Ashurst

Queensland land access and project approvals

Year in review 2024

February 2025

Outpacing change

Contents

"They have a broad team who are very highly experienced."

Chambers Asia-Pacific 2024

"Pragmatic and problem-solving approach."

Chambers Asia-Pacific 2024

Foreword

Welcome to the Queensland land access and project approvals 2024 year in review

In this publication, we highlight the key legislative, policy and judicial developments relating to land access and project approvals in Queensland.

Notably, in the past 12 months we have seen:

- the re-badging of "GasFields Commission Queensland" to "Coexistence Queensland" with an enhanced jurisdiction;
- the broadening of the Land Access Ombudsman's functions;
- the release of a consultation paper detailing the regulatory issues, opportunities and options for reform in the regulation of green hydrogen energy;
- fewer decisions of the Land Court than we have seen in previous years; and
- actions flowing from the former Government's commitments made in the Queensland Resources Industry Development Plan.

This year, we have also seen competing land issues between resources and renewable energy projects intensify. In the absence of regulatory reform on this issue, we have seen industry developing its own novel solutions to work together to develop these projects.

Finally, there has been significant legislative change including a range of amendments to the *Environmental Protection Act 1994* (Qld), and major changes to how wind farm developments are assessed.

We encourage you to reach out to us if you would like to discuss any aspect of this publication.

The articles in this publication are current as of 20 February 2025.

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Key developments in the land access space

Key insights

- The Queensland Government passed the *Mineral and Energy Resources and Other Legislation Amendment Act 2024* (Qld) on 12 June 2024, which makes a range of changes in Queensland's resources space, including the establishment of "Coexistence Queensland", the introduction of amendments to key pieces of resources legislation and a broadening of the functions of other bodies within the sector.
- A consultation paper detailing the regulatory issues, opportunities and options for reform in the regulation of green hydrogen energy was released in February 2024. The Consultation Paper outlines the regulatory challenges, opportunities and potential reforms for green hydrogen energy regulation, highlighting the importance of clear and consistent regulations to ensure certainty for investors and developers.
- A new landholder guide for negotiating onshore gas activity was released in early 2024. The guide covers each stage of the negotiation process, emphasising the relevant considerations landholders should consider when negotiating with gas companies.
- The Land Access Ombudsman received 47 dispute referrals in the 2023–2024 period, representing a marginal decrease compared to last year.

Legislative changes under the MEROLA Act

The *Mineral and Energy Resources and Other Legislation Amendment Act 2024* (Qld) (**MEROLA Act**) was passed with amendment on 12 June 2024. A commencement date is yet to be fixed for most of the amendments. However, some of the amendments, including those relating to Coexistence Queensland, commenced on 18 June 2024.

Coexistence Queensland

In accordance with a Discussion Paper released by the Department of Resources in November 2022, which we previously discussed in our *Queensland Land Access and Resource Approvals Year in Review 2023* article "Review of coexistence institutions and other proposed land access reform," the MEROLA Act establishes a new institution called "Coexistence Queensland" to replace the Gasfields Commission Queensland. The purpose of this body is to manage and improve the sustainable coexistence of landholders, the renewable energy industry and the resources of regional communities.

The responsibilities of Coexistence Queensland will expand beyond the onshore gas industry to (amongst other things):

- identify broader coexistence issues;
- provide advice to Ministers, government entities or other stakeholders about matters relating to the sustainable coexistence of industry, landholders and the community;
- facilitate better relationships between industry, landholders and the community; and
- provide a central point of contact for enquiries pertaining to the sustainable coexistence of industry, landholders and the community.

Office of Groundwater Impact Assessment (OGIA)

The MEROLA Act expands OGIA's functions to provide independent scientific advice regarding subsurface impacts from authorised petroleum and gas activities as requested by relevant government entities.

Land Access Ombudsman (LAO)

The MEROLA Act broadens LAO's functions to:

- include the investigation of breaches of access agreements; and
- provide a voluntary alternative dispute resolution service in relation to mining claims and leases, specifically for parties (re-)negotiating make good agreements, conduct and compensation agreements, access agreements and compensation agreements.

These expanded functions will be funded by an industry levy apportioned equally amongst resource tenure holders with an annual levy covering day-to-day operating costs and a quarterly levy covering costs associated with providing alternative dispute resolution services and investigation services.

Other relevant changes

Key stakeholders should also be aware of the following amendments under the MEROLA Act:

- the Minister for Resources and Critical Minerals now has discretion to decide the length of time required for land relinquished to the State to be re-released for application if the postponement of release is in the best interests of the State;
- the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) has been amended to allow a person claiming an interest in a resource authority to lodge a caveat over an application for a mining lease under the *Mineral Resources Act 1989* (Qld); and
- the *Mineral and Energy Resources (Financial Provisioning) Act 2018* (Qld) has been amended to refine its operation and increase the prescribed "estimated rehabilitation cost" for risk assessments from $100,000 to $10 million.

CSG subsidence framework

The Mineral Resources and Other Legislation Amendment Bill 2024 (Bill) proposed a new risk-based management framework for the regulation of coal seam gas-induced subsidence, which we previously discussed in our *Queensland Land Access and Resource Approvals Year in Review 2023* article "Government releases consultation paper in response to regulatory review of coal seam gas-induced subsidence".

During consideration of the Bill by the Clean Economy Jobs, Resources and Transport Committee, concerns were raised about the complexity of the framework and the lack of consultation on an exposure draft of the Bill.

Consequently, the MEROLA Act no longer includes the proposed coal seam gas-induced subsidence framework. The Government has opted to instead undertake further consultation with relevant stakeholders on the proposed framework, which has now closed. The Government is currently reviewing the feedback that will inform the new framework.

Proposed reforms to accommodate Queensland's green hydrogen industry

In February 2024, the Queensland Government released a consultation paper on developing "an effective regulatory framework for Queensland's green hydrogen industry" (**Consultation Paper**). The Consultation Paper details the regulatory issues, opportunities and options for reform in the regulation of green hydrogen energy and emphasises the need for clear and consistent regulations to provide certainty for investors and developers, particularly given green hydrogen is currently regulated by a range of separate frameworks.

Current regulatory framework applicable to green hydrogen and options for reform

Existing framework	Application to green hydrogen	Options for reform
Planning	Under the *Planning Act 2016* (Qld), approvals for green hydrogen projects are assessed against matters such as environmental impacts, water access, cultural heritage, workplace health and safety and land use requirements.	This framework can either be maintained or reformed to include an energy load threshold assessed by the State.
Renewable Energy	Green hydrogen projects require large scale access to affordable renewable energy, as projects are energy intensive and electricity input prices materially contribute to the cost of production. Currently there is no requirements for renewable energy sourced production under the *Electricity Act 1994* (Qld).	Options for reform include introducing requirements for a hydrogen generation licence under the Electricity Act exempting smaller projects or leveraging the proposed Renewable Energy Zone framework to enable greater renewable energy potential for hydrogen projects.
Pipelines	Pipelines are critical infrastructure for transporting hydrogen products, which are regulated through the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) and the *Gas Supply and Other Legislation (Hydrogen Industry Development) Amendment Act 2023*.	While no further amendments are proposed, the Consultation Paper sought feedback on any pipeline-related issues relating to green hydrogen production and transportation.
Common User Infrastructure	Development of green hydrogen projects requires investment in large-scale new or expanded infrastructure.	While no options for reform are proposed, feedback was sought on any amendments to the existing framework that may be required to accommodate green hydrogen.
Water	The *Water Act 2000* (Qld) is sufficient for green hydrogen project development. However, this is likely to change as more green hydrogen projects are approved. The Queensland Government is undertaking planning activities to meet this increased demand.	While no options for reform were proposed, feedback was sought on any amendments to the water framework (particularly with respect to water infrastructure and supply) that may be required.
Safety	The Office of Industrial Relations will administer the *Work Health and Safety Act 2011* (Qld) and *Electrical Safety Act 2002* (Qld). Resources Safety and Health Queensland will administer the Petroleum and Gas Act to facilitate safety regulations for green hydrogen projects.	The Consultation Paper sought feedback on the current approach to safety risks, whether standalone legislation is required and whether changes to applicable standards for major hazard facilities are required.
Environment	Environmental impact assessments for green hydrogen projects will be assessed under regulatory frameworks in the E*nvironmental Protection Act 1994* (Qld) (**EPA**) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).	While no amendments were proposed, the Consultation Paper sought feedback on whether any amendments to the approvals process were required and whether any risks associated with the development and production of green hydrogen were not adequately covered by existing processes.
First Nations impacts and benefits	Ensuring First Nations people and communities benefit from the hydrogen industry is a key priority at the State and Federal level.	Options for reform include maintaining the status quo under the EPA, making community benefit a criteria of granting hydrogen generation licences or extending existing assessment pathways to ensure stakeholders benefit from projects.
Hydrogen storage in geological formations	Above ground storage of hydrogen requires approval under the *Planning Act 2016* (Qld), which is an adequate framework. There is currently no framework for below ground storage of hydrogen	Reforms are proposed to either put frameworks in the existing resources legislation or in standalone legislation.

