SUPREME COURT OF QUEENSLAND

CITATION:	*Symbolic Resources Pty Ltd v Kingham & Ors* [2020] QSC 193
PARTIES:	**SYMBOLIC RESOURCES PTY LTD (ABN 55 604 407 426)** (Applicant) **v** **FLEUR KINGHAM (PRESIDENT OF THE LAND COURT OF QUEENSLAND)** (First Respondent) and **MALCOLM ROBERT BURSTON** (Second Respondent) and **DAVID GULLO** (Third Respondent) and **SHANE ANDREW WATTS AND AMANDA RAE WATTS** (Fourth Respondents)
FILE NO/S:	SC No 11776 of 2019
DIVISION:	Trial
PROCEEDING:	Application for a statutory order of review
ORIGINATING COURT:	Land Court of Queensland
DELIVERED ON:	26 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2020 & 15 April 2020 Supplementary submissions received 16 April 2020 (applicant) and 23 April 2020 (fourth respondents)
JUDGE:	Wilson J
ORDER:	**The orders of the Court are:** **1. The Land Court decision made on 27 September 2019, which recommended to the Minister for Natural Resources, Mines and Energy that the MLA100123 be rejected, be declared void and set aside.** **2. This matter is remitted to the Land Court to be**

decided according to law.

3. The question of costs is adjourned to a date to be fixed.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – whether the Land Court decision involved errors of law in relation to the construction and application of s 265(11) of the *Mineral Resources Act 1989* (Qld) – whether the respondent's objection was a 'properly made objection' pursuant to ss 265(11) and 260 of the *Mineral Resources Act* 1989 (Qld) – where an objection is duly served upon delivery of the objection pursuant to s 399(2) of the *Mineral Resources Act* 1989 (Qld) and s 39A of the *Acts Interpretation Act* 1954 (Qld) – where service of an objection upon the applicant within the objection period is not a mandatory requirement of s 260 of the *Mineral Resources Act* 1989 (Qld)

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – whether the Land Court considered matters not included in an objection in contravention of s 268(3) of the *Mineral Resources Act* 1989 (Qld) – where the Land Court exceeded its jurisdiction by entertaining a matter not included in an objection

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – whether the Land Court decision had jurisdiction under s 269(4) of the *Mineral Resources Act* 1989 (Qld) to consider matters dealt with under a separate statutory regime – whether the Land Court considered the adequacy of the applicant's environmental authority conditions

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – HEARING – NATURE OF HEARING – NEW MATTER ARISING IN COURT - where the applicant was self-represented in the initial Land Court proceedings – where the Land Court allowed a new witness to give evidence without prior notice to the applicant – whether the applicant was given a reasonable opportunity to adduce evidence in response to this new evidence – whether the Land Court adequately assisted the applicant as a self-represented litigant – whether the applicant was given the opportunity to make an effective choice – whether this amounts to a breach of procedural fairness

Acts Interpretation Act 1954 (Qld), s 39A(1)(b), s 39A(2)
Environmental Protection Act 1994 (Qld), s 181
Mineral Resources Act 1989 (Qld), s 2(f), s 245, s 260, s 261, s 265, s 268, s 269, s 399(2)

Land Court Act 2000 (Qld), s 7

ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation [2002] 1 Qd R 347, cited
Arcturus Downs Limited v Peta Stilgoe (Member of the Land Court of Queensland) & Ors [2019] QSC 84, cited
Craig v South Australia (1995) 184 CLR 163, cited
Dunn v Burtenshaw (2010) 31 QLCR 156, cited
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87, cited
Fearnley v Finlay [2014] 2 Qd R 392, cited
Hossain v Minister for Immigration and Border Protection [2018] 264 CLR 123, cited
John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors [2009] QSC 205, cited
Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531, cited
Lee v Kokstad Mining Pty Ltd [2008] 1 Qd R 65, cited
Mbuzi v Hall [2010] QSC 359, cited
New Acland Coal Pty Ltd v Smith & Ors [2018] QSC 88, cited
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors [2019] QCA 184, cited
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355, cited
Re Refugee Review Tribunal; ex parte Aala (2000) 204 CLR 82, cited
Reihana v Davern & Anor [2014] QSC 127, cited
Ross v Hallam [2011] QCA 92, cited
Symbolic Resources Pty Ltd v Burston & Anor [2019] QLC 39, cited
Tomasevic v Travaglini (2007) 17 VR 100, cited
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 13, cited

COUNSEL: D A Kelly QC and K J McIntyre for the applicant
No appearance for the first respondent
No appearance for the second respondent
David Gullo (self-represented) for the third respondent
M de Waard for the fourth respondent

SOLICITORS: Sparke Helmore Lawyers for the applicant
No appearance for the first respondent
No appearance for the second respondent
David Gullo (self-represented) for the third respondent
Ruddy, Tomlins and Baxter for the fourth respondent

Introduction

Background

[1] Symbolic Resources Pty Ltd ("the applicant") seeks judicial review of a decision made by the Land Court on 27 September 2019 (the "Land Court decision").[1]

[2] The applicant sought a gold mining lease over a rural property known as "Milwarpa Station" and the Land Court recommended the applicant's mining lease application be rejected.

[3] The Land Court recommendation was made under section 269 of the *Mineral Resources Act* 1989 (Qld) ('MRA'), and as Bowskill J stated in *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88, this recommendation is amenable to judicial review:

> "There is no dispute that the decision of the first respondent is a decision to which the JR Act [*Judicial Review Act* 1991 (Qld)] applies. Judicial review is the only available avenue for review of a decision of this kind, as it has been characterised as an exercise of the Land Court's administrative, rather than judicial function. The making of a recommendation under s 269 of the MRA has been described as "an administrative step consequent upon a statutorily prescribed inquiry conducted by the learned Land Court member", and not a decision in relation to a proceeding in the Land Court, from which an appeal lies to the Land Appeal Court."[2]

[4] A number of directions and orders were made by the Land Court prior to the Land Court hearing on 10, 13 and 14 June 2019. All parties appearing in the Land Court were self-represented.

[5] The first respondent is the President of the Land Court of Queensland. On 29 October 2019, the first respondent lodged abiding submissions and sought leave to be excused from the Supreme Court proceedings, save as to the issue of costs. The first respondent did not participate in this judicial review application.

[6] The second respondent is Mr Malcolm Burston, who was self-represented at the Land Court hearing. At the time of the Land Court hearing, the second respondent was the owner of Milwarpa station and he had lodged an objection under the MRA to the granting of the mining lease. Mr Burston sold Milwarpa Station to the fourth respondents on 12 July 2019, and has since deposed that he does not have the finances, time nor interest to participate in these proceedings. The second respondent did not appear at the judicial review hearing.

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1 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39.

2 *New Acland Coal Pty Ltd v Smith & Ors* [2018] QSC 88 at [6] per Bowskill J (footnotes omitted), citing *Dunn v Burtenshaw* (2010) 31 QLCR 156 at [47].

[7] The third respondent is Mr David Gullo. The third respondent is the owner of the property "Seal Pearl," which neighbours the applicant's proposed mining site and he also lodged an objection to the mining lease. He was self-represented at the Land Court hearing and also at this judicial review hearing.

[8] The fourth respondents are Mr Shane Watts and Ms Amanda Watts, who became the registered proprietors of the land comprising Milwarpa Station on 12 July 2019 and after the Land Court hearing. The fourth respondents were joined to this judicial review proceeding on 29 January 2020 and were legally represented in the judicial review hearing.

[9] I should note that the conduct of the hearing was assisted by the applicant, third respondent and fourth respondents agreeing to:

(a) An indexed bundle of relevant documents;

(b) A list of issues in dispute; and

(c) A statement of facts.[3]

[10] The parties provided written submissions and as this hearing occurred during COVID-19 restrictions, all parties appeared at the hearing by telephone or video link.

[11] At the hearing, the parties clarified and focussed their submissions on the issues in dispute. Both the applicant and third respondent disavowed some matters raised in their written outlines.[4]

Grounds of review

[12] The applicant seeks judicial review of the Land Court decision on the following grounds:

1. The Land Court decision involved errors of law in relation to the construction and application of section 265(11) of the MRA, in that the third respondent's objection was not a 'properly made objection';
2. The Land Court decision involved errors of law, in contravention of section 268(3) of the MRA, in relation to the scope of the objections;
3. The Land Court decision involved errors of law in relation to the construction and application of sections 269(1) and (4) of the MRA; and
4. The Land Court decision was made in breach of the rules of procedural fairness.

Agreed list of issues in dispute

[13] The parties have provided an agreed list of issues in dispute:

1. Whether the third respondent's objection was a "properly made objection" pursuant to section 265(11) and section 260 of the MRA.

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3 Exhibit 1.

4 For example, see Transcript of Proceedings, 14 April 2020 at 1-11 / line 35 – 39, 1-62 / line 22 – 35, 1-64 / line 24 – 45 – 1-65 / line 1 – 9.

2. Whether the Land Court:

   (a) Could receive evidence and consider issues on matters not otherwise included in the objections; and

   (b) Did receive evidence and consider issues on matters not otherwise included in the objections.

3. Whether the Land Court:

   (a) Confined the hearing to objections in relation to the grant of a mining lease pursuant to section 245 of the MRA; and

   (b) Had jurisdiction under section 269(4) of the MRA to consider matters dealt with under a separate statutory regime.

4. Whether the Land Court:

   (a) Gave the applicant a reasonable opportunity to adduce evidence in response to the lay witness evidence of the second respondent and the third respondent;

   (b) Gave the applicant a reasonable opportunity to adduce evidence in response to the expert evidence of the second respondent and the third respondent; and

   (c) Whether any of these matters amount to a breach of procedural fairness sufficient to give rise to the relief sought by the applicant.

Remedy sought by the applicant

[14] The applicant submits that grounds 1 – 3 involve purported errors of law, in that they involve errors in construing the MRA. In particular, these grounds relate to the type and form of a Land Court hearing as contemplated by the MRA.[5] If any one of these grounds is established then the Land Court decision would be invalid,[6] and it should be set aside and referred back to the Land Court to be decided according to law.

[15] For the Land Court decision to be set-aside pursuant to ground 4, the applicant must show that by reason of procedural unfairness, the applicant was deprived of an opportunity that would have influenced the outcome in the Land Court as a matter of reality and not mere speculation.[7]

Background to the Land Court decision

[16] The parties outline the background to the Land Court decision in an 'agreed statement of facts'.

[17] On 15 January 2017, the applicant applied to the Department of Environment and Heritage Protection to amend its existing Environmental Authority issued under the

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5 Transcript of Proceedings, 14 April 2020 at 1-7 / line 4 - 7.

6 See *Hossain v Minister for Immigration and Border Protection* [2018] 264 CLR 123 at 132 - 133 [23] - [24] per Kiefel CJ, Gageler and Keane JJ; Transcript of Proceedings, 14 April 2020 at 1-6 – 1-8.

