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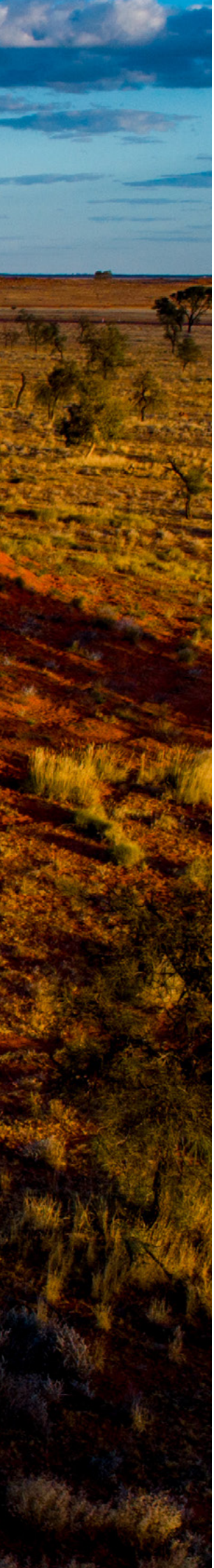
Queensland land access and resource approvals

YEAR IN REVIEW 2022

DECEMBER 2022

Contents



Foreword

Welcome to the 2022 year in review of land access and resource approval developments in Queensland.

It has been another very busy year in the world of land access and resource approval matters in Queensland. Of significance, since late 2021 through 2022, we have seen:

- land access negotiations between resource companies and landholders being affected by issues relating to subsidence, public liability insurance, local Council rates and vegetation mapping;
- continuing co-existence issues between renewable energy project proponents and the resource industry;
- the Land Court handing down decisions providing particularly useful guidance on the assessment of compensation under the *Mineral Resources Act 1989* (Qld) relating to the grant of mining leases;
- consideration regarding the scope of "cultural rights" under the *Human Rights Act 2019* (Qld) and, for the first time, the Land Court taking on country evidence from First Nations witnesses as part of a mining lease objection hearing;
- legislative amendments to Queensland's Resources Acts to promote the development of the new economy minerals industry;
- the GasFields Commission Queensland finding that there is no clear jurisdictional responsibility for regulating and managing the impacts of CSG-induced subsidence;
- Government support for significant reform to the *Regional Planning Interests Act 2014* (Qld); and
- the Land Court releasing a new version of its Model Directions and the introduction of an updated set of Land Court Rules.

At Ashurst, we have the pleasure of advising resource proponents, renewable energy proponents, Government and landholders in relation to land access and resource approval-related matters.

The articles in this publication are current as at 1 December 2022.

We encourage you to reach out to us if you would like to discuss any aspect of this publication. We also recommend you read our *Native title year in review 2021-2022*, which can be accessed here.

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* from 1 January 2022 – 30 November 2022
** from 1 January 2022 – 31 October 2022
*** during 2021/2022 financial year

Key trends in land access negotiations

Over the past 12 months, we have continued to see recurring matters raised in land access negotiations between the mining/CSG industry, renewable energy industry and landholders. These include:

- ongoing concerns regarding public liability insurance coverage for landholders who have gas activities occurring on their land (see our article regarding the latest updates in relation to public liability insurance matters);
- subsidence resulting from CSG operations, and the adequacy of the existing regulatory framework in dealing with subsidence matters (see our article below regarding the GasFields Commission Queensland's response on this matter); and
- co-existence issues relating to renewable energy projects and the mining/CSG industry.

According to the most recent Annual Report published by the Land Access Ombudsman, the number of dispute referrals to the Land Access Ombudsman increased in 2021–2022. During this period, the Ombudsman received 50 dispute enquiries, reflecting a 6% increase on referrals received during the 2020–2021 financial year.

The Ombudsman determined that only one of the 50 disputes was potentially within the Ombudsman's jurisdiction. That matter ultimately did not proceed to the investigation stage after preliminary enquiries. The Ombudsman referred 36 of those enquiries to another entity to resolve (in most cases, to the Queensland Ombudsman).

These referrals relate to:

- disputes between CSG companies and landholders regarding deviated drilling;
- concerns regarding gaining access rights to National Parks, easements, undeveloped roads and neighbouring land;
- dissatisfaction with a decision made by a government department (i.e. Department of Resources; Department of Environment and Science);
- negotiation of conduct and compensation agreements, make good agreements, access agreements and Material Change in Circumstance agreements; and
- resumption of land.

Authors: *Libby McKillop, Senior Associate; Leanne Mahly, Lawyer; Martin Doyle, Graduate.*

Key trends in Land Court compensation determinations

KEY INSIGHTS

- In *Summerville v Skelton* [2022] QLC 7, the Land Court noted that, while the Court is not bound by rules of evidence, a lack of evidence does not assist the Court in assessing the substantial merits of a case. The Court also reiterated that in mining compensation matters legal costs are generally not recoverable, and that a landowner's administrative time spent negotiating compensation is not itself compensable.
- In *NQ Marble Pty Ltd v Commonwealth of Australia* [2021] QLC 42, the Land Court adopted a low-risk valuation approach to calculating compensation, preferring the Commonwealth's methodology over the landowner's, which was found to pose a greater risk to accuracy of the land's valuation as it had more room for error.
- In Aus*tralian Asiatic Gems Pty Ltd v Grabbe & Anor* [2021] QLC 25, the Land Court confirmed that the costs of a valuation report prepared prior to Land Court proceedings could not be categorised as "loss or expense that arises as a consequence of the grant of renewal of the mining lease". This was because grant or renewal could not occur until after compensation had already been determined, and so it would not be correct to suggest that the valuation report was a consequence of the grant or renewal.
- In *Sawyer v Grabbe & Anor* [2021] QLC 27, the Land Court accepted that, where an application is for renewal of a mining claim where the productive potential of the land had already been reduced, the value for compensation for deprivation of possession of the surface of the land should be reduced as well. However, the Court also clarified that it will look at the end result of a work program and the total effect it will have on the production potential of the land, as opposed to considering only the impact the work will have at any given time.

Summerville v Skelton

Summerville v Skelton [2022] QLC 7 concerned the compensation payable by Ms Summerville, an opal miner, to the landowner Mr Skelton.

The parties exchanged several proposed compensation agreements. Prior to the matter being heard by the Land Court, their proposals were as follows:

- Ms Summerville: $10 per hectare per year ($1480 for the 10-year term of the lease). Her offer included several relationship commitments, as well as an open invitation to Mr Skelton to visit the tenement to discuss issues and inspect the camp. Ms Summerville stated that "[t]here will be no compensation for biosecurity inspections".
- Mr Skelton: $500 for 10 years and $132 per year for biosecurity inspections ($1,820 for the 10-year term). Mr Skelton's proposed agreement also contained extensive relationship and conduct terms.

In reply submissions, Mr Skelton referred to *Washington v Skelton* [2021] QLC 11 (a previous case he was involved in), in which Member Stilgoe OAM based compensation for loss of use of the land on a land earning value of $27.95 per hectare per annum.

He then sought orders for:

1. $28 per hectare per annum as compensation for deprivation of use of the land;
2. $400 per annum in biosecurity inspection costs, indexed to CPI;
3. costs for his legal advice and representation; and
4. costs for his administration time.

The Land Court assessed compensation with reference to the specific heads of claim under the *Mineral Resources Act 1989* (Qld).

Member McNamara noted that there was no evidence to quantify Mr Skelton's claims for loss of use of the land, biosecurity inspections and legal advice and representation costs. He stated that, while the Court is not bound by the rules of evidence, "that does not mean that a statement made without sourcing the information supporting it can be taken on its face. A lack of evidence does not assist the Court in assessing the substantial merits of a case".

While Mr Skelton's claim for biosecurity inspections was rejected in the absence of evidence explaining the need for them, Member Stilgoe OAM noted that it has been accepted that the existence of a mining interest and activities warrants observation and checking from time to time. On that basis, he allowed $50 of compensation for an annual one-hour inspection.

The Court also reiterated the established principles that, in mining compensation matters:

- unless there are exceptional circumstances, professional expenses incurred in carrying out a matter are generally not recoverable; and
- the time spent by a landowner negotiating with a miner about compensation is not a loss or expense that arises as a consequence of the grant of the mining tenement.

