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Queensland land access and resource approvals

YEAR IN REVIEW 2020-2021

September 2021

Foreword

Welcome to Ashurst's inaugural annual review of land access and resource approval developments in Queensland.

Through the course of 2020-2021, we have seen a number of key developments relating to land access and approvals for resource projects in Queensland. While there have been minimal legislative developments, we have seen a raft of new decisions from the Land Court, as well as Government initiated review processes.

In particular, we have seen:

- land access negotiations between resource companies and landholders being affected by issues relating to public liability insurance, local Council rates and vegetation mapping;
- decisions from the Land Court providing guidance on how compensation is to be assessed under the Mineral and Energy Resources (Common Provisions) Act 2014 (Qld);
- the Land Court consider mining lease objections made under the Human Rights Act 2019 (Qld) which came into force at the start of 2020;
- multiple occasions where a landholder has been ordered to pay the costs of a miner in Land Court proceedings;
- the Land Court striking out an objection to the grant of a mining lease on the ground that it was frivolous;
- the Land Court handing down decisions providing particularly useful guidance on the assessment of compensation under the Mineral Resources Act 1989 (Qld) relating to the grant of mining leases;
- the Queensland Audit Office tabling its audit report on managing coal seam gas activities which has led to a number of review processes; and
- the GasFields Commission Queensland's release of a new version of its Gas Guide (Gas Guide 2.0).

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

We encourage you to reach out to us if you would like to discuss any aspect of this publication. We also commend you to read our Year in Review – Native Title which can be accessed here.

John Briggs
Partner
T: +61 7 3259 7102
M: 0419 714 853
john.briggs@ashurst.com

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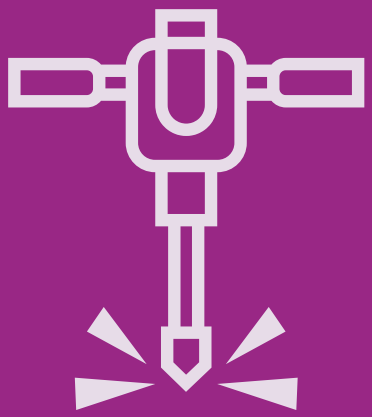

EXPLORATION PERMITS FOR MINERALS GRANTED**

* from June 2020 – June 2021
** during 2020
*** during 2019/2020 financial year

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Key trends in land access negotiations

KEY INSIGHTS

Over the past 12 months, a number of new issues emerged which significantly affected land access negotiations between the mining/coal seam gas (**CSG**) industry and landholders. Some of these key issues relate to public liability insurance, local Council rates and vegetation mapping.

- In response to an insurer's announcement of its intention to no longer provide public liability insurance to landholders who have gas activities occurring on their land, the GasFields Commission Queensland coordinated a working group to develop a new indemnity clause to clarify the liability borne by resource authority holders.
- An increase in a landholder's local council rates caused by a change of rating category is arguably a cost which a resource authority holder may be liable to pay. Resource authority holders should take this into account when negotiating new conduct and compensation agreements (**CCA**s) and interpreting the provisions of existing CCAs (see Land Appeal Court decision in *Westerns Downs Regional Council v Geldard* [2020] QLAC 1, which held that a rating category of "petroleum" was appropriate for a rural property with 20 gas wells and gathering lines).
- Landholders are not entitled to be compensated for a decrease in property value caused by a resource authority holder identifying protected vegetation on their property (see Land Court decision in *Conway & Ors v Australia Pacific LNG CSG Transmissions Pty Ltd & Anor* [2020] QLC 26).

PUBLIC LIABILITY INSURANCE – NEW INDEMNITY CLAUSE

In June 2020, Insurance Australia Group (**IAG**) announced that its subsidiary, WFI, would no longer provide public liability insurance to landholders if there is any petroleum or gas activity (including infrastructure) on their property. This announcement attracted considerable attention across the industry. It became a key issue in land access negotiations involving CSG companies as landholders were concerned about their potential inability to gain insurance coverage.

IAG's decision has implications for not only those landholders who currently have CGS infrastructure on their land and who may have difficulty renewing their policies, but also those landholders being approached by CSG companies to negotiate a CCA and whose current policy may be affected.

In negotiations for CCAs, landholders sought indemnities from CSG companies in relation to insurance coverage, and more broadly sought indemnities from any legal liability, loss, cost or damage caused by, or contributed to by, the resource authority holder and their infrastructure.

In response, the GasFields Commission Queensland coordinated a working group with representatives from the Insurance Council of Australia, AgForce Queensland, Queensland Farmers Federation, Cotton Australia, the Australian Petroleum Production & Exploration Association and relevant government departments. Together, this working group developed a new indemnity clause intended to provide insurers (and landholders) with clarity regarding the extent of the resource authority holder's liability to the landholders. A copy of this indemnity clause is available on the GasFields Commission Queensland's website.

INCREASES IN LOCAL COUNCIL RATES MAY NEED TO BE ADDRESSED IN A CCA

The Land Appeal Court's decision in *Westerns Downs Regional Council v Geldard* [2020] QLAC 1 provides clarity about the impact of CSG infrastructure on a landholder's local Council rates categorisation.

The decision related to an objection by a landholder to a rates categorisation awarded by the Western Downs Regional Council. The landholder argued the land should be categorised as "rural" rather than "petroleum", notwithstanding that there were 22 gas wells and associated infrastructure on the property.

The relevant rates categorisation had a substantial impact on the rates payable by a landholder because under the Western Downs Regional Council "Rating Category Statement", the minimum rates payable for land categorised as Rural is $694, while the minimum rates payable for land categorised as Petroleum (400 ha or greater) is $66,755.

The landholder was successful at first instance, but the decision was overturned on appeal to the Land Appeal Court. The Land Appeal Court accepted the Council's argument that the Land Court erred by focusing on what the landowner/rate-payer was using the land for, rather than what the land was used for generally.

