IN THE LAND COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBERS: MRA495-15, EPA496-15 & MRA497-15

Applicant:	**NEW ACLAND COAL PTY LTD**
	AND
Objectors:	**FRANK ASHMAN & ORS**
	AND
Statutory Party:	**CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION**

Addendum

Comments regarding Land Court process in mining objections

Provided on behalf of OCAA

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1. SUMMARY OF COMMENTS AND RECOMMENDATIONS

1. Third-party merits review rights ensure that decision making is transparent, accountable and rigorous. They safeguard against corruption and increase public confidence, underpinning the integrity of the assessment process as a whole.

2. This is particularly true for significant public decisions which have broad-scale impacts on our shared environment or involve the alienation of valuable shared resources such as minerals, which should be open to the public affected by these decisions.

3. Despite the importance of merits review of these significant decisions, the Queensland Land Court is the first, and often only, merits review available.

4. The Queensland Land Court has evolved over 100 years from the historical mining wardens to the Land Court proceedings we have today. This evolution has occurred to meet community expectations, including increasing protection of our environment. The issues the Land Court deals with can be significant, complex and controversial, crossing a multitude of areas covering environmental, social and economic issues. It is therefore unsurprising that its proceedings have gravitated away from those of an administrative tribunal towards more formal judicial proceedings. The Planning and Environment Court process similarly operates as a formal judicial process with sufficient flexibility to hear and determine the concerns of submitters to development applications.

5. The Land Court is delivering well on its essential public function in mining referral matters. The Court rates well on access to justice for self-represented litigants compared to the published literature. It has been a leader in the use of eTrial systems to reduce time, cost and complexity for all parties. Its decisions have led to significantly improved conditions and provided important findings on facts and law for future decision makers.

6. There is no evidence of systemic abuse of Land Court proceedings. The Court has had the powers to control its proceedings and Level 2 objectors are limited to the few that can afford the time and costs of participating.

7. The time taken for the complex weighing of evidence and consideration of objections by the Land Court is expeditious relative to the years taken by proponents and governments in earlier steps of the assessment process. Further, as only a small number of mines are referred to the Land Court, the objection process does not add

significantly to average assessment times for mines overall. The small additional time to hear the concerns of the community and scrutinise the application material in an independent Court is well worth a process that underpins the integrity of, and public confidence in, the assessment process as a whole.

8. As always, there are improvements to the process that can be made to further enhance fairness, efficiency and access to justice.

9. The lack of final decision in mining referral matters has led to progressive restrictions on the Court's powers. The loss of power to order disclosure disadvantages community litigants without access to the information help by the State and proponents. The loss of costs power also limits the Court's ability to control its proceedings. However, the former costs power did have a chilling effect on community objectors.

10. The lack of final decision has also increased the time, complexity and resources expended by parties on up to three asynchronous judicial reviews arising from the Land Court recommendation and subsequent final EA and final ML decisions.

11. **Recommendation 1:** Move to a post-approval Land Court appeal. This would make it a 'proceeding', automatically restoring the disclosure power, costs power and appeal to the Land Appeal Court. It could also reduce the subsequent appeal pathways from three to one, reducing the time, costs and complexity of appeals for all parties while maintaining community objection rights. This would bring mining leases into line with the process for other mining tenures and site-specific petroleum activities, further reducing complexity. The restored costs power should then be brought into line with other public interest jurisdictions, with parties bearing their own costs with limited exceptions.

12. While the Court has some powers to permit substantial compliance, these do not extend to submissions which are not properly made. This can reduce the accessibility of the Court and increase technicality and complexity for objectors.

13. **Recommendation 2:** Extend the power of the court to allow non-compliance with the relevant Acts where in the interests of justice and convenience.

14. Timely access to accurate transcripts are essential for the administration of justice and fair representation of parties. The new transcription system however has built in delays, costs and unfairness for community litigants which cause disadvantage, delay and disruption to the Court proceedings, as experienced in this case.

15. **Recommendation 3**: Fee waiver provisions should be extended to community groups, public interest matters and where otherwise in the interests of justice. To be fair, fee waivers should extend to same-day transcripts where already prepared for another party. Transcripts should also be subject to the control of the Courts, to allow them to efficiently and fairly conduct their trials.

16. The Land Court can hear significant new evidence that was not available to the Coordinator-General, but is prevented from recommending sensible conditions to

address that evidence, where these conditions would be inconsistent with conditions stated by the Coordinator-General earlier. The restriction also increases the complexity of proceedings, as parties are forced to make legal arguments as to whether or not proposed amendments to conditions are inconsistent with the Coordinator-General conditions. Where existing conditions are inadequate but sensible conditions would be inconsistent, objectors are left with no choice but to seek refusal, pushing parties apart rather than bringing them together to resolve disputes.

17. **Recommendation 4:** Remove restriction on recommendations and final approval conditions being inconsistent with Coordinator-General stated conditions.

18. The Land Court is prevented from hearing evidence in respect of the mining objection which is outside the original grounds of objection referred to the Court by an objector. However the Applicant is not prevented from leading evidence which is different from the EIS. Consequently the Applicant can lead entirely new evidence after the objections are lodged and argue that the objectors cannot respond because it was not mentioned in their objection.

19. **Recommendation 5:** To be fair either:

    a) the Applicant should be prevented from leading evidence not fairly disclosed in its application; or

    b) the Objectors should not be limited to the original ground of their objection (ordinary conduct of hearings would allow for orders finalising the issues early in the proceedings, as occurs in the Planning and Environment Court).

20. In similar administrative jurisdictions there is a statutory requirement that the original decision maker use their best endeavours to assist the tribunal in reaching the correct and preferable decision. In absence of that express statutory requirement the Statutory Party can seek to defend its decision and refuse to assist the Court.

21. **Recommendation 6**: To assist the Land Court in efficiently reaching an informed decision:

    a) The Land Court should be given the power to make a final decision, such that the Statutory Party is bound by the determination and must play and active role; and

    b) The Statutory Party should be required to assist the Land Court consistent with similar jurisdictions.

22. Suggestions that the Land Court process would be improved by returning to a tribunal do not appreciate that this would not reduce the complexity of matters to be considered, but could reduce the powers available to control proceedings, leading to potentially increased assessment times.

23. Suggestions that the Land Court process would be improved by arbitrary time limits do not appreciate that the Land Court is already very efficient and the Court

proceeding is only a very small part of the average total assessment times. The imposition of an arbitrary time limit would threaten the Court's ability to meaningfully consider communities concerns and often complex expert evidence, and does not properly value the important role of third party merits review processes for improving decision making. The suggestion also fails to appreciate how accelerated timetables can be self-defeating as rushed preparation can expand the time spent in hearing, as occurred in this matter.

24. Suggestions that excluding lawyers will accelerate proceedings fails to appreciate that lawyers' knowledge of practice and procedure significantly accelerate the conduct of proceedings relative to self-represented parties.

25. **Recommendation 7**: To maintain the efficiency and effectiveness of Land Court processes, moves towards tribunals, arbitrary time limits or exclusions of lawyers would be counterproductive and should be rejected.

2. SCOPE OF THESE COMMENTS

26. The request for these comments to the Court was made by the Court on day 39 of the hearing, 2 June 2016, and provided for in orders dated 6 September 2016 and varied on 22 September 2016. The Court noted the difficulties that had been experienced with the Land Court powers and process during the hearing and expressed desire to add an addendum to the decision with an intention that it would contain 'comments regarding the process, the costs, the aspects of whether it should be a proceeding or not, whether or not it should [follow] the normal rules, whether it should be a costs circumstance or not'[1] etc, or whether instead we should undertake complete reform of the process and 'follow another state's process.'[2] On 22 September 2016 the Court provided a varies order with respect to these comments which states that all parties may, if they choose:

> "provide to the Court and to the other parties any comments on the process of making Applications for Mining Leases and Objections and the hearing of those objections pursuant to the Mineral Resources Act 1989 and the making of submissions, and objections with respect to the grant of Environmental Authorities for mining activities (such as a Mining Lease Application) pursuant to the Environmental Protection Act 1994, consistent with the request made by member Smith in this regard in T39."

27. OCAA appreciates the request made by His Honour for the parties to provide comment on the Land Court process and any need for reforms which have been experienced through participating in the objection hearing process. As these comments may be published as an addendum to the judgment, they are written for a

[1] T39-13, Lines 8 to 10;
[2] Ibid, Lines 10-11.

broad audience, with more explanation and simplification than would typically be provided in submissions to the Court.

28. OCAA understands these comments are to assist the Court and possibly the public in considering future reforms. It is not for the determination of the issues in dispute in this case per se. As such, OCAA assumes it is not strictly limited to the evidence tendered in these proceedings and relies heavily on the experience of its solicitors, the Environmental Defenders Office Qld Inc (**EDO**). EDO has over a decade of experience in assisting community and self-represented litigants in the Land Court and its predecessor, the Land and Resources Tribunal.

3. THIRD-PARTY REVIEW RIGHTS UNDERPIN INTEGRITY OF ASSESSMENT PROCESS

3.1. Third party merits review generally improves decision making

29. The role of public consultation and independent arbitration by a court in improving decision making is well accepted.[3]

30. Merits review of decisions through an independent court improves the consistency, quality and accountability of decision-making in environmental matters. For example, the ability to challenge a project in the courts:

a) 'facilitates the rigorous analysis that is fundamental to the making of sound decisions (whether by testing the evidence and material advanced by proponents by advancing evidence and material informed by particular and sometimes local knowledge)';[4]

b) 'gives a level of confidence to members of the public that the decision has been reached through a process which has openly examined and scrutinised all of the available evidence - whether or not the result is universally accepted.';[5]

c) ensures the process of environmental planning and assessment is effective;[6]

d) safeguards against corruption;[7]

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[3] Parliament of Australia, 'Citizens' engagement in policymaking and the design of public services', Research Paper No. 1, 2011-2012. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1112/12rp01; NSW Independent Commission Against Corruption report, Anti-corruption safeguards and the NSW planning system (February 2012), p 22 http://www.icac.nsw.gov.au/media-centre/media-releases/article/4023; Productivity Commission NSW, Major Project Development Assessment Processes (2013), p 274, http://www.pc.gov.au/inquiries/completed/major-projects/report/major-projects.pdf.

[4] A. Finanzio, 'Public Participation, Transparency and Accountability – Essential Ingredients of good Decision Making' (2015) 2(1) Australian Environmental Law Digest 3, 3.

[5] A. Finanzio, 'Public Participation, Transparency and Accountability – Essential Ingredients of good Decision Making' (2015) 2(1) Australian Environmental Law Digest 3, 3.

[6] B.J. Preston, 'Third Party Appeals in Environmental Law Matters in New South Wales' (1986) 60 Australian Law Journal 215, 221.

e) provides a forum which allows for and encourages greater public debate on development issues;

f) improves, encourages and aids public participation in land-use decision making;

g) allows multiple views and concerns to be expressed and 'provide[s] a forum where collective rights and concerns can be weighed against the rights and concerns of the individual';[8]

h) recognises that third parties can bring detailed local or specialist knowledge, not necessarily held by the designated decision maker;[9]

i) allows for the development of environmental jurisprudence, clarifying the meaning of legislation;[10]

j) enhances the quality of decision-making, including the quality of reasons for decisions;[11]

k) ensures adherence to legislative principles and objects by administrative decision makers;

l) fosters the development of environmental jurisprudence;

m) fosters natural justice and procedural fairness;

n) focuses attention on the accuracy and quality of policy documents, guidelines and legislative instruments and highlight problems that should be addressed by law and policy reform;[12] and

o) ensures greater transparency and accountability within the decision-making process.[13]

31. The NSW Independent Commission Against Corruption (ICAC) has identified third party merits appeals as of vital importance to a transparent and accountable planning

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[7] Independent Commission Against Corruption, Anti-Corruption Safeguards and the NSW Planning System, Report (2012) 22.

[8] Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' (Paper presented at Town Planning Law Conference, Western Australia, 16 November 2009) http://www.sat.justice.wa.gov.au/_files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf.

[9] Ibid.

[10] Preston B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.

[11] Ibid.

[12] Ibid.

[13] Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' (Paper presented at Town Planning Law Conference, Western Australia, 16 November 2009) http://www.sat.justice.wa.gov.au/_files/10_Hon_Judge_Christine_Trenorden_Presentation.pdf ; Stephen Willey, 'Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia' (September 2006) 24(3) Urban Policy and Research 369–389; Preston B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.

system, and has recommended to the NSW government that the scope of merits appeals be extended as an anti-corruption measure. ICAC found, '[t]*he limited availability of third party appeal rights under the Environmental Planning & Assessment Act 1979 (NSW) means that an important check on executive government is absent… The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system.*'[14]

32. While the references cited above were focused on planning appeals, they are equally as relevant for Land Court objection hearings for resource project applications. Very similar concerns are brought up between planning and development applications and resource applications, with respect to environmental and community impacts, and equal benefits are provided through third party merits appeals for resource application decisions.

33. In essence, the mere existence of the right to challenge decisions before an independent arbiter gives the public confidence that the decision-making process has integrity rather than taking place behind closed doors. There is also an additional benefit that application material is likely to be of a higher quality due to the potential that it may be under scrutiny by objectors, experts and the Court.