By engaging stakeholders and seeking comprehensive feedback, the Queensland Government aims to create a regulatory framework that not only supports the growth of the green hydrogen industry but also ensures it contributes positively to the environment and the economy.

Further details regarding the proposed reforms are available in our 28 February 2024 alert "Queensland's green hydrogen regulation – Consultation Paper".

New guide for land access negotiations

Coexistence Queensland has released a new landholder guide for negotiating onshore gas activity. The guide is split across four chapters, each dealing with a different stage of the negotiation process.

Stage 1 – Preparing for engagement with a gas company

The guide urges landholders to be aware of their right to negotiate where gas activities will have a significant impact on their land or residence. Negotiable matters include how access occurs, the location of the activity and any related compensation.

Stage 2 – Understanding the types of agreements available

There are numerous types of agreements that can be negotiated between a landholder and a gas company. Such agreements can relate to gas infrastructure, water bore impairment, gas pipelines, land access and environmental nuisance. Depending on the context, multiple types of agreements may be required.

Stage 3 – Commencing negotiations

The guide covers a range of considerations that landholders can consider during negotiations, including compensation, conditions relating to conduct, biosecurity plans, property maps, non-monetary benefits, business plans, public liability insurance and the decommissioning process.

Stage 4 – Managing negotiations and agreements

The guide encourages landholders to seek professional advice when negotiating agreements, such as assistance from lawyers, accountants, hydrogeologists, valuers and agronomists.

Key trends in land access disputes

According to the most recent Annual Report published by the Land Access Ombudsman, 47 dispute referrals were directed to the Land Access Ombudsman in 2023–2024. This represents a marginal decrease compared to the 50 referrals received in the previous period from 2022–2023.

Of the 47 dispute referrals, preliminary enquiries were commenced on four of the referrals with no investigative processes following (an increase from two in 2022–2023). Five of the referrals related to the powers of the Land Access Ombudsman, and the remaining 38 were deemed to be out of the Land Access Ombudsman's jurisdiction. These out of jurisdiction claims were redirected to appropriate bodies, most commonly being the Department of Resources and the Queensland Ombudsman. Some complainants were referred to multiple entities due to the mixed subject matter of the claims.

What to look out for in 2025

As we move into 2025, several key developments in the land access and project approvals sector are anticipated:

- stakeholders should monitor the implementation and impact of the MEROLA Act, particularly the operationalisation of Coexistence Queensland and the expanded functions of the OGIA and LAO;
- the outcomes of the ongoing consultation on the CSG-induced subsidence framework will be crucial, as the government reviews feedback to inform the new regulatory framework; and
- the regulatory landscape for green hydrogen energy is expected to evolve over the coming year, with potential reforms aimed at creating a more cohesive and supportive environment for investors and developers in this industry in Queensland.

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Review of mining lease objections processes

Stop Press

On 4 March 2025, the Attorney-General, Deb Frecklington MP, advised the Chair of the Queensland Law Reform Commission, that its mining lease objections review is longer required, and she would withdraw the review, effective immediately. Ms Frecklington also advised that a report on the review would not be required.

The Attorney-General has reiterated that the focus of the current Government, through its Resources Cabinet Committee, is to consider policies and initiatives to maintain and improve the competitiveness of Queensland's resources sector.

The Chair of the Queensland Law Reform Commission, Fleur Kingham, has commented that the Commission is disappointed it cannot finish its work on the review, but respects this is a matter for the Attorney-General.

Key insights

- The Queensland Law Reform Commission has progressed its review into the mining lease objection process, which focusses on processes to decide contested applications for mining leases under the *Mineral Resources Act 1989* (Qld) and associated environmental authorities under the *Environmental Protection Act 1994* (Qld).
- The Commission accepted submissions on two consultation papers between July and September 2024. On 15 November 2024, the Commission released a submissions paper summarising the feedback from the review, and a consultation paper on whether any changes should apply to resource production tenures under other Acts.
- The Commission's final recommendations are expected to be provided to Government by 30 June 2025.

Queensland Law Reform Commission's review of mining lease objections processes

On 15 July 2024, the Queensland Law Reform Commission released two consultation papers for the mining lease objections review, along with two fact sheets and four summary documents.

The review's guiding principles are informed by the Commission's Terms of Reference and are consistent with current commitments by the Queensland Government, including:

- strong and genuine partnerships with Aboriginal peoples and Torres Strait Islander peoples, self-determination and "free prior and informed consent" (**FPIC**) in treaty negotiations and treaty-making; and
- strengthening ESG credentials.

We discussed the Commission's Terms of Reference in our *Queensland Land Access and Resource Approvals Year in Review 2023* article "Timeline released for review of mining lease objections process".

What key changes have been proposed?

The fundamental change proposed is to alter the Land Court's role in the objections process so that the Court will review the decisions made by Government about mining lease and environmental authority applications.

Currently, the Land Court is involved in the process after an objection is made but before a decision is made on the mining lease or environmental authority application.