The Land Appeal Court found that the "petroleum" rating was therefore correctly applied. The Court made it plain that rates are a tax on land, not the owner. Rating categories are framed around usage of the land.

An increase in rates caused by a change of rating category is arguably a cost which a resource authority holder may be liable to pay. Resource authority holders should take this into account when negotiating new CCAs and interpreting the provisions of existing CCAs.

LANDHOLDERS NOT ENTITLED TO COMPENSATION FOR DECREASE IN PROPERTY VALUE CAUSED BY IDENTIFICATION OF PROTECTED VEGETATION ON THE PROPERTY

The Land Court decision in *Conway & Ors v Australia Pacific LNG CSG Transmissions Pty Ltd & Anor* [2020] QLC 26 confirms that a landholder is not entitled to be compensated for a decrease in property value caused by a resource authority holder identifying protected vegetation on the property.

In this matter, the landholders sought compensation from Australia Pacific LNG (**APLNG**), arguing that the diminution in the value of their property arose from APLNG identifying protected vegetation on the property and consequent updates to the Flora Survey Trigger Maps. The Land Court rejected this argument, finding that:

- while an ecological survey might reveal some pre-existing ecological condition that has adverse impacts for the landowner, "[i]t cannot be the case that a resource authority holder can be responsible for loss occasioned by the revelation of an ecological condition that existed on the land regardless of the resource company's activities"; and
- the legislative regime "does not permit this Court to compensate parties for hurt feelings, disappointment, or anger at an environmental protection regime."

KEY TRENDS IN THE DISPUTES SPACE

According to the most recent Annual Report published by the Land Access Ombudsman, there has been a growing number of dispute referrals to the Land Access Ombudsman in 2019-2020. During this period, 23 referrals were received which represents a 35% increase as compared to the 2018-2019 financial year. The general subject matter trends of the dispute referrals seen by the Ombudsman during the 2019-2020 period are broken down below:

- enquiries regarding resource activities in rural areas without CCAs or "make good" agreements;
- disputes regarding easements and water; and
- complaints regarding access of telecommunications personnel on private property.

Despite this increase in referrals, only four disputes were determined to be within the jurisdiction of the Ombudsman (an increased number of referrals from the previous year) with the other 19 disputes being redirected to the appropriate bodies (most often to the Department of Natural Resources, Mines and Energy (now the Department of Resources), the number of referrals being on par with the previous year).

Authors: Libby McKillop, Senior Associate; Paul Wilson, Senior Associate and Leanne Mahly, Lawyer.

Land Court provides guidance about compensation liability under MERCP Act

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KEY INSIGHTS

- The Land Court decision in *Bowen Basin Coal Pty Ltd v Namrog Investments Pty Ltd* [2020] QLC 23 provides useful guidance regarding assessments of compensation, particularly relating to the gross value of production loss and opportunity cost for cattle.
- The Land Court's decision in *Horizon Minerals Ltd & Anor v Stacey* [2021] QLC 17 demonstrates the importance of landholders providing full and accurate records of land use when seeking an expert opinion in compensation matters.

COMPENSATION FOR PRODUCTIVITY LOSS AND OPPORTUNITY COST FOR CATTLE

The Land Court decision in *Bowen Basin Coal Pty Ltd v Namroq Investments Pty Ltd* [2020] QLC 23 provides useful guidance for future valuations and assessments of compensation, particularly relating to the gross value of productivity loss and opportunity cost for cattle.

This matter related to compensation payable under a conduct and compensation agreement (**CCA**) for proposed exploration activities authorised by Bowen Basin Coal's Mineral Development Licences (**MDLs**). The exploration program involved 35 exploration core drill holes, three seismic drill holes and approximately 12 kilometres of seismic lines.

As Bowen Basin Coal and the landholder were unable to reach agreement on the terms of the CCA relating to compensation, the Land Court determined compensation in accordance with its jurisdiction under the *Mineral and Energy Resources (Common Provisions) Act 2014* (**MERCP Act**). The Land Court based its finding on the following approaches to calculating productivity loss and opportunity cost:

- total productivity loss is calculated by multiplying the adult equivalent loss by the average daily weight gain, by 365 days, by the cost per kilogram; and
- total opportunity cost is calculated by subtracting the cost of production (eg freight, selling costs and other expenses) from the value of the production loss.

Based on the above, the Court determined that the compensation payable to the landholder totalled $107,300, which included $38,237 in productivity loss and $28,813 in opportunity cost with the difference being made up of other expenses such as fencing, labour and time. This determined amount was approximately midway between the applicant's and landholder's original claims.

COMPENSATION FOR EXPLORATION ACTIVITIES AFFECTING GRAZING LAND

The Land Court's decision in *Horizon Minerals Ltd & Anor v Stacey* [2021] QLC 17 demonstrates the importance of landholders providing full and accurate records of land use when seeking an expert opinion in compensation matters. The landholder sought $723,699.50 in compensation and the explorers offered between $56,825.50 and $112,265.50.

This matter related to compensation payable for the effects of mining exploration activities on land used to graze cattle. The exploration program involved drilling 333 holes in six paddocks. The vehicles used while drilling created new wheel tracks, impacting the grass. The affected area made up 0.4% of the six paddocks. The parties agreed the affected area needed to be rehabilitated, but disagreed on how rehabilitation should occur. The parties agreed the Court would determine compensation based on the cost of the appropriate method of rehabilitation.

The issue in dispute between the parties was the extent of destocking needed to rehabilitate the land. The landholder's expert opinion suggested the six paddocks should be completely destocked for two years on the assumption that the land held 600 head of cattle. However, the landholder had not supplied stocking records and this assumption was not based on proven facts. The Court therefore did not give any weight to the landholder's expert opinion.