3.2. The Land Court is the main merits review of primary approvals of mining projects

34. Despite the importance of third-party appeal rights in underpinning the integrity of, and public confidence in, the assessment of mining activities, there is no merits review available under the *Environmental Protection Biodiversity Conservation Act 1999* (Cth) or *State Development Public Works Organisation Act 1979* (Qld).

35. Some projects will also require water licenses under the *Water Act 2000* (Qld)[15] or approval under the *Regional Planning Interests Act 2014* (Qld) which may be

[14] NSW Independent Commission Against Corruption Report, February 2012, *Anti-Corruption Safeguards and the NSW Planning System*, available here: http://www.icac.nsw.gov.au/documents/doc_download/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012.

[15] We note that the *Water Act 2000* (Qld) is expected to shortly be amended by the *Water Reform and Other Legislation Amendment Act 2014* (Qld) (WROLAA) such that mines will no longer be required to obtain a water licence for take or interference with associated water. This amendment will also remove a public submission and appeal right which would normally be provided through the applicable water licence assessment process as far as it would have applied to any mining activity. If the Environmental Protection (Underground Water Management) and Other Legislation Amendment Bill 2016 (Qld) is passed, mines advanced in their assessment at the time of commencement of WROLAA may be required to obtain associated water licences as far as they would have currently been required to obtain water licences under the *Water Act 2000* (Qld) for take or interference with associated water. While this provides consequent public submission and appeal rights equal to the water licence framework, the criteria by which the associated water licence will be assessed is not required to be assessed with regard to the principles of ecologically sustainable development, unlike the normal water licence assessment process under chapter 2 of the *Water Act 2000* (Qld). The associated water licence therefore provides a weaker assessment of environmental impacts than the current water licence assessment process.

subject to merits review as far as relevant to those approvals, but all mining projects will require a mining lease and environmental authority. While limited merits review may be available regarding other approvals, it does not encompass the breadth or overarching consideration of a proposal's impacts as a whole.

36. This statutory framework makes the Land Court objection process the main merits review of the primary approvals required for mining projects and elevates its importance as the first, and sometimes only, opportunity the public or affected landholders have to question the mining application before an independent arbiter.

37. Any diminution of the community mining objection rights or powers of the Land Court to hear these objections would therefore erode the integrity of the assessment process which is provided by the opportunity for merits review.

3.3. Third party review is essential for decisions as to the alienation of shared resources and shared environment

38. Under the MRA most minerals are the property of the Crown, making them a public resource to be managed on behalf of the people of Queensland.[16] It is therefore appropriate that there be broad public consultation as to whether, and if so, how, particular resources should be mined.

39. Similarly, the EPA seeks to protect Queensland's environment while allowing for development that improves total quality of life (ecologically sustainable development). As Queensland's environment is shared and valued differently by all who reside or visit here, it is appropriate that there be broad public consultation about proposals that could cause harm to that environment.

40. Researchers from Queensland University of Technology have shown that complex socio-economic issues follow mining activities and can have serious impacts on the provision of social services and recreational activities, housing, community safety, crime, lifestyle and overall community wellbeing.[17] Further, impacts such as dust, noise, traffic and fugitive emissions can have impacts from a mine, along each of the often various and lengthy transportation routes to the final destination for the product. Increased greenhouse gases produced at every stage of production to combustion can also have impacts on climate change globally.

41. Resource projects can have broad-reaching impacts on the local area (such as through noise and dust), district (such as through groundwater) and State (such as through economics and transport networks), as well as nationally and internationally (such as through economics and climatic impacts). It is only fair that those who have

[16] See, for example, Mick Peel, Submission No 8 to Select Committee on Certain Aspects of Queensland Government Administration related to Commonwealth Government Affairs, 14 November 2014, 3.
[17] Carrington, Kerry & Pereira, Margaret (2011) Social Impact of Mining Survey: Aggregate Results Queensland Communities. Available online: http://eprints.qut.edu.au/42056/

an interest in those impacts are able to have those concerns heard by an independent arbiter.

42. Accordingly, the current regime of a merits review, open to members of the public, is appropriate to the alienation of public owned resources and consideration of broad environmental impacts on the community.

3.4. Review of environmental authority alone is insufficient

43. A discussion paper produced by the Queensland Government has previously stated that:

> 'The MRA does not recognise the EIS under either the SDPWO Act or the EP Act so public notification is duplicated for the tenure application despite there being no identifiable benefit to either industry or stakeholders. It is proposed any amendment to the notification and objection process recognise the risk of environmental impact and notification requirements under other legislation when determining the extent of notification that is required.'[18]

44. The subsequent removal of objection rights to mining matters attracted broad community opposition and was subsequently reversed to restore objection rights.[19]

45. The proposal to remove objection rights to the mining lease was incorrect in its foundational assumption that there is 'no identifiable benefit to either industry or stakeholders' in notifying a mining lease. There are fundamental differences between the criteria open for the consideration of the Land Court under an objection hearing relating to the environmental authority, compared to an objection hearing relating to the mining lease.

46. The full list of considerations open to the Land Court for mining objection hearings concerning a mining lease under the MRA, compared to an environmental authority under the EPA, is in the **Appendix** to these comments.

47. Clearly, the environmental authority decision criteria concern environmental impacts, which are undoubtedly of public interest and appropriate for third party involvement in providing submissions and referral of objections to the Land Court.[20]

48. In an objection hearing regarding the mining lease, the Land Court may consider such matters as whether:

    a) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and

[18] Department of Natural Resources and Mines, *Mining lease notification and objection initiative: Decision Regulatory Impact Statement*, (March 2014) 7.
[19] *State Development and Public Works Organisation and Other Legislation Amendment Act 2015* (Qld), s 5; *Mineral and Other Legislation Amendment Act 2016* (Qld),
[20] *Environmental Protection Act 1994* (Qld), s191.

b) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and

c) the past performance of the applicant has been satisfactory; and

d) the public right and interest will be prejudiced; and

e) the term sought is appropriate.[21]

49. These matters are not specifically made available for the Land Court to consider in an objection hearing regarding the environmental authority. As with the environmental authority criteria, the considerations for the mining lease are broad and concern impacts to far more than simply those landholders within and directly adjacent to the mining lease footprint.

3.5. Financial and technical capabilities and past performance of the proponent are all of community concern

50. The financial and technical capabilities of an applicant, as well as its past performance, are considerations that can impact all Queenslanders. Where an applicant is not sufficiently financially sound to meet its obligations in undertaking activities, or is not a responsible operator, it is frequently the case that the Queensland or Australian Governments will foot the bills to ameliorate impacts caused by these operators. This may be done through providing subsidies to the proponent, or through being left with the responsibility of mitigating or avoiding environmental impacts from an abandoned mining site left by a bankrupt proponent.

51. The reality of this concern has become most clearly apparent through the recent bipartisan passing of the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld). It aims to ensure that operators cannot escape liability for environmental harm posed by their activities, even where a proponent company is suffering financial hardship.

52. The Queensland Audit Office has reported that there are 15,000 abandoned mine sites in Queensland, which has left an estimated financial burden on the Queensland Government of $1 billion if these sites were actually rehabilitated by the Government.[22] This is money the community pays in taxes. Also, any environmental harm left by poor operators impacts the broader community, such as the recent concerns that the Murray Darling Basin could be polluted with toxic contaminants from an overflow of the storage ponds of the abandoned Texas Silver Mine.[23]

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[21] *Mineral Resources Act 1989* (Qld), s269.

[22] Queensland Audit Office, Environmental regulation of the resources and waste industries, Report 15: 2013-2014, p.1 https://www.qao.qld.gov.au/files/file/Reports%20and%20publications/Reports%20to%20Parliament%202013-14/RtP15Environmentalregulationoftheresourcesandwasteindustries.pdf.

[23] https://www.ehp.qld.gov.au/management/texas.html.

53. It is therefore a community concern that operators are financially and technically capable of meeting their responsibilities when undertaking the activities they are applying to undertake, and that they have not proven themselves as incapable of appropriately operating a mining lease due to poor past performance.

54. Accordingly, it is not sufficient for merits review to be limited to the environmental authority

4. LAND COURT HAS EVOLVED TO MEET COMMUNITY EXPECTATION

55. A brief overview of the historical context to the Land Court is of assistance to any broader audience reading these comments, to understand what the next steps may be.

56. Prior to 1999 objections to mining leases were heard by a mining warden, whose role had evolved over a hundred years of Queensland's history to a centralised Mining Wardens Court under the MRA.

57. In 1999, the Land and Resources Tribunal (LRT) was created under the *Land and Resources Tribunal Act 1999* (Qld) (**LRTA**) to hear mining objections (among other things). The members of the LRT required expertise or experience in 'land issues' or 'mining or petroleum issues' under the LRTA[24] but did not necessarily need expertise in legal or environmental issues.

58. In 2000, the Land Court was established as a specialised judicial tribunal, composed of 'members' who must be either:[25]

    a) a lawyer with extensive experience in 'land-related matters', 'mining or petroleum issues', 'indigenous issues' or 'something else considered by the Governor in Council to have substantial relevance to the duties of a member'; or

    b) a valuer, or a person professionally qualified in another land-related discipline, with extensive litigation or quasi-judicial experience.

59. At the same time the environmental regulation of mining was moved to the EPA which then required mining proponents to obtain an environmental authority in addition to a mining lease. Objections to the environmental authority for mining activities were heard by the LRT, together with the mining lease.

60. In 2007, the Land Court was significantly expanded to have concurrent jurisdiction to hear objections to the grant of the mining lease and environmental authority for mining activities.[26] The LRT was subsequently discontinued.

[24] LTRA (repealed), s8.
[25] LCA, s16.
[26] *Land Court and Other Legislation Amendment Act 2007* (Qld).

61. It is unsurprising that mining matters can be large and controversial, with significant potential consequences in terms of impacts on landholders and the environment – but also social and economic impacts, such as jobs.

62. In these large and complex matters, it is appropriate that parties call evidence of expert witnesses and are assisted by legal representatives.

63. To non-lawyers, the process is often indistinguishable from a judicial proceeding and it can be surprising, and perhaps confusing, to learn that the Land Court is legally considered to undertake an administrative function similar to a tribunal.[27]

5. CURRENT LAND COURT OBJECTIONS PROCESS IS DELIVERING ITS CORE FUNCTION WELL

5.1. Land Court has improved decisions on subsequent approvals of ML and EA

64. While the time and resources available to prepare these comments do not permit a full review of the effectiveness of Land Court recommendations, as stated above, these comments rely on the experience of EDO Qld obtained through a number of matters in which it has been involved.

5.2. Changes to mining leases from Land Court process

65. Of the three Land Court decisions which EDO Qld has provided representation, it is understood that only one mining lease has been subsequently issued.[28] That mining lease is not publicly available.

66. It is a matter of public record that in deciding to grant the environmental authority MIN101017310 for the Alpha Coal Mine the Environment Minister relied on assurances of the Mining Minister "*that a special condition will be imposed upon the grant of Mining Lease 70426, requiring the applicant to apply for water licences under the Water Act 2000 that will effectively deal with the take of groundwater and associated impacts on existing water supplies*".[29]

67. This would indicate the Minister for Mines intended to follow the Land Court recommendation for further conditions rather than the alternate recommendation of refusal.

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[27] *BHP Billiton Mitsui Coal* Pty *Ltd v Isdale* (2015) QSC 107.

[28] Following *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors [2015] QLC 48* per public announcements by the Queensland Government available here http://statements.qld.gov.au/Statement/2016/4/3/carmichael-mine-approvals-put-thousands-of-new-jobs-step-closer.

[29] Decision notice to Hancock Coal Pty Ltd, Decision about an application for an environmental authority (mining lease), MIN101017310, Mining lease 70426, 12 September 2014, 2.

5.3. Changes to environmental authorities from Land Court process

68. The three Land Court decisions in which EDO Qld has provided representation included recommendations for changed conditions on the environmental authority. Of these three decisions, only two environmental authorities are publicly available.[30] In respect of these two environmental authorities:

    a) for the Alpha Coal Mine, the Environment Minister did not follow the recommendation of refusal, or the alternate recommendation that approval be "*subject to Hancock first obtaining licences to take, use and interfere with water*" but did follow the alternate recommendation of three additional monitoring points;

    b) for the Carmichael Coal Mine, the Department of Environment and Heritage Protection largely followed the recommendations of the Land Court for additional conditions to protect the Black-throated finch.

69. These are clear improvements to the assessment process obtained through community litigants having their objections and evidence heard in the independent Land Court.

70. However, the benefits to the process are not confined to the recommendations alone; the full decision provided by the Land Court involves significant findings of fact and law.

71. The Land Court is, in effect, a public inquiry process which allows the Court to sit as an independent adjudicator of the applications, by leading independent experts and the testing of evidence by highly qualified barristers, usually Queen's Counsel. This process can lead to concessions on the evidence relied on by the proponent at each preceding stage of the state and federal assessment process.