7 Transcript of Proceedings, 14 April 2020 at 1-7 / line 35 – 44, 1-8 / line 1 - 2; see *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* [2009] QSC 205 at [40] per Applegarth J.

Environmental Protection Act 1994 (Qld). On 18 January 2017, the applicant lodged the Mining Lease Application and supporting documents with the Department of Natural Resources, Mines and Energy.

[18] On 24 April 2017, the Department of Environment and Heritage Protection approved the Environmental Authority application and a notice of decision in accordance with section 181 of the *Environmental Protection Act* 1994 (Qld) was issued to the applicant.

[19] On 30 May 2017, the amendment to the Environmental Authority was approved and issued to take effect in relation to the Mining Lease Application at the time of granting the Mining Lease.

[20] On 2 November 2017, the Department of Natural Resources and Mines issued a Notice of Mining Lease and the Mining Lease Notice advertisement.

[21] The notice for mining lease stated:

> "Any objection to this mining lease application must be lodged with an assessment hub on or before 13 December 2017. A copy of such objection is required to be served upon the applicant(s) on or before that date at the following address:-
>
> PO Box 629
>
> BOWEN QLD 4805"

[22] On 7 November 2017, the applicant sent a copy of the prescribed documents to the third respondent by registered post. On 8 November 2017, the applicant emailed a copy of the posted material to the third respondent.

[23] On 8 November 2017, the applicant sent a copy of the prescribed documents addressed to the second respondent by registered post, and emailed a copy of the posted material to the second respondent.

[24] On 15 November 2017, the Mining Lease Notice was advertised in the Bowen Independent newspaper. The Mining Lease Notice stated that a properly made objection must be received before 4.30pm on the last day of the objection period, being 13 December 2017. The advertisement specified that any objection must be made to the Department of Natural Resources and Mines 'Mineral Assessment Hub' (which administers mining permits) and must be served upon the applicant on or before the last day of the objection period.

[25] On 13 December 2017, the third respondent sent his objection ("the Gullo objection") by registered post from the Bowen post office to the applicant.

[26] On 13 December 2017 at 4.25pm, the applicant's representative, Ms Smith, attended the Bowen post office to check the post box for objections. None had been received. The Bowen post office received the Gullo objection on 15 December 2017. On 16 December 2017, Ms Smith attended the Bowen post office and signed for two registered post envelopes from the second and third respondents. The Mineral

Assessment Hub deemed the Gullo objection a 'properly made objection' on 20 February 2018, and it was referred to the Land Court.

[27] On 13 December 2017 at 4.26pm, the applicant received by email the second respondent's objection ("the Burston objection"). On 16 December 2017, the applicant received the Burston objection by post. The Mineral Assessment Hub deemed this a properly made objection on 19 December 2017, and it was referred to the Land Court on 20 December 2017.

Ground 1 – The Land Court decision involved errors of law in relation to the construction and application of section 265(11) of the MRA

[28] The agreed list of issues in dispute frames ground 1 in this way:

> "Whether the Third Respondent's objection was a "properly made objection" pursuant to s.265(11) and s.260 of the *Mineral Resources Act* 1989 (Qld)".[8]

The Gullo objection was not served within time

[29] Section 260(4) of the MRA provides that an objection must be served upon the applicant "on or before the last date that the objector may lodge an objection to that application a copy of the objection lodged by the objector." The last date for service of an objection in this matter was 13 December 2017.[9]

[30] Paragraph 3 of the Land Court decision sets out three findings of fact which the applicant submits was the starting point for where the Land Court hearing, in a most fundamental way, departed from the statutory requirements for the hearing:[10]

(a) Mr Gullo signed and lodged an objection with the Department of Natural Resources and Mines within the objection period;

(b) Mr Gullo did not serve his objection on the applicant within the objection period; and

(c) There is no evidence the applicant suffered any prejudice because of a three-day delay in service.

[31] The Land Court found that the Gullo objection was not served within time.[11] The third and fourth respondents submit that the Gullo objection was served within time, as Mr Gullo posted his objection by registered post within the requisite time.

[32] In support of this submission, the fourth respondents rely upon section 399(2)(c) of the MRA, which to be given its proper context should be read with the entirety of section 399, which states:

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8 Exhibit 1 (Agreed list of issues in dispute).

9 This contention was originally rejected by the fourth applicant. However, this submission was not advanced at trial: Transcript of Proceedings, 14 April 2020 at 1-62 / line 30 – 35.

10 Transcript of Proceedings, 14 April 2020 at 1-12 / line 24 – 26.

11 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [3].

(1) A notice or other document required by this Act to be given or served by a prescribed person to an owner of land shall be duly given or served if—

(a) it is served personally upon the owner; or

(b) it is sent by registered post to the place of residence or business of the owner last known to the prescribed person.

(2) Except as provided in subsection (1), a direction, notice, order or other document required or authorised by this Act to be given or served upon any person by the Minister, Land Court, tribunal authorised officer or other person shall be duly given or served if—

(a) it is served personally upon the person to whom it is directed; or

(b) it is left at the place of residence or business of the person to whom it is directed last known to the person who gives it; or

(c) it is sent by registered post to the place of residence or business of the person to whom it is directed last known to the person who gives or serves it.

(3) Where this Act in respect of a matter requires or authorises a person's name and address to be specified then for the purpose of service of any direction, notice, order or other document in respect of that matter the last address of that person recorded in the register in respect of that matter shall be deemed to be the person's place of residence or business last known to the person so giving or serving.

(4) Where this Act in respect of a matter requires or authorises the name and address for service of a person upon whom any notice may be served on behalf of another person or other persons to be specified, then service upon the person so specified shall be deemed to be service upon the other person or other persons.

(4A) This section does not apply in relation to the giving of a document to which chapter 11, part 3, division 9 applies.

(5) In this section—

prescribed person means—

(a) a holder of, or applicant for the grant of, a mining tenement; or

(b) a person who is carrying out, or intends to carry out, an activity under section 386V.

registered post means a type of post that requires the recipient's signature as proof of receipt.[12]

[33] It is noted that section 399(2) of the MRA outlines the three modes of service permitted under the MRA.

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12 *Mineral Resources Act* 1989 (Qld) s 399.

[34] The fourth respondents refer to section 39A of the *Acts Interpretation Act* 1954 (Qld):

> (1) If an Act requires or permits a document to be served by post, service—
>
> (a) may be effected by properly addressing, prepaying and posting the document as a letter; and
>
> (b) is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved.
>
> (2) If an Act requires or permits a document to be served by a particular postal method, the requirement or permission is taken to be satisfied if the document is posted by that method or, if that method is not available, by the equivalent, or nearest equivalent, method provided for the time being by Australia Post.
>
> (3) Subsections (1) and (2) apply whether the expression 'deliver', 'give', 'notify', 'send' or 'serve' or another expression is used.

[35] The fourth respondents submit that section 39A(1)(b) of the *Acts Interpretation Act* 1954 (Qld) is limited by the operation of section 39A(2).

[36] In this case, the particular postal method permitted under section 399(2) of the MRA is by registered post, which is defined as "a type of post that requires the recipient's signature as proof of receipt."[13] The fourth respondent's submit that section 399(1) and (2) of the MRA provide for a particular postal method – being "by registered post".

[37] Therefore, pursuant to section 399(1) and (2) of the MRA, the fourth respondents submit that service is effected if it is sent by registered post. Applying section 39A(2) of the *Acts Interpretation Act* 1954 (Qld) and section 399(1) and (2) of the MRA to the agreed facts, the fourth respondents submit that the Gullo objection was served on 13 December 2017.

[38] Although the issue of service under section 399 of the MRA is considered in a number of cases, they are predominantly concerned with the address to which documents were posted.[14] Furthermore, there are no relevant cases that consider section 39A(2) of the *Acts Interpretation Act* 1954 (Qld).

[39] I note that section 399(2)(c) of the MRA is concerned with providing permission for the mode of service, being registered post. It is not directed to the timing of service. In my view, pursuant to section 39A(2) of the *Acts Interpretation Act* 1954 (Qld), permission for a document to be served is taken to be satisfied if it is posted by the method as stipulated under section 399(2)(c) of the MRA.

[40] The term "the requirement or permission is taken to be satisfied"[15] does not relate to the time that service is effected. Therefore, in this case, section 39A(2) of the *Acts*

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13 *Mineral Resources Act* 1989 (Qld) s 399(5).

14 *Re Australian Finegrain Marble Pty Ltd v Kagara Pty Ltd* [2006] QLRT 123; *Calcifer Industrial Minerals Pty Ltd v Daraleigh Pty Ltd as Trustee for the DC & ML Dillon Trust* [2010] QLC 46.

15 *Acts Interpretation Act* 1954 (Qld) s 39A(2).

Interpretation Act 1954 (Qld) does not ground a conclusion that service is effected at the time of posting a document.

[41] Section 399(2)(c) merely confirms that service by registered post is an available mode of service. Reading sections 399(2)(c) and (5) of the MRA together, an objection can be regarded as duly served on an applicant if it is sent by registered post (being a type of post that requires the recipient's signature as proof of receipt).

[42] Section 399(2)(c) does not, however, say that service is taken to have been effected "at the time of sending" or "by the act of sending".

[43] Rather, the section contemplates the document having been duly served when the document has been "*sent*", and that directs attention to this question: when is a document forwarded by "a type of post that requires the recipient's signature as proof of receipt" to be regarded as having been "*sent*" for the purposes of effecting service?

[44] The issue to be considered is when the objection was 'sent'[16] or 'delivered'[17] in the ordinary course of post. It is agreed between the parties that:

(a) The third respondent sent the Gullo objection to the applicant by registered post on 13 December 2017;

(b) The Gullo objection was received by registered post at the Bowen post office on 15 December 2017; and

(c) The applicant's representative, Ms Smith, signed for it on 16 December 2017.[18]

(d) Section 39A(1)(b) of the *Acts Interpretation Act* 1954 (Qld) addresses the question of when service is taken to have been effected where a document is served by post. It provides that service is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved.

[45] The High Court in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 describes the distinction between 'delivery' of a document and 'receipt' by its intended recipient as follows:

> "[...] delivery may be different from receipt by the intended recipient and, provided that delivery is not disproved, the fact of non-receipt does not displace the result that delivery is deemed to have been effected at the time at which it would have taken place in the ordinary course of the post."[19]

[46] Mr Gullo was entitled to use the mode of registered post to serve his objection, but his objection was not regarded as "*sent*" at the point of his posting or sending of the objection.

