# COURT PROCESSES FOR ENVIRONMENTAL AND RESOURCE ISSUES IN QUEENSLAND, AUSTRALIA

by

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In preparation for the Queensland Judicial Delegations presentation to various judicial bodies in China, the Chinese judiciary have posed the following questions:

- 1. Does Australia have a special environmental resource court? How to comment on the specialization of environmental resource trial? If there is a special judicial organization, what is the difference between its establishment and ordinary courts? Which cases are within its scope and how is the standard divided?
- 2. Could you introduce some specific regulation and characteristic of environmental public interest litigation in Australia? What is the basic situation of the court's filing and trialing, such as the prosecutor's subject qualification and hearing procedure (including whether the jury system applies to all trial groups, the identification of the party's burden of proof and the deciding method)?

This paper will attempt to answer both of the above questions and shed some light on the jurisdiction and processes of environmental courts in Australia. To begin with, it is necessary to understand how issues relating to jurisdiction work in the various courts in Australia.

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<sup>&</sup>lt;sup>1</sup> The views expressed in this paper are our own and not necessarily those of the Land Court of Queensland.

As Judge Rackemann of the Planning and Environment Court of Queensland noted:

In the context of international progress in the creation and refinement of environmental dispute resolution processes, some of Australia's State-based environmental courts or tribunals (ECTs) have attracted, and continue to attract, significant international attention as exemplars of aspects of 'best practice'.<sup>2</sup>

The *Australian Constitution* is the source of the division of power that exists between the Commonwealth and the States in Australia. As the *Constitution* outlines express powers in favour of the Commonwealth, the Commonwealth may govern and make laws with respect to those such matters. When it comes to environmental and resource related issues however, the Commonwealth has no express authority, and therefore, the States retain the power to legislate on matters relating to planning, the environment and natural resources.

Despite not having express power, the Commonwealth is not prevented from utilising its heads of power within the *Constitution* to create laws with respect to the environment. A famous Australian example of this occurred in the 1980's when a dispute arose between the Commonwealth and the Australian State of Tasmania regarding the construction of a dam. As the Commonwealth had no express power to create legislation regarding the environment, it relied upon the external affairs power<sup>3</sup> to uphold legislation which prohibited building the Gordon below Franklin dam.<sup>4</sup>

In the words of Justice Preston, '[e]nvironmental justice involves the distribution of both environmental benefits and burdens. Particular environmental features, materials or activities can be viewed as both benefits or burdens depending upon the claimant for distributive justice and the context of the claim'.<sup>5</sup>

With environmental issues expanding and attracting more attention from the community and becoming more complex,<sup>6</sup> resource and environment courts play an important role in the progression and review of environmental law related decisions. Justice Barker neatly describes the purpose of review by specialist courts as follows: '[i]ndependent review [is]

<sup>&</sup>lt;sup>2</sup> Judge Rackemann, 'Environmental dispute resolution – lessons from the States' (2013) 30 *Environmental and Planning Law Journal* 329, 329.

<sup>&</sup>lt;sup>3</sup> Australia had entered into international obligations under the World Heritage Convention.

<sup>&</sup>lt;sup>4</sup> Commonwealth v Tasmania (1983) 158 CLR 1.

<sup>&</sup>lt;sup>5</sup> Justice Preston, 'What's Equity got to do with the Environment?' (2018) 92 Australian Law Journal 257, 260.

<sup>&</sup>lt;sup>6</sup> For example, climate change, transnational threats to biodiversity, threats to cultural and environment heritage and threats to agriculture: Serge Killingbeck, 'Sustainable Development – A Review' (2018) 35 *Environmental and Planning Law Journal* 102.

seen as serving the ends of a practical democracy, of achieving accountability, and enabling a reasonable balancing of private rights against public interests'.<sup>7</sup>

#### At the Commonwealth Level

A good example demonstrating the decision-making procedure for environmental issues at a Commonwealth level is found in the *Environmental Protection and Biodiversity*Conservation Act 1999 (Cth). This Act allows for a person dissatisfied with a decision to have it reviewed either, internally, judicially reviewed by the Federal Court<sup>8</sup> or a merits review by the Administrative Appeals Tribunal. Alternatively, declaratory or injunctive relief may be sought in the Federal Court. This differs to the approach taken to environmental issues by State parliaments, which have all thought it appropriate to have a specialist court or tribunal to conduct merits review. The approach taken by the Commonwealth has been described as not representing best practice.