72. For example, for the Carmichael Coal mine case the Land Court found as follows:

> "Overall, my conclusions about the financial and economic evidence are that the applicant has overstated certain elements of the benefit of the mine both in the EIS and in the evidence before this Court. In particular:
>
> - the I/O analysis in the EIS estimated the number of Queensland jobs generated by the mine alone to be over 10,000 fte [full time equivalent] jobs per annum from 2024. Dr Fahrer's evidence, which I have accepted, was that the Carmichael Coal and Rail Project will increase average annual employment by 1,206 fte jobs in Queensland and 1,464 fte jobs in Australia;

[30] Copies of environmental authorities are publicly available on the public register per EPA, s540. Mining and petroleum EAs are available online, for example, the draft Alpha Coal Mine EA, https://www.ehp.qld.gov.au/land/mining/pdf/draft-ea-hancock-coal.pdf ; The Carmichael Coal Mine EA, http://www.ehp.qld.gov.au/management/env-authorities/pdf/epml01470513.pdf ; and the New Acland Coal Mine EA, http://www.ehp.qld.gov.au/management/env-authorities/pdf/epml00335713.pdf.

- the applicant's input figures contained in Dr Fahrer's CGE and CBA modelling probably overstate the selling price of the coal and therefore the royalties generated by the project and the corporate tax payable;
- the discount rates adopted by Dr Fahrer, to value future income in present day values, are lower than those recommended in some guidelines;

While the employment benefits have been corrected in Dr Fahrer's analysis, the other figures remained. The result is that the benefits of the project are likely to be less than modelled by Dr Fahrer. This is not a matter which leads me to conclude that I should not make a recommendation that the applications not be granted. Rather, I shall draw this information to the attention of the Minister."[31]

73. This significant finding of fact did not form part of the ultimate recommendations but is clearly important to all those who had been relying on the, now discredited, promise of 10,000 jobs or the publicised estimates of royalties to flow from the project.

74. Other findings of fact that were drawn to the attention of the Ministers in the reasons, but not forming recommendations, included:

> "that the survival of the globally significant population of the endangered [black throated finch] will be threatened by the proposed mine."[32]

75. In respect of law, Land Court cases have now, for example, well-established the principle that greenhouse gas emissions from the burning of coal from a mine are a legally relevant consideration as part of the public interest.[33] As President MacDonald found:

> 'the issue of climate change is clearly a matter of general public interest and a matter which may militate against the grant of the proposed leases'.[34]

76. This has ensured that climate change impacts are open on their facts to argue in the individual facts and circumstances of each case.

77. These finding of fact and law better inform the Department of Environment and Heritage Protection in the process of making the independent final decision as to whether to grant the environmental authority, and under what terms.

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[31] *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48, 129 [575].
[32] Ibid, 131 [583]-[584].
[33] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth – Brisbane Co-Op Ltd & Ors, and Department of Environment and Resource Management* [2012] QLC 013 [576]; *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection (No. 4)* [2014] QLC 12, [218]; *Coast and Country Association of Queensland Inc v Smith & Anor; Coast and Country Association of Queensland Inc v Minister.for Environment and Heritage Protection & Ors* [2015] QSC 260 at [39].
[34] *Xstrata Coal Queensland Pty Ltd & Ors v. Friends of the Earth – Brisbane Co-Op Ltd & Ors, and Department of Environment and Resource Management* [2012] QLC 013 [576].

5.4. Land Court provides an informal and flexible forum to adjudicate concerns

78. The evolution of recent court decisions concerning the jurisdiction of the Land Court in objection hearings has limited the powers of the Land Court in a way that has affected community litigants, which is discussed below. However, there are many elements of the current Land Court objection hearing process which are beneficial to the community.

79. The Land Court provides an independent forum for community objectors to have their concerns heard with sufficient formality to reduce the inherent power imbalance that exists between mining proponents and community objectors. The Court has stated:

> "The Land Court is different to other courts in that, in a technical sense, the rules of evidence don't apply… That's partly why the Land Court gets called the people's court, because people get the chance to come to court and have their say without all the normal technicalities and formalities of a normal Supreme Court proceeding."[35]

80. Court merits review processes provide a range of mechanisms that attempt to enhance the equality of the parties, including through:

- providing a structured independent and impartial forum for community objectors to have their concerns heard and examined;
- having the Court as an arbiter to hear and decide questions of procedural fairness;
- allowing parties to speak through trained legal representatives and with the support of expert evidence.[36]

81. While the formality of the Court process provides a mechanism to address power imbalances, equally the Land Court has the benefit of being empowered to operate with some flexibility in process. The flexibility in process allows for concessions to be provided to community litigators where necessary. For example, throughout the hearing of this matter, the Court has frequently operated with due consideration of the needs of the self-represented community objectors by providing them with appropriate guidance where they may need. This has included accepting applications for disclosure orally or in writing without the usual forms or notifications required.

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[35] Transcript of Proceedings, *New Acland Coal Pty Ltd v Frank Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* [2016] QLC 29 (Land Court of Queensland, EPA495-15, Mr P.A Smith (Member) (14 April 2016) 20-36.

[36] Claire Baylis and Robyn Carroll, 'The Nature and Importance of Mechanisms for Addressing Power Differences in Statutory Mediation' (2002) 14(2) *Bond Law Review*, 285.

5.5. Land Court's use of eTrial system is commendable and improves access to justice

82. The Queensland Land Court has been a frontrunner in the innovative use of the Court eTrial system.

83. Printing and managing the large volumes of documents produced in litigation is expensive and time consuming. It would not have been possible for the community litigations to participate in the New Acland Stage 3 mine expansion Land Court objection hearing for which these comments have been provided (**Acland case**) to the extent they did if they had to provide and manage hardcopies of all documents. This would have been particularly difficult those who caught the bus from Acland each day.

84. The Court's provision of the eTrial system dramatically reduced the financial and time burden on all parties and accelerated the conduct of the trial.

85. The eTrial system not only improved the efficiency of the conduct of the hearing but proved a valuable resource in the preparation of submission, as the relevant exhibits were able to be easily located and referenced.

5.6. Court facilitates access to justice through case management

86. The practice and procedures of the Queensland Land Court compare well to the published literature on improving access to justice for self-represented litigants. Practices and procedures described in the literature include the following:

- provision of meetings between the registry staff and self-represented objectors, upon referral to the Land Court of objections and throughout proceedings at key moments, to provide explanations of procedures and allow time for objectors to clarify their understanding of these processes;[37]
- demonstrate and explain how the Court will be seeking to ensure natural justice is upheld throughout the proceeding, including through procedural fairness which has been found to greatly assist disadvantaged court participants to feel at ease with the court process;[38]
- adoption of particular communication techniques which demonstrate attention, empathy and respect is being provided to the objector;[39]

[37] Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants – The Dark Side', *Access to Justice*, (2014), 13, <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1031&context=access>.
[38] K. A. Beijersbergen, A. J. Dirkzwager, V. I. Eichelsheim, P. H. van der Laan and P. Nieuwbeerta, Procedural justice and prisoners' mental health problems: A longitudinal study (2013) *Crim Behav Ment Health*, available at <https://www.ncbi.nlm.nih.gov/pubmed/24009140>.
[39] H. W. Wales, V. A. Hiday and B. Ray, 'Procedural justice and the mental health court judge's role in reducing recidivism' (2010) *International Journal of Law and Psychiatry*, <http://dx.doi.org/10.1016/j.ijlp.2010.06.009. See also http://big.assets.huffingtonpost.com/gtown.pdf>.

- providing the ability to have short adjournments where necessary, for the objectors to have time to consider matters put to them or seek clarification as appropriate;
- encouraging early issue identification in written format, to assist objectors to clarify their points, however providing sufficient flexibility to work around these issues in an appropriate manner which does not excessively jeopardise the other parties or the Court process;
- indicate clearly to all parties whether and how assistance will be offered to self-represented litigants at the start of proceedings, to avoid disputes arising through the proceedings;[40] and
- assist the objector with open communication to problem-solve with respect to how the matter may be resolved and the legal consequences and constraints on its resolution, with a view to what the objector is seeking from the matter.[41]

87. There were numerous instances in the Acland case where the Court took the time to explain processes and procedures to self-represented litigants. Court registry staff also provided flexible assistance to self-represented parties in explaining the eTrial system, gaining access to the Court Wi-Fi network and photocopying documents etc.

88. EDO Qld has also been providing considerable assistance to self-represented objectors in these and other proceedings.

89. The primary manner in which EDO Qld assists objectors to the Land Court is through the publication of the handbook 'Mining and Coal Seam Gas in Queensland: A Guide of the community'. This handbook includes a chapter which explains the law and process behind objecting/appealing to the Land Court.

90. In addition EDO Qld has assisted objectors in these proceedings on a pro-bono basis with:

- information on writing submissions on the draft environmental authority;
- information on the overall assessment and Land Court process;
- how to refer submissions as objections to the Land Court;
- explanations of normal court process and court etiquette throughout hearing;
- information on the rules of disclosure and current case law regarding Land Court jurisdiction in this area;
- assisting objectors who wished to leave proceedings with understanding processes; and
- information as to the rules of examination in chief and cross-examination.

[40] Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants – The Dark Side', *Access to Justice*, (2014), 13, <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1031&context=access>.
[41] Ibid.

91. The active case management by the Land Court and limited pro-bono assistance of EDO Qld facilitate access to justice in Land Court proceedings.

5.7. Existing barriers to access deter abuse of court processes

92. There are sufficient financial and resource impediments to deter concerned citizens from bringing matters before a court that are not founded on meritorious grounds. Transcripts alone can cost tens of thousands of dollars. Few but the most concerned objectors are willing to give up the time and investment in having their concerns heard in Court.

5.8. No systemic 'frivolous or vexatious' litigation in Land Court proceedings

93. Those with a financial interest in building a project as quickly as possible are prone to view any assessment or court review as a 'delay' and 'frivolous or vexatious'. The term 'frivolous or vexatious' is a well-established legal term that is relevant across all court jurisdictions.[42] There is therefore myriad of case law and legislation to define this term in applying it to a particular matter.

94. The Land Court of Queensland has held that the term 'frivolous or vexatious' should be given its ordinary meaning, being that the case is 'of little weight', 'carried on without sufficient grounds, serving only to cause annoyance', or 'unmeritorious'.[43]

95. The *Vexatious Proceedings Act 2005* (Qld) allows the Attorney General or a person against whom another person has already instituted a vexatious proceeding (e.g. a mining company) to apply to the Court for a vexatious proceedings order to prohibit them from continuing or instituting proceedings of a particular type.[44] This Act defines 'vexatious proceedings' to include:

a) a proceeding that is an abuse of the process of a court or tribunal; and

b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and

c) a proceeding instituted or pursued without reasonable ground; and

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[42] For example, the *Uniform Civil Procedure Rules 1999* (Qld), applicable to the Supreme, District and Magistrates Courts, rule 15 provides that the registrar may refer an originating process to the court before issuing it if the registrar considers the process to be frivolous or vexatious; rule 162 provides the courts with the power to strike out particulars that are frivolous or vexatious; rule 171 provide the courts with the power to strike out pleadings if they are frivolous or vexatious; rule 389A restricts applications that are frivolous, vexatious or abuse of court's process.

[43] *Reed v Department of Natural Resources and Mines & Ors (No. 3)* [2014] QLC 13, 10-11. Cf: *Reed v QCoal Sonoma Pty Ltd & Ors* [2014] QLAC 8. See also *Burtenshaw & Ors v Dunn* [2010] QLC 70 in respect of 'unreasonable conduct' during the hearing by an objector recovering from brain injuries.

[44] *Vexatious Proceedings Act 2005* (Qld), s5.

d) a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

96. There does not appear to be any instance where a community objector to the Land Court has been either:

a) found by the Land Court to be 'frivolous or vexatious'; or

b) the subject of an order under the *Vexatious Proceedings Act 2005*.

97. It appears the only objector found to be vexatious in the Land Court was a commercial competitor.[45]

98. In September 2014 the report by the Agriculture, Resources and Environment Parliamentary Committee on the Mineral and Energy Resources (Common Provisions) Bill 2014, stated that:[46]

> "The Land Court further confirmed that, in its experience, there was no evidence to suggest that the courts processes were being used to delay project approvals:
>
> > In the court's experience, there have not really been a lot of stalling tactics. If there is, it generally comes from both sides. It is not just landowners or objectors who generally are not ready to proceed; it is also often the mining companies that are not ready. Having said that, the main tool that the court has to deal with delays and putting parties to unreasonable expense and delay is the power to award costs. A party can agree to seek costs against the other party if that is something they perceive as happening. (Farrell, L., 2014, Draft public hearing transcript, 27 August, p. 2.)"