The Court ordered the following compensation:

1. $462 as a lump sum for diminution of the value of the land (section 85(5)(b)). This was based on Member Stilgoe's methodology in *Washington v Skelton*, in which compensation was assessed only in relation to the area diminished, not the total area of the mining claim; and
2. $55 per annum for monitoring costs (section 85(5)(f)).

Both sums included the usual uplift of 10%.

NQ Marble Pty Ltd v Commonwealth of Australia

The Land Court decision in *NQ Marble Pty Ltd v Commonwealth of Australia* [2021] QLC 42 is yet another recent compensation case in which the Court adopted a low-risk valuation approach to calculating compensation for landholders. The applicant, NQ Marble Pty Ltd (**NQ Marble**) held an existing mining lease over land approximately 50 km south-west of Greenvale in north Queensland. NQ Marble had identified two additional commercial styles of marble on and around its existing mining lease and sought to replace it with a new mining lease for a term of 10 years.

This matter related to compensation payable to the landholder, the Commonwealth of Australia, before the new mining lease could be granted. The land was purchased by the Commonwealth through the Department of Defence and is subject to an agistment agreement until June 2022.

NQ Marble's valuer adopted a two-step approach to valuation. Assessing the land as grazing land, he determined the carrying capacity (by calculating stock numbers of 2000-3000 over 51,800 ha) and then determined a per annum amount based on dollar value per head for the disturbed area under the lease. A statutory premium, under section 281(4)(e) of the *Mineral Resources Act 1989*, was then added. The Commonwealth's valuer adopted the "Direct Comparison" approach in conjunction with a combined "Piecemeal" approach and "Before and After" approach to assess compensation under the lease.

The Court preferred the valuation methodology adopted by the Commonwealth. While acknowledging that the approaches of both valuers included "a degree of speculation and estimation", the two-step approach used by NQ Marble's valuer posed a greater risk to the accuracy of the land's valuation, with more room for error resulting from the calculation's 'inputs' and their reliability. The Court also considered that, while the land was subject to the agistment agreement at the time of determining compensation, once the agistment agreement terminates then the land will be used for grazing purposes.

The Court then applied a premium of 20%. This represented a "more than token" premium for the potentiality of the land, while acknowledging that:

- the highest and best use of the land is likely to be for military training purposes, with the potential that further approvals may be needed to achieve this use; and
- although the Commonwealth is likely to be the only purchaser of the land for the highest and best use, that does not mean only a token amount should be added to its market value.

The Court further adjusted the amount, as follows:

- a 35% discount, due to the interest the Commonwealth would retain in the land pursuant to conditions of the mining lease;
- a further 50%, due to the temporary nature of the mining lease; and
- 3% for deferral of compensation until the agistment agreement ends.

Based on the above, the Court determined that the compensation payable to the Commonwealth totalled $34,735.62. This included a final amount of $22,203.44 per ha, $9,374.40 in loss or expenses and an additional 10% to reflect the compulsory nature of the action taken at $3,157.78.

Australian Asiatic Gems Pty Ltd v Grabbe & Anor

Another important decision was recently handed down in *Australian Asiatic Gems Pty Ltd v Grabbe & Anor* [2021] QLC 25. This matter concerned an issue where the originating application referenced the renewal of only one mining lease, rather than the intended two mining leases. However, the parties agreed that the two matters could be joined without need for filing of further material.

The Court noted that Member Stilgoe of the Land Court had previously considered a similar application in *Land & Anor v Grabbe & Anor* [2021] QLC 1, with the same respondent and a different applicant, over nearby tenements, in January of 2021. The Court considered that the underlying facts and circumstances were very similar and thus generally agreed with Member Stilgoe's findings in the earlier decision that $100/ha in circumstances of total loss should be compensation for the deprivation of possession of the surface of the land. Further, the Court found that no compensation could be given for any alleged diminution in the value of the land due to the renewal of the mining lease.

The Court accepted the decision of Member Stilgoe that the appropriate liability for the applicant is one-third of the value of the land. As both mining leases in question are accessed by the same track, the Court found that compensation in this regard is to be apportioned evenly between the two tenements. Further, the Court agreed with the Land Court's finding that one additional hour of inspection time, at a rate of $78.12 per hour, should be paid as compensation. However, no compensation would be given for an increase in management or inspection time as a result of the second tenement.

Consequently, compensation payable to the respondent was calculated to be $1,031.18. This consisted of $78.12 (the hourly rate) x 12 months + 10% uplift, which should be paid annually and indexed to CPI. These amounts were held to be payable until the mining leases expire, which, under the resource authority's public reports, will be in 2025 and 2035 for the two tenements, respectively. The Court also stated that, if one mining lease ended prior to the other and was not renewed, the holder of the mining tenement is to be responsible for the full amount under s 281(3)(a)(vi).

Costs associated with the valuation report in the Land Court were claimed, but were dismissed. Member Stilgoe had held these costs were part of litigation and not incurred due to the application for renewal.

The Court agreed. The Court noted the decision of the Land Appeals Court in *Lonergan v Friese* [2020] QLAC 3, in which it was held that the costs of negotiation cannot properly be characterised as "loss or expense that arises as a consequence of the grant or renewal of the mining lease". This is because the grant or renewal cannot occur until an agreement on compensation is reached or a determination is made by the Land Court under s 281. In other words, because the grant or renewal must occur after compensation is determined, it cannot be said that the legal expenses in negotiation occurred *as a consequence of* the grant or renewal.

The Court also noted that the claim for legal expenses was not itemised in any way to enable the Court to consider it further, and so it was dismissed.

Sawyer v Grabbe & Anor

Lastly, *Sawyer v Grabbe & Anor* [2021] QLC 27 concerned a decision regarding the compensation for the renewal of an existing mining claim and the fresh grant of a mining claim. It dealt with similar subject matter to the *Australian Asiatic Gems* decision summarised above, as well as the *Land* decision referenced in that case, and thus the Land Court saw little reason to depart from many of the findings in those decisions. Material which was filed and relied upon in *Australian Asiatic Gems* was also "recycled" by the respondents for the purposes of this case.

The Court once again applied the findings of Member Stilgoe in the *Land* decision in determining that $100/ha was appropriate in circumstances of total loss for deprivation of possession. The total amount of compensation was reduced to one-third for the renewal, as the productive potential of the land had already been lost due to previous activities on that claim.

The applicant contended, relying on the decision in *Kelly v Chelsea on the Park Pty Ltd* [2020] QLC 36 (summarised on page 21 of our *Queensland Land Access and Resource Approvals Year in Review* for 2020–2021), that only the area of disturbance should be subject to consideration, rather than the whole surface. The applicant also noted that the claims would be worked for only six to seven months of the year.

The Court rejected this submission. The Court considered that, based on the work programme for the claims, the production potential for the whole area of the claims would be significantly impacted once that programme was completed. Accordingly, the Court did not apply any discount for deprivation of the surface of the land. However, the Court also noted that this conclusion meant that any future renewal over the same area would not raise a liability for compensation.