While each State obtains authority to conduct independent review on an environmental, planning, or resource matter through express provision in State legislation, the High Court of Australia, obtains its original, inherent, and appellate jurisdiction<sup>12</sup> from the *Constitution*. Similarly, the *Constitution* provides for State Supreme Courts to exist and the Commonwealth has no power to alter the constitution or organisation of any State Court. Despite this, the High Court has recognised that the Commonwealth may define practices and procedures for State courts exercising Federal jurisdiction. Matters of Federal concern may only be heard by State courts when the Commonwealth vests such jurisdiction in a court or the State.

<sup>&</sup>lt;sup>7</sup> Justice Barker, 'Imagining the Future: Planning and Environment Courts and Tribunals in the 21st Century' (keynote address to the Australasian Conference of Planning and Environment Courts and Tribunals, 30 August 2012).

<sup>&</sup>lt;sup>8</sup> A Commonwealth Court.

<sup>&</sup>lt;sup>9</sup> A Commonwealth Tribunal.

<sup>&</sup>lt;sup>10</sup> Land Court of Queensland (Qld); Planning and Environment Court (Qld); Land and Environment Court (NSW); Environment, Resource and Development Court (SA); Resource Management and Planning Appeal Tribunal (TAS); Mining Tribunal (TAS); VCAT (Planning and Environment division, Building and Construction Division, Land Valuation Division, Unreasonable flow of water between properties Division) (VIC); State Administrative Tribunal (WA); Northern Territory Civil and Administrative Tribunal (NT); Australian Capital Territory Civil and Administrative Tribunal (ACT).

<sup>&</sup>lt;sup>11</sup> See generally Judge Rackemann, 'Environmental dispute resolution – lessons from the States' (2013) 30 *Environmental and Planning Law Journal* 329, 332.

<sup>&</sup>lt;sup>12</sup> Australian Constitution ss 75(iii), 75(v), 73.

<sup>&</sup>lt;sup>13</sup> Forge v Australian Securities and Investments Commission (2006) 228 CLR 45, 74-6.

<sup>&</sup>lt;sup>14</sup> Russell v Russell (1976) 134 CLR 495.

## Queensland

As Queensland, Australia, is the home of the longest standing land and environmental courts, <sup>15</sup> and I am a current Member of the Land Court of Queensland, this presentation lays heavy focus on processes specific to Queensland generally and the Land Court specifically. Despite a Queensland focus, legislation governing environmental matters in other States and the processes under which matters are heard are quite similar.

In Queensland, the State's environmental issues are primarily dealt with by two specialist courts: the Land Court and the Planning and Environment Court (P&E Court). The Magistrates Court, District Court and Supreme Court also play a role in ensuring compliance with planning, environmental and resource legislation.

When deciding which court to commence proceedings in, it is important to follow the relevant legislation to ensure the court has jurisdiction to hear the matter before it. Legislation of particular focus throughout this paper is the *Environmental Protection Act 1994* (Qld) (EPA) and the *Mineral Resources Act 1989* (Qld) (MRA).

## Planning & Environment Court

Although the P&E Court obtains jurisdiction from various legislative acts, <sup>16</sup> its main head of jurisdiction is appeals against decisions under the *Planning Act 2016* (Qld). Decisions of the P&E Court are final and conclusive and only able to be appealed to the Court of Appeal with leave on the grounds of an error of law or if the Supreme Court finds for jurisdictional error. <sup>17</sup> Alternatively, a method of appeal may be provided for in enabling legislation. An appeal to the P&E Court is by way of hearing anew and the appellant bears the onus of proving the appeal. <sup>18</sup>

One of the purposes of the *Planning Act* is to facilitate the achievement of ecological sustainability which requires a balancing exercise that considers protections of ecological processes and natural systems, economic development and maintaining cultural, economic, physical and social wellbeing of people and communities.<sup>19</sup>

<sup>&</sup>lt;sup>15</sup> The Land Court of Queensland was established in 1897 and the Planning and Environment (then known as the Local Government Court) was established in 1966.

<sup>&</sup>lt;sup>16</sup> https://www.courts.qld.gov.au/courts/planning-and-environment-court/about-planning-and-environment-court/rules-and-legislation.

<sup>&</sup>lt;sup>17</sup> Planning and Environment Court Act 2016 (Qld) ss 7(2)–(3), Part 7.

<sup>&</sup>lt;sup>18</sup> Ibid ss 43, 45.

<sup>&</sup>lt;sup>19</sup> *Planning Act* 2016 (Old) s 3.

