381;

> charged. It was the activity of shooting red deer without a game licence ...

63. The prosecution also referred to *Dendy v Brinkworth* [2006] SASC 179 (per Duggan J) in which the defendant was charged with clearing 7.32 hectares of native vegetation contrary to legislation from 27 sites on the same land between the 22 March 2002 and 1 November 2002. After citing numerous authorities[46] on what constitutes a continuous offence, it was concluded that it was open for the defendant to be charged in a single count on the basis that the act of clearing was a continuous offence in relation to the same parcel of land over a period of time.

64. A number of environmental cases were cited in Dendy. In *Cullen v Jardine* [1985] Crim LR 668 the defendant was convicted of one statutory offence of felling 90 trees over a three day period without a licence. On appeal, May LJ said[47]:

> ...The mere fact that a number of issues may arise in the course of a trial does not turn one activity into two or more activities and thus render the information bad for duplicity ... the question of duplicity is one of fact and degree.

65. In *Bentley v BGP Properties Pty Ltd* (2005) 139 LGERA 449[48] the defendant was charged with a statutory offence of causing damage to the habitat of a threatened species of vegetation between 1 August 2001 and 7 December 2001[49]. It was an appeal against a primary judge's decision to allow the prosecution to amend its summons by including a number of alternative acts that caused the damage. An appeal ground, ultimately successful, was that the amendments made the allegation duplicitous. It included a discussion about continuing offences. In this respect, Smart AJ in the New South Court of Appeal said at [56]:

---

[46] For example, statements of Hunt CJ in *R v Hamzy* (1994) 74 A Crim R 341 at 344; *R v Firth* (1869) 11 Cox CC 234 (stealing gas over a period of some years); *R v Giretti* (1986) 24 A Crim R 112 (trafficking drugs a continuous activity could be charged as one offence although involving a number of finite incidents);

[47] Cited in *Dendy* at p 411; Court constituted by May LJ and Kennedy J;

[48] Cited in *Dendy* at p. 413;

[49] Section 118D(1) *National Parks and Wildlife Act 1974* (NSW) – "A person must not, by an act or an omission, do anything that causes damage to any habitat ...."

> I would adhere to the statements of principle that for continuing offences and facts so related that they amount to one activity and that where an offence is defined in the terms of a course of conduct or state of affairs, the prosecution can rely on a series of closely related acts (or omissions) and is not confined to relying on one act. Nor would I question that the acts or omissions relied upon by the prosecution may take place continuously or intermittently over a period of time. These principles are of appreciable importance in relation to environmental offences. Damage caused by one act may be inconsequential. ...

66. In the present case, the evidence is that Unimin used front end loaders to remove an undifferentiated mass of sand from the mine face on Mining Leases 1108 and 7064 as part of its ongoing mining operations. As described above, green material is removed, water added and then it is conveyed to another Mining Lease 1124. The sand is then processed to extract glass grade sand, B Grade sand and heavy metals which are stockpiled separately on that Mining Lease. The glass grade sand is sold off for glass manufacture. The B Grade sand was sold off for other purposes. This activity by Unimin and its predecessor, undisputedly, has been going on for years. In my view this activity constitutes a single activity in the prosecution of a single purpose even though involving separate acts of digging the sand out of the ground on various days within the period pleaded.

67. Further, in creating the offence, section 427(1) EPA speaks in terms of prohibiting a course of conduct or activity of "not carry[ing] out" a level 1 Chapter 4 activity. It is not framed as a separate offence each time an extraction of sand is performed. Compare, for example, section 474.19(1) *Criminal Code* 1995 (C'th)[50] considered by the Court of Appeal in *R v Gargett-Bennett* [2010] QCA 231. There the defendant was charged with using a carriage service to access child pornography between 1 March 2005 and 14 September 2008. The defendant used the internet every day accessing child exploitation material and downloading material paid for by credit card at different times over that 3.5 year period. Those actions were not considered to have "such an immediate

[50] It provided that "A person is guilty of an offence if: (a) the person: (i) uses a carriage service to access material; ... and ...(b) the material is child pornography material".

connection in time, place and purpose of the offences as to warrant a single charge"[51].

68. After citing a number of authorities[52], and rejecting the prosecution's submissions that it was proper to charge in a single count an activity consisting of a number of those acts[53], it was held by majority that section 474.19(1) as it then stood "contemplated a discrete offence committed on every occasion a carriage service was used" and did not create an offence "defined in terms of a course of conduct"[54].

69. I find the EPA offence to be a continuing offence. The limitation period runs from when the offending ceased i.e. 18 December 2008. Accordingly, it is in order for the prosecution to allege in the complaint the activity of "carry[ing] out" the Level 1 Chapter 4 activity from 4 October 2004 to 18 December 2008. I decline to amend the pleadings.

THE PRINCIPAL ISSUE

70. The prosecution submits that the activity of digging the undifferentiated mass from the pit or quarry on Mining Leases 1108 & 7064 were concurrent Chapter 4 and Chapter 5 activities. The legislation contemplates this. When reading the legislation in context[55], sections 18 & 19 EPA do not exclude the possibility that an activity undertaken pursuant to a Chapter 5 authority might also at the same time require regulation under Chapter 4 EPA[56]. Thus, a Chapter 4 authority was required in this case in addition to a Chapter 5 authority already held by the defendant. This is reflected in the wording of the particulars where it is alleged the contraventions occurred "in conjunction with" the defendant's activities at the pit or quarry.

---

[51] At para [20] of the joint judgment of Holmes JA & Applegarth J;
[52] At paras [19] & [20]. Including those cited above and *R v Wilson* (1979) 69 Cr App R 83 (stealing separate items from different departments of the same store); *R v Morex Meat Australia Pty Ltd and Doube* [1996] 1 Qd R 418 (attempting to pervert the course of justice);
[53] Para [19] of the joint judgement;
[54] At para [20] of the joint judgment of Holmes JA & Applegarth J citing *Walsh v Tattersall* (1996) 188 CLR 77, 91 per Gaudron and Gummow JJ.;
[55] Citing a number of authorities such as *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 35 ALR 151, 156-7, 169; *Attorney General v Prince Ernest Augustus of Hanover* [1957] AC 436, 461, 473;
[56] Paras [7], [8] & [12] prosecution's submissions;

71. Likewise, it was submitted for the prosecution that section 319 *Mineral Resources Act* 1989 (MRA)[57] does not exclude the possibility that an activity can be, at the same time, a mining activity and assessable development under the IPA[58]. Section 319 MRA (Reprint 10C) provides[59]:

> ***319 Effect on development***
>
> *(1) Subject to subsections (2) and (3), the Planning Act does not apply to development authorised under this Act.*
> *(2) For administering IDAS for the Heritage Act, the Planning Act applies to a Queensland heritage place under the Heritage Act even if development of the place is authorised under this Act. ... (emphasis added)*[60]

72. The prosecution disagrees with the defence's case that the legislation does not permit the possibility of requiring separate authorities for the same activity at the pit or quarry. It disagrees that, in this case, the activity was firstly a Chapter 5 activity only at the pit or quarry followed possibly by a Chapter 4 activity later on Mining Lease 1124 where the undifferentiated mass had been conveyed to and separated into the different classes of sand[61].