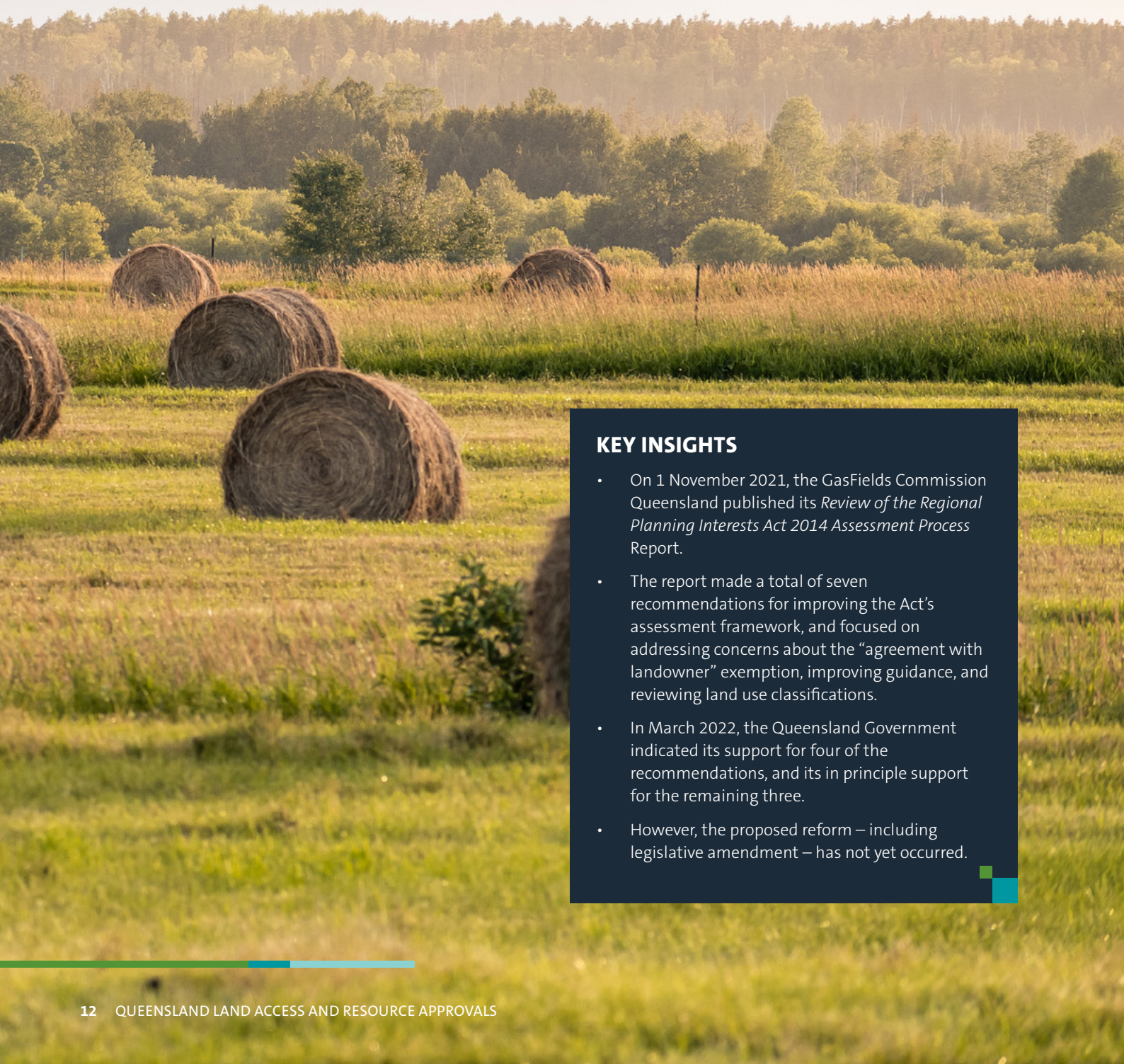
As in *Australian Asiatic Gems*, because the access track is common to both claims, the Court held that the compensation payable be split evenly under the two claims. However, should either claim cease to exist, then the holder of the remaining claim would be liable for the combined annual access track compensation payment under both claims.

With regard to compensation for loss or expenses arising out of additional inspection time, the Court (consistent with *Australian Asiatic Gems*) allowed compensation for one hour per month at $78.12 with a 10% uplift. This was again to be split between the two claims, as the claims were adjoining, and so the Court considered the management time required would not be duplicated – but again, should one claim terminate before the other, then the holder of the remaining claim would be liable for the total amount.

The applicant again made the submission that, because the claims would be worked only six to seven months a year, the management costs should be reduced to that timeframe. The Court was not satisfied that these increased management obligations would be limited to the time the tenements remained 'live', and so declined to reduce this amount.

Authors: *Leanne Mahly, Lawyer; Brigid Horneman-Wren, Lawyer; Martin Doyle, Graduate; Dillon Mahly, Paralegal.*

Queensland Government backs *Regional Planning Interests Act* reform



KEY INSIGHTS

- On 1 November 2021, the GasFields Commission Queensland published its *Review of the Regional Planning Interests Act 2014 Assessment Process* Report.
- The report made a total of seven recommendations for improving the Act's assessment framework, and focused on addressing concerns about the "agreement with landowner" exemption, improving guidance, and reviewing land use classifications.
- In March 2022, the Queensland Government indicated its support for four of the recommendations, and its in principle support for the remaining three.
- However, the proposed reform – including legislative amendment – has not yet occurred.

Review of the *Regional Planning Interests Act*

In early 2020, a Queensland Audit Office report identified stakeholder concerns about the effectiveness of the *Regional Planning Interests Act 2014* (Qld), and recommended that the GasFields Commission Queensland review the Act's assessment processes.

The Commission undertook targeted consultation in early 2021, seeking submissions from key stakeholder groups. Its review sought to evaluate:

- the assessment process and assessment criteria used to manage the impacts of coal seam gas activities in priority agricultural areas and strategic cropping areas;
- the effectiveness of the implementation of the assessment framework;
- the exemptions to the assessment process; and
- the definitions and classification of agricultural land.

Key issues identified for reform

The Commission's consultation identified a number of areas for potential reform.

One of the key issues raised by stakeholders was the opaque nature of the "agreement with landowner" exemption in section 22 of the Act. According to the report, the self-assessment nature of the exemption made it "impossible" to ascertain the extent of activities being undertaken in areas of regional interest, and whether the exemption requirements had been met.

Submissions also described the Act's application and assessment process as coming "too late" in the broader project approval timeline. While the Commission identified no legislative impediment to early applications, it found that the level of detail required by the administering authority meant that applications were possible only on the completion of other processes. In addition to this being "too late" for many stakeholders, it also gave rise to real or perceived duplication.

Finally, the report stated that stakeholders "were united in their views regarding land use classifications" under the Act, finding the current system "complex, inconsistent and imprecise".

Recommendations

In response to these findings, the Commission made a total of seven recommendations, including:

- replacing the "agreement with landowner" exemption with a self-assessment code requiring notification to the administering authority and publication in a register;
- exploring pathways to allow earlier submission of applications under the Act at a more conceptual level;
- State agency review of agricultural land use classifications as they relate to co-existence outcomes; and
- updated guidance material for all stakeholders, including specific guidance for landowners.

Government's response

In March 2022, the Queensland Government responded to the Commission's report by indicating its support for four of the recommendations, and its in principle support for the remaining three.

Recommendations that had the government's full backing include:

- replacement of the "agreement with landowner" exemption, with the government proposing a "compliance-assessment" process rather than self-assessment; and
- updated guidance material.

Key recommendations that received in principle support included facilitating earlier submission of applications, and State agency review of land use classifications (to be led by the Department of Agriculture and Fisheries).

However, the government has not yet given any firm indication of anticipated timing for implementing this reform, and no amendment bills have been introduced or foreshadowed.

Author: *Paul Wilson, Senior Associate.*

Public Liability Update: Government clarifies existing regulatory protections relating to legacy infrastructure

KEY INSIGHTS

At the request of the GasFields Commission Queensland, the State Government has provided assurances to landholders that, under the existing regulatory framework:

- landholders are protected from liability for harm caused by, or arising from, the failure of any legacy petroleum and gas infrastructure on their properties, unless they have contributed to the harm; and
- the State Government takes responsibility for legacy infrastructure.

Despite the State Government's statements, proponents and landholders should of course also remain cognisant of any relevant contractual arrangements between the parties relating to legacy infrastructure (such as any conduct and compensation agreements). In June 2020, a major insurer (WFI, a subsidiary of Insurance Australia Group) announced its intention to no longer provide insurance to landholders with any coal seam gas (**CSG**) activities (and infrastructure) on their property.

Landholders concerned about legacy infrastructure

Following concerns raised by the agricultural sector and landowners, a working group convened by the GasFields Commission Queensland released a new landholder indemnity clause in March 2021 to provide greater clarity for landholders and gas companies where farming and gas infrastructure co-exist.

Some useful background on these matters is contained in our *Qld Land Access and Resource Approvals Year In Review 2020–2021* article "Key trends in land access negotiations", 27 September 2021.

The Commission recently identified that landholders were concerned about public liability risks stemming from legacy infrastructure, which is infrastructure that has been decommissioned, abandoned or rehabilitated at the end of petroleum and gas activities (including CSG activities).

During the working group's discussions about the indemnity clause, it became apparent that stakeholders would benefit from greater clarity and certainty about what protections are in place and the State's liability should landholders have any legacy infrastructure on their properties.