Under the *Planning Act* individuals or entities may go before the P&E Court for appeals relating to development applications and infrastructure charge notices. Developments which are prescribed 'environmentally relevant activities' require an environmental authority (EA), linking the *Planning Act* to the EPA and preventing development until an issued approval of the activity is provided.<sup>20</sup>

#### Land Court

Similar to the P&E Court, the Land Court is established and acquires jurisdiction from various pieces of legislation.<sup>21</sup> Matters relating to the environment over which the Land Court has jurisdiction includes mining objection hearings (MOH), objections to environmental authorities, cultural heritage considerations under the Land Court's Cultural Heritage and Indigenous Land Use Agreement Division and environmental issues relevant to compulsory acquisitions and land valuations.

Mining objections hearings and EA objection hearings are conducted by the Land Court upon referral. A mining claim, lease or EA objection occurs when someone makes an objection to a mining activity or EA. When an EA objection is submitted as well as a mining objection for the same mining activity, the Land Court may hear both EPA and MRA objections in the one hearing.<sup>22</sup> The legislative regimes for how to bring the matter before the Court for an objections hearing differs under both the MRA and EPA, but once a matter is before the Court they mostly proceed the same way. Later in this presentation, we will explain in more detail the process for a mining or EA objections hearing including how the case is filed with the Court, the hearing process, the relevant considerations for the Court and the recommendation process.

#### Supreme Court

The Supreme Court plays a part in the hearing and determination of environmental issues under the MRA by way of having jurisdiction to hear any proceeding challenging or otherwise relating to the validity of a grant.<sup>23</sup>

<sup>&</sup>lt;sup>20</sup> Environmental Protection Act 1994 (Qld) ss 106, 19, Schedule 4.

<sup>&</sup>lt;sup>21</sup> Land Court Act 2000 (Qld) ss 4-5.

<sup>&</sup>lt;sup>22</sup> Environmental Protection Act 1994 (Qld) s 185(1).

<sup>&</sup>lt;sup>23</sup> Mineral Resources Act 1989 (Old) s 370.

## Magistrates Court

A magistrate may determine procedural and investigative matters including whether a warrant should be given allowing entry into a place, whether an investigation is authorised and granting entry orders to work on primary land or access land.<sup>24</sup> In circumstances where an enforceable undertaking is given under the EPA and subsequently breached, a person may apply to the Magistrates Court for an order demanding compliance or discharging the undertaking.<sup>25</sup> In addition to this, the magistrate may also impose a civil penalty or, if the breach is committed wilfully, the person in breach may be held criminally responsible and therefore subject to sentencing.

#### **Criminal Cases**

There are a number of criminal offences under the EPA for various acts and omissions relating to mining leases and the environment including contravening an EA and causing serious environmental harm. Offences under the EPA are indictable offences if the maximum term of imprisonment exceeds 2 years. <sup>26</sup> Indictable offences are heard by a jury in the District Court.

A recent case in Queensland demonstrates how the criminal jurisdiction is brought into environmental matters and the possible consequences of contravening environmental protections.

Linc Energy Limited was found guilty by a jury in the District Court of 5 counts of wilfully and unlawfully causing serious environmental harm over a period of 7 years. Linc Energy operated an underground coal gasification (UCG) plant just outside of Chinchilla, Queensland. A UCG process involves setting fire to a coal seam underground resulting in the production of various gases which Linc then converted into liquid products, such as fuel.<sup>27</sup>

Due to the defendant being a corporation the only penalty open to the Court to impose was a financial penalty in the form of a fine or compensation.

Even though the defendant was in liquidation during the sentencing, Justice Shanahan was of the opinion that there were good reasons of principle to warrant implementing a financial

<sup>&</sup>lt;sup>24</sup> Environmental Protection Act 1994 (Qld) ss 456, 458, 575.

<sup>&</sup>lt;sup>25</sup> Ibid s 513(2).

<sup>&</sup>lt;sup>26</sup> Ibid s 494

<sup>&</sup>lt;sup>27</sup> This process is technically known as a gas to liquid.

penalty including the that purpose of sentences is to punish an offender in a way that is just, to denunciate the conduct and deter the behaviour occurring in future instances.

Counts 1 and 2 related to a site known as Gasifier 2. In the process, the site was operating above hydrostatic pressure which involved a risk of fracturing the coal, allowing contaminants to escape during the process. Omissions prior to work on the site and the use of high pressure air resulted in damage to the landform that spanned a distance of up to 2 kilometres. After reports had been provided recommending shutting down the site, Linc Energy continued to operate and did not seek to draw back contaminants that had escaped.