73. On the other hand the defence goes further. The activity of digging the undifferentiated mass from the pit or quarry on Mining Leases 1108 & 7064 remained a Chapter 5 activity i.e. mining as defined in section 6A MRA and therefore a "mining activity" under section 147 EPA, up until the undifferentiated mass was processed into its constituent parts on Mining Lease 1124. This is supported at paragraphs [20] to [24] in the judgement of de Jersey CJ (as he then was) for the Court of Appeal in *Unimin v State of Queensland* [2010] QCA 169 where he said[62]:

> [20] All of the sand, embracing the glass grade sand and the B grade sand, is "mined" within the meaning of s 6A, because it is won or extracted from the place where it occurs. The question the primary Judge

---

[57] In then Part 8 MRA entitled "Relationship with *Integrated Planning Act* 1997;
[58] Para [9] submissions for the prosecution;
[59] Section 319 was relocated to Chapter 1 Part 3 MRA and renumbered as section 4A by *the Mines Legislation (Streamlining) Amendment Act* 2012 (No 20 of 2012), s 304;
[60] "Development" in the MRA imports the definition s 1.3.2 IPA, relevantly in (e) making a material change of use of premises which is as an ERA "other than a mining activity";
[61] Pages 1 -26 (lines 20 - 25) & 1- 27 (lines 1 - 10) transcript 22 August 2014; paras [1(a)], [5] to [7],[11], [12], [24] to [27] prosecution's submissions;
[62] With Chesterman JA & Atkinson J concurring;

> answered in the negative was: is the component of B grade sand mined for its chemical properties?
>
> [21]On the basis of the facts agreed before His Honour, the appellant knows that it is mining both glass grade and B grade sand. It must mine the latter in order to recover the former. It then turns the latter to a worthwhile commercial use.
>
> [22] While the separation of the B grade from the glass grade occurs subsequently to the "dry mining" operation, it is not right to say that at the earlier time the appellant intends all of the sand to be used in the manufacture of glass. At that time, the appellant knows that a portion of the sand won will not be used in the manufacture of glass, but in the production of mortars and renders.
>
> [23] That the B grade sand is only subsequently separated out does not mean, in terms of the "use" (s 6(3)(b)) intended at the time of extraction, all of the sand must be treated in the same way.
>
> [24] In any case, the mining operation, as defined by s 6A of the Act, extends to the separation of the two grades of material. Sub-section (2) provides that the extraction includes the "separation of a mineral": on His Honour's approach the separation of the glass grade silica sand from the B grade silica sand and other material. (emphasis added)

74. In saying so, His Honour considered the expanded definition of "mine" in section 6A of the *Mineral Resources Act* 1989 (MRA) which had been amended to widen its scope after the decision of the Court of Appeal[63] in *Gonzo Holdings No 50 Pty Ltd v McKie* [1996] 2 Qd R 240 which had read down its precursor[64]. Therefore, it was submitted, the only authorisation required for the activity at the pit or quarry was a Chapter 5 authority for the EPA charge. The activity at the mine face was a single activity so authorised and that the B Grade sand was a necessary by-product of the lawful mining of silica sand. There was no additional activity at the pit or quarry, the subject of the charges, requiring a Chapter 4 authority. The question of "intention" referred to in [21] to [23] of His Honour's judgment was in relation to whether or not the B Grade sand was

---

[63] Macrossan CJ, McPherson JA & Thomas J (as he then was); Macrossan CJ dissenting;

[64] The *Mineral Resources Amendment Act* 1997 (No 14/97); see also page 5 of the Explanatory Memorandum to the Bill where it said "The intention of the [MRA] has always been that the extraction of mineral from its natural state, whether carried out on the land where it was mined or not, is mining"; essentially, "extracting" was given as expanded meaning in new subsections (2) & (3);

a "mineral", not whether it was "mined". Further, the defendant's right to deal with any by-product is beyond the scope of the charges[65].

75. It was submitted for the defence that the prosecution's major premise is flawed in extrapolating the findings of Applegarth J[66] and the Court of Appeal[67] that B Grade sand is not a mineral when not used for its chemical properties into a finding that it was not "mined" at the pit or quarry on ML 1108 & 7064. In fact, it was submitted, both courts found that, in terms of section 147 (1) (a) & (2)(a) EPA, Unimin was carrying out the activity of "mining" under the MRA authorised to take place on "land to which a mining tenement relate[d]". If this is so, then it is a "mining activity" which extended to the separation of the undifferentiated mass on ML 1124 pursuant to section 147 (2)(b) EPA.[68]

76. In respect of the IPA charge, it was submitted for the defence that the activity at the pit or quarry was "mining" within the meaning of the MRA and therefore "mining activity" as defined in section 147 EPA. Therefore it is not "assessable development" as defined in the IPA and, by virtue of section 319 MRA, the IPA does not apply[69].

77. The resolution of these competing positions requires an examination of the legislative provisions and in particular sections 18, 19 & 147 EPA, sections 6A and 319 MRA, and sections 1.3.2, 1.3.5 & Schedules 8 & 10 IPA.

78. The prosecution submits that an activity can only be a "mining activity" as defined in section 147 EPA if it is authorised under the MRA. If it is not "mining" within the MRA then it is not a "mining activity" under section 147. In support, various statements made in the Supreme Court during a civil application and on appeal were relied on where it was found that B Grade sand was not a mineral if not used for its chemical properties (as is the case here). The submission continues that as B Grade sand is not a mineral (as in this case),

---

[65] Paras [8], [11], [44], [64], [65] defendant's closing submission; paras [7], [35] to [38] defendant's written reply;
[66] *Unimin Australia Ltd v State of Queensland* [2009] QSC 384 at, for example [92], [107];
[67] *Unimin Australia Ltd v State of Queensland* [2010] QCA 169;
[68] Paras [11], [45] to [50] submissions for Unimin;
[69] Paras [28] to [35] submissions for the defendant;

it's extraction at the pit of quarry is not authorised under the MRA and does not constitute "mining"[70]. This is so even when the simultaneous extraction of that part of the undifferentiated mass made up of glass grade sand at the pit or quarry is "mining", authorised under the MRA, and is a "mining activity" under section 147 EPA.