The Commission identified that landholders were concerned about exposure to public liability risks resulting from failure of legacy infrastructure, and potential implications for access to finance.

The Commission commenced a regulatory review and identified that the perceived insurance gap and financial exposure concerns of landholders were addressed under the existing regulatory framework. As part of the review, the Commission found that the regulatory frameworks already in place outline the responsibilities of resource companies and the Queensland Government and protect landholders against public liability risks from legacy CSG infrastructure.

A significant recommendation proposed by the Commission was that the State should (as the administrator of the resources legislation) publicly clarify both the protections offered to landholders and the State's liability regarding legacy CSG infrastructure.

Government's response

Consequently, the State Government confirmed that the current regulatory framework:

- protects landholders from liability caused by, or arising from, the failure of any legacy CSG infrastructure, unless the landholders caused or contributed to the harm; and
- renders the State responsible for legacy CSG infrastructure.

Further information on public liability regarding legacy infrastructure and the regulatory protections afforded to landowners is available on the Department of Resources website.

Authors: *Roxane Read, Senior Associate; Dillon Mahly, Paralegal.*

Mining lease application objections hearing: Land Court finds that the human rights of First Nations witnesses require evidence to be given on country

WARATAH COAL PTY LTD V YOUTH VERDICT LTD & ORS (NO 5) [2022] QLC 4

KEY INSIGHTS

- The Land Court has held that First Nations witnesses' cultural rights under the *Human Rights Act 2019* (Qld) would be unduly limited by confining their evidence to written evidence (*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4). The Court therefore ordered that evidence from the First Nations witnesses be taken orally on country.
- The decision is the first time a Queensland Court has considered the scope of "cultural rights" under the Human Rights Act, and also the first time the Land Court took on country evidence from First Nations witnesses as part of a mining lease objection hearing.
- More generally, the Land Court found that "written evidence from First Nations witnesses is a poor substitute for oral evidence given on country and in the company of those with cultural authority". We expect this finding will be raised in other forums and processes involving First Nations people.

Objections to Waratah Coal's Galilee Basin coal mine development

In 2019, Waratah Coal applied for a mining lease and environmental authority in respect of its proposed Galilee Basin coal mine development. Landholders and activist groups lodged various objections to the applications.

The objections were referred to the Queensland Land Court under the *Mineral Resources Act 1989* (Qld) and the *Environmental Protection Act 1994* (Qld). Under these regimes, the Land Court's recommendations inform the final decisions about whether to grant applications.

Some of the objections to the applications were on the basis that decisions to grant the approvals would be incompatible with human rights.

We reported last year on the Land Court's finding that it had jurisdiction and is obliged to consider objections made under the *Human Rights Act 2019* (Qld) in our *Qld Land Access Year in Review 2020-2021* article "Human rights objections pass first test in Land Court", 27 September 2021.

Application for on country evidence based on human rights grounds

As part of this ongoing objection matter, the Land Court was required to decide how evidence should be given by First Nations witnesses.

In *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4, the Land Court found that First Nations witnesses' cultural rights under the Human Rights Act would be unduly limited if their evidence was confined to written evidence.

The objectors applied for an order permitting the Court to take on country evidence from four First Nations witnesses, an event which has not previously occurred in mining lease objection hearings. The application was based on cultural preference and practice in imparting traditional knowledge, having already provided the Court with written evidence in chief.

Waratah Coal opposed the application on the basis that the giving of on country evidence was unnecessary and involved disproportionate costs.

Communal element of cultural rights is crucial determinant of how evidence of First Nations people should be given

The Land Court rejected Waratah Coal's arguments; it concluded that allowing the First Nations witnesses to give on country evidence was not only in the interests of justice, but necessary in order for the Court to conduct the hearing in a way that is compatible with human rights.

The Court noted that whether the conduct of a hearing is compatible with human rights depends on whether the protected right (in this case, the cultural rights under section 28(2)(a) of the *Human Rights Act*) is limited and whether that limitation is reasonable and demonstrably justifiable.

The Land Court discounted arguments about the disproportionate costs that would result from taking evidence on country. The Court instead favoured the argument that the oral evidence would allow the "best evidence" to be given by the First Nations witnesses, and allow the Court to discharge the "administrative and evaluation function" of the mining lease objection hearing.

Importantly, the Land Court emphasised that the cultural rights under section 28 of the *Human Rights Act* are communal in nature, and that the Court would therefore benefit from the First Nations witnesses' evidence about the impact of climate change on their community's ability to enjoy and maintain these rights in the community concerned.

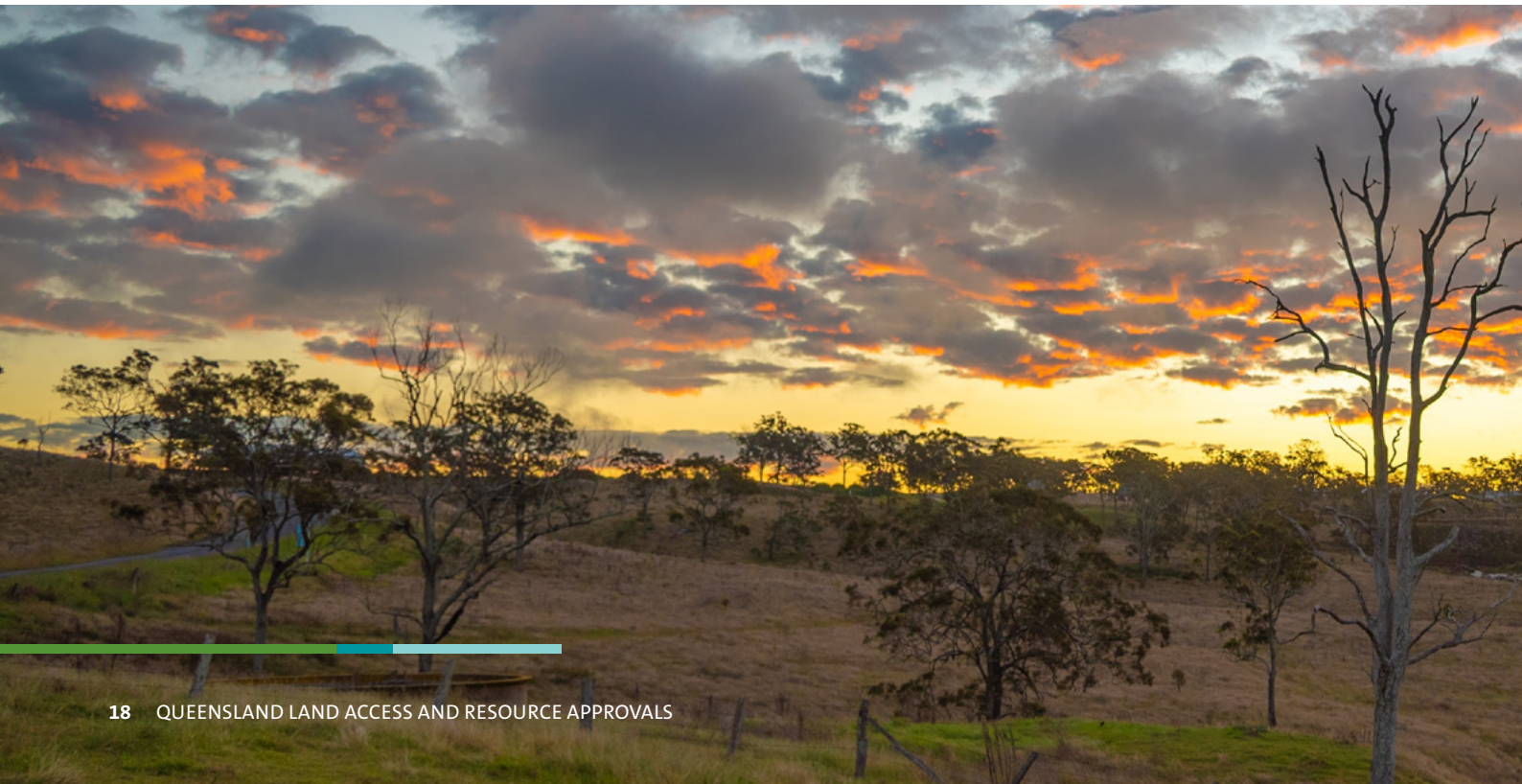
Further, President Kingham found that "written evidence from First Nations witnesses is a poor substitute for oral evidence given on country and in the company of those with cultural authority". The Court expressed a clear preference for oral rather than written evidence of First Nations witnesses where the adjudicative task in the proceeding was evaluative, rather than merely 'fact-finding', in nature.

