

# **Judicial protection of environmental resources – a Land Court perspective**

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## **Background**

The Land Court is tasked with minimising adverse environmental impacts from resource projects such as mining, where there have been environmental objections raised with respect to those projects.

Before a mining project comes before the Land Court, the miner must first apply for mining approval from the government via the Department of Natural Resources and Mines (DNRM), and an environmental authority for that mining project from the Department of Environment and Heritage Protection (EHP).

EHP is the Queensland government department responsible for protecting the environment while providing for ecologically sustainable development both now and in the future. All mining activities (not small scale) are required to obtain an Environmental Authority (EA) from EHP. EHP sets out in the EA, the conditions on which the miner must operate to protect the environment and reduce environmental harm.

Most mid to large scale mining projects will be required by EHP<sup>1</sup> to complete an Environment Impact Statement (EIS) prior to a consideration by EHP as to what environmental conditions should be imposed in the EA. The EIS is a report prepared by independent experts as to the likely effects the mining project will have on the surrounding environment.

## **Objection process**

The Terms of Reference for the EIS and the EIS itself are publically available documents<sup>2</sup> and members of the public can make submissions on these documents to EHP for their consideration. Once EHP has considered the EIS and any submissions opposing the mining project on environmental grounds, EHP issues a draft EA outlining the conditions it believes will minimise harm to the environment by the mining project. The public can object to those EA conditions as being inadequate. Anyone can object; you don’t have to be a directly affected landholder.

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<sup>1</sup> For large scale projects the Queensland Government Coordinator-General may intervene to coordinate the EIS process and impose environmental conditions which must be adopted by EHP

<sup>2</sup> On EHP website, published in local papers, sent to affected landholders

The public can object to the EHP under the *Environmental Protection Act 1994*, and/or they can object to DNRM on environmental grounds under the *Mineral Resources Act 1989*.

Once formal objections have been lodged with DNRM and/or EHP, those objections along with the application for the mining project have to be sent to the Land Court for determination.

### **Land Court**

The Land Court is charged with reviewing all the evidence and determining the relative merits of the application for the mining project application and the objections to it. These hearings can be quite complex and can take from days to, in extreme cases, months to hear. Though ultimately the Land Court provides only recommendations to the Minister for DNRM and to the EHP, those recommendations are in normal circumstances followed.

In considering the environmental issues, the Land Court is largely guided by expert evidence. However there is often conflicting expert opinion. An important consideration for the Land Court in these types of matters is the precautionary principle.

### **The precautionary principle**

The precautionary principle is where there is a threat of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation<sup>3</sup>.

The function of the precautionary principle is, therefore, to require the decision-maker to consider a serious or irreversible threat of environmental damage and to take this into account, notwithstanding that there is a degree of scientific uncertainty about whether the threat exists.

The preference is to prevent serious environmental damage rather than to remediate it.

The precautionary principle should not be used to try to avoid all risks. Rationality also dictates that the precautionary principle and any preventative measure cannot be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified.

The type and level of precautionary measures that will be appropriate will depend on the combined effect of the degree of seriousness and the irreversibility of the threat and the degree of uncertainty. This involves assessment of risk, namely the probability of the event occurring and the seriousness of the consequences should it occur. The more significant and more uncertain the threat, the greater the degree of caution required.

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<sup>3</sup> Section 3.5.1 Intergovernmental Agreement on the Environment made 1 May 1992

Prudence also suggests that some margin for error should be retained until all the consequences of the decision to proceed with the development are known. One means of retaining a margin for error is to implement a step-wise or adaptive management approach, whereby uncertainties are acknowledged and the area affected by the development plan, program or project is expanded as the extent of uncertainty is reduced. An adaptive management approach might involve the following core elements:

- monitoring impacts of management or decisions based on agreed indicators;
- promoting research, to reduce key uncertainties;
- ensuring periodic evaluation of the outcomes of implementation, drawing lessons, and review or adjustment, as necessary, of the measures or decisions adopted;
- establishing an efficient and effective compliance system.

The precautionary principle embraces the concept of proportionality, that is that measures should not go beyond what is appropriate and necessary in order to achieve the objectives in question. A reasonable balance must be struck between the stringency of the precautionary measures, which may have associated costs, such as financial, livelihood and opportunity costs and the seriousness and irreversibility of the potential threat.

The precautionary principle, where triggered, does not necessarily prohibit carrying out the development plan, program or project until full scientific certainty is attained. The solution is to assess the risk-weighted consequences of various options and select the option that affords the appropriate degree of precaution for the set of risks associated with the option.

The precautionary principle is but one of the sets of principles of ecologically sustainable development. It should not be viewed in isolation, but rather as part of the package. This means that the precautionary measures that should be selected must not only be appropriate having regard to the precautionary principle itself, but also in the context of the other principles of ecologically sustainable development, including intergenerational and the conservation of biological diversity and ecological integrity.

#### **Other environmental considerations for the Land Court include<sup>4</sup>:**

**Intergenerational equity** - The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

**Conservation of biological diversity and ecological integrity** - Conservation of biological diversity and ecological integrity should be a fundamental consideration.

Any Commonwealth or State government plans, standards, agreements or requirements about environmental protection or ecologically sustainable development.

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<sup>4</sup> See other considerations in section 191 *Environmental Protection Act 1994* and the definition of standard criteria in Schedule 4 *Environmental Protection Act 1994*

Any relevant environmental impact study, assessment or Report.

The character, resilience and values of the receiving environment.