79. Section 6A *Mineral Resources Act 1989* (MRA) defines "mine":

> ***6A Meaning of mine***
> *(1)* ***Mine*** *means to carry on an operation with a view to, or for the purpose of—*
> *(a) winning mineral from a place where it occurs; or*
> *(b) extracting mineral from its natural state; or*
> *(c) disposing of mineral in connection with, or waste substances resulting from, the winning or extraction.*
> *(2) For subsection (1), extracting includes the physical, chemical, electrical, magnetic or other way of separation of a mineral.*
> *(3) Extracting includes, for example, crushing, grinding, concentrating, screening, washing, jigging, tabling, electrowinning, solvent extraction electrowinning (SX–EW), heap leaching, flotation, fluidised bedding, carbon-in-leach (CIL) and carbon-in-pulp (CIP) processing.* ...(emphasis added)

80. "Operation" is not defined in the MRA. Dictionary meanings give it a wide scope e.g. "active process, activity, performance, discharge of function"[71] and "the act, process, or manner of operating ...a process of a practical or mechanical nature in some form of work or production ... a course of productive or industrial activity"[72].

81. So, as I understand it, the crux of the prosecution's case is that section 6A means to win a mineral, extract a mineral or to dispose of a mineral or waste. B Grade sand is not a mineral as defined and is not waste in this case as it has been sold. Therefore, the activity of "winning" that part of the undifferentiated mass made up of B Grade sand "from a place where it occurs" i.e. the pit or quarry, is not "mining" under the MRA (s 147(2)(a) EPA) and is not an activity that is associated with or facilitates or supports that activity (s 147 (2)(c)(i) EPA). Accordingly, it is not "mining activity" under section 147 EPA, so that ERA 20 in the regulations made pursuant to section 19 EPA

---

[70] Transcript dated 22 August 2014: 1-31(lines 42 – 46), to 1- 32 (lines 1 – 46), 1-32 (lines 1 – 17);
[71] Concise Oxford Dictionary;
[72] The Macquarie Concise Dictionary;

applies requiring a Chapter 4 authority for the EPA charge and is also "assessable development" for the IPA charge. The prosecution further submits that, even if the activity at the pit or quarry was a "mining activity", section 19 EPA does not preclude prescribing a "mining activity" as an ERA by regulation[73].

82. The prosecution relies on a passage from de Jersey CJ's judgement in *Unimin Australia Ltd v State of Queensland* [2010] QCA 169 at [4] in support of its submissions that if B Grade sand is not a "mineral" as defined in the MRA, then further approvals are required to dig up that portion of the undifferentiated mass made up of B Grade sand from the pit or quarry. It is said the statement "could not be clearer"[74]:

> [4] The principal issue before the learned primary judge was whether the lower grade sand is a "mineral" within the meaning of the [MRA]. If it is then, as with the higher purity sand, it may be extracted without the need for permits and approvals under the [IPA] ..., and lawfully sold, **if not, the contrary position applies.** (emphasis added)

83. This, it was submitted, is "entirely consistent with the prosecution's submissions" and that it also demonstrates the relevance of purpose at the time of "winning" or "extraction"[75]. At the time of "winning" or "extraction", the ultimate purpose for B Grade sand was for a non-mineral use. Therefore, the process of "winning" at the pit or quarry constituted at once a Chapter 5 mining activity for the glass grade sand and a Chapter 4 activity for the B Grade sand[76]. The approach to the above quote, it was submitted can be gleaned from para [7] of Applegarth J's judgement in *Unimin Australia Ltd v State of Queensland* [2009] QSC 384[77]:

> [7] The practical significance of the resolution of these issues is that a determination that B Grade silica sand is a "mineral" within the meaning of s 6 of the *MR Act*, and may be lawfully sold, is that there is no requirement for a permit for extraction or other permits and approvals under the *Integrated Planning Act* 1997 (Qld) in respect of the mining, treatment and sale of B Grade silica sand.

---

[73] Paras [24] to [27] submissions for the prosecution;
[74] Transcript dated 22 August 2014: 1 – 38 (line 4);
[75] Para [9] submissions for the prosecution;
[76] Paras [16] & [17] submissions for the prosecution;
[77] Transcript dated 22 August 2014: 1 – 38 (from line 33) to 1 – 39 (to line 5);

84. It must be remembered that the "winning" takes place "from the place where [the mineral] occurs" being the pit or quarry. The "extraction" may begin at the pit or quarry but mostly occurred on ML 1124. The "extraction", as defined in section 6A MRA, is the process of getting the mineral "from its natural state" being the separation of the glass grade and B Grade sand from the undifferentiated mass on ML 1124. Then, the B Grade sand was sold off a stockpile from ML 1124 after the "extraction" had finished. In my respectful view, Applegarth J in [7] was speaking in general terms when using the words "mining, treatment and sale" of B Grade sand. Of course that may be the ultimate effect in certain circumstances but the defendant is charged with a criminal offence of extracting from the pit or quarry on ML 1108 and ML 7064. Similar remarks can be made in respect of the Court of Appeal judgment at [4]. Upon reflection, and after consideration of all of the evidence, the remarks by those courts do not advance the prosecution's case on the questions now before this court. I agree with submissions for the defence that "the precise question of what combination of permits and approvals would be required was never argued nor determined ..."[78].