The Land Court also noted that, while taking on country evidence is not a routine feature of mining objection hearings, it is familiar to courts hearing native title and cultural heritage-related matters.

Implications for future environmental and resource-related proceedings

The resources sector should expect courts to consider the collective nature of cultural rights in the future, including in relation to the manner in which evidence will be given in proceedings, and other contexts where decision-makers must have regard to human rights.

The Land Court has given its clear approval and indeed preference for First Nations witnesses' evidence to be given on country in these circumstances, so the costs and logistics of facilitating this ought to be borne in mind when considering how objection hearings are likely to be conducted in future.



STOP PRESS – LAND COURT RECOMMENDS THAT MINING LEASE APPLICATION AND ENVIRONMENT AUTHORITY APPLICATION BE REFUSED

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21

On 25 November 2022, the Land Court recommended that both the mining lease and environmental authority applications for Waratah Coal's proposed mine be refused (*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21). The recommendation was based largely on environmental, climate change and human rights grounds.

- **Environmental considerations:** The Land Court held that the Bimblebox Nature Refuge has "very high ecological values" which the mine would likely "seriously and possible irreversibly" damage.
- **Climate change:** The Land Court held that Scope 3 emissions can be taken into account in considering whether the mining lease and environmental authority applications are in the public interest. It rejected Waratah Coal's "perfect substitution" argument.
- **Human rights:** The Land Court found the right to life, the cultural rights of First Nations peoples, the rights of children, the right to property and to privacy and home, and the right to enjoy human rights equally would all be limited by the proposed mine and that these limits were not justified in the circumstances.

Where to from here?

The Land Court's recommendations are not the end of the road for this matter. The outcome of the mining lease application will ultimately be decided by the Queensland Minister for Resources, and the environmental authority application by the Chief Executive of the Department of Environment and Science.

Waratah Coal has until late December 2022 to apply for judicial review of the Land Court's recommendations.

Authors: *Libby McKillop, Senior Associate; Amaya Fernandez, Senior Associate; Brigid Horneman-Wren, Lawyer; Greta Sweeney, Graduate.*

Miner beware: Can a changed mine-plan derail hearings into mining lease applications?

***WARATAH COAL PTY LTD V YOUTH VERDICT LTD & ORS (NO 4)* [2022] QLC 3**

KEY INSIGHTS

- In *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 4)* [2022] QLC 3, the Court considered whether revising a mine-plan after it had already been assessed would result in a fundamentally different application such that the Land Court would not have jurisdiction to hear the associated mining lease and environmental authority applications.
- The Court ultimately found that the *degree of change* – whether to activities or impacts or both – is the critical factor and, given the revised mine-plan only resulted in a lesser environmental impact and did not add any new activity or involve expansion of the mine activities, the revised mine-plan still fell within the scope of the applications and therefore within the Land Court's jurisdiction.
- Miners should be conscious that revising a mine-plan after the plan has been assessed has the potential to impact, and possibly derail, the approval process for the mine.

New objections to revised mine-plan

The case of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 4)* [2022] QLC 3 concerned Waratah's applications for a mining lease and environmental authority as part of its Galilee Basin coal mine. Waratah Coal's mine-plan included, among other things, two proposed open-cut pits which would have affected the Bimblebox Nature Reserve. Youth Verdict Ltd and The Bimblebox Alliance Inc. took issue with that mine-plan, and Waratah subsequently revised its plan by abandoning the proposal for the pits.

However, Youth Verdict and The Bimblebox Alliance, who were objectors to the mining lease application, argued that the Land Court of Queensland did not have jurisdiction to make recommendations to the Minister on the mining lease and environmental authority applications due to the revisions to the mine-plan, with the original plan having already been assessed.

The principal question for the Land Court was whether the Land Court had such jurisdiction where – it was argued – the revision resulted in a materially different application which had not been assessed under the statutory framework.

The revised mine-plan did not result in a fundamentally different application

Youth Verdict and The Bimblebox Alliance argued that, because of the revision, the mine-plan had not been assessed during the earlier mandatory steps in the statutory process. They argued it resulted in a fundamentally different application, including in terms of the project's impacts, and accordingly that the Land Court did not have jurisdiction to make recommendations as to whether the Minister should approve the applications.

Importantly, it was agreed by all parties that the *degree of change*, whether to activities or impacts or both, is the critical factor.

While Waratah accepted that a change to a mining project could be so significant that it amounts to a different project, it argued that its change to the mine-plan did not meet that threshold. It did not add new activities; it did not expand activities initially described in the original plan; and abandoning the two pits would reduce the mine's impacts.

The Land Court was *not* satisfied that the revised mine-plan was substantially and materially different such that the mining lease application was fundamentally different. Although the revised mine-plan resulted in a difference in impact to the environment, the fact that it resulted in a lesser impact, and did not add any new activity or involve expansion of the activities the mine would undertake, meant that the Land Court found that it still fell within the scope of the applications.

The Court should not adjourn the hearing so the revised mine-plan can be assessed

The statutory party to the proceeding – the Chief Executive of the Department of Environment and Science – identified four circumstances in which the Land Court might decline to proceed with a hearing in order to uphold procedural fairness.

- Firstly, where the Statutory Party has received additional information and it becomes clear that the re-assessment of the draft environmental authority would not be practicable or possible.
- Secondly, where the Court found the changes sought are outside Waratah's applications as referred to the Court.
- Thirdly, where the original objections to the mining lease and environmental authority applications are not wide enough to consider the effects which derive from the changed activities.
- Fourthly, where the processes, procedures or considerations of fairness of the Court would not permit adjustments to be made in the course of the objections hearing.

The Land Court found that none of these circumstances applied in this case.

The Land Court should continue to hear the applications and objections despite the revised mine-plan

The Land Court ultimately found that the revised mine-plan did not result in mining lease and environmental authority applications that were substantially and materially different from the original applications. As considerations of procedural fairness did not warrant an adjournment and re-assessment of the revised mine-plan, the Court decided it could and should hear the applications and objections based on the revised version.

Authors: *Connor Davies, Senior Associate; Dillon Mahly, Paralegal*.

“Mere disagreement” over a valuation not enough to overturn Land Court’s compensation award for Hail Creek mining lease

***MICHELMORE V HAIL CREEK COAL HOLDINGS PTY LIMITED & ORS* [2021] QLAC 4**

KEY INSIGHTS

- The Land Appeal Court has affirmed a compensation determination decision of the Land Court in *Hail Creek Coal Holding Pty Limited & Ors v Michelmore* [2021] QLC 194, including the primary member's adoption of the "direct comparison method" as a valuation methodology for the assessment of compensation for a mining lease.
- This decision highlights the different approaches to valuation methodologies and the Court's entitlement to accept its preferred evidence.
- Where an applicant for a mining lease in Queensland cannot agree on compensation with a landholder, it should be aware that the Land Court's preferred compensation valuation methodology may be the direct comparison method, although other methodologies may be suitable in the circumstances.
- While proponents and landholders are free to agree on any sum as to compensation, the parties should factor the preferred method into their negotiation strategies in case the parties are unable to reach agreement.

Appeal against compensation determination related to mining lease for existing Hail Creek accommodation camp

This case concerns an appeal against the Land Court's compensation determination in *Hail Creek Coal Holding Pty Limited v Michelmore* [2021] QLC 19.

For more information about:

- the primary decision – see our Energy & Resources Alert "'Extortionate' – Queensland Land Court rejects over the odds compensation claim for Hail Creek mining lease", 31 May 2021; and
- the mining lease objection matter relating to this mining lease – see our Energy & Resources Alert "Queensland Land Court strikes out frivolous objection to Hail Creek mining lease application", 4 May 2020.