The Court accepted the explorer's expert opinion on destocking. This involved rotating stock through the six paddocks over six years, with some reduction in stock numbers. As 0.4% of the land was affected, the Court considered a reduction of 0.4% of stock (2.4 head) each year was appropriate. The compensation for destocking was therefore $8,868.

Based on the above, the Court determined that the compensation payable to the landholder totalled $56,825.50, the lower limit of the explorer's proposal. The remaining compensation was made up of agreed amounts for drafting additional weaners consequent on the stock reduction, spot spraying, expert advice and the landholder's time. The parties also agreed that $18,177.50 was payable for negotiation and preparation costs.

Author: Libby McKillop, Senior Associate.

Human rights objections pass first test in Land Court

KEY INSIGHTS

- In *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33, the Land Court dismissed an application to strike out objections made under the *Human Rights Act 2019* (Qld) (**Human Rights Act**). Environmental groups objected to Waratah Coal Pty Ltd's mining lease and environmental authority applications in respect of its proposed Galilee Basin coal mine development.
- The Land Court found that it has jurisdiction and is obliged to consider objections made under the Human Rights Act.
- Resource companies should prepare to address human rights issues when making mining lease and environmental authority applications.

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OBJECTIONS TO WARATAH COAL'S GALILEE BASIN COAL MINE DEVELOPMENT BASED ON HUMAN RIGHTS GROUNDS

The decision in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 related to Waratah Coal's application for a mining lease and environmental authority for its proposed Galilee Basin coal mine development. Landholders and activist groups lodged various objections to the applications, including on the basis that their grant would be incompatible with human rights.

The objectors argued that the development's impact on local environments would impermissibly affect human rights to property, while consequential greenhouse gas emissions from the coal when used would limit the right to life and other protected rights.

STRIKE OUT APPLICATION BY WARATAH COAL

Waratah Coal applied to strike out the human rights objections on the grounds that the Land Court was not obliged, and had no jurisdiction, to consider objections made under the Human Rights Act.

The Land Court concluded that it is both able and obliged to consider human rights objections and that it does have jurisdiction to do so.

The Land Court rejected Waratah Coal's argument that, because the objectors were not seeking relief or a remedy under the Human Rights Act, they could not rely on section 58 of the Human Rights Act to found their objections.

Waratah argued that the objectors did not have standing to make their human rights objections because they are corporate entities, not natural persons.

The Land Court reasoned that there was no need to determine the issue of the objectors' standing as they were not seeking a remedy at this stage in the proceeding, but only pressing the Court to take human rights into its consideration. Essentially, the Court was of the view that the objectors were entitled to advocate a position on human rights through an objection, given the Human Rights Act obliged the Court to take human rights issues into account.

However, the Court foreshadowed that a question of standing may become pertinent at a later stage.

For more information about the Human Rights Act and the Land Court's decision, see our 10 September 2020 Energy & Resources Alert Human rights objections pass first test in Qld Land Court.

IMPLICATIONS FOR FUTURE RESOURCE AUTHORITY APPLICATIONS

This decision represents the first indication of the Land Court's approach to the Human Rights Act in the context of resource authority applications.

Waratah Coal's strike out application was heard and ruled on by the President of the Court after carefully considered and structured reasoning. Unless and until there is a contrary ruling by a superior court, we can likely expect to see more human rights-based objections to mining objections hearings in the Land Court.

Of course, it remains to be seen how such objections will play out in substantive hearings and decisions of the Land Court. For now, it can be taken that the Court is of the view that it can and must, at least, entertain such objections.

It also remains to be seen whether and how human rights-based arguments might work their way into other types of Land Court cases beyond mining objections hearings (eg applications for the determination of compensation).

The resources sector would be well advised to prepare to meet similar human rights objections at least when making mining lease and environmental authority applications, especially those relating to coal mining developments.

Author: John Briggs, Partner.

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Miners recover costs against landholders who behave unreasonably

KEY INSIGHTS

- In the last 12 months, there have been multiple occasions where a landholder has been ordered to pay the costs of a miner in Land Court proceedings.
- Although the general approach is that costs "follow the event", the Land Court has unfettered discretion to make any order as to costs it considers appropriate in the circumstances (see, eg section 34 of the *Land Court Act 2000* (Qld)).
- Miners have obtained costs orders against landholders who have behaved unreasonably, in the form of refusing to remove a "hopeless caveat", "vexatiously" maintaining an objection, and unreasonably persisting in a compensation claim and refusing to meaningfully engage in alternative dispute resolution.

COSTS ORDERED AGAINST LANDHOLDER "RUBBING SALT INTO WOUNDS"

In *Hail Creek Coal Holding Pty Limited & Ors v Michelmore (No 2)* [2021] QLC 23, the Land Court considered an application made by the miner for its costs of, and incidental to, the proceedings and submitted that costs should "follow the event".

In considering the appropriate approach to costs in this instance, the Land Court considered the following three principles derived from *Lonergan & Anor v Friese (No 2)* [2020] QLAC 4:

- that, in the absence of settlement offers being made, the default position should be that each party bears its own costs;
- that a costs order should not be made unless the party seeking costs can demonstrate that it has been "successful", thereby engaging the rule that costs should "follow the event"; and
- that the reasonableness, or indeed unreasonableness, of the parties in attempting to reach agreement should be taken into account.

In relation to which party should be considered "successful", although the landholder had successfully been awarded compensation from the miner in relation to its mining lease application, the Land Court noted that the award was substantially less than the miner's *Calderbank* offer of $2.2 million made prior to the conclusion of the proceedings. The landholder had originally sought compensation in excess of $14 million which they then revised to a slightly more "modest" $8.14 million. The Land Court ultimately awarded $530,530. Consequently, the Land Court found that this amount, in comparison to Hail Creek's *Calderbank* offer, pointed to the miner's "success".

In relation to reasonableness, the Land Court found that the landholder's initial claim of over $14 million was "clearly unreasonable", particularly since not even the landholder's own expert evidence supported such a view.