85. The prosecution further relies on the following passages by Applegarth J in [2009] QSC 384 at [29] to [32] to support the view that extraction from the pit or quarry of that part of the undifferentiated mass made up of B Grade sand was not mining as it was not a mineral because, at the time of extraction, the B Grade sand had an ultimate purpose of non-mineral use (footnotes omitted)[79]:

> [29] Reliance is placed by the applicant upon the fact that there is one mining operation, and it is only at the end of the process that silica sand is graded and separately stockpiled. This is not a case where there is a separate mining operation for Glass Grade silica sand and another mining operation for B Grade silica sand. Section 6(3)(b) looks at the use for which silica sand is mined and the focus is on the use contemplated by the miner at the time of mining, not the use to which some of the sand is put at a later time by a purchaser. The undifferentiated mass of silica sand is mined for the principal purpose of extracting Glass Grade silica sand for use in glass manufacturing, and, as a consequence, the applicant submits that both the Glass Grade silica

---

[78] Para [84] submissions for the defence;
[79] Transcript dated 22 August 2014: 1 – 36 (from line 23) to 1 – 38 (to line 15); paras [16], [17] submissions for the prosecution;

sand and "the balance of silica sand" is a mineral to which title passes.3 The consequence of the submission is that the applicant submits that it is entitled to sell the balance of the silica sand, being the B Grade sand for whatever purpose its purchaser wishes to use it. Subject to the possible application of s 6(3)(d)(i) to be considered in connection with "the sand issue", the applicant submits that it acquires title to and is entitled to sell the B Grade silica sand for any purpose, including use with cement, as sand for a sandpit, as landfill or to create a private beach.4

[30] I accept the applicant's submission that the focus of s 6(3)(b) is on the use for which the silica sand is mined by the applicant, not on the purpose of an eventual purchaser of any by-product of lawfully mined silica sand. However, the lawfulness of the mining operation in which an undifferentiated mass of silica sand is mined with a view to grading the silica sand into a portion that is suitable for use in glass manufacturing, and a portion that is not, does not mean that all of the silica sand that is extracted is a "mineral". The terms and statutory context of s 6(3)(b) means that silica sand is only a mineral if it is mined for use for its chemical properties. On the agreed facts, not all of the silica sand that is mined is mined for use in glass manufacturing. Only that part of the silica sand that is subsequently graded as Glass Grade silica sand is mined for such a use. The balance, whether described as B Grade silica sand or by-product, is not mined for use in glass manufacture. The fact that the principal purpose of mining and treating all of the silica sand is to extract silica sand that is suitable for use in glass manufacturing does not alter this conclusion.

[31] At the time the silica sand is extracted from its natural state as part of the applicant's mining operation, the applicant knows that part of the silica sand will not be suitable for use in glass manufacturing. The terms of the Act indicate that this sand is not a mineral unless it is mined for use for its chemical properties. The construction of the legislation for which the applicant contends would result in the applicant acquiring title to this "by-product" provided that some small part of the silica sand of which it originally formed part was suitable for use in glass manufacturing. This result would follow even where the Glass Grade silica sand constituted only a tiny fraction of the silica sand that was mined. Neither the terms nor purpose of the Act indicate an intent to define such a by-product as a mineral and for property in it to pass to the holder of the mining lease unless the by-product is mined for use for its chemical properties.

[32] I conclude that the principal purpose for which the undifferentiated mass of silica sand is mined, namely for use in glass manufacturing, does not mean that all of the silica sand, including the by-product or B Grade silica sand that is not suitable for glass manufacturing, is a mineral. The B Grade silica sand that is stockpiled at the end of the applicant's mining operation will be a "mineral" if it is mined for use for its chemical properties and if s 6(3)(d)(i) does not apply to it. It does not qualify as a

> mineral because earlier in the mining operation it formed part of an undifferentiated mass of silica sand that included Glass Grade silica sand. (emphasis in complainant's submissions)

86. The prosecution sought comfort from Applegarth J's use of the words "mining operation" instead of "mining activity" in the above passages[80]. As I understand it, this was to support the proposition that His Honour did not consider this activity to be "mining activity" as defined in section 147 EPA. However, I note the focus of that discussion was whether B Grade sand was a "mineral" as defined in the MRA. Section 147 EPA, which provides the definition for "mining activity" as it applies to Chapter 5 EPA authorities, was not the subject of discussion in that part of the judgment. Section 147 EPA was only considered in a general way under the "passing of property" issue discussed below.

87. A point was also made by the prosecution that Applegarth J declined to make the following declaration sought by the defendant in that civil application and the refusal is "entirely consistent" with the prosecution's case here[81]:

> Carrying on the activity of mining and disposal of silica sand by [Unimin], comprised in part of lower B Grade silica sand, is lawful and does not require any further approvals under the [IPA] and not a registration certificate under the [EPA].

88. Applegarth J described four issues for determination before him. First, there was "the by-product issue" in which it was contended for Unimin that B Grade sand as a by-product of winning and extracting glass grade sand which is a mineral, is also a mineral. He found that it was not a mineral[82].

89. The second issue before His Honour was "the chemical properties issue" where Unimin's alternative argument was that B Grade sand was a mineral in its own right. After extensive analysis, he found that B Grade sand mined for use in white mortars etc. is not a mineral because it is not mined for its chemical properties[83].

---

[80] Transcript dated 22 August 2014; 1 – 37 (lines 16, 17);
[81] Transcript dated 22 August 2014: 1 - 38 (lines 16 – 47) & 1 – 39 (lines 1 – 5);
[82] Paras [3] & [32] of the judgment;
[83] Paras [4] & [92] of the judgment;

90. The third issue before His Honour was "the sand issue" where he had to determine whether the use of B Grade sand as a colourless inert filler in white mortar etc. entails its use "as sand" so as to fall within section 6(3)(d)(i) MRA[84]. His Honour found that sand for use for its chemical properties does not entail sand to be used as sand so as to engage section 6(3) (d) (i). If he had found that B Grade sand was mined for use for its chemical properties, and thus a mineral under section 6(3)(b) MRA, then section 6(3)(d)(i) would not necessarily provide a ground to conclude it was not a mineral[85].

91. The fourth ground before Applegarth J was "the passing of property issue" where he had to determine whether any condition of leases, any environmental authority, or any legislative provision operated to pass property to Unimin of anything that is not a mineral. His Honour concluded that they don't[86]. He noted that he was not asked to determine property rights in the B Grade sand that was sold over the years[87] which lends support for the defence's submissions that this case was commercial in nature and about what was to occur in the future[88].