At first instance, as the parties had not been able to agree on compensation, the Land Court was required to settle the amount of compensation which the landholder was entitled to for grant of the mining lease to the Miners. The mining lease concerned an accommodation camp that had already been in use by mine workers from the Hail Creek Mine for more than 15 years.

Ultimately the Court at first instance adopted the "direct comparison method" of valuation proposed by the Miners' valuer, which resulted in a determination of a total compensation amount of $530,530. This was in stark contrast to the $7,000,000 sum put forward by the landholder's valuer as a result of using the "net present value" method.

Landholder's grounds of appeal

The Land Appeal Court granted the appellant an extension of time to appeal against the Land Court's compensation determination, despite recognising the poor prospects of success of the appeal.

The appellant raised eight grounds of appeal against the compensation determination, all of which were dismissed. The appellant's additional appeal against the costs decision was described by the Court as a "bare assertion of error... without any explanation" and was subsequently dismissed.

Incorrect application of principles to assess compensation

The appellant's first two grounds of appeal asserted that Member Stilgoe had misapplied the principle in *Raja Vyricheria Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302 (***Raja***). He claimed that the primary member's findings "missed the critical point that he was making about the *Raja* principle", namely that the respondent would have almost certainly renegotiated an extension on the existing lease it held over the accommodation village if it had not been granted the mining lease. The primary member's discounting of the market value for the risk that there would be little demand for the camp, other than by Hail Creek, was also claimed to be a failure to apply the *Raja* principle.

The respondent disputed the appellant's claims that the primary member had misapplied the *Raja* principle. The Court agreed that *Raja* relates to the potentialities of land when assessing market value, which did not have application in the present case as the parties had agreed that the "highest and best use of the subject land [was] as an accommodation village".

Indeed, the respondent's valuer had applied a multiple of 2.5 to the pastoral value of the land to account for the land's value as an accommodation village, which the primary member and the Appeal Court found was a generous application.

The third ground of appeal was related to the first two – involving a claim by the appellant that the primary member failed to apply the test for valuing a commercial opportunity in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. The Appeal Court rejected this argument as having no direct application to the subject land, with the market value to be determined by applying the test in *Spencer v The Commonwealth* (1907) 5 CLR 418.

Acceptance of the incorrect valuation method

The Court placed considerable focus on the next three grounds of appeal, relating to the appellant's claim that the primary member erred in applying the direct comparison method rather than the net present value method advanced by the appellant's valuer.

The Court found no error in the primary member's decision to favour the direct comparison method, noting that:

- the primary member was entitled to accept the evidence of the respondent's valuer over the evidence of the appellant's valuer;
- there was no other approach that the primary member "could rationally have adopted" after rejecting the entirety of the evidence of the appellant's valuer; and
- the respondent's valuer had accounted for the competing valuer's criticism by adopting the maximum premium of 250% where the comparable sales reflected a premium of between 100% and 250%.

The Court found that there was "no merit" in the appellant's argument that the direct comparison method was not a form of comparable sales approach, and noted that the appellant's valuer indeed agreed that the comparable sales approach was the "preferred method of valuation". The appellant's "mere disagreement" with the primary member's "logical, rational and evidence-based" reasons was not sufficient to establish error.

Failure to reject expert evidence of respondent's valuer

The basis of the seventh ground of appeal was that the evidence of the respondent's valuer "failed to disclose the basis or reasoning for his expert opinion" and should have been found to be inadmissible by the primary member. The Court found no merit in this ground of appeal and noted that the appellant had the opportunity to make that submission to the primary member and did not.

Failure to resolve doubts in favour of a more liberal estimate

Finally, the appellant contended that the primary member failed to apply the principle that "doubts are resolved in favour of a more liberal estimate" when assessing compensation payable (*Commissioner of Succession Duties (SA) v Executor Trustee and Agency Company of South Australia Ltd* (1947) 74 CLR 358). The Court found that there was no evidence that the primary member failed to apply this principle and that "it did not demand that the primary member apply a valuation method that she found to be inappropriate in the circumstances".

Authors: *Connor Davies, Senior Associate; Finley Harding, Graduate.*

Coal seam gas-induced subsidence flagged for further regulatory attention

KEY INSIGHTS

- Earlier this year, the GasFields Commission Queensland conducted targeted consultation as part of its review of the regulatory framework associated with subsidence resulting from coal seam gas (**CSG**) operations.
- As part of that consultation, the Commission released a Discussion Paper which reviewed the adequacy of the current regulatory framework, with a view to identifying potential regulatory or other enhancements in this space.
- In its Discussion Paper, the Commission found that there is no clear jurisdictional responsibility for regulating and managing the impacts of CSG-induced subsidence. This is an area for potential regulatory improvement that would provide landholders with greater certainty and protection against the adverse consequences of CSG-induced subsidence.
- The Commission is aiming to deliver the final report, with a package of recommendations on how to best address CSG-induced subsidence, to the relevant Queensland Government Ministers in late 2022.

In May 2022, the GasFields Commission Queensland released a Discussion Paper which considered the adequacy of the current regulatory framework relating to potential subsidence from coal seam gas (**CSG**) operations, and potential enhancements to improve the management of the economic impacts of that subsidence on farming operations.

What is CSG-induced subsidence and why is it a problem?

During CSG production, coal seams are depressurised to allow gas to flow to the surface. The resulting compaction of coal seams in response to this depressurisation can cause subsidence at the ground surface as overlying formations subside.

Agricultural peak bodies, and landholders with farming operations on high-value agricultural land near Dalby and Cecil Plains on the Condamine River floodplain, have raised concerns about the potential for CSG-induced subsidence to impact farming.

How is the existing regulatory framework deficient?

The Discussion Paper found that the current regulatory framework is complex, multi-faceted and touches on a number of State and Federal regulations. This means that there is no clear jurisdictional responsibility to regulate and mitigate the impacts of CSG-induced subsidence. Further, there is uncertainty surrounding:

- the potential on-farm consequences and economic impacts of CSG-induced subsidence;
- when the protections under the existing regulatory framework may be invoked;
- which farming operations are afforded protections under the existing framework; and
- how the adverse impacts of CSG-induced subsidence can be assessed, determined and resolved (other than in the Land Court of Queensland).

What is the way forward for regulatory reform?

According to the Discussion Paper, the key to appropriate reform will be gaining a clearer understanding of the consequences and materiality of CSG-induced subsidence at a farm scale. This is especially important in terms of economic impacts.

The Commission has devised a set of principles that will guide its recommendations for regulatory reform. These principles include:

- providing a statutory framework that ensures appropriate protection for landholders where CSG-induced subsidence can be demonstrated to have economic impacts on farming land;
- providing clear roles and responsibilities to various entities involved in monitoring these impacts; and
- providing a pathway to impact assessment and dispute resolution, including alternative dispute resolution, with an ultimate determination in the Land Court as a last resort only.

This Commission will bring together its research findings and the outcomes of the regulatory review, and will produce a report containing the review findings and recommendations. The Commission may seek further engagement from stakeholders to inform the final report.

The Commission is aiming to deliver the final report, with a package of recommendations on how to best address CSG-induced subsidence, to the relevant Queensland Government Ministers in late 2022. The final report will also be made available on the Commission's website. We will keep track of key updates.

Authors: *Paul Wilson, Senior Associate; Leanne Mahly, Lawyer; Brigid Horneman-Wren, Lawyer; Greta Sweeney, Graduate.*

Amendments to Queensland's Resources Acts to promote new economy minerals

On 21 November 2022, the *Coal Mining Safety and Health and Other Legislation Amendment Act 2022* (***Amendment Act***) received royal assent. The majority of the Amendment Act commenced on that date, though Part 2 (which amended the *Coal Mining Safety and Health Act 1999*) commenced on 25 November 2022.

The key amendment will enable rent deferral for mining leases relating to new economy minerals. The other amendments address operational issues and rectify clerical errors.

The new amendments will provide the Minister with a discretionary power to defer rent for the grant of a mining lease for a "new economy mineral" (**NEM**) provided the deferred funds are redirected to the project's start-up and development costs. Consequently, an amendment to the *Mineral Resources Regulation 2013* would prescribe the types of NEMs that are eligible for rent deferral.

However, there are several conditions that the rent deferral for NEM mining leases would be subject to, including:

- rent deferral would be available for the first year's rent only;
- staged percentage payments would be required until the deferred amount is paid in full, with 20% of the deferred amount being added to the usual rent for years 4 to 8 of the mining lease; and
- the rent deferral arrangement would be a condition of the mining lease.