[47] Rather, his objection was regarded as "*sent*" at the point the objection was delivered in the ordinary course of post, unless the contrary was proved. In this case, there was an

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16 *Mineral Resources Act* 1989 (Qld) s 399(2)(c).
17 *Acts Interpretation Act* 1954 (Qld) s 39A(1)(b)
18 Exhibit 1 (Agreed statement of facts).
19 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 97 per Mason, Murphy, Wilson, Deane and Dawson JJ.

absence of evidence before me as to when a registered post letter would be delivered in the ordinary course of post.

[48] However, I note that in the particular case of registered post, the contrary can be proved by evidence of the recipient's signature as proof of receipt.

[49] The Gullo objection was received by the Bowen post office on 15 December 2017 and received by Ms Smith on 16 December 2017; both dates being outside the time stipulated by section 260 (4) of the MRA. Accordingly, in this case nothing turns on whether service occurred on 15 or 16 December 2017.

[50] What is clear in this case is that service did not occur on 13 December 2017 as required by section 260 (4) of the MRA.

[51] Accordingly, the Gullo objection was not served within the objection period as stipulated by section 260(4) of the MRA.

The Gullo objection needs to be a properly made objection

[52] The Land Court acquires jurisdiction over an application for a mining lease where a "properly made objection" is made in respect of an application. The key provision is section 265 of the MRA:

> **265 Referral of application and objections to Land Court**
>
> (1) Subsections (2) and (3) apply if—
>
> (a) a properly made objection is made for an application for a mining lease; and
>
> (b) the application for the mining lease relates to an application under the Environmental Protection Act, section 125 for an environmental authority for a mining activity relating to a mining lease; and
>
> (c) either—
>
> (i) an objection notice relating to the application for the environmental authority is given under the Environmental Protection Act, section 182(2) to the EPA administering authority; or
>
> (ii) the applicant for the environmental authority has requested, under the Environmental Protection Act, section 183(1), that the application for the environmental authority be referred to the Land Court.
>
> (2) The chief executive must refer the following to the Land Court for hearing—
>
> the application for the mining lease;

(b) all properly made objections for the application for the mining lease;

(c) all objection notices, relating to the application for the environmental authority, given under the Environmental Protection Act, section 182(2);

(d) if the applicant for the environmental authority has requested the EPA administering authority to refer the application to the Land Court under the Environmental Protection Act, section 183—a copy of the request.

(3) The chief executive must make the referral within 10 business days after the latest of the following—

(a) the last objection day for the application for the mining lease;

(b) if an owner of land may lodge an objection under section 260(2)—the last day of the period for lodging an objection under that subsection;

(c) the last day on which the application for the environmental authority may be referred to the Land Court under the Environmental Protection Act, section 185(2).

(4) Subsections (5) and (6) apply if—

(b) a properly made objection is made for an application for a mining lease; and

(c) the application for the mining lease does not relate to an application under the Environmental Protection Act, section 125 for an environmental authority for a mining activity relating to a mining lease.

(5) The chief executive must refer the application for the mining lease, and all properly made objections for the application, to the Land Court for hearing.

(6) The chief executive must make the referral within 10 business days after the later of the following—

(a) the last objection day for the application for the mining lease;

(b) if an owner of land may lodge an objection under section 260(2)—the last day of the period for lodging an objection under that subsection.

(7) If the Land Court receives a referral under subsection (2) or (5), the Land Court must fix a date for the hearing and immediately give written notice of the date to each of the following—

(a) the chief executive;

(b) the applicant for the mining lease;

(c) a person who has lodged a properly made objection for the application for the mining lease;

(d) a person who has given to the EPA administering authority, under the Environmental Protection Act, section 182(2), an objection notice relating to the application for the environmental authority.

(8) The hearing date must be at least 20 business days after the last objection day for the application for the mining lease.

(9) The Land Court may make an order or direction that a hearing under section 268 for an application for the grant of a mining lease and any objections to the grant happen at the same time as an objections decision hearing under the Environmental Protection Act, section 188 relating to the application for the mining lease.

(10) If all properly made objections referred to the Land Court under subsection (2) or (5) are withdrawn under section 261 or struck out under section 267A before the Land Court forwards its recommendation to the Minister under section 269, the Land Court may remit the matter to the chief executive.

(11) In this section—

properly made objection means an objection lodged under section 260 that has not been withdrawn

[53] Section 265(1)(a) provides that sections 265(2) and (3) (the chief executive's requirement to refer the matter to the Land Court) only apply where a "properly made objection" has been made for an application for a mining lease.

[54] Section 265(2)(b) of the MRA provides that the chief executive must refer all properly made objections to the Land Court for hearing.

[55] Section 265(11) of the MRA defines a *"*properly made objection*"* to mean *"*an objection lodged under section 260 that has not been withdrawn*"*.

[56] Section 261 of the MRA provides that an objection can be withdrawn by the objector providing written notice of the withdrawal. The timing of the withdrawal affects who the objector is required to notify:

(1) If the objector withdraws an objection prior to it being referred to the Land Court, then the objector must give written notice of the withdrawal to the chief executive;[20] and

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20 *Mineral Resources Act* 1989 (Qld) s 261(1)(a).

> (2) If the chief executive has already referred the objection to the Land Court under section 265 of the MRA, then the objector must give written notice of the withdrawal to the Land Court and the applicant.[21]

[57] The applicant submits that because there was non-compliance with section 260(4) of the MRA, the Gullo objection could never have been regarded as properly made and the Land Court did not acquire jurisdiction to hear the matter. This submission requires a consideration of what is meant by section 265(11) of the MRA, i.e. "an objection lodged under section 260 that has not been withdrawn".

[58] Section 260 of the MRA deals with an objection to an application for a grant of a mining lease and provides:

> (1) An entity may, on or before the last objection day for the application, lodge with the chief executive an objection in writing in the approved form.
>
> (2) An owner of land who attends a conference with the applicant for the grant of a mining lease may lodge an objection on or before the expiration of 5 business days after the conclusion of that conference or if the applicant for the grant of the mining lease fails to attend the conference after the day upon which the conference was convened, notwithstanding that the period for objection prescribed by subsection (1) has expired.
>
> (3) An objection referred to in subsection (1) or (2) shall state the grounds of objection and the facts and circumstances relied on by the objector in support of those grounds.
>
> (4) Each objector to an application for the grant of a mining lease shall serve upon the applicant on or before the last date that the objector may lodge an objection to that application a copy of the objection lodged by the objector.

The applicant's contention – service is a mandatory requirement of section 260

[59] The Land Court acquires jurisdiction over an application for a Mining Lease only where a "properly made objection" is made in respect of an application; the key provision is section 265 of the MRA.

[60] Section 265(11) of the MRA defines a "properly made objection" as "an objection lodged under section 260 that has not been withdrawn."

[61] At the hearing, senior counsel for the applicant articulated the issue to be determined:

> "What the court is being asked to decide in this case is what – what did the legislature intend a properly made objection to mean? Did it mean an objection simply lodged under section 260(1)? Or is the court directed, as the actual terms of the Act say, to section 260 and to the entirety of the process contemplated by section 260? We submit to your

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21 *Mineral Resources Act* 1989 (Qld) s 261(1)(b).

> Honour that the objection to be an objection lodged under section 260, as distinct – and we use this distinction deliberately – as distinct from merely 260(1), must be one which complies with the statutory process contemplated by section 260, which includes the process of service in 260(4)."[22]

[62] The applicant submits that the correct construction of section 265(11) of the MRA is that section 260(4) places a mandatory obligation on the objector to serve upon the applicant on or before the last objection day a copy of their objection. If this is accepted, then the applicant submits that the Gullo objection should not have been considered by the Land Court pursuant to section 265 of the MRA, and to do so was an error of law requiring the Land Court decision to be set aside.[23]

[63] The applicant's submissions consider the language of section 265(11) and what is meant by an "objection lodged under section 260." The applicant submits that the underlined words direct attention to the entirety of section 260, and not merely to section 260(1).

[64] The applicant suggests that if the legislature had intended to direct consideration merely to section 260(1), the section would have been drafted to state, "an objection lodged under section 260(1)". In support of this interpretation, the applicant cites a number of sections within the MRA where the legislature has sought fit to specifically refer to sub-sections.[24]

[65] On a practical level, and in further support of a mandatory service requirement being read into section 265(11) of the MRA, the applicant submits that if objectors failed to comply with the service requirement outlined in section 260(4), then an applicant might remain ignorant of an objection for many months. Such a situation would be contrary to the objectives of the MRA to "provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals".[25] With reference to *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 ("*Project Blue Sky*")[26] and the *Acts Interpretation Act* 1954 (Qld),[27] the applicant states that the Court should provide an interpretation of statute that will best achieve the purpose of the legislation.

The proper construction of section 265(11)

[66] Section 265 of the MRA introduces the term "a properly made objection" and facilitates a process whereby the chief executive must refer all properly made objections[28] and the application for the mining lease[29] to the Land Court, and then the Land Court must fix a date for the hearing.[30]

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22 Transcript of Proceedings, 14 April 2020 at 1-13 / line 11 – 19.
23 Transcript of Proceedings, 14 April 2020 at 1-7 / line 25 – 33.
24 The applicant cites the *Mineral Resources Act* 1989 (Qld) ss 265(1)(c)(i), 265(1)(c)(ii), 265(2)(c), s 265(3)(b), 265(3)(c), 265(6)(b), 265(7)(d).
25 *Mineral Resources Act* 1989 (Qld) s 2(f).
26 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78] per McHugh, Gummow, Kirby and Hayne JJ.
27 *Acts Interpretation Act* 1954 (Qld) ss 14A, 14B.
28 *Mineral Resources Act* 1989 (Qld) s 265(2)(b).
29 *Mineral Resources Act* 1989 (Qld) s 265(2)(a).

[67] Section 265(2) places a number of mandatory obligations on the chief executive to advance the application for the mining lease, which includes referring all properly made objections to the Land Court.[31]

[68] Once the Land Court receives the chief executive's referrals, then section 265(7) imposes a mandatory obligation upon the Land Court to fix a hearing date and immediately give written notice to:

(a) the chief executive;

(b) the applicant for the mining lease;

(c) a person who has lodged a properly made objection for the application for the mining lease;

(d) a person who has given to the EPA administering authority, under section 182(2) of the *Environmental Protection Act* 1994 (Qld), an objection notice relating to the application for the environmental authority.

[69] Section 265(11) defines "a properly made objection" as "an objection lodged under section 260 that has not been withdrawn". Prior to an objection being referred to the Land Court, the objector can withdraw the objection by giving notice to the chief executive; there is no obligation to give notice to the applicant at this stage.[32]

[70] Section 265 imposes no obligations upon the applicant for the mining lease.

[71] The applicant's contention is that in order for an objection to be a "*properly made objection*" it must comply with the whole of section 260, and not just section 260(1).