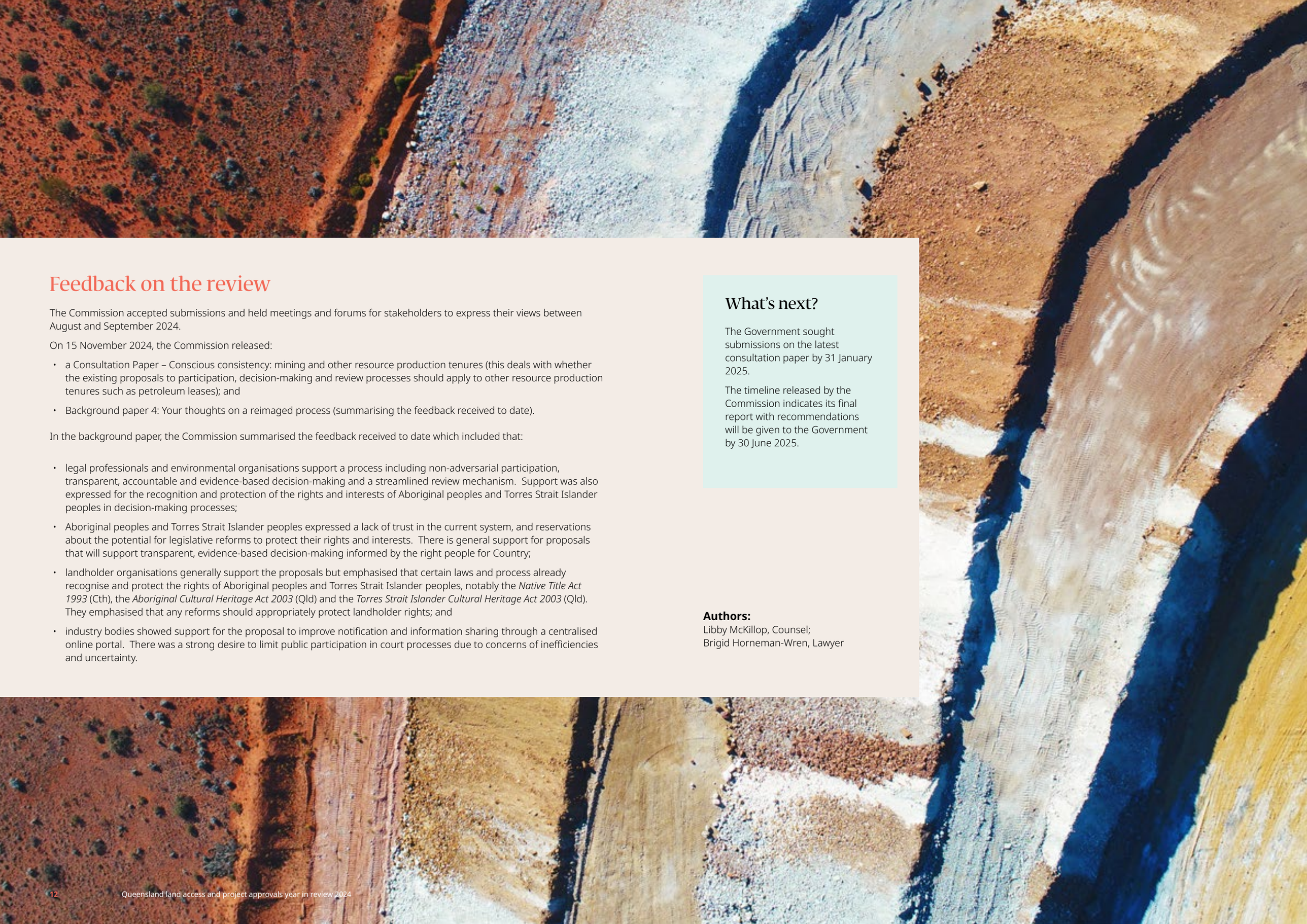
The Commission's aim is to make the process more efficient, reduce delay and align the Land Court's function with the traditional role of courts as reviewers of Government decisions. In this proposed review process, the Land Court would be able to consider both the merits and legality of Government decisions in a combined review, with the Land Court only able to consider the same evidence as that before the original decision-makers, except in exceptional circumstances. There would then be a single appeal pathway directly to the Queensland Court of Appeal.

The consultation papers also made the following key proposals:

1. creating an integrated, non-adversarial participation process, including a new centralised online portal, which would include public notice and information as the proposal progresses through the participation and decision-making processes;
2. establishing an Aboriginal and Torres Strait Islander Advisory Committee to consult with community and advise decision-makers when a proposed project may impact the rights and interests of First Nations Peoples. The Commission has asked for views on the proposed Advisory Committee, as well as on other models of community participation;
3. establishing a new Independent Expert Advisory Panel for environmental authority applications that meet specified criteria. The Committee has proposed that this be like the current New South Wales Independent Expert Advisory Panel; and
4. requiring decision-makers to consider input provided through the new participation process, any advice of the Independent Expert Advisory Committee, and the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in land, culture and cultural heritage.

The consultation papers also pose questions about who should have standing to object to mining lease applications; the orders the Land Court should be able to make; who should pay the costs of the review; how the pre-lodgement process should operate; and how the objections process interacts with other relevant Acts.

As part of this final point, the review will be tracking developments in the review of the Queensland's cultural heritage legislation. For more information about the review, see our *Native Title Year in Review 2023-2024* article "Heritage reforms stall as States wait for lead from reform shy Commonwealth" and *Native Title Year in Review 2023-2024* article "Queensland commences review of its cultural heritage legislation".



Feedback on the review

The Commission accepted submissions and held meetings and forums for stakeholders to express their views between August and September 2024.

On 15 November 2024, the Commission released:

- a Consultation Paper – Conscious consistency: mining and other resource production tenures (this deals with whether the existing proposals to participation, decision-making and review processes should apply to other resource production tenures such as petroleum leases); and
- Background paper 4: Your thoughts on a reimaged process (summarising the feedback received to date).

In the background paper, the Commission summarised the feedback received to date which included that:

- legal professionals and environmental organisations support a process including non-adversarial participation, transparent, accountable and evidence-based decision-making and a streamlined review mechanism. Support was also expressed for the recognition and protection of the rights and interests of Aboriginal peoples and Torres Strait Islander peoples in decision-making processes;
- Aboriginal peoples and Torres Strait Islander peoples expressed a lack of trust in the current system, and reservations about the potential for legislative reforms to protect their rights and interests. There is general support for proposals that will support transparent, evidence-based decision-making informed by the right people for Country;
- landholder organisations generally support the proposals but emphasised that certain laws and process already recognise and protect the rights of Aboriginal peoples and Torres Strait Islander peoples, notably the *Native Title Act 1993* (Cth), the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld). They emphasised that any reforms should appropriately protect landholder rights; and
- industry bodies showed support for the proposal to improve notification and information sharing through a centralised online portal. There was a strong desire to limit public participation in court processes due to concerns of inefficiencies and uncertainty.

What's next?

The Government sought submissions on the latest consultation paper by 31 January 2025.

The timeline released by the Commission indicates its final report with recommendations will be given to the Government by 30 June 2025.

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Coexistence between renewable and resource projects in Queensland remains key issue

Key insights

- As renewable project development continues at rapid pace to meet the Queensland Government's ambitious targets, coexistence issues relating to "overlapping" renewable and resource projects continue to be a key concern for industry.
- The current regulatory framework does not adequately manage these coexistence matters. Achieving satisfactory coexistence outcomes for both sectors is critical for the energy transformation.
- To date, the Queensland Government has taken some modest steps to address these issues by expanding the jurisdiction of GasFields Commission Queensland, and re-badging it as "*Coexistence Queensland*", and adding mapping layers to GeoResGlobe, but further action is necessary.
- In the absence of regulatory reform, industry is developing its own novel solutions to address these matters

Coexistence of projects – regulatory context

Prior to the renewable energy boom, the mining and gas industry had become accustomed to dealing with other "*coexistence*" challenges relating to their interaction with landholders (particularly with pastoralists), and with other overlapping resource authority holders. Those interactions are managed within the established regulatory frameworks under the Mineral and *Energy Resources (Common Provisions) Act 2014* (Qld) (**MERCP Act**).

Increasingly, we are now seeing various instances in Queensland of large-scale wind farms and solar projects being developed in and around CSG well-pads and mineral exploration sites. Typically, the renewable projects are developed under a development approval and with land tenure granted by the underlying landholder in the form of a long-term lease. Importantly, this tenure provides the renewable project proponent with the status of an "occupier" under the MERCP Act.

Generally, it is the resource authority holder who holds the liability to compensate any "occupiers" for the "compensatable effect" they suffer. "Compensatable effect" is defined in the MERCP Act by reference to various heads of compensation including those effects that may be suffered by the occupier because of a resource authority holder carrying out its activities on the land, including deprivation of possession of the land's surface, diminution of the land's value, and diminution of the use made, or that may be made, of the land or any improvement on it.

Subject to some exceptions, generally a resource authority holder must not carry out "advanced activities" on private land unless each owner and occupier of the land is a party to a conduct and compensation agreement (CCA) about the advanced activity and its effect.

If the parties cannot agree a CCA, the MERCP Act provides a statutory negotiation pathway involving alternative dispute resolution and an eventual referral to the Land Court for determination, or arbitration.

Further, resource authority holders also hold a liability to pay the occupier's "negotiation and preparation" costs necessarily and reasonably incurred in seeking to enter a CCA or deferral agreement. These costs generally include legal fees, accounting costs, and valuation costs.