99. This position was also supported by the Infrastructure, Planning and Natural Resources parliamentary committee recently when considering the Mineral and Other Legislation Amendment Bill 2016, who noted in their committee report that:

> 'the majority of the committee notes that only a small number of appeals against mining leases are lodged in the Land Court each year by environmental groups, and the Minister is not bound by a recommendation of the Court.
>
> *Despite mining stakeholders' claims that frivolous or vexatious cases are extensively used by landholders and other groups, the majority of the committee was unable to find evidence to support this view.* '[47]

100. Full weight must therefore be given to the established finding that the Land Court has not found any community objections brought to the Land Court in mining

[45] *Ralph DeLacey & Anor v Kagara Pty Ltd* [2007] QLC 0137.
[46] Agriculture, Resources and Environment Committee, Mineral and Energy Resources (Common Provisions) Bill 2014, Report No. 46, September 2014, 15, http://www.parliament.qld.gov.au/documents/committees/AREC/2014/24-MinEngResBill/rpt-main.pdf.
[47] Infrastructure, Planning and Natural Resources Committee, *Mineral and Other Legislation Amendment Bill 2016,* Report No. 26, 55th Parliament (May 2016), 17.

objections hearings to have been frivolous or vexatious, as confirmed by research by the Australian Productivity Commission,[48] and the Queensland Parliamentary Library.[49]

101. On the contrary, the Land Court has found objectors to be acting in the public interest, motivated solely by environmental or community concerns and clarifying important principles of law.[50] No costs have ever been awarded by the Land Court against a client represented by EDO Qld. In contrast, costs have been awarded against a mining company in favour of an objector in one of the cases in which EDO Qld provided representation to a different objector.[51]

5.9. Land court process does not add significantly to average application and assessment times

102. Major projects often have corresponding large impacts which can take considerable time to properly describe and assess. A review of the Coordinated Projects website shows that the average time between the lodgement of an Initial Advice Statement by a proponent, and the delivery of a Coordinator-General report, is 4-5 years.[52] Of those 4-5 years, approximately 1-2 years is taken by proponents on average, preparing an EIS and 2-3 years is taken by the Coordinator-General preparing terms of reference, seeking and reviewing further information from the proponent, and preparing the CG evaluation report.

103. Roughly 100 mines are approved each year and a handful of community objections to mines are referred to the Land Court.[53]

104. In the experience of EDO Qld and from a brief review of published decisions, Land Court referrals typically proceed to hearing in about six months on average, with decisions within a further six months on average.

105. The Land Court assessment is considerably quicker than the average time taken by the Coordinator-General to assess the EIS and to prepare the Coordinator-General

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[48] Productivity Commission Research Report, Major Project Development Assessment Processes, November 2013, 277.

[49] On request of the former Agriculture, Resources and Environment Committee in their inquiry into the Mineral and Energy Resources (Common Provisions) Bill 2014. As referred to by then Member for South Brisbane Ms Jackie Trad in the transcript to the second reading speech of the Mineral and Energy Resources (Common Provisions) Bill 2014, Record of Proceedings, First Session of the Fifty-Fourth Parliament, 9 September 2014, 3024, available online here: https://www.parliament.qld.gov.au/documents/hansard/2014/2014_09_09_WEEKLY.pdf.

[50] *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth - Brisbane Co-Op Ltd (No 2) [2012] QLC 67*, [39]-[42].

[51] *Hancock Coal Pty Ltd v Cassoni (No. 5)* [2014] QLC 33.

[52] http://www.statedevelopment.qld.gov.au/assessments-and-approvals/coordinated-projects.html

[53] The Land Court Annual Report 2014-15 indicates that in 2013-14 26 objections or appeals were lodged under the *Environmental Protection Act 1994* in relation to mining, petroleum and gas tenures. The breakdown for community mining objections was not available. As search of Land Court decisions reveal only 20 cases considering the standard criteria under the EPA.

Report and, as it only applies to the small number of projects challenged, does not significantly increase average assessment times for mines.

106. The small additional assessment time is well worth the process that underpins the integrity of, and public confidence in, the assessment process as a whole, as discussed above.

6. POSSIBLE IMPROVEMENTS TO ACCESS TO JUSTICE, FAIRNESS AND EFFICIENCY

6.1. Lack of final decision in mining referrals has increased complexity and assessment times and reduced Court's power to control proceedings

107. Unlike other matters within the Court's jurisdiction, such as CSG approvals or water licences, the Land Court does not make a final decision on referred objections, but rather makes a recommendation to the ultimate decision makers. In this respect, the mining assessment and Court objection hearing process is an anomaly when compared to the typical assessment process and court involvement in other development approvals processes, which generally involve a final decision by the government and then a post-approval merits appeal process.

108. This limitation on the Land Court's power in mining objection hearings has hampered the Court's ability to conduct matters fairly and efficiently, and increases the time, complexity and costs for all parties.

6.1.1. *Lack of final decision has denied appeal to the Land Appeal Court, creating recourse to complex judicial review processes*

109. The *Land Court Act 2000* (Qld) provides for decisions of the Land Court to be appealed to the Land Appeal Court.[54] However, in the case of *Dunn v Burtenshaw* (2010) 31 QLCR 156 the Land Appeal Court found that, as the Land Court only made recommendations in respect of mining leases rather than final decisions, it was considered an administrative function rather than a judicial proceeding. Consequently, the Land Court recommendation could not be appealed in those matters.

110. This leaves the Land Court recommendations to be judicially reviewed in the Supreme Court, rather than appealed.

111. The final decisions by the Minister on the mining lease and the Director-General (DG) on the environmental authority follow the Land Court recommendation, therefore these can also be judicially reviewed.

[54] *Land Court Act 2000* (Qld), s58.

112. This is an unnecessarily complicated process, which may lead to up to three parallel judicial review appeals (see Figure 1 below). These separate appeals can also interfere with each other, prolonging each hearing.

113. For example, the Alpha Land Court decision was made on 8 April 2014 and the judicial review application in respect of the decision was filed on 6 May 2014. The environmental authority for the Alpha mine was granted on 23 September 2014 and subject to a judicial review application which was filed on 7 October 2014. The joining of the two judicial review applications prolonged the hearing of the first judicial review. The ML has not been granted but may be subject to a further judicial review long after the first judicial review applications have been concluded.

114. Significant time and resources are spent by all parties and the Court in undertaking a mining objection hearing. This resource expenditure is then potentially tripled through the three methods of judicial review, which effectively have taken the place of a normal court appeal process, and increase the complexity of the decision making process for all parties.

115. A single appeal from a Land Court final decision on the EA and ML could be more integrated, efficient and expeditious (see Figure 2 below). If submissions are permitted in both the EA and ML prior to approval then these submissions could form one of the matters to which the Court has regard, thereby removing the need for the distinction between Level 1 and Level 2 objectors, which currently complicates referral objections. It is also possible that the list of considerations under the EA could be expanded to cover the additional matters in the ML, thereby removing the need for any merits appeal of the ML.

116. This would reduce complexity, duplication and assessment times while maintaining and enhancing community objection rights. It would also bring mining appeals into consistency with CSG appeals, further streamlining legislative complexity. If appeals are limited to EAs, it would potentially open the door for the jurisdiction to one day merge with the Planning and Environment Court.

Figure 1: Current – Pre-Approval Land Court Process (mining lease matters) where objector or applicant refer the application to the Land Court

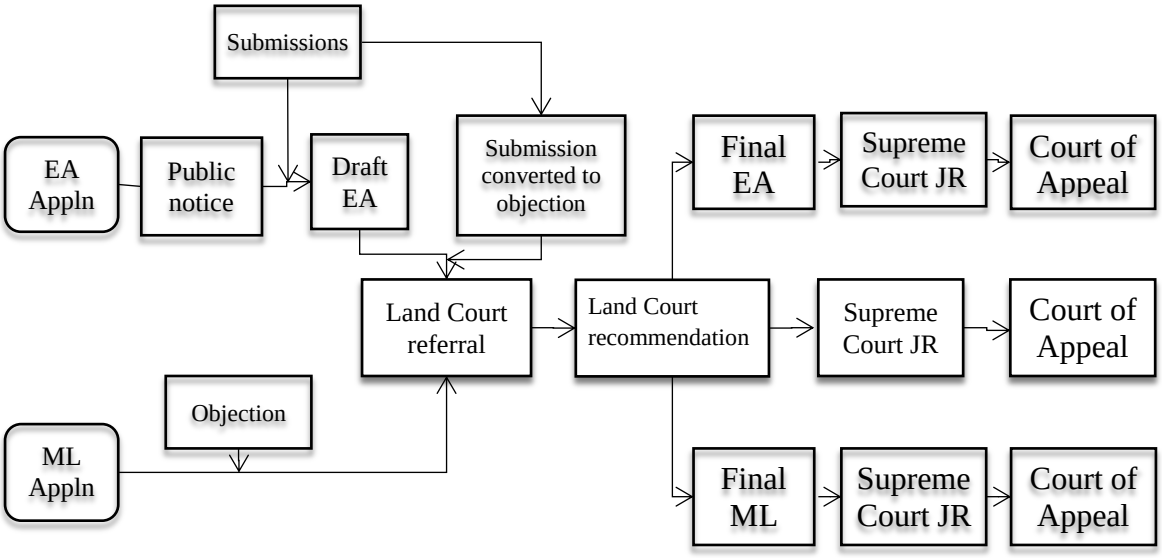
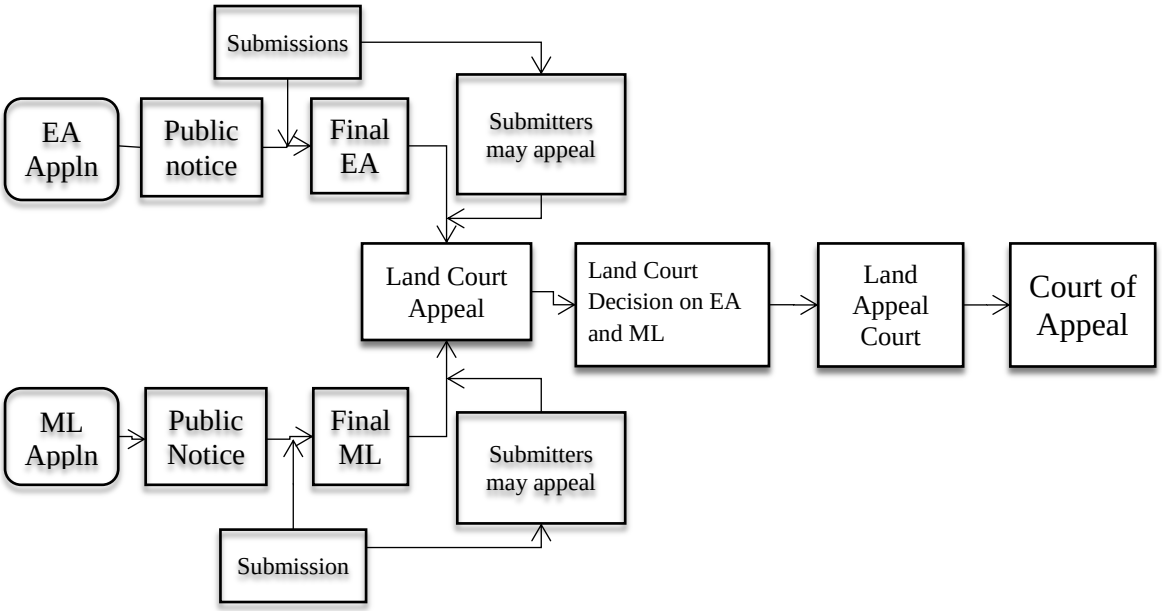


Figure 2: Possible future – Post-Approval Land Court Process (mining lease matters)



117. We note that the approach of providing the Land Court with post-approval merits review appeal jurisdiction was previously suggested in the Queensland Government discussion paper published for public comment in March 2014, entitled '*Mining lease notification and objection initiative: Decision regulatory impact statement'.* The policy objective guiding that discussion paper was '*to reduce regulatory burden, cut red tape and regulation for the mining industry to support resources sector growth by speeding up project approvals to stimulate Queensland's economy and create jobs*'.[55]

118. The consideration of the discussion paper of a post-approval appeal power for the Land Court is therefore similarly framed, proposing that '[*i]n circumstances that the Land Court's decision is final (and not appealed to a higher jurisdiction), the administering authority's consideration of the Land Court's recommendations and associated administrative requirements can be avoided, reducing cost and unnecessary delays in granting approvals*.'[56]

119. While a final decision would reduce delay and complexity, this would be true regardless of any appeal to a higher jurisdiction, so there is no basis for curtailing appeal rights from the Land Court if it were given the final decision.

6.1.2. ***Final decision would be consistent with coal seam gas assessment process***

120. As stated above, there is currently a lack of consistency in how environmental authorities for mining activities and environmental authorities for petroleum and gas activities are assessed.

121. Both 'mining activity' and 'petroleum activity' are within the definition of 'resources activity' under the EPA.[57] Petroleum activities include activities authorised under the *Petroleum and Gas Production and Safety Act 2009* (**P&GA**).[58] These activities include exploring for and producing CSG.

122. A person may apply for an environmental authority for a resource activity under Chapter 5 of the EPA. If the application is non-standard (ie large or complex) the application is considered a 'site specific application'.[59]

123. Like applications for mining activities, site specific applications for petroleum activities must be publicly notified,[60] unless an EIS has satisfied that step.[61]

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[55] Department of Natural Resources and Mines, *Mining lease notification and objection initiative: Decision Regulatory Impact Statement*, (March 2014), 21.
[56] Department of Natural Resources and Mines, *Mining lease notification and objection initiative: Decision Regulatory Impact Statement*, (March 2014), 19.
[57] EPA, s107.
[58] EPA, s111.
[59] EPA, s124.
[60] EPA, s149(b).
[61] EPA, s150.