[72] *Project Blue Sky* makes it clear that, ordinarily, the meaning that the legislature is taken to have intended will correspond with the grammatical meaning of the provision.[33]

[73] The correct approach to statutory construction must begin and end with the text itself,[34] whilst also not forgetting that the "modern approach to statutory construction […] insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise".[35]

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30 *Mineral Resources Act* 1989 (Qld) ss 265(7), (8).

31 *Mineral Resources Act* 1989 (Qld) s 265(2)(b).

32 *Mineral Resources Act* 1989 (Qld) s 261(1)(a).

33 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ.

34 *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* (2014) 201 LGERA 82 at 95 [55] per Morrison JA, with whom McMurdo P and Douglas J agreed.

35 *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* (2014) 201 LGERA 82 at 95 [55] per Morrison JA with whom McMurdo P and Douglas J agreed, citing *CIC Insurances Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. See also *Fearnley v Finlay* [2014] 2 Qd R 392 at 397 [17] per Jackson J, with whom Holmes and Morrison JJA agreed, and *Johnston v Brisbane City Council & ors* [2019] QSC 130 at [80].

[74] I note that section 265(11) does not state that a "properly made objection means an objection lodged *and served* under section 260". In my view, had the legislature intended to make service a mandatory requirement then section 265(11) would have so stated.

[75] Importantly, section 265(11) singles out and specifically uses only the word "lodged". The use of the term "lodged" links section 265(11) to section 260(1), which uses the term "lodge with the chief executive".

[76] Further, section 260(4) of the MRA uses the word "*lodged*" in a way that clarifies that service takes place subsequent to any objection having already been lodged. It states:

> (4) Each objector to an application for the grant of a mining lease shall serve upon the applicant on or before the last date that the objector may lodge an objection to that application a copy of the objection lodged by the objector.

[77] In my view, the term "properly made objection" only refers to an objection lodged with the chief executive.[36] Once this has occurred, then section 265 of the MRA places certain obligations upon the chief executive.

[78] If service was a component of a properly made objection, then the chief executive would be required to satisfy itself that the objection had been served upon the applicant for the mining lease, prior to referring the objection to the Land Court.

[79] On a practical level, the chief executive may not necessarily know whether service has occurred in compliance with section 260(4) prior to complying with the mandatory obligations imposed by section 265.

[80] The applicant submits that the chief executive has 10 business days to be satisfied that service has occurred in compliance with section 260(4):

> MR KELLY: I don't wish to delay too much on ground 1, but I will submit this in response of a point raised yesterday, your Honour - - -
>
> HER HONOUR: Yes.
>
> MR KELLY: - - - is that the argument we advance against the point that's being made is that we would submit that the court, when it considers any referral by the Chief Executive, should proceed on the basis that the referral takes place in an objective statutory context where firstly the referral must happen within 10 business days after the last objection day, and that's required by section 265(3). And secondly, the objector – as we said yesterday – is required to serve upon the applicant a copy of any lodged objection on or before the last objection day. That's section 260(4).

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[36] *Mineral Resources Act* 1989 (Qld) ss 260(1), 265(11).

> Against that objective background, we would submit to your Honour that it is not unreasonable to interpret or presume that the 10 business day period is there for a logical reason: namely for the Chief Executive to satisfy itself that objections have been served on the land owner as mandatorily required by the Act. What that would involve is the Chief Executive, even though it not being expressed in the statute as a requirement, the Chief Executive satisfy his or herself as to whether service has in fact occurred, the Act allowing 10 days for that to occur. We say that is not an unreasonable approach to construction given the objective background.[37]

[81] The applicant's proposed construction reads an obligation into section 265 that simply doesn't exist.

[82] If the MRA required the chief executive to be satisfied that objections have been served on the applicant, then the MRA would stipulate such an obligation. It does not.

[83] Further, if an objector failed to comply with the service requirement set out in section 260(4) then it is not the case, as the applicant argues, that an applicant may remain ignorant of an objection for months; section 265(7) requires the Land Court to fix a date for the hearing and immediately give written notice to the applicant.

[84] In my view, when regard is had to the entirety of sections 260, 261 and 265 of the MRA, the statutory interpretation proposed by the third and fourth respondents is correct; the language of section 265(11), and in particular the use of the word "lodged", places a mandatory requirement only on the lodgement of the objection with the chief executive pursuant to section 260(1).

[85] Whether service has been satisfactory effected has no bearing on whether an objection is "properly made" under section 265(11).

[86] The third respondent's objection was "a properly made objection" pursuant to sections 265 of the MRA.

Ground 2 – The recommendation involved errors of law in relation to the scope of the objections

[87] The parties have broken this ground into 2 issues, i.e. whether the Land Court:

(a) Could receive evidence and consider issues on matters not otherwise included in the objections; and

(b) Did receive evidence and consider issues on matters not otherwise included in the objections.[38]

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37 Transcript of Proceedings, 15 April 2020 at 2-13 / line 36 - 46, 2-14 / line 1 – 11.

38 Exhibit 1 (Agreed list of issues in dispute).

The Land Court cannot receive evidence and consider issues on matters not otherwise included in the objections

[88] Relevantly, sections 268(1) – (3) of the MRA provides:

> (1) On the date fixed for the hearing of the application for the grant of the mining lease and objections thereto, the Land Court shall hear the application and objections thereto and all other matters that pursuant to this part are to be heard, considered or determined by the Land Court in respect of that application at the one hearing of the Land Court.
>
> (2) At a hearing pursuant to subsection (1) the Land Court shall take such evidence, shall hear such persons and inform itself in such manner as it considers appropriate in order to determine the relative merits of the application, objections and other matters and shall not be bound by any rule or practice as to evidence.
>
> (3) The Land Court shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application.

[89] Section 268(3) of the MRA qualifies and limits section 268(2) so that the Land Court hearing is not at large.

[90] In *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2002] 1 Qd R 347 ("*Quandamooka*"), the President of the Land and Resources Tribunal, at first instance, had taken the view that the MRA did not preclude the respondents from addressing or leading evidence with respect to matters not raised in their objections.[39]

[91] However, this approach was rejected by the Queensland Court of Appeal, who found that at a hearing pursuant to section 268(1) of the MRA, the Tribunal can only entertain an objection and receive evidence which relates to a ground in a duly lodged objection.[40] Mullins J explained:

> "[61] The distinction drawn by the learned President between hearing submissions and evidence from an objector which do not relate to the objector's objection on the basis that they relate to the other matters in relation to the application (apart from the objection) which the Tribunal has power to hear is not borne out by the plain language of ss 268(2) and (3) of the MRA. The powers given to the Tribunal pursuant to s 268(2) of the MRA are wider than the powers of the Tribunal in relation to the hearing of an objection which are the subject of s 268(3). At the hearing under section 268(1) of the MRA the respondent is limited to making submissions to and placing evidence before the Tribunal which

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39 *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2002] 1 Qd R 347 at 353 [24] per Mullins J, with whom Davies JA and Mackenzie J agreed.

40 *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2002] 1 Qd R 347 at 360 [60] per Mullins J, with whom Davies JA and Mackenzie J agreed.

> relate to a ground in its objection. The purpose of s 268(1) of the MRA is not defeated by giving effect to the plain language of ss 268(2) and (3) of the MRA."[41]

[92] In relation to the requirements of section 268(3), Jerrard JA cited the *Quandamooka* case in *Lee v Kokstad Mining Pty Ltd* [2008] 1 Qd R 65 ("*Kokstad Mining*") at paragraph 9:

> "[9] […] The quoted subsections were considered by this Court in *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation*. This Court held that s. 268(3) was to be construed as qualifying s. 268(2), and that accordingly the LRT was precluded from hearing submissions or evidence from an objector to the grant of a mining lease on a matter not raised in its duly lodged objection. The decision in *ACI Operations v Quandamooka Lands Council Aboriginal Corporation* has the effect, as put by Mackenzie J. in that matter, that the Tribunal's right to hear such persons and inform itself in such a manner as it considered appropriate under s. 268(2) is subject to the limitation in s. 268(3) that, whatever else the Tribunal may do to inform itself of what it is required to satisfy itself, it is precluded from entertaining an objection by an objector to an application or any ground thereof, or any evidence in relation to a ground, where there has not been an objection duly lodged in respect of a matter which an objector subsequently wishes to agitate […]".[42]

[93] The terms of section 268(3) of the MRA are clear. As set out in the *Quandamooka* case and *Kokstad Mining*, the Land Court is precluded from entertaining an objection to an application or any ground thereof, or any evidence in relation to a ground, where there has not been a duly lodged objection in respect of a matter which an objector subsequently wishes to agitate.

Did the Land Court receive evidence and consider issues on matters not otherwise included in the objections?

[94] The applicant originally identified two issues discussed by the Land Court, which they submit were extraneous to the Gullo objection and the Burston objection:

(a) Biosecurity; and

(b) The Environmental Authority application process for approval and whether the Department of Environment and Science was misled ("the Environmental Authority issue").

[95] The applicant does not pursue any contention in relation to biosecurity.

[96] At the outset, the Land Court relevantly summarised the objections in this way:

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41 *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2002] 1 Qd R 347 at 360 - 361 [61] per Mullins J, with whom Davies JA and Mackenzie J agreed.

42 *Lee v Kokstad Mining Pty Ltd* [2008] 1 Qd R 65 at 72 [9] per Jerrard JA.

> "[5] Although the objections raise a number of issues, in essence the objectors say mining is not appropriate in the [Mining Lease Application] because of the impact on the grazing operation on Milwarpa and upon the environment, particularly given its location in the Don River catchment area, which is a coastal catchment for the Great Barrier Reef World Heritage Area.
>
> [6] The matters raised by the objectors are conveniently dealt with under the criteria specified by s 269(4) of the MRA, to which I now turn."[43]

[97] In dealing with the issue of whether the provisions of the MRA were complied with,[44] the Land Court noted:

> "[9] The objections question the adequacy of the information provided with the [Mining Lease Application]. Those complaints are relevant to other criteria I must consider, about mineralisation, financial capacity, and environmental impacts.
>
> [10] The objectors did raise one issue that might be characterised as one of noncompliance, but with the *Environmental Protection Act* 1994, not the MRA. They submit Symbolic Resources used the wrong process by applying to amend its existing environmental authority to include the [Mining Lease Application]. As a result, they say there has not been a proper assessment of the environmental impacts of the proposed mine, and the conditions imposed by the environmental authority are inadequate. I will consider that issue when addressing the environmental impacts of the proposed operation. It does not concern compliance with the provisions of the MRA, which is the focus of s 269(4)(a)."[45]

[98] The issue to be determined in this case is whether the Gullo objection contained any material regarding the Department of Environment and Science being misled.