In making its costs order, the Land Court ordered that the landholder pay the miner's costs on a standard basis, due to the "punitive" nature of *Calderbank* offers. In closing, the Land Court remarked (at [39]) that it:

> can understand that [its] decision on costs may be rubbing salt into his wounds. But this decision is a salutary lesson to all involved. Landowners should be careful not to be taken in by overenthusiastic advice from which it is difficult to depart with dignity. Miners should not be stingy in their early negotiations for compensation. Lawyers for parties should give appropriately considered advice. A 20-year mining lease is a long time to reflect on missed opportunities.

COSTS ORDERED AGAINST LANDHOLDER WHO FILED "HOPELESS" CAVEAT

In *New Emerald Coal Pty Ltd v Manlam Pty Ltd* [2019] QLC 43, the Land Court considered an application by New Emerald Coal that a landholder's caveat be removed, and that a corresponding costs order be made against the landholder. As the caveat was withdrawn prior to the commencement of the hearing, the Court was only required to consider the costs application.

New Emerald Coal submitted that it was appropriate for a costs order to be made in its favour because:

- the landholder's caveat was hopeless as there was "no caveatable interest to support it";
- the caveat had been maintained until a very late stage – that is, mere moments before the commencement of the hearing – despite there being no ground to support it; and
- as a result, New Emerald Coal had no choice but to bring the proceedings to remove it.

The Land Court agreed with New Emerald Coal and made an order for costs in its favour, to be agreed within 14 days of the publication of reasons or otherwise to be assessed on a standard basis.

COSTS ORDERED AGAINST LANDHOLDER FOR "VEXATIOUSLY" MAINTAINING OBJECTIONS TO THE GRANT OF A MINING LEASE

In *Peter Campbell Earthmoving Pty Ltd v Plentygold Miclere Pty Ltd* [2020] QLC 15, the Land Court considered an application for costs against a landholder brought by Peter Campbell Earthmoving Pty Ltd, after having its objections to the grant of its mining lease struck out.

The landholder, Plentygold Miclere Pty Ltd (**Plentygold**), had objected to the application for ML 70069 by another company, Lodestar Mine Pty Ltd, which went into receivership and transferred the mining lease application to Peter Campbell Earthmoving. However, notwithstanding that Plentygold's objections were largely specific to the original applicant, Plentygold maintained the objections which consequently required Peter Campbell Earthmoving to apply to strike out the objections.

The Land Court determined that, although there was insufficient evidence to prove an improper motive for maintaining the objections, the landholder had maintained its objections "vexatiously". Therefore, the Land Court ordered costs on a standard basis in the applicant miner's favour.

COSTS ORDERED AGAINST A LANDHOLDER FOR UNREASONABLE PERSISTENCE IN A COMPENSATION CLAIM AND FOR A LACK OF MEANINGFUL ENGAGEMENT IN ADR

In *Kelly v Chelsea on the Park Pty Ltd (No 2)* [2020] QLC 43, the applicant miner, Mr Kelly, sought an order that the respondent landholder, Chelsea on the Park Pty Ltd, pay his costs of the hearing on an indemnity basis.

The Land Court took the following three factors into consideration:

- whether the landholder's original compensation claim was reasonable;
- whether the landholder had refused to engage "meaningfully" in alternative dispute resolution (**ADR**); and
- whether Mr Kelly did, in fact, make an offer to settle.

Due to the requirement in section 279(1)(a) of the *Mineral Resources Act 1989* (Qld) that the Court only has jurisdiction if the parties cannot agree compensation, meaningful engagement in ADR is a relevant matter to the consideration of costs. The Land Court concluded that the facts (eg not responding to Mr Kelly's invitation to mediation) indicated that Chelsea was "not interested in a mediated solution unless that solution was wholly or substantially on [Chelsea's] terms".

Although the Land Court acknowledged that Mr Kelly had made an offer to settle, the offer had been made just before the hearing, this offer did not reflect the actual value of the land and was inadequate in other practical respects (eg providing sufficient inspections and surveillance).

Taking into consideration all three factors, the Land Court concluded that an order for costs was appropriate, particularly in light of Chelsea's unreasonable persistence in the compensation claim and lack of meaningful engagement in ADR. However, it was not appropriate for Chelsea to pay Mr Kelly's costs on an indemnity basis. Chelsea was ordered to pay Mr Kelly's costs of the hearing on a standard basis.

Author: Libby McKillop, Senior Associate and Leanne Mahly, Lawyer.

5

Land Court strikes out frivolous objection to Hail Creek mining lease application

KEY INSIGHTS

- In *Hail Creek Coal Holdings & Ors v Michelmore* [2020] QLC 16, the Land Court struck out an objection to the grant of a mining lease on the ground that it was frivolous.
- The Land Court clarified that an objection may be struck out under the *Mineral Resources Act 1989* (Qld) (**MRA**) if it is frivolous or vexatious. It does not need to be both. If an objection is struck out, the Court is not otherwise required to consider the statutory criteria in section 269(4) of the MRA and make a recommendation to the Minister about the application.

OBJECTION TO APPLICATION FOR MINING LEASE OVER EXISTING ACCOMMODATION CAMP

This case concerned a mining lease application made by Hail Creek Coal Holdings Pty Ltd and other mining companies over land held under a pastoral lease by a landholder. The mining lease would authorise the use of the land for an accommodation camp which had otherwise been operating on the site since 2003.

One of the landholder's objections to the mining lease application was that: "the mining lease should not be granted because, taking into consideration the current and potential future uses of the land, the proposed mining operation is not an appropriate land use."

The Miners sought to strike out this objection as frivolous or vexatious.

The Land Court noted that the Land Court's power to make such an order comes from section 267A(1)(b) of the MRA and not the *Uniform Civil Procedure Rules 1999* (Qld).