124. After public notification, the administering authority must decide that the application be refused, or approved subject to conditions.[62] This step applies to both mining activities and petroleum activities.

125. Division 3 of Chapter 5 of the EPA then deals with the objection process to the Land Court for mining activities[63] but does not apply to petroleum activities.

126. The decision to approve a petroleum activity is instead considered an 'original decision' under Schedule 2, Part 1 (Original decisions for Land Court appeals) of the EPA.[64]

127. A 'dissatisfied person' for an 'original decision' includes a submitter for a site-specific application for an environmental authority for a petroleum activity.[65]

128. A 'dissatisfied person' may seek internal review of the decision, which results in a 'review decision'.[66] A dissatisfied person who is dissatisfied with the decision may appeal against the review decision to the Land Court.[67]

129. Any party to the appeal can ask the Court to conduct or provide mediation.[68]

130. The appeal is by way of hearing anew, with the same powers as the original decision maker.[69] In deciding the matter the Land Court may:[70]

a) confirm the decision; or

b) set aside the decision and substitute another decision; or

c) set aside the decision and return the matter to the administering authority who made the decision, with directions the Land Court considers appropriate.

131. A party to the Land Court proceeding may appeal to the Land Appeal Court against the decision.[71] A party to the Land Appeal Court may appeal to the Court of Appeal on legal errors only.[72]

132. This process for petroleum activities is similar to the assessment and court appeal process provided for other environmentally relevant activities under the EPA, as well as development applications under the *Sustainable Planning Act 2009* (Qld).

133. Accordingly, giving the Land Court final decision on mining activities would bring it into line with petroleum activities, and other environmental and development assessment processes.

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[62] EPA, s172.
[63] EPA, s180.
[64] EPA, s519.
[65] EPA, s520(2)(a).
[66] EPA, s521.
[67] EPA, ss523-524.
[68] EPA, s526.
[69] EPA, ss527-528.
[70] EPA, s530.
[71] Land Court Act 2000, s64.
[72] Land Court Act 2000, s74.

134. Similarly, a process whereby any party to the appeal can seek for the parties to put submissions to the Court with respect to undertaking an alternative dispute resolution process. This may not be appropriate in all instances, and should therefore be voluntary and not mandatory, but it may assist some objectors to resolve disputes with the applicant outside of a more formal court process.

6.1.3. *Lack of finality limits Court's power to order disclosure, disadvantaging community and impeding proper Court function*

135. The decision in *Dunn v Burtenshaw*, referred to earlier, has had far reaching ramifications.

136. In 2014, objectors to a mining lease and environmental authority sought by BHP Billiton Mitsui Pty Ltd (BHP) sought disclosure of relevant documents from BHP.[73] The Land Court ordered such disclosure and BHP sought judicial review of the decision in the Supreme Court (recalling that appeals to the Land Appeal Court had become unavailable following the decision in *Dunn v Burtenshaw*).

137. Consistent with the decision in *Dunn v Burtenshaw*, the Supreme Court found that a mining objection was not a 'proceeding' and as such the power in sections 4 and 13 of *the Land Court Rules 2000* (Qld) to order disclosure in a 'proceeding' was not available in a mining referral.

138. The Land Court made some attempt to remedy this situation through *Practice Direction 1 of 2015* (Practice Direction) which sought to apply the same procedures to "referred matters" (objections to mining leases and environmental authorities) as other matters before the Land Court.[74]

139. The effectiveness of this remedy was tested in the decision of *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* [2016] QLC 29 when objectors sought disclosure of noise and dust data held by New Acland Coal Pty Ltd (NAC).

140. The Land Court found that the Practice Direction was not sufficient to extend the Land Courts jurisdiction in referred matters to include the power to award disclosure.

141. Consequently, the Land Court is currently without the power to order disclosure of relevant documents in referred matters. This is a grave impediment on the fairness of objection proceedings as the mining proponent will typically hold most of the relevant data and information, putting the objectors (and the statutory party) at an extreme disadvantage in reviewing the factual claims of the proponent.

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[73] *BHP Billiton Mitsui Coal Pty Ltd v Isdale* [2015] QSC 107

[74] Available here: http://www.courts.qld.gov.au/__data/assets/pdf_file/0020/431462/lc-pd-1of2015.pdf.

142. If the Land Court is given the final decision, as outlined in 6(a) above, then the hearing would be considered a proceedings and the disclosure power would be restored without further amendments to the *Land Court Rules 2000*.

6.1.4. ***Lack of finality limits Court's power to award cost – own costs would be more appropriate for the public interest jurisdiction***

143. The decision in *Dunn v Burtenshaw* has also affected the costs power of the Land Court.

144. As power to award costs under section 34 of the *Land Court Act 2000* (Qld) applies only to proceedings, the President of the Land Court found in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* (No. 2) [2016] QLC 22 that the costs power did not apply to mining referrals. Consequently, the Court did not have the power to award the costs sought by Adani against an environmental objector.

145. On the same day the President applied the same reasoning to deny an application by a successful indigenous objector for costs in *Legend International Holdings Inc v Taylor Aly Awaditijia & Anor* (No. 4) [2016] QLC 23.

146. While there is no formal rule of precedent in the Land Court objection hearings, the decisions by the President of the Land Court in *Adani* and *Legend* have been followed by other members of the Land Court in *Baralaba Coal Pty Ltd & Anor (administrators appointed) v Paul Stephenson and Chief Executive, Department of Environment and Heritage Protection (No. 2) [2016] QLC 25* and *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* (unpublished decision by Member Smith, 18 May 2016).

147. This means that effectively the Land Court is unable to make orders as to costs in objection hearing proceedings. As a public interest jurisdiction, the most appropriate rules as to costs orders for Land Court objection hearings is that there is a general rule each party pays their own costs for participation in the proceeding, except where it can be demonstrated that a party is pursuing frivolous or vexatious grounds under the normal legal definition of this term as described above.

148. If the Land Court is given the final decision, as outlined in 6(a) above, then the hearing would be considered a proceedings and the current costs power would be restored without further amendments to the *Land Court Act 2000*.

149. The current discretion as to costs orders does however create significant uncertainty and fear amongst community objectors who potentially risk hundreds of thousands of dollars in cost orders against them if they challenge a mining approval in the Land Court.[75]

[75] See for example T77-11.

150. It is not possible to quantify how many community members do not participate in a Court process where there is a notional fear that costs may be awarded against them. This fear cannot be overstated – the remote possibility of receiving an adverse costs order is a significant disincentive to community groups who are not well resourced to stand up for their concerns in court.

151. A more appropriate costs regime for matters which concern the public interest, such as the development of our shared resources, is the regime being implemented in the Planning and Environment Court (essentially restoring the position that persisted under the former *Integrated Planning Act 1997*).[76] These cost rules provide that generally parties bear their own costs but may have costs awarded against them if they are obstructive, frivolous of vexatious, or otherwise unreasonably default in procedural requirements.

6.2. Land Court power to heal errors could be extended to further reduce technical complexity

152. As discussed above, the Land Court generally acts with flexibility to reduce the complexity for community litigants. However, the law does not always provide sufficient flexibility to allow the Court to act without undue technicality and formality. For example, in the case of *McAvoy & Anor v Adani Mining Pty Ltd & Ors*,[77] the Court found it was not within its discretion to allow two indigenous objectors, the ability to join as normal objectors to the Land Court objection proceedings due to their submission being five hours outside of the time period defined in the *Mineral Resources Regulation 2013* (Qld).

153. The Court pointed out the difficulties in the complex drafting and interaction of the EPA and MRA and reiterated the comments of Justice Davies in ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation[78] that:

> "Relevant provisions of the Mineral Resources Act 1989 are poorly drafted and by no means clear in their meaning. This is particularly unfortunate when jurisdictional expedition, simplicity and in formality of procedure should be important aims."

154. The Court found that discretion under MRA section 392 to allow substantial compliance did not extend to filing of a submission on the same day, but outside the allotted time, for properly made submissions. The parties were allowed to participate in the hearing as parties pursuant to EPA section 186(d) per another Court discretion.

155. The Court's power to remedy defects in applications or submissions that are before it could be sensibly extended in a manner similar to section 440 of the *Sustainable*

[76] *Planning and Environment Court Act 2016* (uncommenced), s 60.
[77] [2014] QLC 32
[78] (2002) 1 Qd.R 347.

Planning Act 2009 which was amended to remedy a similar limitation on the discretion in that jurisdiction.[79]

156. This would allow the Court to use a sensible degree of discretion in allowing, for example, objections filed slightly out of time without prejudice to the parties to be valid, or to revive lapsed applications where just and appropriate in the circumstances.

6.3. Lack of access to timely transcript disadvantages and delays proceedings

157. Significant disadvantages and delays to all parties involved in the Acland case have been caused by difficulties in accessing transcripts in a timely fashion, particularly with regard to closed court session.[80] Through the numerous times in which objectors have received transcripts after an extensive delay, including delays which extended past the maximum 10 day period, the objectors have had little time to prepare their submissions on citing the transcript.[81] These delays have then caused further delays to the entire proceedings, such as the time allowed for closing submissions.

6.3.1. ***The role of transcripts in the justice system***

158. Transcripts offer efficiency and transparency in the legal field,[82] and transcript technology can make the courts more accountable.[83] According to the Western Australian Government, and equally relevant to all judicial systems, court records, including transcripts, provide 'a unique source of information on the social, political and economic development' of a state and its legal system.[84] Furthermore, transcripts serve to reduce the confusion of courtroom testimonies,[85] and are an invaluable source of information and evidence in appeals.[86] This is particularly the case for self-represented litigants, and for highly technical litigation, as most environmental litigation is.

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[79] See for example s4.1.5A of the *Integrated Planning Act 1997* (Superseded) and *Hamill v Brisbane CC* [2005] QPELR 23.
[80] T11-36 to T11-43; T11-53; T12-4 to T12-10.
[81] T18-42.
[82] Auscript, *The Auscript Difference* (2013) Auscript < http://www.auscript.com/about/the-auscript-difference/#Vision>.
[83] National Association for Court Management, *Information Technology Management* (7 March 2003) National Association for Court Management < https://nacmnet.org/sites/default/files/images/4IT.doc>.
[84] State Records of Western Australia, *Court Records* Government of Western Australia < http://www.sro.wa.gov.au/archive-collection/collection/court-records>.
[85] 'The Importance of Court Reporting' on my Criminal Justice Degree, my Criminal Justice Degree < http://career.myonlinecriminaljusticedegree.com/2011/05/importance-of-court-reporting.html>.
[86] Anne Wallace, 'The Challenge of information Technology in Australian Courts' (1998) 9(1) Journal of Judicial Administration, 8.

6.3.2. *Who provides transcripts in Queensland*

159. Presently, Auscript is the exclusive provider of court transcript services to Queensland Courts.[87] Auscript strictly enforces the 'No Transcript Sharing Arrangements',[88] and this effectively means that Auscript has a monopoly as the sole transcript provider in Queensland. It has been tabled in parliament that since this contract has been awarded to Auscript, the cost of court transcripts have reportedly increased by 73%.[89]

160. From 1926 until 2013 transcription services were provided by the government owned State Reporting Bureau (**SRB**). The SRB provided written records in the Supreme, District and Magistrates Courts.[90] The Queensland Audit Office reports that during this period prior to 2013:[91]

a) the costs were shared between the State and parties on an equal basis (50:50);[92]

b) copying and sharing was common practice, although it was prohibited;[93]

c) price to parties was about $200/hr or $516 per 100 pages (or $1031 total cost to parties and State);[94] and

d) there was a power held by the judiciary to order in special circumstances, which include matters of major public significance and interest, that transcripts could be provided at no charge or at a lesser charge. [95]

161. On 11 September 2012, the former Attorney-General announced the decision to outsource these services. The former Attorney-General, stated that '[a] *number of questions have been raised in the District Court 2010-2011 annual report about the general efficiency of the current system.*' There were reports that the SRB had also suffered from technological 'glitches'.

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[87] Auscript, *Queensland Courts* (2013) Auscript < http://www.auscript.com/justice/courts-and-tribunals/queensland-courts/>.
[88] Ibid.
[89] Joshua Robertson, 'Chief Justice Criticises 'Often Poor' Court Transcriptions Since Outsourcing', *The Guardian (Australian Edition)* (online) 2 January 2015 < http://www.theguardian.com/australia-news/2015/jan/02/chief-justice-criticises-often-poor-court-transcriptions-since-outsourcing>.
[90] Daniel Hurst, 'Court record work will be outsourced as a result of budget cuts', *Brisbane Times* (online) 12 September 2012 <http://www.brisbanetimes.com.au/queensland/court-record-work-will-be-outsourced-as-a-result-of-budget-cuts-20120912-25rqj.html>.
[91] Queensland Audit Office (QAO), December 2015, "Provision of court recording and transcription services - Report 9: 2015–16", 9, available at <https://www.qao.qld.gov.au/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.qao.qld.gov.au%2Fsites%2Fqao%2Ffiles%2Freports%2Frtp_court_recording_and_transcription_services.pdf>.
[92] Ibid, 15.
[93] Ibid, 16.
[94] Ibid, 48.
[95] Queensland Land Court, 9 November 2015, per Member Smith. Presumably under section 8 of the superseded *Recording of Evidence Act 1962* (14 October 2010) which made recorders officers of the Court.