Authors: *Leanne Mahly, Lawyer; Finley Harding, Graduate; Dillon Mahly, Paralegal.*

Mineral Resources Act 1989 (Qld) amended to recognise validity of older mining leases without formal lease instrument

KEY INSIGHTS

- The *Resources and Other Legislation Amendment Act 2021* (Qld) (***Amendment Act***) was passed on 13 October 2022 and commenced on 20 October 2021. Among other things, the *Amendment Act* introduced a provision into the *Mineral Resources Act 1989* (Qld) which allows for the validation of certain mining leases without the issue of an instrument of lease.
- The new provision applies to certain mining leases granted between 1 September 1990 and 21 April 2010.

How the new provision for validating certain mining leases operates

Section 334ZOA of the newly amended *Mineral Resources Act 1989* (Qld) (***MRA***) applies to mining leases granted after the commencement of the MRA on 1 September 1990 but before the commencement of section 52 of the *Mines and Energy Legislation Amendment Act 2010* on 21 April 2010, where:

- the relevant Minister at the time complied with the previous requirement of the Governor in Council that an instrument of lease be issued to the applicant for the lease; and/or
- an instrument of lease was not issued to the holder of the lease.

Under section 334ZOA, mining leases which meet these criteria are taken to be, and always to have been, as valid as if the Minister had complied with the requirement outlined above, and an instrument of lease had been issued.

Anything:

- done under or in relation to the mining lease; and
- required or allowed to be done in relation to an instrument of lease that was not done,

is, and was, as valid as if the above criteria were met. Further, the rights and liabilities of all persons are taken to be, and to have been, the same as if the criteria had been met.

What this means for holders of mining leases caught by the new provision

The new provision is designed to offer certainty for holders of mining leases, to ensure that they can continue to operate with confidence.

Section 334ZOA applies retrospectively, but does not confer any new rights or obligations on anyone. It addresses only a narrow administrative deficiency that might affect an otherwise validly granted mining lease, as well as actions taken and rights and liabilities created under it.

Authors: *Brigid Horneman-Wren, Lawyer; Greta Sweeney, Graduate.*

Land Court Rules 2022: An updated set of rules for Queensland's Land Court

KEY INSIGHTS

- This year saw the introduction of a new set of Land Court rules more than two decades after the previous rules came into force.
- The *Land Court Rules 2022* have been updated so as to align with Land Court procedures brought in by way of practice directions or legislative amendments.
- The new rules also introduce some new concepts, such as a rule providing for costs to be personally payable by a party's lawyer or agent.

Key changes

The raft of changes modernises and updates the rules to bring them into line with Land Court procedures brought in by way of practice directions and legislative amendments. These changes also introduce some new rules. Some of the key amendments to the rules relate to:

- filing of a statement of facts and issues;
- establishment of the Land Court ADR panel;
- expert evidence;
- the way in which hearings can be conducted;
- the filing, giving, making or issuing of documents electronically;
- costs payable by a party's lawyer or agent; and
- disclosure.

Statement of facts and issues

The new rules require each party to a proceeding to file a statement of facts and issues with the Registry. The statement of facts and issues must comply with the requirements set out in the new rules. For example, the statement must be in the approved form and state:

- all the issues the party considers the Court must decide;
- all the material facts the party relies on;
- any conclusion or point of law the party relies on (but only if the party also states the material facts in support of the conclusion or point); and
- the decision the party wants the Court to make.

The previous rules did not provide for the parties to file a statement of facts and issues.

Land Court ADR panel

The new rules provide for the Court to establish a panel of persons to conduct alternative dispute resolution of matters, known as the "Land Court ADR panel". The new rules also provide for the Court to refer matters to ADR.

The Land Court ADR panel was established some time ago, with Practice Directions 1 of 2018 and 4 of 2020 setting out the relevant procedures and practices for the operation of the panel. This concept has now been brought into the Land Court Rules.

Expert evidence

The new rules broaden the scope of the procedural requirements for expert evidence. For example, they set out the parameters within which communication between experts and parties may occur while a joint expert meeting is on foot. Responses to communications by experts must be in writing, addressed to the experts jointly and in terms agreed to by the parties (or as directed by the Court) to ensure transparency and fairness.

The new rules also provide for the Court to direct that a proceeding be subject to an expert process facilitated by a Court-appointed and appropriately qualified person, known as a convenor. In essence, the convenor will facilitate the preparation of expert evidence, work with the parties to manage the expert process, work with the experts and assist in case management. However, there are limits on what a convenor can do. A convenor is not able to decide any substantive issue or procedural dispute, nor can they preside at a hearing, final hearing or appeal against a decision made in the proceeding. The Court-directed process for experts set out in the new rules generally reflects the Court-managed expert evidence – or CMEE – process outlined in Practice Direction 6 of 2020.

Hearings

Consistent with the previous rules, the new rules provide for the Court to dispense with oral hearings in certain circumstances. The new rules clarify that a proceeding – or an application in a proceeding – is decided without an oral hearing if it is decided on written material and submissions without appearances from the parties. Oral hearings, however, are still standard and may be conducted (all or in part) by audiovisual link, audio link or another form of electronic communication approved by the Court.

Filing, giving, making or issuing documents electronically

The new rules provide for documents to be filed, given, made or issued electronically. A document filed electronically will be taken to have been filed on the day it is received by the Registry, provided the whole document is received before 4.30 pm on a day the Registry is open for business. Otherwise, it will be deemed to have been filed on the next day the Registry is open for business.

Costs payable by a party's lawyer or agent

The new rules provide for the Court to order a lawyer or agent to repay all or part of any costs order made against their client if the costs were incurred because of the lawyer's or agent's delay, misconduct or negligence.

Disclosure

The new rules provide for a party to apply for an order for disclosure, although nothing prevents parties from agreeing to disclose documents by consent. The application must outline the proposed scope of the disclosure.

The new rules also prevent a party from applying for an order for disclosure, unless the order would be in accordance with the main purposes of the rules. In essence, the main purposes of the rules are to ensure that:

- proceedings are resolved quickly, fairly and without undue delay, expense and technicality; and
- parties participate in an expeditious way and comply with the rules and any direction of the Court.

The previous rules did not address disclosure in detail. Instead, they referred to Chapter 7 of the *Uniform Civil Procedure Rules 1999* (Qld), which deals with disclosure.

Authors: *Amaya Fernandez, Senior Associate; Greta Sweeney, Graduate.*

Land Court introduces new versions of the Model Directions

KEY INSIGHTS

- The Land Court of Queensland has issued two new versions of its Model Directions in a little over 12 months.
- New version 2.3 of the Model Directions (released in October 2021) altered a number of the Court's model directions, including in relation to giving evidence, costs orders, case management and hearing arrangements.
- New version 2.4 of the Model Directions (released in December 2022) includes further amendments and updates arising from the new *Land Court Rules 2022* and Practice Direction 1 of 2021 relating to land valuation appeals.

Model Directions

In October 2021, the Land Court of Queensland issued version 2.3 of its Model Directions. The Court then issued a further set of new Model Directions, version 2.4, in December 2022.

The Court expects parties to use the Model Directions when proposing directions.

The key changes from each update against the previous version 2.2 of the Model Directions are summarised below.

Case management of land valuation appeals

Versions 2.3 and 2.4 introduced changes to the model directions relating to the case management of land valuation appeals. For appeals against a valuation of more than $5 million, the Registry will issue standard directions as soon as practicable after the appeal is filed. A party may request a directions hearing if it proposes case-specific directions.

If the parties do not intend to call expert evidence in a land valuation appeal, then parties are directed to use a set of "fast track directions". Otherwise, the standard directions will apply. This is consistent with the Court's Practice Direction 1 of 2021, which outlines the process for appeals under the Land Valuation Act 2010.

Costs orders

New model costs directions have been included in version 2.3 and significantly updated in version 2.4. The new model directions, from version 2.4, provide for:

- the filing of an application and written submissions if a party seeks a costs order, as well as written submissions in response; and
- costs applications to be heard on the papers, unless otherwise ordered.