Mining leases are dealt with separately under the *Mineral Resources Act 1989* (Qld) and the MERCP Act land access framework does not apply to those interests. Instead, once a mining lease is granted, the land is effectively sterilised from other land uses, and it is an offence to enter the area of the mining lease without consent.

Current regulatory framework is inadequate

The existing regulatory framework is not fit for purpose for the competing interests of resource authority holders and renewable project proponents.

The MERCP Act framework pre-dates the renewable energy transition and was primarily aimed at balancing the rights and interests of farmers with mining and gas development in Queensland.

Resource projects and renewable energy projects have different approval pathways for approval which do not adequately consider existing land uses. Further, the framework dealing with the protection of "restricted land" in the MERCP Act does not adequately contemplate areas or structures associated with renewable energy projects.

The existing framework does not determine any priority for the competing land uses. However, if a resource authority holder is unable to agree a CCA with an occupier (which could be a renewable energy proponent), the statutory negotiation process can be followed with an eventual application to the Land Court to make a determination of compensation which also enables the resource authority holder access rights once that application is made. Owners and occupiers of land do not have the right to refuse access to resource authority holders.

To date, the Land Court has not made a determination in the context of compensation that should be paid to an occupier that is a renewable project proponent. The Land Court did consider some of these issues in a limited manner in Deimel v Phelps & Anor [2022] QLC 6. Ashurst acted for CleanCo in these proceedings.

The status and timing of the project development of each of the projects can influence compensation liability.

There can also be significant safety and operational concerns associated with resource and renewable projects occurring in the same area. For example, we are aware of some cases where wind generation turbines are proposed within very close proximity to operational gas well pads and there are no mandatory codes or standards addressing the minimum set back distances.

Government response and further reform needed

One of the former Government's key areas of focus under the Queensland Resources Industry Development Plan was fostering coexistence and sustainable communities. The Government has completed some of its actions outlined in the Plan, including:

- amending the Land Access Code to include a revised set of coexistence principles;
- expanding the coverage of GasFields Commission Queensland, now called Coexistence Queensland, to include the resources and renewable energy sectors;
- taking steps to capture the renewable energy industry in regional plans as they are updated; and
- creating and maintaining new mapping layers on GeoResGlobe and Queensland Globe that spatially map resource tenures, renewable energy zones and projects, approved and proposed renewable energy projects.

Further reform will be necessary to more holistically deal with the safety and operational concerns arising from these overlapping projects, as well as properly addressing land use priority and disputes.

Industry response

In the absence of regulatory reform, industry is developing its own novel solutions to address these coexistence matters.

Over the past few years, Ashurst has advised numerous proponents (from both the renewable and resources sectors) in the negotiation of agreements to address the various matters associated with coexistence of these projects.

In our experience, open engagement, collaboration and a detailed and robust process for exchange of information is critical to the success of these arrangements. Some of the key issues to be addressed include safety management and incident response, coordination of activities and access, project plans and information sharing, life cycle planning, biosecurity requirements and coordination, and protocols for project completion including rehabilitation.

Another key consideration is of course the impact of these projects on the underlying landholders, and how the proponents can work together to ensure consistent communication and processes with those important stakeholders.

Next steps

The Government recently acknowledged in the Discussion paper for Draft Renewables Regulatory Framework that as population and industries continue to grow, there is increased pressure on land and infrastructure. Competition for land is intensifying in regions where there is increasing demand for renewable energy, infrastructure, industrial and manufacturing opportunities, critical mineral deposits, agricultural production, and need for environmental conservation.

The Crisafulli government acknowledges that as renewable energy development is occurring at a rapid pace, there needs to be a greater focus on proactive consideration of environmental and community propriety where renewables are being built. The Government intends to review all Regional Plans to ensure they are "dynamic and responsive to wider trends and geopolitical change". This Government has said this review will be underpinned by a detailed mapping of competing land uses, which will inform prioritisation of these interests at a regional landscape scale.

Until this review is carried out, and any enhancements to the regulatory framework are enacted, the responsibility to achieve effective and workable coexistence outcomes rests with industry to meaningfully collaborate.

Author:
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A big year for Queensland environmental law reform but Federal reforms stall

Key insights

- At the Queensland level, a broad range of amendments to the *Environmental Protection Act 1994* (Qld) commenced in June 2024.
- Key changes include an offence for breaching the general environmental duty, expanded notification obligations, and a new statutory enforcement tool.
- Proposed reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) appear to have stalled, with the Federal Government's "Stage 2" reform Bills failing to pass the Senate.

Major amendments to Queensland's environmental legislation commence

Last year in our *Queensland Land Access and Resource Approvals Year in Review 2023* article "Potentially significant changes to Queensland environmental legislation release for public consultation", we discussed a range of proposed amendments to the Environmental Protection Act 1994 (Qld).

These amendments commenced in June 2024, after the Queensland Parliament passed the *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024* (Qld). Key amendments include:

- an offence for failure to comply with the general environmental duty, making the duty directly enforceable for the first time;
- expanded notification obligations, with entities now required to notify where they "ought reasonably to have become aware" of certain events or circumstances;
- an active "duty to restore the environment" as soon as reasonably practicable after an incident involving contamination; and
- a new statutory enforcement tool called an "environmental enforcement order", which replaces environmental protection orders, direction notices, clean up notices and cost recovery notices.

Of particular note, the new environmental enforcement order can be issued for an activity "even if the person is the holder of an environmental authority that authorises…the activity". This gives rise to the risk of compliant activities being the subject of enforcement action (see our 2023 article referred to above for further discussion). With little guidance on this aspect of the amendments, how these tools are used in practice remains to be seen.

Where did the Federal Government land with its environmental reform?

Despite some momentum in the first half of 2024, proposed reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) appears to have stalled.

In late 2023 and early 2024, the Federal Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) published consultation papers on proposed changes to the EPBC Act, some of which were discussed in our February 2024 alert "Overhaul of Australian environmental laws begins in earnest". Key proposed changes include:

- the establishment of Environment Protection Australia (**EPA**), an independent body to be responsible for approvals, compliance and enforcement;
- the creation of National Environmental Standards (**NES**);
- streamlining assessment methods via "standard" and "low impact" self-assessment pathways;
- reforming environmental offsets;
- improving conservation planning arrangements; and
- establishing Environment Information Australia (**EIA**).

We published a series of alerts about these reforms during the first half of 2024 as follows:

- "Overhaul of Australian environmental laws begins in earnest" with release of detailed consultation papers" (13 February 2024) provides an overview of the reforms and details of the proposed new EPA and EIA;
- "Assessment pathways under Australia's proposed new Federal environmental laws" (28 February 2024), outlines the differences between the current and proposed new assessment pathways; and
- "Australia's proposed National Environmental Standards" (16 April 2024), discusses the five draft National Environmental Standards (NES) and contains a Stop Press about the bills to create the EPA and EIA.

Three reform bills were introduced into Parliament on 29 May 2024, reflecting what the Federal Government called "Stage 2" of the reform:

- the Nature Positive (Environment Protection Australia) Bill 2024 (Cth), which would establish EPA;
- the Nature Positive (Environment Information Australia) Bill 2024 (Cth), which would establish the Head of Environment Information Australia within the DCCEEW; and
- the Nature Positive (Environmental Law Amendments and Transitional Provisions) Bill 2024 (Qld), which would amend the EPBC Act and other environmental laws.

The Bills were passed by the House of Representatives on 4 July 2024, and were introduced into the Senate on 12 August 2024. However, the Federal Government did not get the crossbench support required to pass the Bills through the Senate by the end of 2024.

The Senate referred the Bills to the Environment and Communications Legislation Committee, which published a consultation report in September 2024. As part of this publication, the Coalition and the Greens provided dissenting opinions that highlighted the need for further consultation and reform.

The committee recommended that the Bills be passed subject to several recommendations:

Further consultation: The committee recommended that the Australian Government undertake further consultation regarding the definition of 'nature positive' to ensure that it is consistent with Australia's international commitments, including the Global Biodiversity Framework.