162. In the period between 22 April 2013 and 1 July 2013, Auscript took over as the monopoly provider of transcript services to Queensland's courts and tribunals.[96] Auscript won a major contract with the Queensland Department of Justice and Attorney-General (**DJAG**), commencing in 2013 for a period of six years with an option to extend it for another four years thereafter.[97] Auscript has stated that this contract followed an '*exhaustive and challenging tender process*' over the 2012 Christmas period.[98]

163. However, this tender process has been publicly criticised.[99]

6.3.3. ***Critique of Auscript services***

164. In December 2015 the Queensland Audit Office released a report, finding that:

> *"The procurement process undertaken by DJAG did not comply fully with the government's state procurement policy. It was not well planned or executed by DJAG, meaning the department cannot reliably demonstrate the best value for money outcome was achieved."*[100]
>
> *"DJAG cannot reliably demonstrate whether its present outsourcing model for court recording and transcription services represents the best overall value for money that it could have obtained, in terms of either cost or quality and timeliness"*[101]
>
> *"The savings realised by the state have also come at a cost to court users in terms of the prices they pay for their transcripts and the levels of service they receive. Costs, inaccuracies and delays can have a profound impact on people's ability to prepare their case and access justice."*[102]
>
> *"The outsourced model DJAG implemented has shifted some of the costs associated with producing recording and transcription services to end users.*

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[96] Auscript, *Official Transcripts of Queensland Courts and Tribunals* (2013) Auscript < http://www.auscript.com/justice/courts-and-tribunals/queensland-courts/>.
[97] Auscript, 'Auscript wins exclusive Queensland DJAG Recording and Transcription contract' on Auscript blog, Auscript Blog (22 February 2013) < http://www.auscript.com/auscript-wins-exclusive-queensland-djag-recording-and-transcription-contract/>.
[98] Ibid.
[99] Joshua Robertson, 'Chief Justice Criticises 'Often Poor' Court Transcriptions Since Outsourcing', *The Guardian (Australian Edition)* (online) 2 January 2015 < http://www.theguardian.com/australia-news/2015/jan/02/chief-justice-criticises-often-poor-court-transcriptions-since-outsourcing>; Alex McKean, 'Qld LNP's dodgy donations for deals: Move on, nothing to see here', *Independent Australia* (online) 20 August 2014 <https://independentaustralia.net/politics/politics-display/qld-lnps-donations-for-deals-move-on-nothing-to-see-here,6794>.
[100] QAO, p24.
[101] QAO p8.
[102] QAO, 7.

We estimate this has resulted in a 119 percent cost increase, at a minimum, for users in the civil court jurisdiction…"[103]

"The rushed process continues to hinder DJAG and Auscript—being the root cause of user concerns and their on-going contract management problems." [104]

165. Queensland's Chief Justice has noted that '[*s]ometimes matters are transcribed incorrectly or not at all*' since outsourcing transcripts to Auscript.[105] In the Supreme Court of Queensland Annual Report for 2013-2014, it was noted that:

'It is pleasing to note that, unlike last year, there have been no major delays in the receipt of Auscript transcripts for the preparation of appeal record books. The quality of the transcripts, however, remains variable, and like last year is often poor. Sometimes matters are transcribed incorrectly or not at all. Inappropriate paragraphing is common. When the accuracy of a portion of transcript is critical to a ground of appeal, it is often necessary for the judges to check the transcript against the original recording. Transcripts of appeal hearings are sometimes delivered outside the timelines time set by Auscript. These manifest transcript problems can delay the timely delivery of judgments.[106] ,

6.3.4. ***Need for transcripts to be timely and affordable and need for public interest exemption***

166. Correct judicial decisions require timely, complete and accurate information. [107] Transcripts form an important part of the information that assists courts in making their decisions, along with the role they play in assisting parties while the litigation is on foot. This timely, easily-accessible information is also important for accountability.

167. Parties to a large Land Court matter in Queensland, involving numerous experts covering complex scientific material, can face a bill of over $2,000 per day to access the transcripts for the proceedings. Over a medium sized matter of four weeks the total cost of transcripts can be $40,000.

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[103] QAO, 3.
[104] QAO p8.
[105] Joshua Robertson, 'Chief Justice Criticises 'Often Poor' Court Transcriptions Since Outsourcing', *The Guardian (Australian Edition)* (online) 2 January 2015 < http://www.theguardian.com/australia-news/2015/jan/02/chief-justice-criticises-often-poor-court-transcriptions-since-outsourcing>.
[106] Supreme Court of Queensland, Supreme Court of Queensland Annual Report 2013-2014, (31 October 2014).
[107] National Association for Court Management, *Information Technology Management* (7 March 2003) National Association for Court Management < https://nacmnet.org/sites/default/files/images/4IT.doc>

168. Presently, Auscript provides fee waivers 'on the grounds of financial hardship' in Queensland and at the federal level.[108] However, this process is clearly aimed at individuals, with the form only asking for individual details, concessions cards, household income and household expenditure.[109] This wording is problematic for incorporated associations, and there is currently no recognition of the financial hardship an association may experience in conducting public interest litigation in the interests of the community. There is a need for this waiver to be extended to better include incorporated associations, or for a public interest exemption of fees to be introduced, in order to facilitate open justice, transparency, accountability and to support public interest litigants.[110]

6.3.5. *Issues and problems with the current transcript system*

169. Auscript has responded to allegations of rising costs of transcripts by pointing to the 'reality' that 'for over 95% of the criminal hearings recorded and transcribed by Auscript as part of the Queensland Courts contract, parties receive the transcript for free'.[111] However, providing a financial hardship fee waiver for individuals and in criminal proceedings is not enough. Access to justice issues must be viewed in a broader context than only criminal proceedings.

170. As noted in the Queensland Audit Office report, '[c]ost and timeliness of delivering court reporting and transcription services can affect accessibility and equity of the justice system. This is particularly so under a user pays model, which shifts these costs to users of the courts.'[112]

171. The EDO Qld and their clients have noted many issues with the current monopoly on transcription services and lack of a public interest exemption.

6.3.6. *Previous case examples*

172. In 2014 the EDO Qld represented the Coast and Country Association of Qld in *Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage*

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[108] Hearsay, *Court Recording and Transcript Production – New Service Provision Arrangements* (February 2013) The Journal of the Bar Association of Queensland http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1596&Itemid=48.

[109] SRB, *SRB Fee Waiver Form* Auscript <www.**auscript**.com/wp-content/.../JAG-2151414-v1-**Fee_waiver**_form.>. A copy of which is Exhibit SPR4 to the Affidavit of Sean Ryan dated 15 December 2015.

[110] EDO Qld, *Attorney General: Qld Needs Fairer, Affordable, Genuine Access to Justice* (March 2015) EDO Qld <http://edoqld.nationbuilder.com/>.

[111] Auscript, 'QLD Criminal Transcript Costs Addressed' on Auscript blog, Auscript Blog (8 August 2014) < http://www.auscript.com/qld-criminal-transcript-costs-addressed/>.

[112] Queensland Audit Office (QAO), December 2015, "Provision of court recording and transcription services - Report 9: 2015–16", at p48, available at <https://www.qao.qld.gov.au/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.qao.qld.gov.au%2Fsites%2Fqao%2Ffiles%2Freports%2Frtp_court_recording_and_transcription_services.pdf>

Protection (No. 4).[113] In this matter, an attempt was made to use the Auscript Fee Waiver form on the grounds of financial hardship, but it soon became clear that even if this application was successful, it would be ineffective to use this avenue due to the mandatory delay.

173. Auscript advised the EDO Qld that there would be a 10 day turnaround to deliver the transcript from the day that the application for a fee waiver was lodged.[114] The fee waiver application had to be lodged with the transcript request, which cannot be done until the day of the trial. Therefore, the objector would not be able to receive the transcripts until 10 days after the first day of the hearing, which for a large and fast-paced case is unworkable. Therefore, the only option was to pay the full cost of the transcript and receive them on the day. It is also not possible to apply for a fee waiver refund retrospectively.[115]

174. EDO Qld also represented the Land Services of Coast and Country (**LSCC**) in a five week hearing for *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors*.[116] LSCC objected to Adani, a well-resourced corporation, building what would be the largest coal mine in Australia, due to its environmental impacts. The transcription costs were in excess of $40,000. Sums like these are daunting for public interest cases and impede accountability and open access to justice.

175. This is concerning from an access to justice perspective, as it essentially means that all litigants that experience financial hardship are unable to properly present their case even if a fee waiver is applied, due to the 10-day delay in its provision. They will be at a significant disadvantage to a well-resourced opponent who will be able to refer precisely to the previous day's proceeding with the benefit of a transcript.[117]

176. Proceeding without access to the transcript no only disadvantages the objector, but also the Court which would have to consider the matter without the benefit of submissions accurately referenced to the evidence from the objectors.

6.3.7. ***Transcripts process should be amended to provide Courts power to control provision***

177. The Queensland Audit Office recommended that Department of Justice and Attorney-General undertake the following steps to rectify the issues that arose through the outsourcing of the provision of transcripts to Auscript:

[113] [2014] QLC 12.
[114] Email from Auscript to EDO, 1 October 2014. A copy of which is in Exhibit SPR2 to the Affidavit of Sean Ryan dated 15 December 2015.
[115] Ibid.
[116] [2015] QLC 48.
[117] Email from Juanita Williams of EDO to Caitlin Manners of Auscript, 1 October 2014. A copy of which is in Exhibit SPR2 to the Affidavit of Sean Ryan dated 15 December 2015.

1. *'resolves known contract issues with Auscript as a matter of priority, and vary the contract as needed;*
2. *ensures all contractual rights are appropriately exercised and obligations met, including as a priority:*
    - *approval of a suitable transition-out plan as required under the contract;*
    - *independently verifying Auscript's performance and billing information, as provided for under the contract;*
3. *assesses the effectiveness of existing contract performance measures and change as needed, including introducing incentives and penalties that will better drive performance and high quality service delivery;*
4. *conducts a cost benefit analysis, while considering full lifecycle costs, to determine if current services are cost effective and providing value for money, with a view to revisiting costs and how services are delivered where they are not*
5. *immediately conducts a detailed assessment of service delivery requirements, user needs and market capability to identify future service delivery options*
6. *evaluates feasible alternative service delivery options to determine the best value for money option in terms of cost, timeliness and quality*
7. *develops a strategy and plan to progress to the best value for money option at the end of the current contract.*'

178. We are not aware whether DJAG have acted upon any of these recommendations as yet.

179. Community access to transcripts and a fair trial could be enhanced by:

a) amending the Fee Waiver form to accommodate circumstances for community groups and drought affected landholders experiencing financial hardship (ie not just welfare recipients);

b) allowing fee waivers for same day transcripts;

c) renegotiating the contract with Auscript such that where a transcript has been prepared and provided to one party in a proceedings it may be provided without charge (to the State or any party) where so ordered by a Court;

d) amending the Recording of Evidence Act to:

i) include public interest as well as financial hardship as a basis for fee waiver; and

ii) restoring the power of the Courts to control the provision of transcripts.

180. Due to the pivotal importance for transcripts in the administration of justice and conduct of proceedings, courts should have the power to control the provision of transcripts.

181. This should include the power of the Court to order that a transcript be provided to a party on the basis of financial hardship, public interest, or it is otherwise in the interest of justice.

182. This may be possible by making transcription recorders officers of the Court, which appears to be the mechanism by which Courts previously had control, although consideration of this mechanism may be warranted.

183. The Court is in the best position to determine when transcripts should be provided free of charge due to hardship or public interest nature of proceedings, as well as to dictate appropriate time periods by which transcripts should be provided.

6.4. Restraint on recommendations being inconsistent with CG conditions prevents positive solutions and causes complications

184. The Coordinator-General has discretion to determine which projects get 'coordinated project' status under the *State Development and Public Works Organisation Act 1971* (Qld). Where a proposal is designated as a coordinated project the Coordinator-General becomes a coordinating decision maker for the project, and provides a preliminary decision recommending whether the project should proceed or not. A proponent may apply for a declaration, or a declaration can be made by the Coordinator General under his own initiative.[118] If an application is made, the Coordinator-General needs to be satisfied that the project has at least one of the following:

- complex approval requirements;
- strategic significance to an area, including for the infrastructure, economic and social benefits, capital investment or employment opportunities it may provide;
- significant environmental effects; or
- significant infrastructure requirements.[119]

185. Most large-scale, high impact mines are designated as coordinated projects.

186. In the Coordinator-General's report, conditions may be required or recommended for the project. Under the EPA the administering authority for the environmental authority or draft environmental authority must adopt the conditions proposed by the Coordinator-General, and cannot make any other conditions which are inconsistent with a Coordinator-General's condition.[120] The Land Court also may not make

[118] *State Development and Public Works Organisation Act 1971* (Qld), s.27AA.
[119] *State Development and Public Works Organisation Act 1971* (Qld), s.27(2)(b).
[120] *Environmental Protection Act 1994* (Qld), s.205.

recommendations which are inconsistent with a Coordinator-General's condition in its objection decision.[121]

187. Frequently the Coordinator-General provides conditions with respect to environmental matters in the Coordinator-General Report.