THE OBJECTION WAS FRIVOLOUS, BUT NOT VEXATIOUS

The Land Court clarified that an objection is frivolous when it is made without reasonable grounds, and vexatious when it is made purely to annoy or trouble the other side. An objection may be struck out if it is frivolous or vexatious; it does not need to be both.

On the evidence before it, the Land Court could not conclude that the landholder had brought the objection purely to annoy or trouble. The objection was therefore not vexatious, despite its effect being to vex the miners.

However, the Land Court was satisfied that the objection was frivolous.

The landholder's objection narrowed to the issue of the impact of the mining camp on surface water and groundwater. The objection did not identify any specific impact on water caused by the camp. The Land Court considered that, as the camp had already been operating for many years on the land, it would be reasonable to expect more specificity about the nature and source of the landholder's concerns. This lack of detail left the miners having to guess the substance of the assertions against them – a position which has previously led to objections being struck out as frivolous.

The camp's operation had already been considered by the local authority in granting a development approval and by the Department of Environment and Science in extending an existing environmental authority over the land. In light of these previous investigations and the landholder's inability to point to any impacts beyond facts "so vague as to be meaningless", the Court determined that it did not need to receive expert reports before striking out the objection as frivolous.

For more details about this case, see our 14 May 2020 Energy & Resources Alert Queensland Land Court strikes out frivolous objection to Hail Creek mining lease application.

Authors: John Briggs, Partner and Libby McKillop, Senior Associate.

Land Court provides further guidance on the assessment of compensation under the Mineral Resources Act for mining leases

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KEY INSIGHTS

- The Land Court has recently handed down two decisions which provide useful guidance on the assessment of compensation under the *Mineral Resources Act 1989* (Qld) (**MRA**) relating to the grant of mining leases.
- In *Kelly v Chelsea on the Park Pty Ltd* [2020] QLC 36, the Land Court overturned the longstanding, arbitrary approach to compensation under the string of *Struber* cases, instead assessing compensation with reference to the specific heads of claim under the MRA.
- In *Hail Creek Coal Holding Pty Limited & Ors v Michelmore* [2021] QLC 19, the Land Court adopted the valuation methodology proposed by the mining lease applicant, being the "direct comparison method" which considers the subject property and its actual or proposed use against sales of like properties.

STRUBER APPROACH TO DETERMINING COMPENSATION OVERTURNED

In its 18 December 2020 decision in *Kelly v Chelsea on the Park Pty Ltd* [2020] QLC 36, the Land Court overturned the well-established approach to the determination of mining compensation propounded by the Struber precedents since 2009, stating that this approach imposed "an arbitrary rate totally divorced from the landowner's actual losses".

In the earliest of the string of Struber cases dealing with this issue – *Fitzgerald v Struber* [2009] QLC 76 – the Land Court accepted the "going rate" for compensation on the land in question as $10 per hectare per annum for the mining area and reduced this amount to $5 per hectare per annum for the access area. This rate was then applied in the subsequent Struber cases and became the go-to method for determining the quantum of mining compensation.

However, in *Kelly*, the Land Court took a different approach by determining compensation by reference to the specific heads of claim under section 281(3)(a) of MRA, namely, assessing the landowner's actual deprivation or possession of the surface of the land and all loss or expense that arises as a consequence of the renewal of the mining lease sought by the applicant.

Notably, when assessing "loss or expense", the Land Court confirmed that a landholder's legal fees for negotiation of a compensation agreement are not compensable as they do not arise "as a consequence" of the renewal of the mining lease and therefore do not fall within the ambit of section 281(3)(a)(iv) of the MRA.

THE "DIRECT COMPARISON METHOD" ADOPTED IN MICHELMORE

Hail Creek Coal Holding Pty Limited & Ors v Michelmore [2021] QLC 19 concerned the compensation payable by Hail Creek Coal Holdings Pty Ltd and other mining companies (**Miners**) to a landholder. This is the second decision in the ongoing dispute between the companies and the landholder in relation to this mining lease application.

The parties had been unable to reach an agreement on the compensation payable and their valuers had arrived at markedly different figures:

- the Miner's valuer reached a sum of $530,530;
- the landholder's valuer reached a sum of $7,000,000.

Member Stilgoe OAM of the Land Court was concise in summarising her task of assessing compensation by asking: "what is the value to be given to the surface of the land?". Answering that question entailed making a decision in relation to competing valuation methodologies, and factoring in so-called "questions of risk" which might affect the value of the land.

The Court quoted a 1983 decision of the Land Appeal Court that "the best test of value is to be found in sales of comparable properties, preferably unimproved or lightly improved, in the open market as close as possible to the date of valuation." This approach is referred to as the direct comparison method, and was the approach taken by the valuer engaged by the Miners.

The relatively unique nature of the property and land use meant there was a dearth of readily-comparable sales. Nevertheless, the Miners' valuer had considered, insofar as was possible, comparable sales of land with existing accommodation, and sales of land bought with the intention of constructing mine accommodation. His assessment, which was ultimately accepted by the Court, involved:

- a finding that the comparable sales reflected a premium of between 100% and 250% over and above the value for the alternative uses for the land;
- adopting the highest premium of 250%;
- applying that premium to the land's value as grazing land (which the parties had agreed would be valued at just under $190,000); and
- applying an additional 10% uplift for the compulsory nature of the acquisition as required by the MRA,

for a total compensation amount of $530,530.

For more information about this decision, see our 31 May 2021 Energy & Resources Alert "Extortionate" - Queensland Land Court rejects over the odds compensation claim for Hail Creek mining lease.

Authors: Libby McKillop, Senior Associate; Connor Davies, Lawyer and Leanne Mahly, Lawyer.