First Nations traditional knowledge: The committee recommended that the Minister consider measures to encourage the incorporation of First Nations traditional environmental knowledge into the EIA and in particular in determining the baseline for nature positive, and in the register of national environmental information assets, with appropriate protections for Indigenous Cultural and Intellectual Property and the confidentiality of culturally sensitive information.

Greater procedural safeguards for EPOs: The committee recommended that amendments be made to the *Nature Positive (Environment Law Amendments and Transitional Provision) Bill* 2024 to introduce greater procedural safeguards for the issuing of Environmental Protection Orders (EPO), including considering requirements for limited merits review, and requiring the Minister (and subsequently the CEO of the EPA) to disclose the underlying facts that have led to the issuing and scope of an EPO.

NES to be disallowable instruments: To ensure parliamentary oversight to this process, the committee recommended that National Environmental Standards be disallowable instruments.

In its dissenting report, the Coalition criticised various elements of Labor's Nature Positive Plan, including the lack of clear direction for implementing the legislation, the amount of time it was taking to discuss the reforms, and the lack of support from stakeholders for the proposed changes. There were also concerns raised regarding the proposed funding for the new EPA.

The reforms were briefly back on the Government's agenda in late January/early February 2025, when the *Nature Positive (Environment Protection Australia) Bill* and related legislation appeared on the Senate's notice paper for 6 February 2025. A few days later it was removed from the notice paper and the Senate passed a motion that all three bills would not proceed. We will now have to wait until after the federal election to see what happens next on Federal environmental law reform.

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Land Court approves BHP coal mine – an unexpected departure from Waratah

Summary

- In 2022, the Land Court accepted the existence of anthropogenic climate change in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21. This decision gave rise to an expectation that project proponents will find it difficult to obtain approvals for fossil fuel extraction, especially coal mining.
- The 2024 decision in *BHP Coal Pty Ltd & Ors v Chief Executive, Department of Environment, Science and Innovation* [2024] QLC 7 challenges this assumption. In this case, the Land Court recommended that the government approve an application related to the extension of a Moranbah coal mine.
- The Court held that while climate change is a relevant factor in its decision making, it is not the only factor. The Court also found that while the application engaged the right to life, protection of children and recognition and equality before the law, any limitation on these rights was 'procedurally appropriate and proportional'.

Environment Council of Central Queensland objects to the extension of a Moranbah mine

BHP Coal Pty Ltd (BHP Coal) applied to amend its existing Environmental Authority (EA) to extend its mining operations at Caval Ridge, Moranbah. In response, the Queensland Department of Environment, Science and Innovation (DESI) drafted an amended EA permitting the extension. The Environment Council of Central Queensland (ECCQ) lodged an objection against the draft EA.

The Court characterised the ECCQ's objections as falling under seven categories:

- the need for an Environmental Impact Statement (EIS);
- greenhouse gas (GHG) emissions;
- climate change consequences;
- impacts to endangered and threatened species;
- groundwater and surface water impacts
- rehabilitation and the final void; and
- cumulative impacts.

No requirement to provide a full EIS

The ECCQ submitted that BHP Coal had 'exploited a regulatory loophole' in its failure to provide a full EIS under the *Environment Protection Act 1994* (Qld) (EP Act).

Under the EP Act, an EIS is not required for a coordinated project. Given BHP Coal's original proposal was for a coordinated project, it was not the subject of an EIS process under the EP Act. Rather, BHP followed an EIS process under the *State Development and Public Works Organisation Act 1971* (Qld). The Court held that BHP Coal had not exploited a regulatory loophole, going as far as to say that, if it had, the proposal had nonetheless undergone 'rigorous assessment' and the public was given ample chance to provide feedback.

The project's estimated emissions do not affect the economic viability of the mine

The ECCQ submitted that BHP Coal's methodology for estimating its scope one methane emissions was flawed and that an accurate estimation would affect the economic viability of the mine. The Court disagreed, finding no real difference between the relevant estimation tools. The estimated emissions constituted less than 3% of the proposal's total emissions.

Climate change is not the only factor in the court's decision

The ECCQ submitted that 'it is no longer appropriate to approve new or expanded coal proposals' because of their impact on climate change. The Court accepted, applying Waratah, that 'any extraction, and consumption, of fossil fuel will add to … climate change risks'. However, it reiterated that climate change is not the only determinative factor in its decision. The proposal's environmental impacts must be weighed against its economic and social benefits.

In Waratah, the economic and social benefits of the coal mine were uncertain. In the present case, an identifiable economic benefit was that the coal mined in Moranbah is high-quality metallurgical coal used in the production of steel. The significance of the type of coal is that Queensland will require steel to build the requisite infrastructure needed to meet its net zero targets. Other facts that further distinguished BHP Coal from Waratah that were raised by *BHP Coal* are that the proposal does not affect an area of ecological significance and the application is for the extension of an existing coal mine, not a new project.

BHP Coal's offset and management measures are adequate and appropriate

The ECCQ contended that the project is likely to have a significant impact on listed threatened species. The amended EA demonstrated that BHP Coal intends to manage this impact through progressive rehabilitation, a reduction in the size of the out of pit overburden dump and several offsets. The Court found that such measures, while not 'particularly impressive or noteworthy', were expected and sufficient. The processes for managing groundwater and surface water impacts under the amended EA were also considered to be satisfactory.

The ECCQ also submitted concerns about the size and toxicity of the post rehabilitation void and its contents. However, these concerns were dismissed as:

- the size of the void under the amended EA was no greater than that sanctioned by the current EA; and
- the amended EA included additional rehabilitation requirements with respect to the void.

Finally, the ECCQ voiced general concerns about cumulative impacts. In response, BHP Coal produced evidence that 'the cumulative impacts are not related to the proposal but come from other existing and approved mines in the area'. The Court found that any cumulative impacts attributable to the subject proposal would be adequately managed.

Relevance of the Human Rights Act in EA applications

The Court acknowledged that in undertaking an objections decision, it was acting in its administrative capacity. As a public entity, under section 58(1) of the Human Rights Act 2019 (Qld), the Court's decision must be compatible with human rights and give proper consideration to any human rights relevant to the decision. BHP Coal and DESI submitted that the extension will likely affect property and privacy rights. The Court, however, disagreed, satisfied that these rights will not be engaged by the application.

Neither BHP Coal nor DESI gave evidence on the impact of the application on the right to life, protection of children and recognition and equality before the law. The ECCQ was a non-active objector and did not provide submissions to the Court. Notwithstanding, the Court confirmed that, despite evidence demonstrating the differences between the mine applications, President Kingham's conclusion in Waratah remains relevant and applicable. Any activity that involves increasing GHG emissions is an identifiable threat to human rights.

The Court accepted that the right to life, protection of children and recognition and equality before the law were engaged by BHP Coal's application. However, the economic benefits of the proposal outweighed its limited effect on these rights. Further, any limitation on cultural heritage rights was appropriate and proportional in light of BHP Coal undertaking a cultural heritage study, consulting with Traditional Owners and a related cultural heritage management plan.