6.4.1. *Inconsistency restriction prevents positive solutions arising from the new evidence heard by the Land Court*

188. The restriction around avoiding inconsistency with Coordinator-General conditions means that there are significant limitations on the submissions that may be raised by the community with respect to the coordinated project, as well as limiting the applicant's ability to offer suggestions of amended or additional conditions to address objector concerns or unfavourable evidence. This restriction also significantly limits the Court in providing positive solutions through amended conditions as a result of the outcomes of an objection hearing. This is particularly the case where new evidence regularly arises during the hearing that the Coordinator-General did not, and could not, have considered as part of the evaluation report and for imposing conditions.

6.4.2. *Inconsistency restriction causes additional complicated legal argument over the extent of inconsistency*

189. The restriction on inconsistency creates the need for parties to embark upon complex legal arguments with respect to whether submissions raised by themselves or other parties are in fact inconsistent with a Coordinator-General condition or not.

190. It also creates a difficult task for the Land Court in determining whether conditions are inconsistent. There have been no definitive principles about inconsistency determined in a binding court decision, and the Land Court decisions on the issue do not, at this point, provide clear guidance. This uncertainty could lead to further litigation.

6.4.3. *Inconsistency restriction forces landholders into arguing refusal where reasonable conditions are incompatible*

191. Further, the restrictions around inconsistency create complications in the legal arguments that are able to be submitted to the Court. For instance, objectors may be forced to argue that a project should be rejected outright, where rejection of the project is not considered to be inconsistent with the Coordinator-General conditions,

[121] *Environmental Protection Act 1994* (Qld), s190.

where in some instances the enabling of the amendment of Coordinator-General conditions may solve the issue in dispute. For example, a lower noise level limit may satisfy an objector but be unavailable as an option due to inconsistency with the Coordinator-General's conditions, thus the objector has no choice but to seek refusal, because the reasonable condition is unavailable.

6.5. Evidentiary procedures should be adjusted to even playing field

192. The limitation under the MRA which prevents the Land Court from hearing evidence in relation to any ground not contained in the objection as lodged,[122] results in some objectors lodging very broad grounds for fear that issues may be raised by expert evidence that fall outside of any grounds narrowly drafted and therefore be prevented from being heard.

193. There is also a potential asymmetry of this restraint which may lead to unfairness on objectors. The Applicant may seek to lead new evidence in the objection proceeding which was not in the EIS, and therefore not addressed in the grounds of objection, and then prevent the objector from responding to that evidence on the basis that it was not within the objectors grounds. For example:

a) an economic chapter of an EIS may be entirely based on economic I/O Modelling;

b) the objector prepares grounds and evidence of the deficiencies in that approach;

c) the Applicant responds with entirely new economic evidence based on a different form of analysis and also contends that the objector cannot lead evidence in response to this new form of modelling as it was not raised in the objectors grounds (drafted prior to the new modelling being disclosed).

A fairer approach would be that either:

a) the Applicant is not strictly bound to the EIS and the objector is not strictly bound to the grounds drafted in response to the EIS (the grounds could still be particularised in response to a request or amended with the leave of the Court); or

b) the objector is strictly bound to the grounds drafted on the basis of the EIS and the Applicant cannot lead evidence on any matter that is not fairly disclosed in the Application or EIS.

The latter of these approaches would have the advantage of accelerating the Land Court hearing process as the Applicant would not be permitted to deliver, for example, substantially new economic modelling within the expert meeting process.

[122] MRA, s77(3).

6.6. The role of the administering authority in an objections hearing requires clarification to improve efficiency

194. Since 2001, the EPA has made the administering authority, which assesses an EA application and issues any draft EA, a party to draft EA objection hearings.[123] For this reason, the administering authority is commonly referred to as the Statutory Party. Once it has referred objections to the draft EA to the Court and notified the applicant, there is no express statutory guidance or requirement on the role of the Statutory Party during an objections hearing.

195. The Queensland Supreme Court has recently held that the Land Court is undertaking an administrative role in reviewing and making recommendations regarding objections hearings.[124] In similar jurisdictions with an administrative role, such as the Administrative Appeals Tribunal (AAT) and the Queensland Civil and Administrative Tribunal (QCAT), there is a statutory requirement for the original decision maker to use his or her best endeavours to assist the reviewing body to make its decision on the review.[125] This can include the requirement for the original decision maker to provide a statement of reasons for the decision and to provide documents in its possession or control relevant to the review.[126] The obligation on the body undertaking the administrative review role is to arrive at a 'correct or preferable' decision.[127]

196. It has been noted that the AAT is not to review the reasons of, or look for errors on the part of, the original decision maker. [128] Further, in Tascone and Australian Community Pharmacy Authority and Katsavos and Katsavos and Kouzas (Parties Joined), Deputy President Forgie stated:

> "A decision-maker's role is not to defend a decision but to assist the Tribunal to find the correct or preferable decision. It may assist by lodging relevant material, researching the law and making submissions on both. This is an invaluable role for, despite its having powers that might enable it to make its own enquiries, practical considerations render them relatively ineffectual powers. Assisting the Tribunal in this way does not compromise the decision-maker's impartiality should the decision be remitted to it for both it and the Tribunal remain part of the administrative continuum directed to reaching the correct or preferable decision. Indeed, it accords with the decision-maker's duty to "*... use his or her best endeavours to assist the Tribunal to make its*

[123] Currently, s.186(a) EPA.
[124] *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107.
[125] For example, see s.21(1) *Queensland Civil and Administrative Tribunal Act 2009* and s.33(1AA) *Administrative Appeals Tribunal Act 1975* (Cth).
[126] For example, see s.21(2) *Queensland Civil and Administrative Tribunal Act 2009* and s.37(1) *Administrative Appeals Tribunal Act 1975* (Cth).
[127] For example, see s.20(1) *Queensland Civil and Administrative Tribunal Act 2009*; regarding the AAT, see *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; 24 ALR 577 at 589 per Bowen CJ and Deane J.
[128] Dwyer, J. (1991) 'Overcoming the adversarial bias in tribunal procedures' 20 *Federal Law Review* 252 at 255

decision in relation to the proceeding" (original emphasis; citations omitted).[129]

197. With respect to the role of original decision makers in a QCAT review, QCAT has:

a) stated that there is a positive obligation on decision makers to 'nail their colours to the mast';[130]

b) stated that decision makers are to conduct themselves as model litigants, meaning they must produce all relevant information, both favourable and unfavourable;[131] and

c) issued a practice direction that emphasises that the decision maker's role is not adversarial, and that to assist the Tribunal it must properly test evidence of other parties, call witnesses (but not to give evidence as to why it made the original decision), outline the relevant issues for determination, and to make submissions as to the appropriate decision in light of the statutory framework and evidence at hearing.[132]

198. Given the similarities of the function of those tribunals with the administrative role of the Land Court in objections hearings, it is apt to give close consideration to the above discussion of the role of the original decision maker on the EA application. While there are some differences in jurisdiction,133 there is nonetheless similarity between the Land Court's role in providing recommendations back to the administering authority after a mining objections hearing and both:

a) the AAT's/QCAT's ability to remit a matter back to the original decision maker for reconsideration in accordance with any recommendations or directions of the AAT/QCAT[134]; and

b) the Land Court's role in determining an appeal by a dissatisfied applicant for a non-mining EA (i.e. regarding a refusal, or conditions imposed on approval), where the Court can similarly return the matter to the administering authority with directions considered appropriate.[135]

199. In the absence of any legislative requirement to assist the Court, as applies in the AAT, QCAT and other such administrative review bodies, the Statutory Party has conducted itself in the Acland case such that it has been defensive of its decision to approve the Applicant's EA amendment application and to issue the draft EA. For

[129] [2011] AATA 724 at [138].
[130] *D'Arro v Queensland Building and Construction Commission* [2015] QCAT 100 at [16].
[131] *Tucker v Queensland Building Services Authority* [2011] QCAT 43 at [7a].
[132] QCAT Practice Direction No 3 of 2013, updated 23 November 2015.
[133] The AAT and QCAT have express requirements to consider the application anew, on the same statutory criteria as the original decision maker, while the Land Court considers very similar to the original decision maker on the EA application – compare ss. 176 and 191 EPA.
[134] s.43(1)(c)(ii) *Administrative Appeals Tribunal Act 1975* (Cth) and s.24(1)(c) *Queensland Civil and Administrative Tribunal Act 2009.*
[135] s.530(1)(c) EPA.

example, the Statutory Party only substantively cross-examined one expert136, and in its closing submissions stated that:

a) the Court has no power to make findings in relation to the Statutory Party's regulation of the Applicant's past activities at the mine;[137]

b) any failure to call its own officers can only be inferred to not have assisted its own 'case';[138]

c) its consideration of the EA amendment application was 'thorough', compliant with statutory requirements and included appropriate conditions;[139]

d) the delegate's reliance on other approvals and assessment processes should not be subject to 'adverse finding or criticisms';[140]

e) on the basis of material available at the time of the decision to issue the draft EA, there was a 'sufficient and proper basis' for the decision, and no basis for a finding that it was 'neglectful';[141] and

f) new evidence from the hearing, contrary to that before the delegate at the time of the draft EA decision, should not be relied on to 'impugn' the delegate's decision.[142]

200. That approach has had limited utility for the Court in determining appropriate recommendations. Further, it is respectfully suggested that in the Acland case the Statutory Party could have assisted the Court, but did not, regarding:

a) the potential implications of the expert evidence presented;

b) the potential implications of new monitoring results disclosed during the hearing, such as noise monitoring data indicating extensive non-compliance with noise limits at sensitive receptors;

c) calling departmental experts on key issues such as air quality and noise impacts to be involved in discussion and testing of that evidence, and in the formulation of any appropriate EA conditions, particularly given evidence of their involvement in both the Coordinator General and Statutory Party assessment of the proposal;

[136] The Statutory Party cross-examined Dr Tanya Plant's health expert, Dr Jeremijenko, in defence of its past regulation of the Applicant: see T63-43, line 16 to T63-51 line 35.
[137] Statutory Party's Outline of Submissions dated 19 September 2016 at [153].
[138] Statutory Party's Outline of Submissions dated 19 September 2016 at [157].
[139] Statutory Party's Outline of Submissions dated 19 September 2016 at [8], [73], [104], [112], [116], [117] and [172].
[140] Statutory Party's Outline of Submissions dated 19 September 2016 at [115].
[141] Statutory Party's Outline of Submissions dated 19 September 2016 at [116].
[142] Statutory Party's Outline of Submissions dated 19 September 2016 at [117].

d) necessary correction of errors and omissions in its compliance assessment report of the Applicant's past performance, which were only identified by objector analysis of the documents the Statutory Party and Applicant had provided to parties during the matter (despite it then acknowledging those problems);

e) calling departmental compliance officers to assist with the Court's fulsome understanding of past compliance issues, given the errors in the compliance assessment report;

f) the implications for the Statutory Party's initial assessment of the Applicant's past performance of being 'good' in light of those compliance report errors and omissions and the related documents disclosed;

g) providing or advising on potential amendments to the draft EA for the Court's consideration, despite the Court's request; and

h) submissions as to potential consistency and/or inconsistency of potential amendments to the draft EA with Coordinator General conditions.[143]

201. With respect to the Acland case, these shortcomings in the Statutory Party's conduct has likely made the Court's job in making appropriate recommendations more difficult, particularly in circumstances where there has been extensive evidence over 83 days, with over 7000 pages of transcript, and with urgency concerns pressed on the Court by the Applicant. This is despite the Court's specific request at a pre-trial directions hearing on 2 March 2016 for pro-active assistance from the Statutory Party as the 'honest broker' in assessing conflicting evidence and suggesting potential conditions.

202. Given the above, Land Court decisions could be made more informed and efficient if the Statutory Party was to have a clearer, more active and more useful role in EA objections hearings. Two possible, but not necessarily mutually exclusive, ways in which the role of the Statutory Party could be clarified and improved for objections hearings include the following.

a) By giving the Court final determination powers (see section 6(a) of these comments), the Statutory Party should play a role similar to a council in a planning appeal in the Planning and Environment Court. Particularly, this would involve active negotiation with parties, and assistance to the Court, regarding appropriate conditions on any approval in light of new evidence.

b) If the Court retained its recommendation-only role, legislative reform to the Land Court Act could see requirements for the Statutory Party to assist the Court using its best endeavours, and to provide a statement of reasons and disclose all relevant documents, similar to those on original decision makers in QCAT and AAT.

[143] OCAA discusses these issues in its written submissions dated 13 September 2016.

7. POSSIBLE REFORMS THAT WILL NOT IMPROVE THE LAND COURT PROCESS

7.1. Tribunal process may not improvement on current process

203. One alternative to the current process, which has been suggested by others, is returning to mining application hearings being undertaken by a specialist tribunal. The suggestion appears to assume that the tribunal would be 'speedier and less complex' than the current Land Court objection hearing process.[144]

204. As stated above, the *Land Court and Other Legislation Amendment Act 2007* (Qld) abolished the Land and Resources Tribunal which had previously heard mining objections under the MRA and EPA, among other matters, and provided the Land Court with jurisdiction to hear these matters. Particularly given the limitations that have been established in the Land Court's ability to hear mining objections, there is very little difference in the speed and formality by which a matter may be heard in a tribunal compared to the Land Court currently.