After this stage and a report from the CEO detailing the consequences from the Gasifier 2 operations, Gasifier 3 was carried out without an adequate site characterisation. Linc Energy consulted its in-house scientists who advised that there was insufficient data to determine operating parameters for Gasifier 3, particularly, insufficient data to determine whether the gasification process could be controlled. Despite being aware of the 2 reports, Linc Energy proceeded with Gasifier 3. During Gasifier 3, Linc Energy became aware of gas escaping through cracks in the ground and bubbling to the surface. The UCG process continued, even after Linc Energy received a recommendation to decommission Gasifier 3 in March 2009. Operating until May 2009, the Gasifier 3 process, completely disregarded the damage that would result.

Moving to Gasifier 4, Linc Energy sought advice regarding an appropriate site and were advised that Chinchilla would not be feasible due to the damage already caused to the landform by Gasifiers 1-3. In particular, the site would not be able to deliver optimal pressure for the gas to liquid process. Despite this warning, Chinchilla was chosen for Gasifier 4 and some mitigating steps were taken to reduce the impact to the site; the sentencing judge formulated the opinion, from the evidence, that the steps taken were not done to a standard which would achieve the desired result. Linc Energy, being aware of the failure to maintain the Gasifier 4 site, covered up gas bubbling with crusher dust to prevent a regulator from noticing the contamination during an inspection of the site.

When Gasifier 5 was introduced, a report categorised the site as unsuitable due to significant fracturing, nevertheless, Chinchilla was approved for operation. Linc Energy sought to amend its EA and the Department for Mines, Resources and Energy sought data as to the impacts on internal groundwater, as a result of that application. When faced with providing further information or abandoning the application for amendment, Linc Energy withdrew the

application. At this time, Linc Energy also decided to cease voluntary monitoring of groundwater samples. The sentencing judge formed the opinion that this conduct clearly indicated that the damage being caused was within Linc Energy's knowledge and that Linc had attempted to conceal this from the regulator. His Honour considered this to be an aggravating feature of this case.

During Gasifier 5, Linc Energy was aware of a significant concentration of contaminants detected within monitoring bores and shallow wells in December 2011, nevertheless, operation continued until December 2013. The decommissioning of all Gasifiers offended principles of a 'clean cavern' approach. This means that the appropriate method of decommissioning the site by drawing back contaminants by the use of pressure was not followed. 'Each gasifier was operated in a manner that resulted in explosive and toxic gases, tars and oils escaping into parts of the landform'.<sup>28</sup> The offences concerned have resulted in a contamination of the groundwater system, which will require monitoring and remediation for many years. There was also a present risk, at the time of sentencing, of explosion and toxicity at the site and in the landforms.

His Honour considered Linc Energy to have put its commercial interests above the duty of safeguarding the environment and to have ignored the evident risks of destruction, resulting in this ecological vandalism. In relation to the last 2 offences, his Honour was of the opinion that Linc Energy had clear knowledge of the environmental damage that would be caused as evidenced by the attempt to amend the EA and the cessation of groundwater monitoring.

Justice Shanahan had regard to the high value which is to be placed on the environment for offences committed during commercial developments and that such offending should be met with salutary and deterrent penalties. When determining the penalty to be imposed for the 5 individual offences, his Honour considered the appropriateness of a compensation order, though he declined to order one on the basis that there was no appropriate quantum placed before him and that there may be other processes for claiming such compensation.

In total, the sentencing judge remarked that the possible maximum penalty in relation to each of counts 1 to 3 were \$1,561,875 and for counts 4 and 5, the maximum penalty is \$2,082,500 for each offence. For offences 1 to 3, Judge Shanahan fined Linc Energy \$700,000 per count and for offences 4 and 5, \$1,200,000 per offence. The convictions were recorded. In this

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<sup>&</sup>lt;sup>28</sup> The Queen v Linc Energy Ltd (In liq) sentencing remarks of Judge Shanahan, District Court of Queensland (11 May 2018) line 28–9.

sentence, his Honour also had regard to the relevant criteria and sections of the *Penalties and Sentences Act 1992* (Old).<sup>29</sup>

# **Civil Cases Involving Mines or New Environmental Authorities**

A MOH must be conducted by the Land Court if a person objects to an application for a mining lease or an EA relating to a mining lease.<sup>30</sup> This occurs once an objection has been made and the administering authority refers the matter to the Land Court.