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Consolidated Land Court practice directions

KEY INSIGHTS

- In December 2020, the Land Court published new Consolidated Practice Directions as requested by the profession in one of its regular consultation sessions with the Court.
- The Consolidated Practice Directions cover the following matters: digital procedures in the Land Court; representation of parties; alternative dispute resolution; expert evidence in the Land Court; mining objection hearings; compensation for resource projects; and certain other matters.

DIGITAL PROCEDURES

Practice Direction 5 of 2020, issued on 11 December 2020, deals with the digital procedures used in the Land Court including electronic filing, hearing arrangements and the eTrial portal.

The key purposes of this practice direction are to:

- facilitate the Court dealing with cases in a way that is accessible, fair, just, economical and expeditious;
- encourage the efficient and cost-effective management of documents at all stages of litigation; and
- facilitate the conduct of electronic trials.

This practice direction repeals and replaces Practice Direction 1 of 2019 – *eTrials (Electronic hearings) and Practice Direction 2 of 2019 – Provision of Electronic Documents to the Land Court*.

REPRESENTATION OF PARTIES

The Consolidated Practice Directions also include *Practice Direction 5 of 2017* which deals with representation by agents and *Practice Direction 4 of 2017* which deals with direct access briefing. Both of these practice directions facilitate the representation of parties by persons other than legal practitioners in order to "minimise the risk of disruption to litigation" and to "promote the orderly conduct of cases".

ALTERNATIVE DISPUTE RESOLUTION

Practice Direction 4 of 2020, issued on 19 November 2020, deals with the procedure for nomination of an ADR convenor, or the process, when the parties cannot agree on a convenor. In such a case, a party may make a request that the Judicial Registrar made the relevant nomination. *Practice Direction 1 of 2018 and Practice Direction 3 of 2017* also deal with ADR procedures and detail the process for court-supervised mediations, while Practice Direction 2 of 2015 specifically deals with the preliminary conference process for appeals under the *Land Valuation Act 2010*.

EXPERT EVIDENCE

Practice Direction 6 of 2020, issued on 14 December 2020, provides a detailed overview of the procedures for expert evidence, the duties of expert witnesses, and their respective parties, and the Court's expectations regarding expert witnesses.

This practice direction repeals and replaces *Practice Direction 2 of 2017 and Practice Direction 3 of 2018*.

MINING OBJECTION HEARINGS

Of particular interest, and in light of recent litigation in the Land Court, *Practice Direction 4 of 2018*, amended on 7 April 2020, details the process that the Land Court will adopt for mining objection hearings. The circumstances where the Land Court is required to conduct a mining objection hearing include where a person objects to a mining claim application, a mining lease application or an environmental authority application relating to a mining lease.

After hearing the mining objection, the Land Court is required to make a recommendation to the "decision-maker" on the basis of the evidence admitted and submissions made during the hearing alone. As such, the Land Court does not play an investigative or inquisitive role in its conduct of mining objection hearings. *Practice Direction 6 of 2017* specifically details the process for determining costs in matters where the Court performs a recommendatory function, such as in mining objection hearings.

COMPENSATION FOR RESOURCE PROJECTS

Practice Direction 3 of 2019, amended on 11 August 2020, details the process that the Land Court adopts in both compensation disputes as well as conduct and compensation disputes, recognising that the parties may be economically incentivised to resolve such disputes by agreement through ADR.