[99] The Gullo objection raises the Environmental Authority issue as follows:

> **"17.0 Issuing of Environmental Authority**
>
> Environmental Authority EPVL03917316 was issued to Symbolic Resources on 30 May 2017, which includes ML100123. However, the tenure for ML100123 had not been granted as at 30 May 2017 and the tenure is currently a mining lease application. The Environmental Authority for ML100123 was provided to Symbolic Resources without the opportunity for submissions or objections from affected persons. The first I heard of the Symbolic Resources mining project was when I received a letter in the mail (dated 7 November 2017) informing me of a mining lease application process.

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43 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [5], [6] (footnotes omitted).
44 *Mineral Resources Act* 1989 (Qld) s 269(4)(a).
45 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [9], [10].

> It appears that the Symbolic Resources Environmental Authority was issued under a Minor Amendment to the EA for ML1075, which is a mining lease at an unknown location not anywhere near the MLA100123 site. However, section 223 of the Environmental Protection Act 1994 defines the difference between a Major and Minor Environmental Authority Amendment, with section 223(e)(i) noting that a Minor amendment cannot relate to a new relevant mining lease tenure for the Environmental Authority. In this case, it appears that Symbolic Resources have added a new mining lease tenure onto an existing Environmental Authority without following the pathways of the Major Environmental Authority Amendment process (i.e. public notification)."

[100] The applicant describes this objection as a complaint about the type of amendment sought and the fact that there was no public notification process.

[101] The applicant submits that the issue of the Department of Environment and Science being misled is not one that was agitated in either of the objections.

[102] The applicant argues that the Gullo objection does not contain the Environmental Authority issue, because it does not suggest the applicant misled the Department of Environment and Science. Therefore, the Land Court should not have entertained the Environmental Authority issue at the hearing.[46]

[103] The 'compiled list of issues in dispute', as found in the court managed expert evidence report, states the Environmental Authority issue in the following terms:

> "whether the issuing of the Environmental Authority for a "Greenfields" alluvial mine site by simply amending an Environmental Authority for another existing mine site over 100 km away follow the spirit of the approval pathways for environmental authority amendments under the Environmental Protection Act 1994".

[104] The first suggestion of an alleged 'misleading' of the Department of Environment and Science was in the opening submissions of the third respondent:

> "Today we will be presenting to the court that Symbolic Resources' mining lease application for the Christmas Gift open-cut mine site has not at all considered the potential impacts from their proposed 25-year open-cut mining operations and, in fact, have deliberately shortcut the correct environmental approvals and assessment processes under the Environmental Protection Act 1994, for providing false and misleading statements to the Department of Environment and Science, again, an environmental authority for the mining lease. Your Honour, Symbolic Resources will say that it's nothing to worry about environmentally, and they'll follow the standard EA conditions of mining operations, and that we should trust them to do the right thing.
>
> However, your Honour [we] will present to the court that Symbolic Resources have not completed the prudent environmental investigations to provide assurance to the surrounding landholders, nor the general

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46 Transcript of Proceedings, 14 April 2020 at 1-23 / line 10 - 14.

> public, on the level of environmental impact the proposed open-cut site, nor should they be allowed to proceed under the standard EA conditions due to the nature of their operations. We'll provide evidence that show the proposed open-cut mining operations will have a significant impact for the environmental values of the area, detrimentally impacting cattle – cattle property operations, rural aesthetics, and potentially impact the Great – the waters of the Great Barrier Reef World Heritage Area. In my original and – mining lease application objection letter, I stated how my year 10 school assignment on mining had more information on mining processes and environmental practices and controls than the Symbolic Resources mining lease application contained for a 25-year mining lease application, on the doorstep of the Great Barrier Reef.
>
> Your Honour, today we'll also be discussing how Symbolic Resources have not provided evidence of sufficient mineralisation for a [Mining Lease] to be approved. As you'd be well aware, there's a requirement of section 269(4) of the Mineral Resources Act when the Land Court makes their recommendation to the Minister to grant a mining lease, in relation to whether an area is mineralised. Your Honour, at the end of the hearing we'll be asking for the court – asking the court for recommendations to refuse the mining lease application to the Christmas Gift open-cut site due to Symbolic Resources' complete and flagrant disregard for proper environmental and legal processes."[47]

[105] The second respondent also made allegations about the Environmental Authority process in opening submissions, but his concern was in relation to amending an existing application in circumstances where he contended a new application was required.

[106] A considerable amount of the Land Court hearing was taken up with discussion regarding the adverse environmental impacts and specifically the Environmental Authority issue.[48]

[107] The applicant made it known during the course of the hearing that no further information regarding the Environmental Authority issue, or any other issue, had been forthcoming from the second or third respondent on this issue.[49]

[108] The Land Court decision considered the Environmental Authority issue in detail at paragraph 57 – 69 under section 269(4)(j) of the MRA, and in doing so also considered whether the Department of Environment and Science had assessed the potential adverse environmental impacts of the application to amend the Environmental Authority.[50]

[109] The applicant submits that discussion of the Environmental Authority issue in the Land Court decision was "an entirely speculative enquiry into whether an application not before the court had misled an agency who wasn't represented in the proceedings."[51] The applicant submits that the Land Court went beyond its powers under section 268(3)

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47 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-4 at 1-11 / line 37 to 1-12 / line 23.
48 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-4 at 1-73 – 1-78.
49 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-4 at 1-78 / line 45, 1-80 / line 10, 1-82 / line 15.
50 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [57] – [69].
51 Transcript of Proceedings, 14 April 2020 at 1-23.

of the MRA from the last sentence of paragraph 61 through to paragraph 69 of its decision:

> "[61] Symbolic Resources identified the application as a major amendment. In any event, it was common ground that the application to amend the [Environmental Authority] was not publicly notified and the application was granted. Mr Burston and Mr Gullo did not have the opportunity to make a submission on whether [the Department of Environment and Science] should grant the application and, if so, on what conditions. They say the application was misleading and there has not been a proper assessment of the potential impacts of the mine.
>
> [62] In its application to amend the [Environmental Authority], in answer to a question about whether it currently operates under an [Environmentally Relevant Activity] standard, Symbolic Resources checked the "yes" box and stated: "Tenures are managed and operated on the one resource project". Resource project is defined as: "resource activities carried out, or proposed to be carried out, under 1 or more resource tenures, in any combination, as a single integrated operation."
>
> [63] A single integrated operation is defined in the following way:
>
> "[A single integrated operation] [o]ccurs when all the below criteria are met:
>
> (a) the activities are carried out under the day-to-day management of a single responsible individual, for example, a site or operations manager
>
> (b) the activities are operationally interrelated
>
> (c) the activities are, or will be, carried out in one or more places
>
> (d) the places where the activities are carried out are separated by distances short enough to make feasible the integrated day-to-day management of the activities."
>
> [64] I doubt the three tenures can qualify as a single integrated operation because of the requirement in (d) that the distances between the tenures is short enough to make feasible the integrated day to day management of the activities. ML1075 and EPM26160 are located about 120 km away from MLA100123 by road (and 80-85km in a straight line.
>
> [65] Further, the answers to Q14 are relevant. Q14 calls for information relevant to assessing environmental impacts. The applicant must make an assessment in response to a series of questions, and provide sufficient information to support their assessment. In answer to each question, the box N/A was checked,

and a brief reason given for the assessment, with no supporting documentation:

MANDATORY INFORMATION	
A description of the environmental values likely to be affected by the proposed amendment*	Provided ☐ N/A ☒
Reason for N/A: No Change	
Details of any emissions or releases likely to be generated by the proposed amendment*	Provided ☐ N/A ☒
Reason for N/A: No Change no emission or releases	
A description of the risk and likely magnitude of impacts on the environmental values*	Provided ☐ N/A ☒
Reason for N/A: No Change	
Details of the management practices proposed to be implemented to prevent or minimise adverse impacts*	Provided ☐ N/A ☒
Reason for N/A: project operates under the code of environmental compliance for standard exploration and mining projects	
Details of how the land the subject of the application will be rehabilitated after each relevant activity ceases*	Provided ☐ N/A ☒
Reason for N/A: project operates under the code of environmental compliance for standard exploration and mining projects	

[66] Of particular note is the answer to the first question "a description of the environmental values likely to be affected by the proposed amendment". Mr Gullo questioned Ms Smith about the reason

given for the assessment N/A: that there was "no change". He put to her that there was a significant difference in the environmental values of ML1075, which is near Collinsville and some 250 km by waterway from the Great Barrier Reef waters and MLA100123, which is near Bowen, 30km by waterway and in a different regional eco-system to the Collinsville site.

[67] Ms Smith appeared to have misinterpreted the question as one relating to impacts rather than the environmental values likely to be affected. She said "the impacts are about what our activities are and how they will impact that area." That response is surprising, given Ms Smith's former role with the predecessor to [the Department of Natural Resources, Mines and Energy]. The question is expressly focussed on any difference in environmental values that might be affected.

[68] Mr Gullo, who is an environmental scientist, gave evidence about the environmental values of the two sites. Ms Smith did not challenge him on that, except to say there was similar vegetation. I accept Mr Gullo's evidence that the environmental values of the two tenures are different. The answer given by Symbolic Resources on its application to amend the [Environmental Authority] is misleading. On the evidence before the Court, it is inaccurate.

[69] As there is no evidence from [the Department of Environment and Science] about its assessment-level decision, it is not possible for the Court to decide whether the answers considered above did, in fact, mislead it. However, they were apt to do so. It raises doubts about whether [the Department of Environment and Science] could or did properly assess the potential adverse environmental impacts and condition the activity appropriately. Given the evidence from Mr Lucas and Mr Paterson, there is a real question about whether standard environmental conditions are appropriate for this activity on the area applied for. I now turn to that evidence."[52]

[110] The applicant submits that this discussion led the Land Court to conclude that:

"[87] Further, in its application to amend the [Environmental Authority], whether it intended to or not, in its answer to Q14, Symbolic Resources gave [the Department of Environment and Science] misleading information about the environmental values of the [Mining Lease Application]. In the absence of evidence to the contrary, it is reasonable to assume [the Department of Environment and Science] took the application at face value.

[...]

[100] Finally, on the evidence before the Court, I cannot assume that [the Department of Environment and Science] has conditioned the

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52 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [61]-[69] (footnotes omitted).

> [Mining Lease Application] in a way that properly protects the environmental values at risk from the activity. The risks to the environment of the [Mining Lease Application] and also the potential impact on the Great Barrier Reef are also relevant to the public right and interest, and whether any good reason has been shown to refuse to grant the lease."[53]

[111] The applicant submits that the Land Court's discussion at paragraph 61 – 69, and the conclusions drawn at paragraph 87 and 100, agitated issues that were not contained in the Gullo objection[54] and their inclusion constitutes an error of law.[55]

The third respondent's contention – the Environmental Authority issue was raised in the Gullo objection, and was simply developed further at the Land Court hearing

[112] The third respondent submits that the Environmental Authority issue was raised in the Gullo objection.