Despite the subtle differences in the legislative regimes for how to get to Court, once here, the matters proceed in essentially the same way. In a MOH the relevant parties include the EA administering authority,<sup>31</sup> applicant (mining lease or EA applicant), and any person who has objected to the mining lease or EA. The Land Court has discretion to add parties to the EA proceedings as it determines.<sup>32</sup>

The Land Court takes part in the decision-making process by providing a recommendation to either the Minister for the Department of Natural Resources, Mines and Energy and/or the Chief Executive of the Department of Environment and Science, considering all relevant statutory criteria, the objections before the Court and the EA.<sup>33</sup> The statutory standard criteria for an EA includes considerations of intergenerational equity, the public interest and any Federal or State government plans, requirements or agreements regarding environmental protection or ecologically sustainable development. When undertaking these considerations, it is often the case that expert evidence is required for the Court to properly understand the impacts of certain activities.

An illustrative example of a MOH including an EA and mining lease is *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No.4)* [2017] QLC 24. In this decision there were 28 expert witnesses and 38 lay witnesses. The experts gave evidence on matters including groundwater modelling, conceptualisation, faulting and quality; economics; agricultural economics; coal markets; flood and surface water quality; noise and vibration; air quality, dust and greenhouse gases; mental health; physical health; social impact assessments and community and social

<sup>&</sup>lt;sup>29</sup> The Queen v Linc Energy Ltd (In liq) sentencing remarks of Judge Shanahan, District Court of Queensland (11 May 2018).

<sup>&</sup>lt;sup>30</sup> Land Court Practice Direction 4 of 2018.

<sup>&</sup>lt;sup>31</sup> For EA matters only.

<sup>&</sup>lt;sup>32</sup> Environmental Protection Act 1994 (Qld) s 186.

<sup>&</sup>lt;sup>33</sup> Mineral Resource Act 1989 (Qld) ss 78, 269(4); Environmental Protection Act 1994 (Qld) s 191.

environment; visual amenity; livestock; rehabilitation; traffic, transport and roads; valuation; land and soil; and terrestrial fauna.<sup>34</sup>

The *New Acland* decision was reviewed by the Supreme Court of Queensland and is currently under appeal in the Court of Appeal.

The MOH jurisdiction of the Land Court differs to that discussed earlier in this paper on the basis that the Court operates in a recommendatory role and undertakes a weighing-up process of the benefits and detriments of a claim, application or authority to provide a recommendation to the Minister or Chief Executive rather than finding in favour of a party to the proceedings. The determination by the Land Court must provide a recommendation advising whether the mining claim, lease or EA should be rejected or granted and whether any additional or specific conditions should be imposed.<sup>35</sup>

The Land Court also has jurisdiction to strike out all or part of any objections lodged if it is outside the Land Court's jurisdiction, frivolous or vexatious or otherwise an abuse of process of the Land Court, at any stage of the MOH.<sup>36</sup>

## Mining Compensation

The Land Court also has jurisdiction to determine the amount of compensation a landholder is entitled to when there is a mining activity on their land. The considerations for the Land Court when determining compensation payable include environmental impacts to the land such as, the impacts of dust on livestock and access to water etc. A party aggrieved by the Land Court's determination of compensation may appeal to the Land Appeal Court within 20 business days. The Land Appeal Court is vested with the power to vary the determination as it sees just or to disallow the appeal and confirm the determination.<sup>37</sup> In hearing a mining compensation appeal, the Land Appeal Court must consider matters of relevance to the Land Court decision. Whatever determination is made by the Land Appeal Court is final and conclusive.<sup>38</sup>

<sup>&</sup>lt;sup>34</sup> New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No.4) [2017] OLC 24 [112].

<sup>&</sup>lt;sup>35</sup> Mineral Resource Act 1989 (Qld) ss 78, 269(2).

<sup>&</sup>lt;sup>36</sup> Ibid s 267A.

<sup>&</sup>lt;sup>37</sup> Ibid ss 86(1), 86(4)–(5), 282(1), 282(4)–(5).

<sup>&</sup>lt;sup>38</sup> Ibid s 282(7).

In the event of a material change in the circumstances of a mining lease, the mining lease holder or any landowner in relation to the mining lease, may apply to the Land Court for a review the original compensation amount.

#### **Other EPA Provisions**

Other jurisdiction under the EPA is:

- Section 522 Stay of operation of particular original decisions for securing the effectiveness of review and later appeals to the Land Court or the P&E Court;
- Section 522A Stay of decision relating to financial assurance;
- Section 522B The Land Court must refuse an application for a stay of an
  environmental protection order if satisfied there would be an unacceptable risk of
  serious environmental harm if the stay was granted;
- Section 523 Certain original decision of the Chief Executive may be appealed to the Land Court;
- Section 530 An appeal will be by way of rehearing and with the same powers as the administering authority.