Adjournment requests

Requests to adjourn a directions hearing or review must now be made no later than midday on the business day before the case is set for the directions hearing or review.

The deadline was previously 4.00 pm at least two business days before the directions hearing or review.

Presiding Member indications

The Model Directions no longer state that the parties may be given an indication of which Member will be allocated to hear the matter at the time it is listed.

Hearing arrangements

The model directions relating to hearing arrangements have been amended as follows:

- parties are to provide the relevant hearing materials to the Land Court Registry by 4.00 pm two business days before the hearing, as opposed to five business days before the hearing review as specified in the previous version;
- parties are to provide hearing materials in digital form;
- parties are to provide an agenda for concurrent evidence by experts who have prepared a joint report; and
- the model directions no longer provide for an index to hearing materials to be given to the Registry. They have also removed the template index to hearing materials from the appendices. For completeness, Practice Direction 3 of 2019 still requires parties in compensation disputes and conduct and compensation disputes to provide an index to the hearing bundle five working days before the hearing review.

Other changes

Other changes include:

- amendments arising from the *Land Court Rules 2022* (discussed above), including amendments to the section on disclosure to bring that text in line with the new rules; and
- minor updates to the section on alternative dispute resolution.

Authors: *Amaya Fernandez, Senior Associate; Leanne Mahly, Lawyer; Greta Sweeney, Graduate; Martin Doyle, Graduate.*

Caveats over resource authorities under the *MERCP Act*

KEY INSIGHTS

- Caveats can be lodged over resource authorities under the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (**MERCP Act**) in order to prevent registration of any dealings in relation to that resource authority.
- In *Miracle Lane International Holdings Limited v Spinifex Mines Pty Ltd & Ors* [2022] QLC 2, the Land Court found that a caveat which was due to lapse should remain in force given related Supreme Court proceedings which were on foot.

What are caveats under the *MERCP Act*?

A caveat registered against a resource authority prevents registration of a dealing (such as the registration of a transfer, sublease or mortgage) in relation to the "affected resource authority" from the date and time of lodgement.

However, a caveat does not create an interest in the affected resource authority.

When can caveats be registered?

A person claiming an interest in a resource authority may lodge a caveat over the resource authority if the caveat:

- complies with the prescribed requirements for it; and
- is not a prohibited caveat; and
- is accompanied by the fee prescribed by regulation.

The "prescribed requirements" for lodgement of a caveat are those prescribed by the *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld). Caveats cannot be registered over prospecting permits.

How long can caveats remain registered?

A caveat expires at the following times:

- for a caveat for which there was *consent*, at the expiration of the term, if any, stated in the caveat. If the caveat does not state any term, the caveat continues until it is withdrawn or removed. Note that there is consent to a caveat only if each holder of an affected resource authority has consented to lodgement of a caveat and consent is lodged together with the caveat;
- for a *non-consensual* caveat, either at the expiration of any Land Court order in force in relation to the caveat, or three months after the date of lodgement of the caveat, or a shorter term as stated in the caveat.

Caveats can also be withdrawn at any time by notification from the caveator to the chief executive.

An application can also be made to the Land Court for an order that a caveat be removed by:

- a person who has a right or interest (present or prospective) in the affected resource authority;
- a person whose right (present or prospective) to deal with the affected resource authority is affected by the caveat.

Compensation for caveats lodged without reasonable cause

A person who lodges a caveat over land without reasonable cause is liable to compensate anyone who suffers loss or damage as a result.

Miracle Lane International Holdings Limited v Spinifex Mines Pty Ltd & Ors [2022] QLC 2

In *Miracle Lane International Holdings Limited v Spinifex Mines Pty Ltd & Ors* [2022] QLC 2, a caveator who had lodged caveats against a number of resource authorities sought an order from the Land Court that a caveat which was otherwise due to lapse remain in force due to the presence of ongoing Supreme Court litigation relating to those resource authorities. The caveator feared that, without the continuing registration of the caveat, the resource authorities could be sold which would detrimentally affect the Supreme Court proceedings and the ability to potentially recover any monies.

It was accepted by the parties in this matter that the test to maintain a caveat is the same as the test for the grant of an interlocutory injunction, being:

- whether there is a serious question to be tried; and
- whether the balance of convenience favours the caveat remaining in force while the question in dispute is yet to be determined.

On the facts before him, Member Isdale concluded that removing the caveat would alter the status quo in the related Supreme Court proceedings with unknown possible effects. This led Member Isdale to ultimately conclude that the balance of convenience favoured the caveat remaining in force.

Authors: *Libby McKillop, Senior Associate; Greta Sweeney, Graduate.*

Determining costs: A Goliath entity must not necessarily pay a David entity's costs

***NEW ACLAND COAL PTY LTD V OAKEY CREEK COAL ACTION ALLIANCE INC (NO.3)* [2022] QLC 5**

KEY INSIGHTS

- Costs generally follow the event, meaning that a party who is successful in litigation will not usually pay costs for the litigation.
- The Court will not dissect proceedings into various "events" when considering costs.
- A party will not obtain an order for costs merely because it has acted reasonably.
- Being a smaller entity than the other party will not, of itself, be sufficient to argue that the other party should pay costs.

In *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc (No 3)* [2022] QLC 5, Oakey Coal Action Alliance Inc (**Oakey Coal**) requested an order that New Acland Coal Pty Ltd (**New Acland**) pay its costs arising from both a 2017 application to reopen and a 2018 remitted proceedings.

The 2017 reopening – An unclear victory

Although New Acland applied for reopening to introduce new material related to groundwater, the new material was found to ultimately be irrelevant to the outcome of the case. As a result, Oakey Coal sought an order that New Acland pay its costs of and incidental to not only the application to reopen the hearing, but all the costs incurred for considering the new irrelevant evidence, briefing its experts, the additional hearing time and the submissions required by the new evidence.

Oakey Coal submitted that the orders should be made for the following reasons:

1. costs should follow the event – the waste is the relevant "event" when considering the application of the general rule;
2. Practice Direction 4 of 2018 sets out the matters the Court may consider when deciding to make a costs order. Oakey Coal relied on paragraph 84(c) to argue that "wasted" costs it incurred – due to the matter being remitted based on irrelevant material – should be considered by the Court as an "other relevant factor" under paragraph 84(g); and
3. costs were wasted because the new material related to groundwater which Bowskill J (as her Honour then was) found was outside of the Court's jurisdiction.

The Court did not accept that "wasted costs" were an "event" within the meaning of the general rule that costs follow the event. It was noted that courts are reluctant to dissect proceedings into various events or issues when determining costs, particularly in jurisdictions where it is difficult to identify a victor. Further, the Court was not persuaded that Oakey Coal was "successful" in the application, so as to engage the ordinary rule that costs follow the event.

The Court also did not accept that the introduction of the new evidence was sufficient to justify an order for costs. In particular, the Court noted that the application to reopen was not a waste of Oakey Coal's resources as the Independent Expert Scientific Committee final report that was introduced into evidence did have some relevance to live issues in the case.

The 2018 remitted hearing – A David and Goliath story

Oakey Coal also submitted that New Acland should pay its costs for the 2018 remitted hearing as the costs were "wasted" – since the case was ultimately heard before Member Stilgoe OAM – and it would be "fair" for New Acland to pay Oakey Coal's costs.

Oakey Coal's primary submission was that the remitted hearing was complex and time consuming and that its efforts in the rehearing were wasted because New Acland pressed for the rehearing despite the appeal. The Court accepted these submissions. However, the Court rejected Oakey Coal's submissions in relation to its reasons for not applying for a stay of the remitted hearing.

Further, Oakey Coal submitted (relying on *Anson Holdings Pty Ltd v Wallace & Anor* (2010) 31 QLCR 130) that fairness required an order in its favour. The Court rejected this submission and noted that "a party does not obtain an order for costs simply because it has acted reasonably". The Court accepted that the costs of the 2017 and 2018 hearings were not trivial, and that Oakey Coal is a not-for-profit community group, and New Acland is a large company pursuing a project for significant commercial gain. However, the Court did not accept that the relative disparity between the parties justified an order for costs without some other factor being present.

Ultimately, the Court refused the application for costs in relation to the 2017 reopening and the 2018 remitted proceedings. The Court also made no order as to the costs of these proceedings.

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