[113] While the third respondent accepts that the Gullo objection did not specifically suggest the applicant misled the Department of Environment and Science,[56] the third respondent submits that the Gullo objection did suggest that a major Environmental Authority amendment had been issued without public notification.[57]

[114] The third respondent submits that this indicated he had reservations about the Environmental Authority application process – reservations that were developed at the Land Court hearing once more information on the issue had come to light.[58] The third respondent submits:

> "I thought, "Something's not right here." I smelled a rat that the process hadn't been followed correctly. Something fishy is going on [...] I could not understand how a new greenfield site on a remnant – you know, a pristine new mining lease development could go ahead without the appropriate environmental assessments. How the Department of Environment and Science could just wave it through and say, "Yes. Here's your tick. Here's your environmental authority. Take that." It was not right. And that's what my objection referred to."[59]

[115] The third respondent also submits that the Land Court was empowered, pursuant to section 269(4) of the MRA, to take into account whether there would be any adverse environmental impacts caused by the operations.

Fourth respondents' contention – the Land Court was empowered to discuss the Environmental Authority issue

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53 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [87], [100].
54 Transcript of Proceedings, 14 April 2020 at 1-24 / line 7 – 11.
55 See *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2002] 1 Qd R 347.
56 Transcript of Proceedings, 14 April 2020 at 1-50 / line 3 – 17.
57 Transcript of Proceedings, 14 April 2020 at 1-50 / line 11 – 17.
58 Transcript of Proceedings, 14 April 2020 at 1-50 / line 33 – 37.
59 Transcript of Proceedings, 14 April 2020 at 1-49 / line 20 – 31.

[116] The fourth respondents submit that the applicant concedes the Gullo objection raised a complaint in relation to the Environmental Authority application process. Therefore, the fourth respondents submit that the real issue before the Court is whether the Gullo objection can give rise to the matters the Land Court ultimately considered.

[117] The fourth respondents submit that paragraph 17 of the Gullo objection contained the Environmental Authority issue.

[118] The fourth respondents submit that the MRA does not require objectors to include particulars that go further than identifying the ground of the objection, which can be done on a fairly basic level so long as there is a relationship between the ground of objection and the discussion by the Land Court.[60]

[119] Echoing the submissions of the third respondent, the fourth respondents note that while the Gullo objection may not have used the term "misleading conduct," it nonetheless suggests the applicants added a mining lease tenure without undertaking the proper process:

> MR DEWARD: I.e. public notification. Now, in my submission, although that is not as eloquently put as perhaps a lawyer would've put it, that is sufficient to give rise to what I can only refer to as what's ultimately found to be the misleading – the misleading conduct. Because what Mr Gullo seems to be saying in this paragraph is that, the applicants have added a new mining lease tenure without undertaking the proper process.[61]

[120] The fourth respondents therefore submit that the Land Court's decision from paragraph 61 to 69 was not a "speculative enquiry",[62] but rather discussed "precisely the things that are being complained of" in the Gullo objection.[63] The fourth respondents submit that the assessment done by the President contained in paragraph 57 to 69 shows the President working through the complaint leading to paragraph 100 as the conclusion.[64]

[121] The fourth respondents submit that the Land Court was empowered under section 268(2) of the MRA to take such evidence, hear such persons and inform itself in such a manner as it considered appropriate with regards to the Environmental Authority issue.

[122] The fourth respondents submit there was no error of law.

The Land Court was precluded from dealing with the Department of Environment and Science being misled

[123] In my view, the Land Court was precluded from hearing submissions or evidence from an objector in relation to the applicant misleading the Department of Environment and

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60 Transcript of Proceedings, 14 April 2020 at 1-72 / line 34 – 39; Transcript of Proceedings, 15 April 2020 at 2-3 / lines 7 – 13.
61 Transcript of Proceedings, 14 April 2020 at 1-74 / line 14 – 19.
62 Transcript of Proceedings, 14 April 2020 at 1-23.
63 Transcript of Proceedings, 14 April 2020 at 1-76 / line 5-6.
64 Transcript of Proceedings, 14 April 2020 at 1-77 / line 30 – 45.

Science, as it was not contained in the objections duly lodged in respect of the application.

[124] Paragraph 17 of the Gullo objection raises the issue that an Environmental Authority was provided to the applicant without the opportunity for submissions or objections from affected persons. This ground of objection is summarised in the last sentence of paragraph 17:

> "In this case, it appears that Symbolic Resources have added a new mining lease tenure onto an existing Environmental Authority without following the pathways of the Major Environmental Authority Amendment process (i.e. public notification)."

[125] Section 268(3) of the MRA is clear in its terms that the Land Court "shall not entertain an objection to an application or any ground thereof or any evidence in relation to any ground if the objection or ground is not contained in an objection that has been duly lodged in respect of the application."

[126] I do not accept there is "no requirement as to the specifics and the particulars that need to be contained in that ground of objection," therefore "it can be done on a fairly basic level".

[127] Whilst section 268(3) does not stipulate the specificity required of the objection or ground, this section must be read with section 260(3), which sets out what needs to be stated in an objection:

> (3) An objection referred to in subsection (1) or (2) shall state the grounds of objection and the facts and circumstances relied on by the objector in support of those grounds.[65]

[128] The facts and circumstances of the objection as set out in paragraph 17 of the Gullo objection was concerned with an Environmental Authority being provided to the applicant without the opportunity for submissions or objections from affected persons and without following the pathways of the major Environmental Authority amendment process (i.e. public notification); this does not extend to the applicant misleading the Department of Environment and Science.

[129] At the Land Court hearing, under sections 268(1) and (3) of the MRA, the respondents were limited to making submissions and placing evidence before the Land Court which related to a ground in their objections.[66]

[130] In my view, paragraph 17 of the Gullo objection cannot anchor any of the submissions, evidence and findings of the Land Court about the applicant misleading the Department of Environment and Science, within the boundaries established by section 268(3) of the MRA.

[131] The issue about the applicant misleading the Department of Environment and Science was beyond the scope of paragraph 17 of the Gullo objection.

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65 *Mineral Resources Act* 1989 (Qld) s 260(3).

66 *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2002] 1 Qd R 347 at 360 – 361 [61] per Mullins J, with whom Davies JA and Mackenzie J agreed.

[132] The Land Court was precluded from entertaining the Environmental Authority issue as it was not raised in an objection that was duly lodged in respect of the application. The Land Court was in error to do so.

[133] I accept that the Land Court's discussion at paragraph 61 – 69, and the conclusions drawn at paragraph 87 and 100, agitated issues that were not contained in the Gullo objection, and their inclusion constitutes an error of law.

[134] The term 'jurisdictional error' necessarily connotes some mistake around a court's or tribunal's power affecting its proper functioning, either by it misapprehending or disregarding the nature or limits of its functions or powers or acting wholly outside that jurisdiction.[67] Errors may extend to include instances where a tribunal acts in the absence of a jurisdictional fact, disregards a matter the legislation requires to be taken into account (but only as a condition of jurisdiction) or misconstrues the statute which gives it power so that it misconceives the nature of the function it is performing.[68]

[135] In *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, Kiefel CJ, Gageler and Keane JJ set out the consequences of a decision beset by jurisdictional error:

> "Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction. A decision made outside jurisdiction is not necessarily to be regarded as a "nullity", in that it remains a decision in fact which may yet have some status in law. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all". To that extent, in traditional parlance, the decision is "invalid" or "void".[69]

[136] The Land Court exceeded its jurisdiction by entertaining evidence or any submissions based on the applicant allegedly misleading the Department of Environment and Science. The Land Court was precluded from doing so pursuant to section 268(3) of the MRA.

[137] The generality of paragraph 100 of the Land Court decision, where the Land Court stated that on the evidence it cannot assume that the Department of Environment and Science has conditioned the Mining Lease Application in a way that properly protects the environmental value at risk from the activity, must encompass the evidence of the

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67 *Craig v South Australia* (1995) 184 CLR 163 at 176-177 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at 573-574 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

68 *Reihana v Davern & Anor* [2014] QSC 127 at [15] per A Wilson J.

69 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 133 [24] per Kiefel CJ, Gageler and Keane JJ (footnotes omitted).

applicant misleading the Department of Environment and Science. Accordingly, this issue clouds or infects the ultimate conclusions made by the Land Court.

[138] I note that the respondents did not contest that a finding of jurisdictional error, in relation to any of grounds 1 – 3, would result in the Land Court decision being set aside.[70]

[139] As the applicant has established a jurisdictional error, the Land Court's recommendation should be set aside and the matter should be referred back to the Land Court to be decided according to law.

Ground 3 – The recommendation involved errors of law in relation to the construction and application of sections 269(1) and (4) of the MRA

[140] The agreed list of issues breaks this ground into two issues:

(1) Whether the hearing was confined to objections in relation to the grant of a mining lease pursuant to section 245 of the MRA; and

(2) Whether the Land Court had jurisdiction under section 269(4) of the MRA to consider matters dealt with under a separate statutory regime.

[141] The applicant's written submissions were not wholly relied upon at trial.

[142] At trial, the applicant acknowledged that their written submissions for ground 3 did not clearly articulate their argument and sought to refine these points in oral submissions.[71]

[143] At the hearing, the applicant clarified that ground 3 rests with how the court should construe section 269(4)(j) of the MRA, which provides that the Land Court is entitled to consider whether there will be any adverse environmental impact caused by the applicant's [mining] operations and, if so, the extent thereof.[72]

[144] Section 269(4) of the MRA provides:

> (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

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70 Transcript of Proceedings, 14 April 2020 at 1-6 – 1-8.
71 Transcript of Proceedings, 14 April 2020 at 1-26 / line 10 – 16.
72 Transcript of Proceedings, 14 April 2020 at 1-28 / line 1 – 3.

(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.[73]

[145] At the hearing, the issues in dispute were confined in scope. The applicant referred to paragraph 69 of the Land Court decision and submitted that if the Land Court had followed the second last sentence of this paragraph (as underlined), then that would have reflected a proper approach to decision making under section 269(4)(j) of the MRA:[74]

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73 *Mineral Resources Act* 1989 (Qld) s 269(4).