92. That was the context of His Honour's comments in paragraph [7] cited earlier. He declined to make the declarations sought "in the form proposed by [Unimin]"[89]. However, after the parties had the opportunity of considering his judgment and then hearing their submissions, he made the following declarations he described as being "appropriate to determine the dispute between the parties"[90]:

> 1. On the proper construction of section 6 of the *Mineral Resources Act* 1989, the lower purity B Grade silica sand by-product, that is obtained by the applicant in the course of mining higher purity A Grade silica sand, is not a "*mineral*" within the meaning of s 6 of the *Mineral Resources Act* 1989 unless mined "for use for its chemical properties". (my emphasis[91])

---

[84] Generally, it excludes sand if used as sand or supplied for use as sand from being a "mineral";
[85] Paras [5] & [103] of the judgment;
[86] Paras [6] & [124] of the judgment; section 310 MRA provides for the passing of property in minerals lawfully mined subject to royalty payments;
[87] Para [119] of the judgment;
[88] Transcript dated 22 August 2014: 1 -12 (line 3); a discussion on the nature of declaratory relief is beyond the scope of these proceedings but generally, a declaration must be of some utility to the parties i.e. to be of use in the future and not issues that are now spent: see Young, Croft & Smith *On Equity* (Lawbook Co 2009) at pp1075 et seq.;
[89] Para [125] of the judgment;
[90] *Unimin Australia Ltd v State of Queensland (No 2)* [2010] QSC 23; see [2009] QSC 384 at [126];
[91] The word "mining" replaced the words "winning and extracting" which were proposed at trial;

> 2. On the proper construction of s 6(3)(b) of the *Mineral Resources Act* 1989, the lower purity B Grade silica sand by-product that is mined for use in white mortars and white renders is not mined "for use for its chemical properties" within the meaning of s 6(3)(b) of the *Mineral Resources Act* 1989. (my emphasis)

In contrast to this case, those declarations further highlight the focus of proceedings before His Honour which relate to the meaning of "mineral" in section 6 MRA and the relevance of "purpose" in determining whether or not B Grade sand is "mineral".

93. I note that Applegarth J was not specifically called on to consider the effect of sections 18, 19 EPA, ERA 20, the relationship between Chapter 4 and Chapter 5 EPA and whether or not the activity at the pit or quarry constituted "mining" as in the definition of "mine" in section 6A MRA or "mining activity" as defined in section 147 EPA. I agree with the defendant's submissions on this point[92]. His consideration of section 6A MRA focussed on the disposal of waste under "the passing of property issue" and not, as is the question in this case, whether the extracting of the undifferentiated mass from the pit or quarry is "an operation with a view to, or for the purpose of winning mineral" etc. His Honour's reference to section 147 EPA at [121] was again in the context of "the passing of property" issue. It appears that he was giving an explanation of the legislative scheme in coming to the view that there were no provisions as to the passing of property of non-mineral material.

94. Given the focus of the questions for determination before Applegarth J and the Court of Appeal, and the discretionary nature of declaratory relief[93], I do not accept the prosecution's submissions that the statements relied on materially advance its case in these criminal proceedings.

---

[92] Para [82] submissions for Unimin;

[93] See for example *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581 -582; see also Gibbs J in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 438: "After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration";

95. It should be further noted that there is no express reference in Applegarth J's judgement delivered 30 November 2009 to possible criminal proceedings against Unimin in respect of past conduct. The complaints initiating these proceedings against Unimin were made the next day, 1 December 2009[94]. On reading that judgment, it appears His Honour was not appraised of contemplated criminal proceedings. Whilst noting the declarations sought were refused on different grounds, the fact of contemplated criminal proceedings may nevertheless have been a relevant factor as to whether or not the discretion to grant declaratory relief should be exercised[95]. This further supports Unimin's submissions that the focus of those proceedings related to future activity and was of a commercial nature and not concerned with the issues confronting this court[96].

96. The next major submission for the prosecution with a view to showing that the activity at the pit or quarry is not "mining activity" as defined in section 147 EPA is the application of the rule of statutory interpretation *noscitur a sociis* in relation to the words "directly associated with" and "facilitates or supports" in section 147 (2) (c) (i) EPA[97]. Passages from two authorities were cited explaining that rule: *Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [2006] NSWCA 207[98] and *Deputy Commissioner of Taxation v Dick* [2007] NSWCA 190[99]. For example, at paras [12] & [13] in *Dick*:

---

[94] The complaints were filed in court on 4 December 2009 returnable in the Cleveland Magistrates Court 22 January 2010;

[95] See for example *Crane v Gething* [2000] 97 FCA 45 at [31] per French J (as he then was): "What emerges from the case law generally is a spectrum of responses to claims for declaratory or consequential relief where such relief is based upon the proposition that the conduct at issue is or is not a contravention of the criminal law. At one end of the spectrum is the case involving a claim for a declaration based upon undisputed facts and a question of law such as the construction or validity of a statute or delegated legislation or a statutory instrument. Where there are no pending criminal proceedings the probability of such a claim being entertained is at its highest, albeit subject to discretion informed by the well-established reluctance of civil courts to enter into criminal jurisdiction. Where a prosecution is pending the prospect of obtaining relief is less. Where the claim is sought during a trial the prospect of obtaining relief are probably negligible. Where the claim is made after a trial it will ordinarily be seen as subverting established appeal processes albeit it may be entertained in exceptional circumstances - *Biggs v DPP* (supra)".

[96] See also para [128] Applegarth J's judgment where he said it was inappropriate to make declarations which "determine rights and liabilities in respect of the past supply of sand made with knowledge of the respondent and in respect of which it received royalties";

[97] Transcript dated 22 August 2014: 1 -33 (from line 17) to 1 – 36 (to line 22);

[98] Per Spigelman CJ, McColl & Basten JJA agreeing;

[99] Spigelman CJ, Santow & Basten JJA;

> The relevant principle of statutory interpretation is noscitur a sociis which has been imaginatively translated by Lord McMillan as 'words of a feather flock together'. As his Lordship went on to explain the principle: "The meaning of a word is to be judged by the company it keeps": Lord McMillan, *Law & Other Things* (Cambridge University Press, Cambridge, 1937), p 166.
>
> ...As Lord Kenyon CJ once put it, where a word "stands with" other words it "must mean something analogous to them". ...

97. Having regard to dictionary meanings of the words "facilitates or supports"[100] that follow "directly associated with" in section 147 (2) (c) (i), it was submitted they should be interpreted as something that promotes and advances an activity in section 147(2) (a) or (b) EPA. That is, it promotes or advances the removal of glass grade sand being a mineral that is mined under the MRA. The words should not be interpreted to promote or advance something in conjunction with it, namely the removal of B Grade sand that is not a mineral under the MRA[101].

98. In my view, the difficulty with that is its characterisation. The approach is too narrow having regard to the facts of this case and the definition of "mine" in section 6A MRA. The facts, as already stated, are that the undifferentiated mass comprising a mixture of glass grade sand, B Grade sand and other material must be dug out of the ground in the one action in order to get the glass grade sand. After the undifferentiated mass has gone through a process, the glass grade sand is "extracted" i.e. separated out at a different location and at a different time to the "winning" from the pit or quarry. The B Grade sand is a by-product of that process. If anything, the activity of digging the whole undifferentiated mass out of the ground "is directly associated with" or "facilitates or supports" the activity of mining glass grade sand authorised under the MRA to take place "on the land to which a mining tenement relates". If such is the case, then it is "mining activity" under section 147(2) (c) (i) EPA. However, the defence's primary submission outlined earlier, is that this is "mining" itself which constitutes "mining activity" under section 147(2) (a) EPA.