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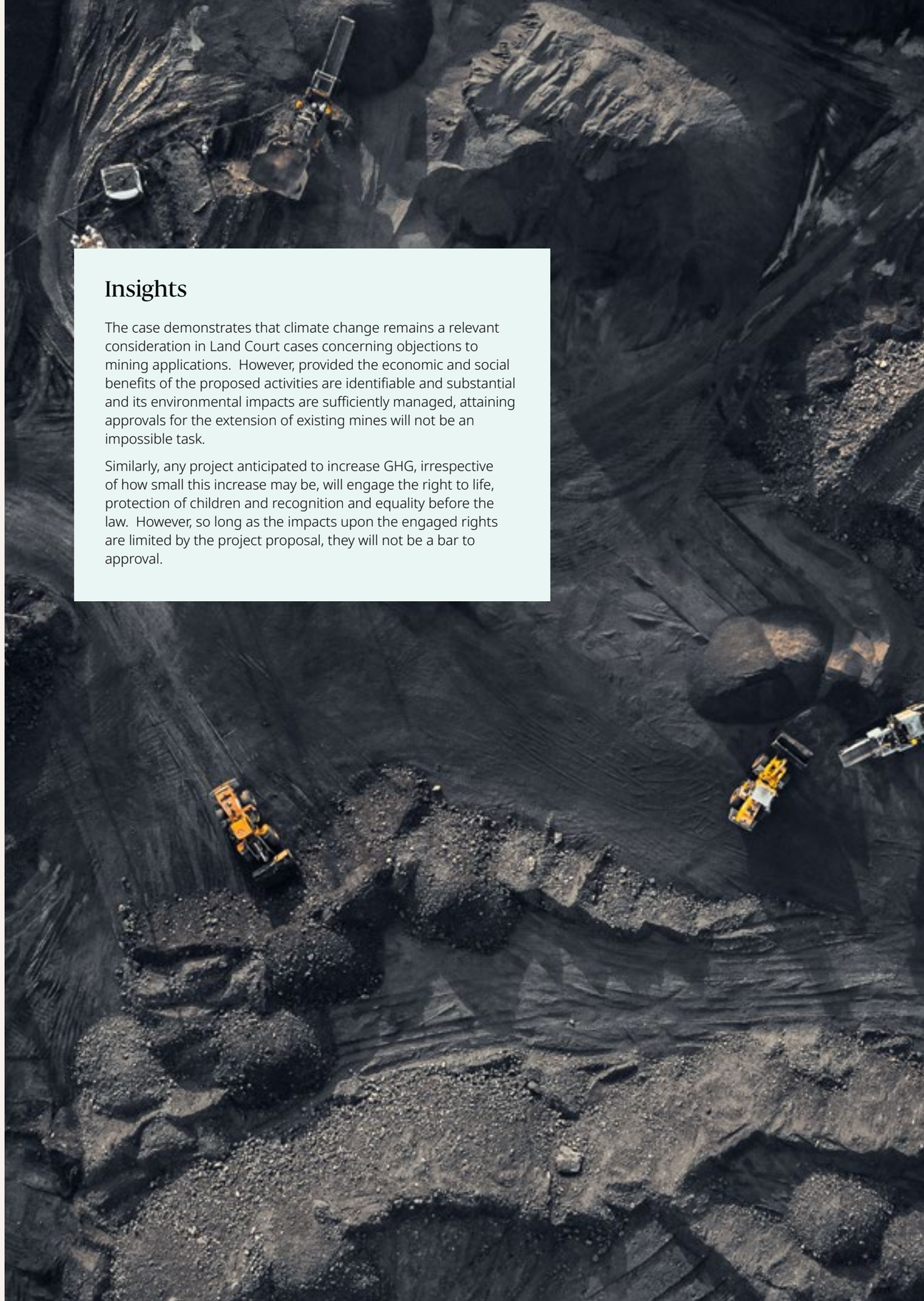

Insights

The case demonstrates that climate change remains a relevant consideration in Land Court cases concerning objections to mining applications. However, provided the economic and social benefits of the proposed activities are identifiable and substantial and its environmental impacts are sufficiently managed, attaining approvals for the extension of existing mines will not be an impossible task.

Similarly, any project anticipated to increase GHG, irrespective of how small this increase may be, will engage the right to life, protection of children and recognition and equality before the law. However, so long as the impacts upon the engaged rights are limited by the project proposal, they will not be a bar to approval.

Land Court orders environmental authority applicant to pay the Department's costs, despite partial success on appeal and concessions

Summary

- In *MacMines Austasia Pty Ltd v Chief Executive, Department of Environment, Science and Innovation (No 3)* [2024] QLC 21, the Land Court ordered MacMines to pay the Department's costs of its unsuccessful appeal against the Department's decision that it's environment authority application was not properly made.
- MacMines asked the Court to depart from the general rule that costs follow the event on a number of grounds, which required the Land Court to consider the application of the discretion to order costs as it deems appropriate in section 27A of the Land Court Rules.
- The Court determined that MacMines' partial success on discrete issues did not warrant an issues-based cost order and reinforced the principle that costs generally follow the event. It also confirmed that a government agency can be awarded costs.

Costs application

The Department sought an order for MacMines to pay its costs, relying on the general rule that "costs follow the event". MacMines argued that the general rule should not apply and submitted that each party should instead bear its own costs in this case, primarily because the Department:

- was only partially successful in the appeal;
- made several concessions on discrete issues throughout the appeal process which resulted in MacMines having to expend time and resources to respond to those issues which were later conceded; and
- is a government agency, not a private litigant.

The Land Court has the power to order costs as it considers appropriate under section 27A of the *Land Court Act 2000* (Qld). This position differs from the default position under the *Uniform Civil Procedure Rules 1999* (Qld), which provides that costs generally follow the event. In contrast, section 27A states that the Land Court may order costs as it considers appropriate but if it does not do so, each party to the proceeding must bear its own costs. Although the rule that costs follow the event does not "govern" the "unfettered discretion of the Court" provided by section 27A, that rule is "deeply embedded in the law" and "must be considered".

Court refuses to depart from general rule

The Court acknowledged that MacMines had spent time and resources on considering, researching and developing arguments on issues that were later conceded or won. However, the Court observed that this was part of the ordinary course of litigation and that the time spent on the issues conceded, 'no longer agitated' or 'won' did not amount to special circumstances that would warrant a departure from the general rule that costs follow the event.

Moreover, the Court said that there were 'good reasons not to encourage applications…on an issue-by-issue basis, involving apportionments based on degrees of difficulty of issues, time taken to argue them and the like' (quoting the High Court in *Firebird Global Master Fund II Ltd v Republic of Nauru* (No 2) (2015) 327 ALR 192). The core dispute in this case was whether MacMines' application was properly made, and the Court indicated that it should be "slow" to favour the view that partial success on discrete issues, whether decided at the hearing or conceded before the hearing, should lead to a departure from the general rule and justify an issues-based cost order.

The Court also rejected the argument that the Department's status as a government agency should prevent it from being awarded costs, noting the matter had little (if any) public benefit arising from the litigation to justify an alternative approach.

The Court therefore decided in favour of the Department and ordered MacMines to pay the Department's costs of and incidental to the proceeding.

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Land Court dismisses application for injunctive relief and adverse possession on jurisdictional grounds

Summary

- In *Noble v Yarrabah Aboriginal Shire Council* [2024] QLC 19, the Land Court dismissed an application for an injunction seeking adverse possession of land. The applicant's claims were based on her family's long-term caretaking and cultural connection to the land, which she alleged had been desecrated by the Yarrabah Aboriginal Shire Council.
- The Court found that it lacked jurisdiction to award adverse possession of the land in question, as Aboriginal DOGIT land is State land granted 'in fee simple in trust' and not subject to the same adverse possession claims as freehold land under the *Land Title Act 1994* (Qld).
- The Court also determined that it could not grant an injunction to stop the alleged desecration of cultural heritage sites because the harm had occurred and was not ongoing. It also lacked the power to award compensation for any emotional trauma, pain and harm caused by the Council's actions.

Claim for adverse possession

Adverse possession is a legal doctrine allowing a person occupying land owned by another to acquire ownership and title to the land under certain conditions. In Queensland, a claim for adverse possession is made through an application for registration 'as proprietor by adverse possession' under the *Land Title Act 1994* (Qld) (**Land Title Act**).

However, the Land Title Act pertains to freehold land, and Aboriginal DOGIT land is State land granted 'in fee simple in trust' under the *Land Act 1994* (Qld). On that basis, the Court concluded that it did not have the jurisdiction to award the applicant adverse possession of the DOGIT land.