74 Transcript of Proceedings, 15 April 2020 at 2-22 / line 30 – 40.

> "[69] As there is no evidence from [the Department of Environment and Science] about its assessment-level decision, it is not possible for the Court to decide whether the answers considered above did, in fact, mislead it. However, they were apt to do so. It raises doubts about whether [the Department of Environment and Science] could or did properly assess the potential adverse environmental impacts and condition the activity appropriately. Given the evidence from Mr Lucas and Mr Paterson, there is a real question about whether standard environmental conditions are appropriate for this activity on the area applied for. I now turn to that evidence."[75]

[146] It is clear that the Land Court properly assumed the applicant would comply with the legal requirements that effected its operations.[76] The applicant submits that the correct inquiry for the Land Court was therefore:

> "If my client – our client had complied with the conditions, would there have still been adverse environmental aspects and to what extent?"[77]

[147] The applicant submits that its argument for ground 3 is best exemplified by paragraph 72 of their written submissions:

> "[72] Considerations of overland flow and impact on groundwater through environmental contamination are matters that may be considered in the objections hearing under the MRA but, as these issues have already been conditioned in the [Environmental Authority], the appropriate enquiry was as to the adequacy of the condition. No such enquiry was made. Indeed, one of the experts, Mr Lucas, prepared his report on the basis of the Applicant undertaking in-stream mining of the Ward Creek in circumstances where no such mining will take place and the [Environmental Authority] expressly prohibits it. Despite this, Mr Lucas did not alter his position regarding the prospective environmental impacts and the Land Court relied on this evidence."

[148] The Land Court acknowledged that the applicant did not propose to mine Ward's Creek, and the Environmental Authority would appear to preclude such operations. The Land Court noted that the applicant would build a weir if required for its operations.

[149] The Land Court then noted that further mining had the potential to mobilise sediments into the watercourses, which could have an impact on water quality.

[150] At the Land Court hearing, Mr Lucas, an environmental engineer and geomorphologist, provided a report about the aquatic habitat values that might be affected by the mine and the risks of the activity. Mr Lucas assumed when writing his report that the proposal was to mine in the watercourses. This was not the case. Indeed, the Environmental Authority conditions prohibited such activity. The Land Court decision acknowledges that Mr Lucas' position was clarified when he gave oral evidence.

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75 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [69].
76 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [49].
77 Transcript of Proceedings, 15 April 2020 at 2-23 / line 5-6.

However, in Mr Lucas' oral evidence he maintained his opinion that there was a significant risk of sediment mobilisation under the Mining Lease Application.

[151] At the Land Court hearing, Mr Lucas was asked to consider the environmental impacts of the mine if the applicant complied with conditions A5 and A6, which dealt with storm water runoff and sediment control structures. However, the applicant submits that this line of inquiry was not considered in the Land Court decision.

[152] The applicant submits that the controversy that fell to be decided by the Land Court should be framed by the applicant's line of inquiry with Mr Lucas:

> "Here are the standard conditions dealing with sediment. Here's how we propose to mine. What's your opinion about whether those matters will be satisfactory?"[78]

[153] However, the applicant submits the Land Court decision never grappled with or decided these issues, and instead embarked upon a line of reasoning, exemplified first by paragraph 77, where the President introduces the implied notion that there was no evidence the Department of Environment and Science had not considered the potential impact of sediment mobilisation on the marine environment.

[154] The applicant notes that conditions A5 and A6 were standard conditions directed specifically to erosion and sediment control.[79]

[155] The applicant refers to paragraph 100 of the Land Court decision, which, in their submissions, addresses the critical part for ground 3, where the President concludes:

> "[...] I cannot assume that the department has conditioned the [Mining Lease Application] in a way that properly protects the environmental values at risk from the activity."[80]

[156] The applicant submits that the Land Court's refusal to assume "that the department has conditioned the Mining Lease Application in a way that properly protects the environmental values at risk from the activity" is premised on the notion that the applicant misled the Department of Environment and Science:

> "And, because of that assumption, the Land Court never in fact engages with the adequacy of the condition in fact imposed by conditions A5 and A6, which was the subject of evidence by the expert in response to my client's proposed mining activity. And you will not, your Honour, find any reference at all to conditions A5 and A6 in the reasons."[81]

[157] The applicant submits that the Land Court should have assessed any possible environmental impact with reference to the applicant following the Environmental Authority conditions.

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78 Transcript of proceedings, 15 April 2020, at 2-23 / line 40 – 42.
79 Transcript of proceedings, 15 April 2020, at 2-24 / line 6 – 7.
80 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [100].
81 Transcript of proceedings, 15 April 2020, at 2-24 / line 17 – 21.

[158] The applicant submits that section 269(4)(j) of the MRA is not an invitation for the Land Court to speculate about the processes followed under another Act by another authority, and whether those processes were satisfactory.

[159] Rather, the applicant submits the Land Court should consider an objection against the background of facts established by the Department of Environment and Science.[82] The applicant submits that where there is a statutory mechanism to deal with a matter in another piece of legislation, then the appropriate mechanism ought to be followed. In support of this submission, the applicant refers to *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184 ("*Oakey Coal*"):

> [110] It is fundamental that the *Mineral Resources Act*, including to the extent that it operates in tandem with the *Environmental Protection Act*, is concerned only with the significance of activities that are prohibited unless authorised by a mining lease or an environmental authority. It is axiomatic that the provisions of these Acts have nothing to say about any activities which are prohibited by other laws and which these Acts cannot authorise. That is why s 269(4)(i) uses the expression "operations to be carried on under the authority of the proposed mining lease" and why s 269(4)(j) refers back to that expression. Activities that are prohibited by other laws cannot be undertaken whether or not a lease is granted or an environmental authority is issued.
>
> [111] For this reason, when considering a referral to it, the Land Court is also concerned only with those activities in which an applicant proposes to engage lawfully because they will be permitted under the proposed statutory instruments or, not being generally prohibited, will be freely undertaken as part of the mining activities that would be authorised.
>
> [112] Once it is appreciated that, without a special statutory authority to do so, the holder of a mining tenement has no right to interfere with groundwater, it follows that the grant of a mining lease cannot possibly, as a matter of practicality, impinge upon groundwater. If, as a matter of practical fact, proposed mining operations would have no effect upon groundwater, then the issue is irrelevant. If mining operations would interfere with groundwater, then those mining operations cannot be undertaken until a further authorisation, permitting interference with groundwater, is obtained. A mining lease would not, on its own, then be enough for such mining operations to be undertaken lawfully.
>
> [113] In this case, the *Water Act*, in its applicable form, vested all rights to the use, flow and control of water in the State. "Water" was defined to include "underground water". Section 808(2) made it an offence for a person to "interfere" with water unless authorised to do so under the Act or under another law. A person could obtain such an authority under the *Water Act*. Section 206(1)

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[82] Transcript of proceedings, 14 April 2020 at 1-30 / line 41 – 47, 1-31 / line 1 – 12.

> allowed the holder of a mining tenement to apply for a licence that would permit such a holder to interfere with water "under" the relevant land. The process for the grant of a licence follows the usual form of requiring public notification and requiring the decision maker to take into account statutory criteria. The whole of Chapter 3 of the *Water Act* is concerned with mining activities and their "impacts" on groundwater.
>
> [114] The separation of the consideration of issues concerning groundwater from other environmental issues relating to an intended mining project was inconvenient. For this reason, amendments have been enacted so that interference with groundwater is now one of the rights of the holder of a mining lease. The consequence is that interference with underground water, of the kind in issue in this case, now constitutes part of the "operations to be carried on under the authority of the proposed mining lease" and is, for that reason, a matter to be taken into account by the decision maker. However, those amendments do not apply to this case.
>
> [115] It follows that, in my respectful opinion, Bowskill J was right in her conclusion that it was outside the jurisdiction of the Land Court in this case to consider the effects of the proposed mining activities upon groundwater.[83]

[160] The applicant submits that the Land Court did not consider the adequacy of the Environmental Authority conditions in its decision, and that this was an error of law.[84]

The Land Court did consider the adequacy of the Environmental Authority conditions

[161] In my view, the Land Court did consider the adequacy of the Environmental Authority conditions; in particular condition A5 and A6.

[162] The applicant submits that the correct inquiry for the Land Court was if the applicant complied with the conditions, then "would there have still been adverse environmental aspects and to what extent?"[85]

[163] The Land Court proceeded on the basis that the applicant would comply with the legal requirements that effect its operations, however stated that there was a real question about whether the standard environmental conditions were appropriate for the area.[86]

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83 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* [2019] QCA 184 at [110] – [115] per Sofronoff P, with whom Philippides JA and Burn J agreed (footnotes omitted); see also *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 13.

84 Transcript of proceedings, 14 April 2020 at 1-7 / line 25-31.

85 Transcript of Proceedings, 15 April 2020 at 2-23 / line 5.

86 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [69].

[164] The Land Court then sets out in paragraphs 70 to 77 the evidence which raised such a question.

[165] The applicant states that the Land Court never in fact engages with the adequacy of conditions A5 and A6 which was the subject of expert evidence in response to the applicant's mining activity. To this end, the applicant highlights that there is no reference at all to conditions A5 and A6 in the reasons.

[166] However, in my view, the Land Court has engaged with the adequacy of conditions A5 and A6. Clearly, the issue of sediment mobilisation and control particularly concerned the Land Court:

> "[71] Given the lack of detail in the material supporting the [Mining Lease Application], Mr Lucas assumed, in writing his report, that the proposal was to mine in the watercourses. That was clarified when he gave oral evidence. Nevertheless, he maintained his opinion there was a significant risk of sediment mobilization in the [Mining Lease Application].
>
> [72] Mr Lucas said the watercourses in the area he inspected are morphologically diverse, and that diversity provides the aquatic habitat values. The watercourses maintain a reasonable balance between sediment supply, storage and transport. The hydrology of the system is relatively unaffected by the existing land use activities.
>
> [73] If mining caused sediment mobilisation, the environmental values at risk are the diversity of habitat in downstream watercourses and, for finer sediment, the marine environment of the Great Barrier Reef lagoon. Mr Lucas was unable to describe the likely magnitude of impacts on those values on the limited information provided by the applicant, in particular about the precise location of disturbance, and whether it is within the flood envelope. He estimated the flood envelope would extend more than three metres from the low bank of the waterway. Although he was shown some data about rainfall events, he said the the flood envelope for the [Mining Lease Application] would need to be properly modelled.
>
> [74] Mr Lucas said the alluvial terraces would be subject to stream flows in larger rainfall and runoff events. Substantial earthworks would be required to construct diversion channels to take the flows out of the valley, and to protect mining operations from flood flows that would otherwise mobilise sediment that would flow through to the Great Barrier Reef lagoon.
>
> [75] Mining close to the creek was not the only issue with sedimentation. Mr Lucas said that disturbed areas well back from the creek, in moderate to high slopes, will generate sediment that will travel. Then it is a question of whether it is adequately captured by sediment control systems before it enters the watercourse.