99. The prosecution submitted that to be a "mining activity" in section 147(2)(c)(i) EPA, the activity that is directly associated with or facilities or

---

[100] The Macquarie Dictionary, 3rd Edition at 754 & 2127 respectively;
[101] Transcript dated 22 August 2014: 1 -36 (lines 13 – 23);

supports an activity under section 147(1)(a) or (b) must also satisfy the requirement that it "may cause environmental harm": section 147 (2)(c)(ii). If not, it is not "mining activity" and therefore, it was submitted, the legislation contemplates by necessary implication that such activity may be a Chapter 4 activity[102]. No authorities were referred to.

100. In response, it was submitted for the defendant that this may be theoretically possible although unlikely but is irrelevant as such an activity would not then be a mining activity. The question in this case is whether a single activity at the pit or quarry can simultaneously be a Chapter 4 and Chapter 5 activity[103]. That is, does section 19 EPA authorise the making of regulations for an ERA that is a "mining activity"? In any event, it was submitted there is an abundance of evidence that the activity at the pit or quarry causes environmental harm, for example exhibit 50 (Environmental studies report for the extension of ML 1108), and provisions on the various mining leases and authorities in exhibits 14, 54 & 108[104]. Further, it was for the prosecution to "nominate" the activity at the pit or quarry that does not cause environmental harm[105]. It has not done so. I agree with those submissions.

101. The submission for Unimin reasserts the view that the single activity at the pit or quarry was "mining" under the MRA as per section 147 (2) (a) in any event without the need to resort to section 147 (2) (c).

102. Another submission for the prosecution was that a construction of the legislation urged by Unimin would deprive the definition of "extraction"[106] in the *Environmental Protection Regulation* 1998 of any meaningful operation. That is, the definition suggests that "extracting" will include extracting material if both conditions do not apply "irrespective of whether the particular material is the primary purpose of the process of extraction"[107]. It will be recalled that the

---

[102] Para [10] submissions for the prosecution;
[103] Para [27] submissions for the defence;
[104] Transcript dated 22 August 2014: p 1 -20 (lines 26 to 45);
[105] Transcript dated 22 August 2014: p 1 – 20 (lines 26 to 46);
[106] See para [14] herein;
[107] Paras [13] to [15] submissions for the prosecution;

definition of "extraction" is phrased in terms of what is not extraction if two conditions are met.

103. In response, it was submitted for Unimin that on the facts of this case the definition is irrelevant. I understand this submission to mean that whether or not the activity at the pit or quarry is extracting within that definition, it is extracting for the purposes of the regulation made pursuant to section 19 EPA which does not authorise making a regulation prescribing a "mining activity" as an ERA. The definition of extraction is directed at excluding from ERA 20 those extraction activities that are relatively small such as the construction of a dam and in those circumstances, a permit is not required. In any event, the primary purpose of the extraction at the pit or quarry was to gain all of the material and there is clear evidence that more than the prescribed amount of material has been extracted. Therefore, if ERA 20 applied, the activity at the pit or quarry may be "extracting" for the purposes of the regulations only[108]. I agree with those submissions.

104. In its submission, the prosecution has referred to "the particular material is the primary purpose of the process of extraction". It introduces a concept of "process" at the point of extraction. The first condition of what is not "extraction" within the definition of "extraction" refers to "The primary purpose of the extraction is not to gain the material" (emphasis added). Unimin's primary purpose at the pit or quarry on ML 1108 & ML 7064 is to gain all of that material in order to process it on ML 1124 to gain Glass Grade sand. Processing mainly occurs on ML 1124. "Material" is not defined in the EPA or the regulations. Dictionary meanings relevantly include "Matter from which thing is made (raw material)"[109] and "anything serving as crude or raw matter for working upon or developing"[110]. In my view it is significant that the definition of "extraction" uses the word "material" and not "mineral". Consistently with Unimin's construction of section 19 EPA, it seems to me that "material" connotes something different to "mineral" and has broader application. This supports the view that "material" more comfortably fits with

[108] Transcript dated 22 August 2014: p1 -21 (from line 24) to p 1 - 22 (to line 20);
[109] The Concise Oxford Dictionary;
[110] The Macquarie Concise Dictionary;

digging the whole undifferentiated mass from the pit or quarry rather than that part of it which constitutes either Glass Grade sand only or B Grade sand only. Thus, the primary purpose of extracting the undifferentiated mass from the pit or quarry was to gain all of this "material" from there. Apart from that, I cannot see how the construction of the EPA agitated by Unimin deprives the definition of "extraction" of a meaning in the regulations. However, the definition of "extraction" applies for the purposes of the regulations and Unimin submits that section 19 EPA does not authorise the making of an ERA by regulation that is a "mining activity". For reasons given herein, I accept that submission.

105. Another reason which tends to militate against the "necessary implication" agitated by the prosecution in order to show that the activity at the pit or quarry requires dual authorisation is that there are other express provisions in the EPA dealing with the issuing of more than one registration certificate under certain circumstances. Section 73F (Registration Certificates) in Part 2 (Registration) of Chapter 4 EPA[111] entitled "Registration certificates" provides that an administering authority may issue two or more registration certificates if "satisfied the activities will not be carried out as a single integrated operation". Subsection 73F(3) then provides that activities are a single integrated operation if a number of factors are satisfied including whether the activities are "operationally interrelated" or whether "the activities are ... carried out at two or more places at or about the same time, and the places where they are carried out are separated by distances short enough to make feasible the integrated day to day management of the activities". Thus, the legislature has expressly provided for circumstances where more than one authority may be required under Chapter 4 and yet is silent on whether Chapter 4 and Chapter 5 authorities are concurrently contemplated where there is the one activity at the pit or quarry. Interestingly, if the factors above were employed to the facts of this case, they would tend to support a requirement for one authority only.