Application for adverse possession and injunctive relief

The applicant filed an Originating Application in the Land Court Registry on 12 June 2024, seeking adverse possession of a parcel of land within the Yarrabah Deed of Grant in Trust (DOGIT), managed by the Yarrabah Aboriginal Shire Council (**YASC**). The applicant's claim was based on her family's role as 'caretakers of the land' for the past two decades and their 'cultural and sacred connection' to the land, which she alleged had been desecrated by the YASC.

The applicant sought either the transfer of the property or compensation amounting to $161,300 for the emotional trauma, pain, and harm caused by the Council's actions.

The YASC challenged the jurisdiction of the Land Court to hear and determine the application, leading to a series of submissions and reviews.

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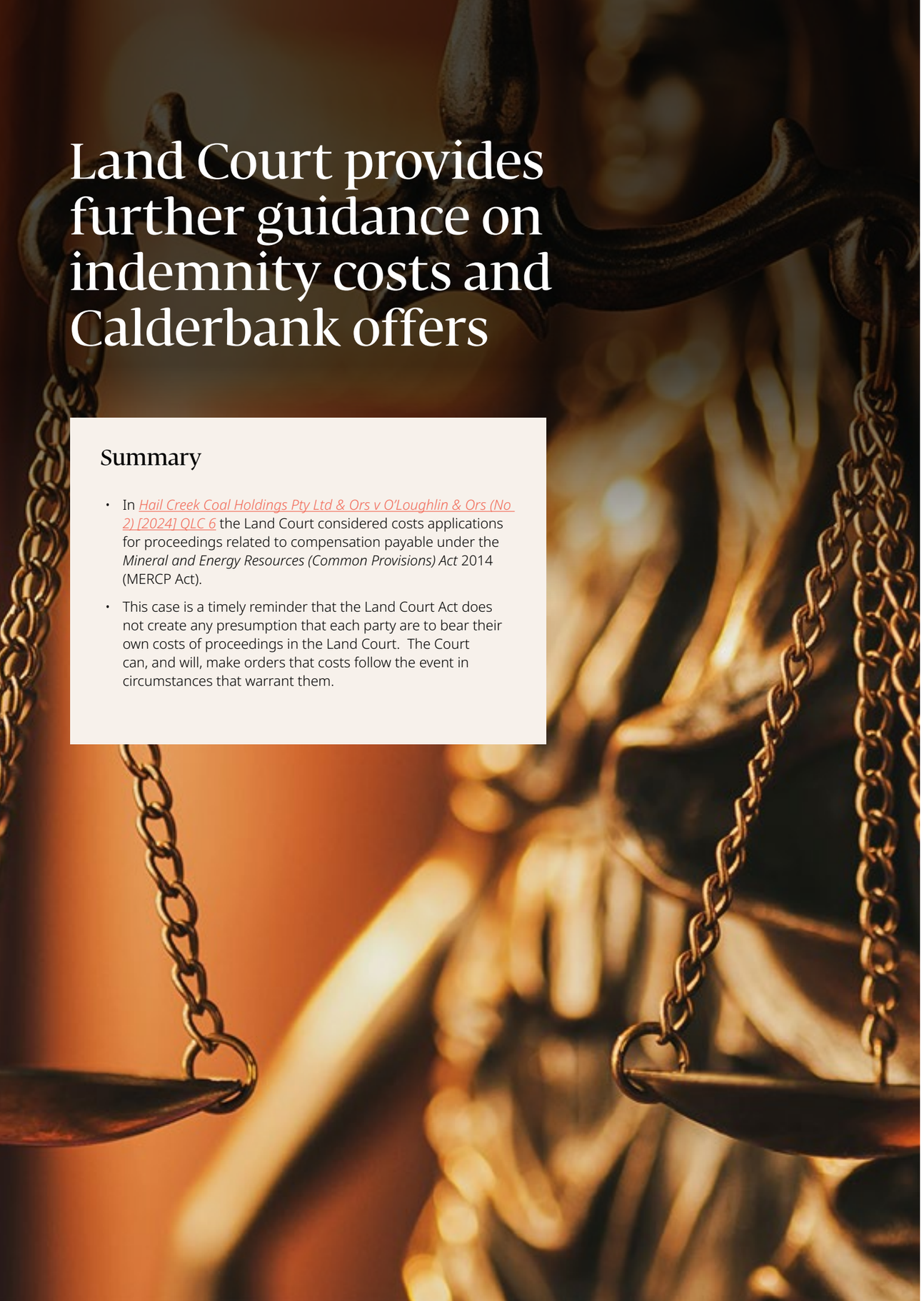
Claim for injunctive relief

The applicant also sought injunctive relief under section 32H of the *Land Court Act 2000* (Qld) (**Land Court Act**) to stop the alleged desecration of cultural heritage sites the land. The Court noted that its jurisdiction under section 32H is limited to stopping ongoing acts that contravene Aboriginal cultural heritage protection provisions. Since the harm alleged by the applicant had already been caused, the Court held that the time for granting an injunction had passed. Further, the Court found that an alleged breach of the duty of care under the *Aboriginal Cultural Heritage Act 2003* (Qld) is a matter for consideration of prosecution in the Magistrates Court and is not something that the Land Court can decide. The Court also noted that it lacked the power to award compensation for any emotional trauma, pain and harm caused by the Council's actions.

Insights - limitations of Land Court's jurisdiction

The decision highlights the intricate legal landscape governing land use and cultural heritage protection in Aboriginal communities, and the limitation of the Land Court's jurisdiction in this regard.

Land Court provides further guidance on indemnity costs and Calderbank offers



Summary

- In *Hail Creek Coal Holdings Pty Ltd & Ors v O'Loughlin & Ors (No 2) [2024] QLC 6* the Land Court considered costs applications for proceedings related to compensation payable under the *Mineral and Energy Resources (Common Provisions) Act* 2014 (MERCP Act).
- This case is a timely reminder that the Land Court Act does not create any presumption that each party are to bear their own costs of proceedings in the Land Court. The Court can, and will, make orders that costs follow the event in circumstances that warrant them.

The primary proceedings

The respondents for these proceedings own and operate a station in central Queensland. Their property is overlapped by mineral development licence 442, owned by the members of the unincorporated joint venture (the **HCJV**) which also own the nearby Hail Creek Coal Mine.

The HCJV intended to conduct advanced activities on the property. The HCJV and the landholders tried and failed to negotiate a conduct and compensation agreement (**CCA**) under the MERCP Act for these advanced activities in 2022 and 2023.

The HCJV then applied to the Land Court under section 96 of the MERCP Act to resolve the dispute and determine both compensation and the terms of the CCA (the **primary proceedings**).

On 8 December 2023, the Land Court determined that:

- HCJV should pay $10,354.50 for compensation under section 81 of the MERCP Act to the landholders for the advanced activities;
- HCJV should pay $25,947.33 for the landholders' negotiation and preparation costs under section 91 – that is, the costs prior to the commencement of the proceeding; and
- the CCA should be on the terms set out in a schedule to the decision, which largely adopted the terms put forward by the HCJV.

The only outstanding matter was the costs of the proceeding itself, which were left to be dealt with later.

What were the parties' positions regarding costs?

The HCJV submitted that the landholders should pay the HCJV's costs of the proceeding on a standard basis from the commencement of the proceeding, up until 11 October 2023. That was the date the HCJV made a Calderbank offer, conforming to the principles in Calderbank v Calderbank [1976] Fam 93, of (among other things) $55,000 compensation, not including negotiation and preparation costs, which the landholders rejected. Alternatively, HCJV sought costs on a standard basis for the entire proceeding.

The landholders submitted that HCJV should pay their costs on the standard basis, or at least until the Calderbank offer expired on 15 October 2023. Relevantly, they submitted that it was reasonable for them not to have accepted HCJV's offers, including the Calderbank offer, as they achieved a more favourable outcome.