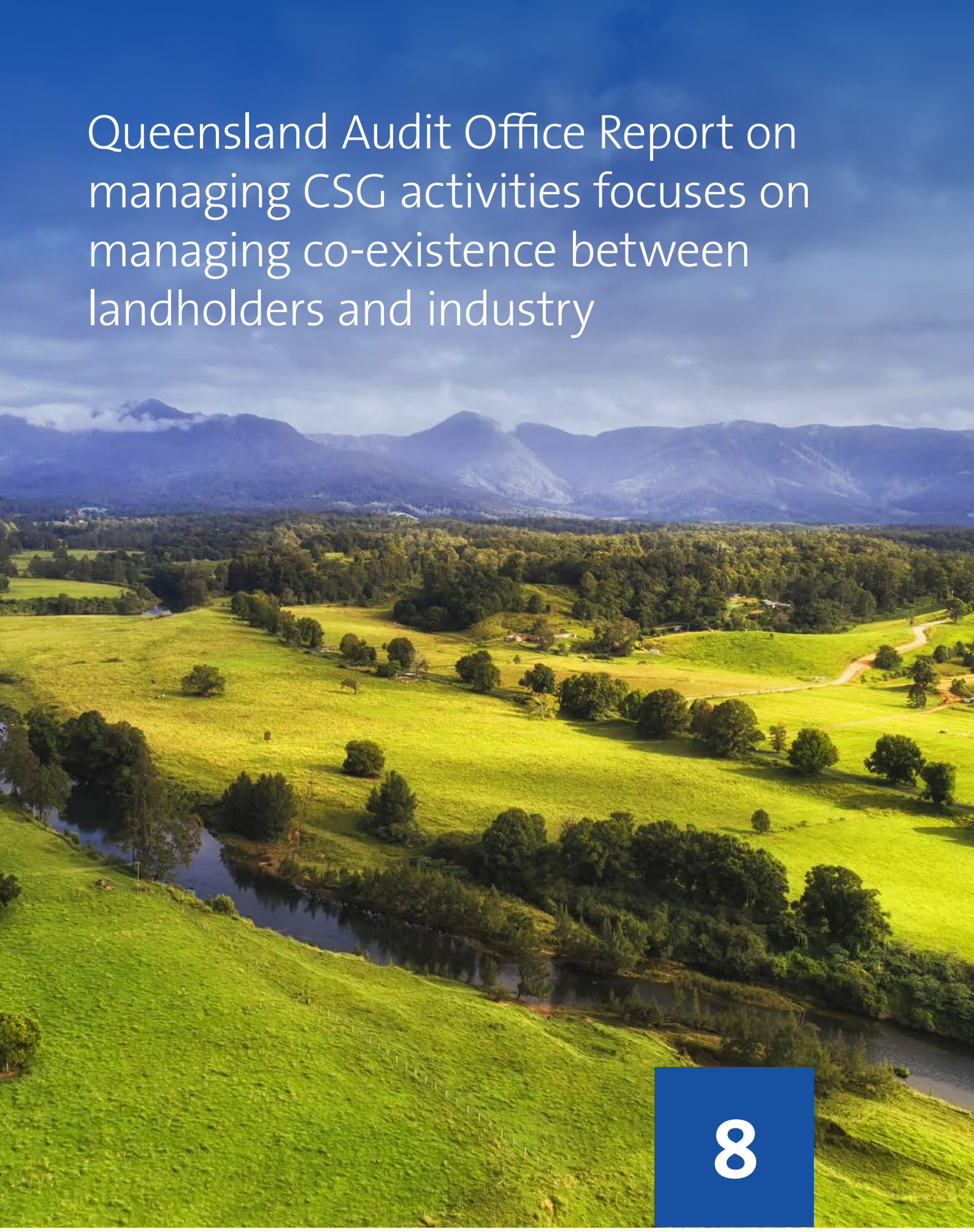
OTHER MATTERS

The Consolidated Practice Directions also include practice directions on a number of discrete matters, including:

- *Practice Direction 1 of 2017* which deals with case management procedures for compensation determinations relating to resource projects;
- *Practice Direction 2 of 2018* which deals with site inspections;
- *Practice Direction 7 of 2015* which deals with filing written submissions; and
- *Practice Direction 5 of 2009* which deals with the form of address in Court.

Author: Leanne Mahly, Lawyer.

Queensland Audit Office Report on managing CSG activities focuses on managing co-existence between landholders and industry



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KEY INSIGHTS

- On 18 February 2020, the Queensland Audit Office (**QAO**) tabled its audit report on managing coal seam gas (**CSG**) activities. While the report is focussed on CSG, some recommendations will affect other resource and infrastructure proponents.
- The QAO found that while the regulators' frameworks for regulating CSG activities were generally effective in their portfolio areas, refinement would support better coordination between departments and improve data collection and sharing, and help to manage the ongoing challenges in delivering successful co-existence between landholders, communities and the CSG industry.
- As a result of the findings of this audit report, the GasFields Commission Queensland is currently undertaking a review of the *Regional Planning Interests Act 2014* (Qld) (**RPI Act**).
- Concerns regarding compensation available to neighbouring landholders for offsite impacts were raised during the audit process. The regulators confirmed there has been a clear policy direction from government in relation to offsite impacts and compensation liability. However, they agreed to "review their existing communications to ensure that landholders neighbouring CSG activities are aware of the regulatory framework and its application to them".

QAO AUDIT REPORT: MANAGING CSG ACTIVITIES

One of the objectives of the QAO's audit was to review the effectiveness of the two regulators in regulating the CSG industry: the Department of Natural Resources, Mines and Energy (**DNRME**) (now the Department of Resources) and the Department of Environment and Science (**DES**).

The audit also considered the role of the GasFields Commission Queensland. While the Commission is not a regulator, it has a legislated oversight role to the regulatory framework, facilitates co-existence and provides advice to government, industry and stakeholders.

RECOMMENDATIONS

The QAO made nine recommendations in its audit report. The key recommendations related to the performance of the regulators, the effectiveness of the current legislative regime dealing with co-existence of the CSG industry with other land uses, compensation for offsite impacts for neighbouring landholders, and the role of the GasFields Commission Queensland.

REGULATORS PERFORMANCE

The QAO found that while the regulators' frameworks for regulating CSG activities were generally effective in their portfolio areas, refinement would support better coordination between departments and improve data collection and sharing, and help to manage the ongoing challenges in delivering successful co-existence between landholders, communities and the CSG industry. In particular, it is likely that government departments, agencies and the industry will continue to find ways to improve engagement and facilitate information sharing across all commodities with relevant stakeholders.

PRIME AGRICULTURAL LAND & THE RPI ACT

A key issue in land access negotiations is managing co-existing activities, particularly in relation to renewable projects (eg solar and wind) and agricultural activities with resource authorities.

An area of importance for co-existence is effectively assessing the potential impact of resource activities (including CSG) and development activities on highly productive agricultural land. The current legislative framework is intended to manage the impact of resource activities and other regulated activities on areas of regional interest by adding additional conditions into approvals to protect these areas.

The QAO noted stakeholders' concerns about the framework, in particular, the need for greater consistency of land classifications across the RPI Act and the need to improve the identification of priority agricultural interests and protect them from non-agricultural development. Although not within the scope of the audit, the QAO noted that stakeholders also raised concerns that the current framework has not kept pace with new activities (eg use of priority agricultural land for solar farms is not subject to this framework).

As a result, the QAO recommended that the GasFields Commission Queensland review the assessment process under the RPI Act to determine whether it adequately manages CSG activities in areas of regional interest and to ensure that it continues to meet the intent of the Government's co-existence policy.

The GasFields Commission Queensland has now commenced the RPI Act review process. The scope of this review is to review the:

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

A report summarising the outcomes of this review is due to be released shortly.

OFFSITE IMPACTS

The QAO found that "landholders and their representatives continue to express concern that they have struggled to obtain remedy or compensation for offsite impacts". As a result, the audit recommended that the regulators and the GasFields Commission Queensland evaluate the adequacy of alternative arrangements to remedy offsite impacts.

This recommendation relates to the ongoing issue around landholders wishing to be compensated when offsite CSG activities cause impacts to air quality, dust and noise.