106. It was further submitted for the defence to support the view that the activity at the pit or quarry is authorised under the MRA to take place on "land to which

[111] Entitled "Development Approvals and Registration (other than for mining and petroleum activities);

the mining tenement[112] relates" as per section 147(1) (a) EPA is the power in section 234(1) (a) MRA to grant a mining lease[113] "to mine the mineral or minerals specified in the lease and for all purposes necessary to effectually carry on that mining"[114]. There is no dispute here that Unimin held mining leases on ML 1108 & ML 7064 to mine for silica sand. One would have thought that digging the undifferentiated mass from the pit or quarry with a view to winning a mineral, namely Glass Grade sand, which forms the major part of that mass, falls within the description "for all purposes necessary to effectually carry on that mining".

107. The facts are distinguishable from those *In Re Clark* [2005] QLRT 118 where the miner had a mining lease to mine sand in block form for building purposes. However, separate and discrete overburden had to be removed to get to the blocks. Thus, both categories of material were on the same site but the activity of moving them were at different times. The Tribunal held the removal of the overburden i.e. quarrying, was not an essential precursor to the mining[115] and that the statutory scheme clearly contemplated a separate scheme of authorisation[116]. A Chapter 4 quarry authorisation in addition to a Chapter 5 mining authorisation was required to remove the overburden. In this case, the mineral (the glass grade sand) is inextricably mixed in with the undifferentiated mass which had to be removed and processed in order to separate the glass grade sand from the B Grade sand and other material. The removal of the undifferentiated mass from the pit or quarry **is** a necessary precursor to the mining of the "mineral" i.e. the glass grade sand. In my view, on the facts of this case, the activity of digging the undifferentiated mass from the pit or quarry falls within the definition of "mine" i.e. to carry on an operation with a view to .." and therefore is authorised under the MRA at that point.

---

[112] "Mining tenement" is defined in Schedule 2 MRA to include a "mining lease"; it is not defined in the EPA;
[113] Section 6D MRA provides that a mining lease is one of a number of authorities under that Act;
[114] Paras [72] of Unimin's submissions & para [23] Unimin's reply;
[115] Para [7] on page 3 (austlii report);
[116] Paras [9] to [12] on page 4 (austlii report);

108. The scenario in *Clark* was posited by the defence in recognition of the fact that "on different facts ... there could be a Chapter 4 activity operating 'in conjunction with' a Chapter 5 activity" where the holder of a gold mining lease removes granite overburden in order to expose the gold[117]. However, unlike in the present case, the activity of removing the overburden occurs at a different time to the "winning" of the gold. They are two separate activities.

109. After *Gonzo*, the expanded definition of "mine" of which "mining" is a derivative, in my view includes digging the undifferentiated mass out of the ground right up to its separation. In *Gonzo*, the miner had a gold mining lease. He extracted quantities of material from that land comprising various substances mixed together including gold. There was no question that that constituted mining on the land the subject of the mining lease. However, he transported it to other land not the subject of the mining lease and processed it there to extract the gold. While the majority of the Court of Appeal concluded that the activity on the other land was not mining, the legislature reversed that decision by amending the section 6A MRA definition of "mine" into its current form. This further supports the defence's submission that the activity of removing the undifferentiated mass from the pit or quarry was "mining" in terms of section 6A MRA which was authorised to take place on the land to which the mining tenements relate under section 147 EPA.

110. In summary, the defence's case is that the activity at the pit or quarry on ML 1108 and ML 7064 is "mining" as per section 6A MRA and is therefore a "mining activity " as defined in section 147 EPA being an activity authorised to take place on land to which the mining tenements relate. As it is a "mining activity", section 19 EPA does not authorise the making of regulations for ERA's that are mining activities as defined. Even if the activity at the pit or quarry was not "mining", it is an activity "directly associated with or facilitates or supports" the activity of mining with the same result.

111. In this regard, the defence firstly dealt with the legislative history of sections 18 & 19 EPA which were inserted into the EPA by the *Environmental*

---

[117] Paras [8] & [9] submissions for the defence;

Protection and Other Legislation Amendment Act 2000 (No 64 of 2000). The regulation of the mining industry was transferred from the Department of Mines and Energy to the Environmental Protection Agency[118]. The EPA was further amended by the *Environmental Protection Legislation Amendment Act* 2003 (No 95 of 2003) which took effect from 4 October 2004. It was submitted that from 4 October 2004 ERAs were governed by Chapter 4 EPA and mining activities were governed by Chapter 5 EPA[119].

112. Thus, it was submitted, it was beyond the power in sections 18 & 19 EPA to prescribe by regulation a "mining activity" as an environmentally relevant activity (ERA) and that ERA 20 in the *Environmental Protection Regulation* 1998 made pursuant to section 19 should be read as excluding a mining activity. That is, the collective effect of these provisions is that if the activity at the pit or quarry on the facts of this case is a mining activity, then it cannot at the same time be a Chapter 4 activity. This is consistent with the legislative intent that mining be governed by Chapter 5 EPA and non-mining activities be governed by Chapter 4 EPA. This is supported in the definition of "chapter 4 activity" which provides for an ERA "other than a mining activity"[120].

113. On the other hand the prosecution says that those provisions should not be so read having regard to the overall legislative scheme and that section 19 EPA does not exclude the possibility that something undertaken in order to conduct a mining activity might also be regulated under an ERA. Different considerations may apply to different aspects of the one activity[121]. Reference was then made to the various extracts from the judgments of Applegarth J and the Court of Appeal referred to earlier in which I had concluded do not advance the prosecution's case.

114. On the facts of this case, I accept that the single activity at the pit or quarry is "mining" authorised under the MRA on the land to which the mining tenements

---

[118] The Explanatory Memorandum to the Bill stated the objects were to transfer the environmental regulatory provisions from the MRA administered by Department of Mines and Energy to the EPA administered by the then Environmental Protection Agency;
[119] Paras [13] to [19] submissions for the defence;
[120] Transcript dated 22 August 2014: 1 – 36 (from line 23) to 1 – 38 (to line 15);
[121] Paras [7], [8], [24] to [27] submissions for the prosecution;

relate and therefore is "mining activity": ss 147(1) (a) & (2) (a). I accept the submissions for the defence that, on a plain reading of words in sections 18 & 19 EPA, section 19 EPA only authorises ERAs by regulation that are not "mining activities". Section 18 EPA clearly separates " a mining activity" in paragraph (a) from "another activity prescribed under section 19.." in paragraph (b). Then, the words "other than a mining activity" in section 19 EPA must be given some meaning and effect and that they are not either superfluous or insignificant: *Project Blue Sky Inc v Australia |Broadcasting Authority* (1998) 194 CLR 355 at [71][122]. Consistently, section 20 EPA then provides that an ERA "other than a mining activity" must be prescribed as a Level 1 or Level 2 ERA by regulation made pursuant to section 19 EPA[123]. In my view, it is not open to imply a power in section 19 EPA to make regulations for a "mining activity" and ERA 20 should be read as not including a "mining activity". The activity at the pit or quarry is what Unimin has been charged with and this is "mining" authorised by the MRA and thus "mining activity".