205. The Land Court states itself, '[t]*he more important and substantial the case, where the parties are legally represented, the stricter the Court tends to be when requiring the parties to comply with formal procedures*'.[145] The Planning and Environment Court is comparable in that it frequently hears matters where parties are unrepresented and has the flexibility to strengthen or relax the level of formality and process around the sophistication of the parties to the legal process.

206. This trend towards more formality for matters which may be of greater public interest and where legal representation is used by parties is likely to be so whether the matter is before a tribunal or a court, and is an appropriate response by an independent arbiter hearing matters of import to the broader community with the benefit of legal professionals to assist it.

207. When the Land and Resources Tribunal was hearing ML mining objections, an analysis of the Annual Reports from the Tribunal demonstrates that some matters still took over 6 months to be heard by the Tribunal.

208. With more resources, the Land Court may be able to undertake the hearing and deciding of matters with more expedition. For example, adding more members to the Court may assist in distributing the case load, and reduce the pressures the few existing members face in hearing matters under the multiple jurisdictions in which the Land Court operates.

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[144] John McCarthy, Mining opponents gain more powers to prevent projects going ahead in Queensland, *Courier Mail*, (online) 24 February 2016 < http://www.couriermail.com.au/news/queensland/mining-opponents-gain-more-powers-to-prevent-projects-going-ahead-in-queensland/news-story/2127169496b39aa6a67a89d1698037ed>.

[145] CAC MacDonald, BR O'Connor, LA Marshall, 'Land Court Jurisdiction – Recent Legislation and Case Law Update', *Queensland Law Society Symposium Property Law Stream,* (2012), 3.

209. However, any claim that the Land Court currently takes an excessive amount of time to hear and determine matters is disputed. Mining applications, particularly for the large scale mines recently being heard by the Land Court,[146] frequently involve highly complex matters in dispute, for example around groundwater modelling or economic modelling, with extensive environmental impact statements being examined. In the main, the length of objections hearings are at least in line with, if not faster than, the periods taken for an planning appeal in the Planning and Environment Court. It would be highly inappropriate to put even greater time pressures on the Court to hear and decide these complex matters than currently exist, as this will only compromise the quality of decision that can be made by the Court.

210. Proponents have already been seeking expeditious hearing timeframes, which have put enormous pressure on the parties, including inexperienced self-represented objectors and the limited resources of EDO Qld, as well as the Court. The New Acland Stage 3 mine expansion Land Court objection hearing for which these comments have been provided, has involved approximately:

- 40 individual objectors;
- 27 expert witnesses (eight of which were called by objectors);
- 38 lay witnesses;
- 14 active parties;
- 84 hearing days;
- two site inspections;
- 1,892 Exhibits; and
- 7,452 pages of transcript;

211. It has been probably the largest ever Land Court objection hearing and possibly the largest community objection hearing in Australia's history.

212. The most recent comparison would be the Adani case, which was referred to the Land Court in September 2014 and proceeded rapidly to a 20 day hearing commencing approximately five months later on 31 March 2015. The Acland case, which was at least four times larger on any metric, particularly due to the number of parties involved and experts called, was referred in October 2015 and commenced hearing approximately five months later on 7 March 2016.

213. The extremely accelerated timetable has place extraordinary pressure on the poorly-resourced objector litigants and caused further disruption to the proceedings, for example:

[146] Such as for Carmichael, Kevin's Corner and Alpha coal mines in the Galilee Basin.

a) not all expert reports were able to be completed prior to opening statements, requiring the evidence to be opened without it being fully known; [147]

b) the applicant and assessing department were still providing large amounts of documents and data during the proceedings, resulting in objectors having to deal with it whilst other evidence was continuing, and also in expert witnesses having to prepare supplementary statements once the data was available, this was evident in particular with the groundwater, [148] noise, [149] and economics evidence;[150]

c) new data and analysis was disclosed by both sides in examination in chief of witnesses, causing further disruption while it was considered;[151]

d) a new witness, Mr Barnett, was introduced during the hearing of evidence, causing further disruption to the proceedings; [152] and

e) expert witnesses made various statements through independent and joint reports which expressed an inability to properly consider all necessary issues or material due to time constraints placed on them in the proceedings.[153]

214. While these disruptions may not have been entirely absent if a longer lead period had been allowed, they certainly would have been reduced, minimising the hearing days required and potentially leading to a more well-informed outcome.

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[147] See for example T1-3, Lines 38-45 where Welshman SoE was filed on 11 March 2016 after openings commenced and Elkin SoE was not complete prior to openings and was not filed until 18 March 2016.

[148] See for example T17-2, Lines 6-8, affidavit of Mr Durick's sworn and filed on 11 March 2016 attaching new report from Mr Barnett (28 pages); T22-79, Lines 8-10, affidavit of Mr Barnett attaching memorandum sworn on 20 April 2016 (46 pages) and second affidavit of Mr Durick sworn on 20 April 2016 (211 pages). These reports and affidavit's resulted in supplementary reports from both Prof. Werner on 5 May 2016 (T27-4, Lines 1-4) and Dr Currell on 6 May 2016 (T25-90, Lines 42-44). This process resulted in a 'relatively hastily convened expert conclave' with the groundwater experts, which resulted in a supplementary joint expert report (see T25-91, Lines 38-45); Mr Barnett provided a supplementary memorandum in response to Prof. Werner and Dr Currell's supplementary reports (T57-5, Lines 7-35); Second supplementary statement of Prof. Werner and Dr Currell tendered on 2 June 2016 (T61-6, Lines 36-39).

[149] After a substantial amount of new data was received (including new modelling files at 12:10am on 1 June 2016) over a period of two weeks, this lead to Mr Savery providing a supplementary report on 1 June 2016 (see T39-3, Line 41 to T39-4, Line 3). This lead to Mr Elkin's evidence being postponed and the matter adjourned for 1 day to enable Mr Elkin to consider the report (T39-2, Lines 16-20).

[150] See Fahrer Supplementary SoE filed on 17 June 2016 resulting in OCAA filing Campbell Supplementary SoE on 5 July 2016 (T61-2, Lines 39-42).

[151] See for example Exhibit 751, Coal Markets Forecast Table that was introduced into evidence during Mr Williams evidence-in-chief (T15-73, Line 1 to T15-76, Line 6).

[152] See T22-79, Lines 8-10. On 10 May 2016 leave was granted by the Land Court for Mr Barnett to be an expert witness in the proceedings.

[153] Adrian Dean Werner, 2016, Individual Expert Witness Report- Groundwater Modelling, Page 2, Paragraph 2; John Quiggin & Jerome Fahrer, 2016, Joint Expert Report to the Land Court of Queensland, Page 3; John Quiggin, 2016, Individual Expert Witness Report-Economic Assessment: Input-output Modelling & Computable General Equilibrium modelling, Page 21; John Quiggin, 2016, Individual Expert Witness Report-Economic Assessment: Input-output Modelling & Computable General Equilibrium modelling, Page 30 Supplementary Joint Export Report- Air Quality, Page 3, Issue 2.1(a); Supplementary Joint Export Report- Air Quality, Page 5, Issue 2.1(b).

215. In addition, there was inadequate time provided during proceedings to allow consideration of possible amendments to conditions which may have assisted in resolving some issues raised by objectors.[154] The first time this was raised was in annexures provided in the Applicant's written submissions provided 26 August 2016. This meant significant time was lost that could have been spent meaningfully considering the adequacy of the conditions and any amendments that may have otherwise addressed the concerns raised by the objectors or as a result of evidence heard by the Court.

216. If any greater pressure were put on the Court and the parties to hear a matter such as recent Land Court objection hearings for mines more expeditiously, the quality of the participation by the parties and the Court's decision can only be greatly reduced. This would then sacrifice the benefit provided to the community for holding third party merits review processes, wasting the resources of all involved. It would, from a proponent's perspective, also result in less scrutiny of its application material and the evidence base for an appropriate decision.

217. There is no room for mining objection hearings to be heard more expeditiously than they are currently conducted in the Court without compromising objector's rights, or reducing the quality of the decisions produced by the Court. The timeframe of the Land Court objection hearing process needs to be viewed in context of the need to properly assess this and other coal mines and to make the correct decision on whether or not it should be approved.

7.2. Removing legal representation will not speed hearing

218. Decisions from the High Court and now federal legislation recognise that individuals have the right to self-represent in court proceedings and individuals are free to exercise that right in all Australian courts.[155] This is an important right that assists in providing access to justice to those who cannot afford legal representation. Nevertheless, the legal system is complex and it is rare that a self-represented litigant will hold the necessary expertise and experience to navigate that system effectively. It is argued that the right to self-represent sits alongside a right equally to legal representation or the right to be meaningfully heard; the latter including the right to access legal services and alternatives to representation.[156]

219. Cases commenced by self-represented litigants in the Supreme and County Courts are reported to be more likely to be dismissed, discontinued, abandoned or struck-out. [157] The low level of success of self-represented litigants in court is reported to occur regardless of the merits of their case.[158] This demonstrates that there may be

[154] Paragraph 31 of OCAA Reply Submissions to Statutory Party Submissions, p. 7.
[155] *Collins v Hass* (1975) 133 CLR 120; *Cachia v Hanes* (1994) 179 CLR 403; s 78 *Judiciary Act 1903* (Cth).
[156] Family Law Council, *Litigants in Person: A Report to the Attorney-General prepared by the Family Law Council*. (Canberra, August 2000), 15
[157] Elizabeth Richardson, Tania Sourdin & Nerida Wallace *Self-Represented Litigants, Literature Review*. Australian Centre for Court and Justice System Innovation (2012) 27, 30.
[158] Rabeea Assy 'Revisiting the Right to Self-representation' (2011) 30 *Civil Justice Quarterly* 267, 268.

inherent flaws in how the right to self-representation is operating in Australian courts.

220. This failure of the system to deliver positive responses can create difficulties for the courts; for example the Supreme Court of Queensland Annual Report notes that self-represented litigants have been a burden on court resources through their additional need for support in navigating the legal system. [159] While the court or registry office is not able to provide self-represented litigants with legal advice, this does not always deter those litigants from seeking this advice, generally out of desperation and confusion.

221. However, this failure also leads to frustration and disillusionment for members of the community who often invest considerable amounts of time and resources into litigation but with little chance of obtaining a result in their favour. The court process can be incredibly daunting for self-represented litigants, with many procedures not being written down in easily accessible and understandable locations, and even procedural rules being often found in multiple locations due to the way our courts have evolved. Even the most flexible and compassionate of courts can be an intimidating experience for community members who have never had to engage with the legal system previously.

222. Where this burden on self-represented litigants is coupled with the small chance of the proceedings resulting in an outcome in their favour, there is little incentive for community members to undertake self-represented litigation. This means that many, but not all, of the benefits provided through third party merits appeal rights (see above for further discussion) and through the provision of the right to self-represent, are effectively lost through the ineffectiveness of the system in supporting these rights to lead to proportionally positive outcomes.

223. Legal representation undeniably greatly assists the court and self-represented litigants through providing the ability to understand and engage with the court through typical court process and through professional legalese. This assists the court to operate efficiently, increases community confidence and comfort in engaging in the process, and also assists community litigants in increasing their chances of obtaining a result that meets their needs or desires. Further, providing legal representation to all parties also assists the broader society through the improved quality, accountability and transparency in decision making, community awareness and community confidence that results from effective third party merits reviews.

Environmental Defenders Office (Qld) Inc
30 September 2016

[159] Supreme Court of Queensland, Supreme Court of Queensland Annual Report 2013-2014, (31 October 2014), 10.

APPENDIX

Extract from the *Mineral Resources Act 1989* (Qld), section 269(4):

The Land Court, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, shall take into account and consider whether—

(a) the provisions of this Act have been complied with; and

(b) the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate; and

(c) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and

(d) the land and the surface area of the land in respect of which the mining lease is sought is of an appropriate size and shape in relation to—

(i) the matters mentioned in paragraphs (b) and (c); and

(ii) the type and location of the activities proposed to be carried out under the lease and their likely impact on the surface of the land; and

(e) the term sought is appropriate; and

(f) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and

(g) the past performance of the applicant has been satisfactory; and

(h) any disadvantage may result to the rights of—

(i) holders of existing exploration permits or mineral development licences; or

(ii) existing applicants for exploration permits or mineral development licences; and

(i) the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management; and

(j) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof; and

(k) the public right and interest will be prejudiced; and

(l) any good reason has been shown for a refusal to grant the mining lease; and

(m) taking into consideration the current and prospective uses of that land, the proposed mining operation is an appropriate land use.

Extract from the *Environmental Protection Act 1004* (Qld), section 191:

In making the objections decision for the application, the Land Court must consider the following—

(a) the application;

(b) any response given for an information request;

(c) any standard conditions for the relevant activity or authority;

(d) any draft environmental authority for the application;

(e) any objection notice for the application;

(f) any relevant regulatory requirement;

(g) the standard criteria;

(h) the status of any application under the Mineral Resources Act for each relevant mining tenure.