The issue of neighbouring compensation liability was addressed in the 2018 amendments to the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (**MERCP Act**) introduced by the *Mineral, Water and Other Legislation Amendment Act 2018* (Qld). In particular, amendments were made to section 81 of the MERCP Act to clarify that compensation is only available to landholders who have the relevant activities occurring on their land. In addition, in his second reading speech to the respective Bill, the Minister clarified the effectiveness of current arrangements in addressing compensation for neighbouring landholders (ie alternative arrangements required by environmental authority conditions, and "make good" provisions under the *Water Act 2000* (Qld)).

In response to the QAO's recommendation, both regulators confirmed that there has been a clear policy direction from government in relation to offsite impacts and compensation liability. However, they both agreed to "review their existing communications to ensure that landholders neighbouring CSG activities are aware of the regulatory framework and its application to them".

The GasFields Commission Queensland also committed to "work with the regulators and key stakeholders on this point, and they will brief the Minister on the outcome of this investigation".

ENGAGING WITH STAKEHOLDERS

The QAO reported that there was confusion among some stakeholders about the rights, entitlements, and obligations of industry and stakeholders, and some expressed concerns about access to information when landholders are negotiating with industry.

As a result, the QAO recommended that the regulators and the GasFields Commission Queensland evaluate their current collaborative engagement approach to ensure the needs and concerns of all stakeholder groups are met and investigate ways to improve information exchange in situations where landholders have not been provided information to make an informed decision.

In response to these recommendations, the regulators and the Commission are working to significantly improve access to, and exchange of, information for stakeholders who engage with these agencies. Additionally, the regulators and the Commission are reviewing existing, and developing new, engagement programs in response to stakeholder feedback.

REGULATORY FRAMEWORK

The audit found that the GasFields Commission Queensland is not fulfilling all of its legislative functions and does not currently provide oversight of the regulatory framework. As a result, the QAO recommended that the Department of State Development, Manufacturing, Infrastructure and Planning, of which the GasFields Commission Queensland is an independent statutory authority, determines the scope, future function and role of the Commission, taking into account industry maturity and stakeholder consultation.

The QAO also found that the GasFields Commission Queensland could improve its effectiveness by:

- evaluating its current collaborative engagement approach to ensure the needs and concerns of all stakeholder groups are met;
- providing input into the process of land release for gas exploration;
- extending its advice on CSG issues and processes; and
- identifying further opportunities for advising government and stakeholders.

Authors: Libby McKillop, Senior Associate and Roxane Read, Lawyer.

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New Gas Guide released by GasFields Commission

KEY INSIGHTS

- In December 2020, the GasFields Commission Queensland released a new version of its Gas Guide (**Gas Guide 2.0**).
- The Gas Guide 2.0 is a "one-stop shop" for up-to-date information about developments in the gas sector and is specifically aimed at landholders to ensure that they are able to effectively manoeuvre the processes and procedures relevant for petroleum and gas development on their land.
- The Gas Guide 2.0 includes a roadmap which provides an overview of each stage landholders can expect to engage with petroleum and gas proponents.

GAS GUIDE 2.0 AT A GLANCE

The Gas Guide 2.0 covers matters relevant to landholder negotiations with petroleum and gas proponents in Queensland, including:

- the award of exploration permits;
- key agreements (eg access agreements, CCAs and "make good" agreements);
- dispute resolution;
- landholder rights and obligations;
- key legislation and policy frameworks; and
- rehabilitation and asset handover.

GASFIELDS COMMISSION QUEENSLAND'S ROADMAP

The Gas Guide 2.0's roadmap summarises the key matters that parties should keep in mind during each stage of engagement and details each stage of gas industry tenure, namely:

- advertisement of new tenure – forms part of the exploration phase;
- grant of Authority to Prospect (**ATP**) and/or Petroleum Licence (**PL**) – spans the engagement, land access and construction phases; and
- ATP and/or PL rehabilitation and relinquishment – forms part of the land rehabilitation and asset handover phase.

The full edition of the Gas Guide 2.0, including the roadmap, can be accessed on the GasFields Commission Queensland's website.

Author: Leanne Mahly, Lawyer.

Key contacts

John Briggs
Partner
T: +61 7 3259 7102
M: 0419 714 853
john.briggs@ashurst.com

Tony Denholder
Partner
T: +61 7 3259 7026
M: 0419 602 697
tony.denholder@ashurst.com

Libby McKillop
Senior Associate
T: +61 7 3259 7529
M: 0403 616 146
libby.mckillop@ashurst.com

Paul Wilson
Senior Associate
T: +61 7 3259 7193
M: 0417 430 407
paul.wilson@ashurst.com

Amaya Fernandez
Senior Associate
T: +61 7 3259 7120
M: 0490 108 366
amaya.fernandez@ashurst.com

Roxane Read
Lawyer
T: +61 7 3259 7456
M: 0428 499 073
roxane.read@ashurst.com

Connor Davies
Lawyer
T: +61 7 3259 7289
M: 0466 794 081
connor.davies@ashurst.com

Leanne Mahly
Lawyer
T: +61 7 3259 7323
leanne.mahly@ashurst.com

Leonie Flynn
Expertise Counsel, Projects Australia
T: +61 7 3259 7253
M: 0408 105 249
leonie.flynn@ashurst.com

ashurst

BRISBANE

Level 38 Riverside Centre
123 Eagle Street
Brisbane QLD 4000

Tel +61 7 3259 7000
Fax +61 7 3259 7111

MELBOURNE

Level 26
181 William Street
Melbourne VIC 3000

Tel +61 3 9679 3000
Fax +61 3 9679 3111

SYDNEY

Level 11
5 Martin Place
Sydney NSW 2000

Tel +61 2 9258 6000
Fax +61 2 9258 6999

CANBERRA

Level 11
12 Moore Street
Canberra ACT 2601

Tel +61 2 6234 4000
Fax +61 2 6234 4111

PERTH

Level 10 Brookfield Place
123 St Georges Terrace
Perth WA 6000

Tel +61 8 9366 8000
Fax +61 8 9366 8111

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