115. The prosecution have relied on extracts of judgments before Appelgarth J and the Court of Appeal and that by "necessary implication" that the single activity at the pit or quarry can be concurrently a Chapter 4 and Chapter 5 activity[124]. Put another way, it was submitted that sections 18 & 19 EPA "do not exclude the possibility that an activity under Chapter 5 might also be an activity under Chapter 4"[125]. Whilst it is said sections 18 & 19 EPA do not exclude that possibility, on the other hand there is nothing in the context of those sections warranting the possibility of a concurrent requirement of Chapter 4 & Chapter 5 activities either. These are criminal proceedings.

116. The words of a statute "must first be read in the context provided by the statute as a whole ... and if so read, the meaning of the section is literally clear and

---

[122] Citing *Commonwealth v Baume* (1905) 2 CLR 405 per Griffith CJ; See also D C Pearce & R S Geddes *Statutory Interpretation in Australia* (Butterworths, 8th ed. 2014) at [2.26] citing a number of cases since; also cited by Applegarth J at [2009] QSC 384 at [45] in construing the meaning of "chemical properties" in section 6(3)(b) MRA entitled "Meaning of mineral";
[123] At para [11] herein;
[124] Para [10] submissions for the prosecution;
[125] Para [7] submissions for the prosecution;

unambiguous, nothing remains to but to give effect to the unqualified words"[126]. The language in sections 18 & 19 EPA are clear enough. ERAs by regulation are for activities that are not mining activities. The language in section 6A MRA as to what constitutes "mining" is also clear enough. The activity at the pit or quarry was authorised under the MRA. In my view the necessary implication urged by the prosecution is not warranted. Further, the EPA in Chapter 4 has expressly provided for the issuing of two or more concurrent Chapter 4 authorities under certain circumstances: s 73F. However, apart from the clear words in sections 18 & 19 EPA referred to earlier, the EPA is otherwise silent on the question before this court.

117. As a matter of statutory construction, I was invited by the defence to consider subsequent legislation, namely the *Environmental Protection Regulation* 2008 effective 1 January 2009, in order to assist in interpreting the *Environmental Protection Regulation* 1998 applicable in this case. The charge periods end 18 December 2008. The definition of "extractive activity" was changed to include "extracting ... from an area". In referring to the examples given in the new regulation which form part of the regulation[127], the defence says this broadens the law so as to encompass extracting from a stockpile and highlights the narrowness of the old regulation[128]. It was also conceded that taking from a stockpile from 1 January 2009 may constitute a Chapter 4 activity if not directly associated with, facilitating or supporting an activity in s 147(2) (a) or (b).

118. The effect of the cases cited in support of this exercise is that subsequent legislation can only be taken into account if there is some ambiguity in the former legislation: *Grain Elevators Board (Vic) v Dunmunkle Shire* (1946) 73 CLR 70; *Allina Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 203. I note the approach taken by Dixon J in *Grain Elevators* (at 86) where he considered the subsequent amendment to assist in interpretation on the grounds that to give the prior legislation a wider meaning than that expressly given by the amendment would render the amendment "unnecessary" and "futile". However,

---

[126] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509 at 512 per Gibbs CJ citing cases including *Attorney –General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, 473 and *Cooper Brookes (Wollongong) Pty Ltd v FC of T* (1981) 35 ALR 151 at 156-7;
[127] See section 14(3) *Acts Interpretation Act* 1954;
[128] Paras [58] to [63] submissions for the defence;

although this approach has been applied in some cases to a provision of doubtful meaning, the Full Federal Court in *Allina* cautioned against this approach that little assistance will be gained by looking at the amending statute where the words of the former provision are clear and that care should also be taken to ensure that the amending words were not included to remove possible doubts as to the meaning of the former provision[129].

119. However, I find there is no ambiguity in the former regulation which, in its terms says "Extracting ... sand ... from a pit or quarry". This is what Unimin has been charged with. The subsequent regulation cannot be considered to interpret the former. I agree with the prosecution's submissions on this point[130]. The court does not know and cannot speculate as to the reasons why the definition was changed.

120. In conclusion, in respect of the EPA charge, Unimin had a Chapter 5 authority to dig the undifferentiated mass from the pit or quarry on ML 1108 & ML 7064. A Chapter 4 authority was not required.

121. For the IPA charge, Unimin was not carrying out a material change of use as it had the appropriate environmental authority under the EPA. It was carrying out a mining activity at the pit or quarry on ML 1108 & ML 7064. By virtue of Schedule 8 Table 2 IPA, that was not assessable development which did not apply in any event due to section 319 MRA. I accept those submissions.

Summary

122. I find that the activity at the pit or quarry was "mining" bearing the same meaning as "mine" defined in section 6A MRA.

123. That activity is "mining activity" as defined in section 147 (2) (a) EPA.

124. In the alternative, the digging of the undifferentiated mass from the pit or quarry is an activity "directly associated" with the activity of "mining" a mineral,

---

[129] See also Pearce & Geddes *Statutory Interpretation in Australia* (Butterworths, 8th ed. 2014) at [3.33] & [3.34] and cases cited therein;
[130] Transcript dated 22 August 2014: p 1 - 42 (from line 13) to p 1 - 43 (to line 19);

namely, Glass Grade sand under section 147 (2)(c)(i) EPA and is therefore "mining activity".

125. Section 19 EPA authorises the making of a regulation prescribing an ERA that is not a "mining activity". Accordingly, the scope of ERA 20 does not include a "mining activity" as defined in section 147 EPA.

126. As Unimin was undertaking a "mining activity" at the pit or quarry, ERA 20 does not apply on the facts of this case.

127. For the EPA charge, a Chapter 4 authority was not required to dig the undifferentiated mass from the pit or quarry.

128. For the IPA charge, I find that Unimin was not carrying out a "material change of use" as it had an appropriate environmental authority under the EPA.

129. Unimin was carrying out a "mining activity" as defined in section 147 EPA, which, by virtue of Schedule 8 Table 2 IPA, was not "assessable development" under the IPA.

130. The IPA does not apply to the activity at the pit or quarry by operation of section 319 MRA.

131. I find the defendant not guilty on both charges.

132. I will refrain from making formal orders at this point to enable the parties to consider these reasons.