Land Court's decision on costs

The Court awarded HCJV with costs on a standard basis from commencement to 17 October 2023, and on an indemnity basis on and from the commencement of the hearing on 18 October 2023.

The Land Court has a general power under section 27A of the *Land Court Act 2000* (Qld) (LCA) to order costs "as it sees appropriate" subject to any provision to the contrary in the LCA or another Act. Section 34(2) of the LCA then provides a default position that parties are to bear their own costs. This power had been explored by Kingham P in *Queensland Industrial Minerals Pty v Younger & Ors; Queensland Industrial Minerals Pty Ltd v Ryan (No 2)* [2017] QLC 54 (QIM). Kingham P set out the following general principles about costs under section 27A (at [4] – [8]):

- the discretion to grant costs is unfettered;
- each case must be judged on its own facts and circumstances;
- costs are not awarded to punish the unsuccessful party, but compensate the successful party;
- section 34(2) does not create a general rule that each party should bear their own costs. Rather, the Court should consider the "deeply embedded" rule that costs should follow the event when exercising its discretion;
- the Court should have regard not only to the orders made, but also to the issues raised and the parties' relative success in respect of those issues (though should be cautious about taking an issue-by-issue analysis, except where there were particularly "dominant" or "separable" issues).

Given both parties claimed standard costs from the other, it was necessary for the Court to determine whether either party could demonstrate "success" in this matter. The parties had each provided compensation statements during the primary proceedings which set out the total amount of compensation which should be payable.

The landholders submitted that they had been successful on one issue, which is why the award was larger than the HCJV's position in its statement. The HCJV, on the other hand, noted that the landholders had been unsuccessful on all the main issues they raised, the award was mostly consistent with the HCJV's position, and the disputed terms of the CCA had been decided in accordance with the HCJV's submitted position.

The Court, unsurprisingly, favoured HCJV's position. Each of the "dominant issues" in the primary proceeding had been determined in the HCJV's favour. The one issue on which the landholders had been successful was a minor one.

On that basis, the Court held that the ordinary rule that costs follow the event had been engaged. The next question was whether the HCJV would receive indemnity costs.

The Court's approach to indemnity costs

In determining whether indemnity costs was appropriate, the Court had to consider:

- Was the offer "a genuine attempt to reach a negotiated settlement and not just a means of triggering a costs sanction"?
- Was the offer more favourable than the determination of compensation "indicating that they were real, not trivial or contemptuous"?
- Was the rejection of the offer unreasonable in the circumstances? This considers whether there was sufficient time to consider the offer, adequate information was provided to enable consideration of the offer, and whether any conditions were reasonable.

The Court also considered whether indemnity costs was warranted in all the circumstances, reflecting the generally discretionary nature of this relief.

The Court determined these questions in favour of the HCJV. In doing so, the Court made specific note that the persuasive burden was placed on the landholders to demonstrate their failure to accept the offer was "objectively reasonable", because the Calderbank offer was more favourable than the determination.

Operating on an incorrect premise doesn't mean insufficient information

One of the more interesting findings from this decision related to this question about whether the landholders had sufficient information to consider the offer.

The landholders sought to argue that it was not imprudent for them to reject the offer of 11 October 2023, because it was not until well into the hearing of the primary proceedings that the HCJV produced evidence to demonstrate that a key fact they relied on for the bulk of their claim was untrue. The landholders pointed out that, "unusually", joint expert meetings and reports did not occur in this matter, so there was no opportunity for this to be identified earlier.

The HCJV said, in response, that it is not their fault that the landholders operated on an incorrect premise. The Court agreed with the HCJV. The source of the incorrect factual information was the landholders, and the HCJV should not bear responsibility for this mistake.

A reminder of costs in the Land Court

This case is a reminder that the Land Court has a broad discretion to order costs of a proceeding that it considers appropriate. Parties should therefore be mindful of the risks and consequences of rejecting reasonable offers of settlement, and of advancing unrealistic or unsustainable claims for compensation.

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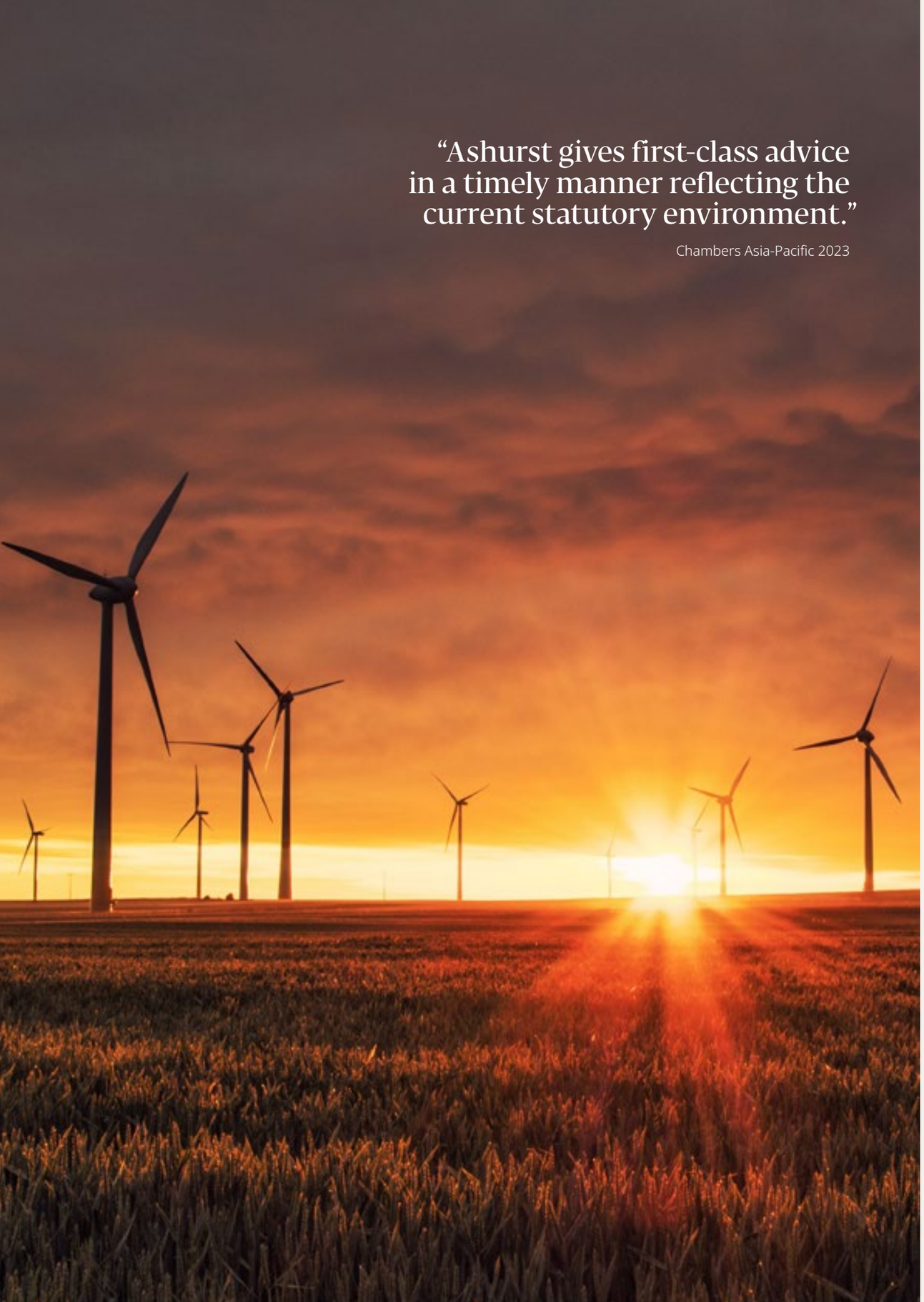

“Ashurst gives first-class advice in a timely manner reflecting the current statutory environment.”

Chambers Asia-Pacific 2023

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