> [76] If the sediments are non-dispersive, Mr Lucas said it might be difficult to find enough room for sediment containment given the terrain of the [Mining Lease Application]. If the fine sediments are dispersive, they are very difficult to contain in sediment containing structures because they do not drop out of suspension and, if the systems fill, the fine dispersive sediment will continue to travel through. If fine dispersive material was in a flood flow out of this catchment (the Don River system), it would most likely travel through to the marine environment, the Great Barrier Reef lagoon.
>
> [77] The impact of sediment on the Great Barrier Reef is a matter of current concern. It is the subject of a Bill now before the Queensland Parliament which, if passed, would strengthen the regulation of this impact in the [*Environmental Protection Act* 1994 (Qld)]. There is no evidence that [the Department of Environment and Science] has considered the potential impact of sediment mobilisation on the marine environment or sought to impose conditions directed to avoiding or mitigating that risk.[87]

[167] Condition A6 deals with sediment control and sediment control structures:

> **A6:** The holder of the environmental authority must design, install and maintain adequate erosion and sediment control structures wherever necessary to prevent or minimise erosion of disturbed areas and the sedimentation of any watercourse, waterway, wetland or lake."

[168] In paragraphs 75 and 76 of its reasons, the Land Court, with reference to the expert evidence, engages with the substance of condition A6 when it considers the adequacy of sediment control systems and sediment containing structures. It is noted that the Land Court did not proceed on the basis that mining would occur in or near the watercourses as it stated that sediment mobilisation could occur in areas well back from the creek.

[169] The Land Court concludes that the evidence of Mr Lucas and Mr Patterson raises a real question about the adequacy of the standard conditions to deal with adverse environmental impacts of the proposed activity of the Mining Lease Application and surrounding environment.[88]

[170] I do note that the issue, as raised in ground 2, about the Department of Environment and Science being misled by the applicant, does cloud, or infect, paragraph 100 of the Land Court decision. On the evidence, the Land Court could not assume that the Department of Environment and Science conditioned the Mining Lease Application in a way that properly protects the environmental values at risk from the activity. Such a finding must encompass the evidence about the Department of Environment and Science being misled.

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87 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [71] – [77] (footnotes omitted).

88 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 39 at [89].

[171] However, in my view, after considering the reasons, it is not the case that conditions A5 and A6 were only ever considered in the context of the Department of Environment and Science being misled. The Land Court's reasons demonstrate, with some particularity, that it did engage with the adequacy of condition A5 and A6, which was the subject of expert evidence in response to the applicant's mining activity.

[172] The applicant's arguments in relation to ground 3, as refined and articulated at the hearing, have no substance.

Ground 4 – the decision was made in breach of the rules of procedural fairness

[173] In their agreed list of issues, the parties separate ground 4 into three sub-issues:

(1) Whether the applicant was given a reasonable opportunity to adduce evidence in response to the lay witness evidence of the second respondent and the third respondent; ("the Mr Pott issue");

(2) Whether the applicant was given a reasonable opportunity to adduce evidence in response to the expert evidence of the second respondent and the third respondent; ("the expert report issue"); and

(3) Whether any of these matters amount to a breach of procedural fairness sufficient to give rise to the relief sought by the applicant.[89]

Procedural Fairness

[174] The applicant acknowledges that a finding that there has been a breach of procedural fairness does not necessarily mean the Land Court decision must be set aside.[90]

[175] The applicant submits that in determining whether a breach of procedural fairness has occurred, and whether this requires the primary decision to be set aside, the court should be guided by *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors* [2009] QSC 205.

[176] In *John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors,*[91] Applegarth J noted that even if the court is satisfied that there has been a denial of natural justice, relief may be denied if it can be shown that compliance with the requirements of natural justice would have made no difference to the outcome.[92]

[177] The applicant must show that, as a matter of reality and not mere speculation, the applicant has been deprived of a substantive opportunity to influence the outcome of a decision.[93]

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89 Exhibit 1 (Agreed list of issues in dispute).

90 Transcript of proceedings, 14 April 2020 at 1-7 / line 35 – 39.

91 *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205.

92 *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205 at [40] per Applegarth J, citing *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147, *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at 91 [17], 130-131 [131].

93 *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205 at [40]; Transcript of proceedings, 14 April 2020 at 1-7 / line 40 – 47, 1-8 / line 1-2.

[178] The applicant also outlines the principles of natural justice as discussed in *Arcturus Downs Limited v Peta Stilgoe (Member of the Land Court of Queensland) & Ors* [2019] QSC 84 at [91]:

> "The classic ingredients of the principles of natural justice include requirements that a party is made aware of the case that is put against them and is given an opportunity to present its material to the decision maker and be given an appropriate opportunity to address the issues raised."

[179] I note that all parties were self-represented at the Land Court hearing. Ms Smith, the director and public officer for the applicant, appeared on behalf the applicant.

The Mr Pott issue

Background

[180] On the first morning of the hearing and prior to hearing any evidence, the President enquired about whether there were witnesses in the courtroom. The second respondent then stated that he may have some witnesses:

"KINGHAM P:	[...] Mr Burston, do you have anyone here?
RESPONDENT M. BURSTON:	Yes, your Honour. I don't have any witnesses – registered witnesses to stand in, but I do have some people here that can confirm something, and they would be happy to be sworn in on a day if it was necessary."
KINGHAM P:	Well, I did ask that all parties file statements by any witnesses they intended to rely upon, and as I understand it, you have filed no evidence.
RESPONDENT M. BURSTON:	No, that's right.
KINGHAM P:	Including not any evidence from you or from Mrs Burston.
RESPONDENT M. BURSTON:	No.
KINGHAM P:	So at this stage, I wouldn't be allowing you to call anybody to give evidence other than the expert witnesses who have been identified to give evidence on Friday.

RESPONDENT M. BURSTON: Fine. Thank you, your Honour.[94]

[181] Mr Cross was called on behalf of the applicant and gave evidence about the permanent spring in the area of the Ward Creek bore. Ms Smith asked Mr Cross whether he had ever seen this spring dry up, and Mr Cross gave evidence that the spring dried up most years. Mr Cross also gave evidence that the applicant's proposed mining activity would probably not impact the third respondent's bore.[95] When questioned by the President, Mr Cross conceded that he did not have any particular qualifications in this area.[96]

[182] Ms Smith also asked Mr Cross whether he had observed certain animal species on the property during the ten years that he owned the property. This line of questioning was retracted when the President noted Mr Cross was being asked to challenge the expert evidence of Mr Patterson, without holding the relevant expertise.[97]

[183] It is clear that the President did not find Mr Cross to be an impressive witness.[98]

[184] On the second day of the Land Court hearing, Mr Murphy was called on behalf of the applicant. He gave evidence which included his knowledge of the soil and rock samples he had taken from the Ward Creek area.[99]

[185] Mr Murphy also gave evidence that Ward Spring had been dry at one time.[100]

[186] It was at this stage that the third respondent asked the President if he could call Mr Pott as a witness. Mr Pott had been a previous owner of Milwarpa.

[187] The third respondent submits that the reason he raised this evidence so late in the hearing was that he had just 'twigged to the relevance of it':

> RESPONDENT GULLO: And Mr Gideon Potts has an affidavit statement saying that he has never seen the spring go dry - Ward's spring go dry, and that's three generations of cattle grazing before. So I just picked - just a point that Mr Murphy raised, it just twigged. So could we introduce this?[101]

[188] Mr Pott had signed a statutory declaration in the following terms:

> "To Whom It May Concern
>
> I Gideon Wayne Pott was a 3rd generation grazier on Milwarpa for over 53 years and in that time I have never seen Wards Spring go dry.
>
> Milwarpa relied totally on springs and surface water up until the late 60's

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94 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-4 at 1-4 / line 38 – 1-5 / line 17).
95 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-125 – 2-127.
96 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-127 / line 27 – 30.
97 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-131 / line 22 – 47.
98 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 29 at [47].
99 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-151 – 2-163.
100 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-162 / line 7.
101 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-162 / line 25 - 30.

> After that time, man made water bores were introduced. This allowed us to expand cattle numbers. In my time on Milwarpa, the property run 2000 to 2400 head of cattle. The variation was due to wet or dry seasonal conditions. I have never met or seen Anna Smith [...] the company Symbolic Resources and in my time on Milwarpa, I have never given Anna Smith or Symbolic Resources permission to prospect, fossick or investigate mineralisation.
>
> Regards,
>
> Gideon W Pott".

[189] Mr Pott's statutory declaration had been prepared on 7 June 2019.

[190] However, Ms Smith was unaware that a written statement had been prepared and signed by Mr Pott until it was presented at the hearing six days later.

[191] At the time Mr Pott was called to give evidence and present his affidavit, the President stated:

> "[...] if we have a witness here who is able to give evidence about it from a long association with the property, I'm minded to hear it, but I want Ms Smith to have an opportunity to have a look at it first. So I'll just stand down for a couple of minutes and then we'll resume and I'll hear from you, Ms Smith."[102]

[192] The hearing was stood down for ten minutes to enable Ms Smith to review Mr Pott's affidavit.

[193] After the adjournment, the President asked Ms Smith whether she would like to present an argument against the acceptance of Mr Pott's evidence.[103] Ms Smith replied:

> "While we're not happy about late evidence being submitted, your Honour, and I believe this matter's been discussed a number of times in court, we've got no objection."

[194] Prior to Mr Pott being called, the President made it clear that she was unimpressed with Mr Pott being called at this late stage in the proceedings:

> KINGHAM P: Well, given it was a live issue, when there was all the discussion at the beginning of the hearing about new evidence, that would've been the time for the - for you or for Mr Burston to have brought to my attention that there was this information from Mr Pott because it could've saved the court an awful lot of time. It could've been put to anyone who was expressing an opinion about either the source of it or whether it runs dry. So I am unimpressed. But I will allow you to lead the evidence. Are you wanting to

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102 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-164 / line 1 – 5.

103 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-164 / line 14 – 15.

ask any more questions of Mr Pott or do you just rely on his statement?[104]

[195] Mr Pott was then called to give evidence. The scope of his evidence was limited and he was asked very few questions by any party. The entirety of his evidence is as follows:

RESPONDENT GULLO: Just rely on the statement. I just wanted to confirm with Mr Pott, the first sentence that - so you talk about you're a third generation grazier, Mr Pott. How many years has your - Roma Peak [indistinct] been in your family?—In my family?

[indistinct] was in the family, sir [indistinct] Mr Pott?—Well, my great grandfather owned it. He died in 1953, the year I was born. So he died that year. And he willed it to my father. And I've become a part owner in the late 70s probably. So - and I lived there for 53 years before selling out there.

So what date do you think your family, did the Pott family---- ?—Sorry?

So what date do you think the Pott family first took on Milwarpa, that region that the property did----?—It would've been sometime in the 1800s.

In the 1800s?—Yes.

Okay. So, Mr Pott, from your records - obviously, your records from the family and this is obviously for the time - you've been there for 53 years. So from the 1800s plus your 53 years----

KINGHAM P: He can really talk about his - he can talk about his 53 years, can't he?

RESPONDENT GULLO: His only 50 years. Okay, okay.

KINGHAM P: And he has. He has in his statement.

RESPONDENT GULLO: Okay. I just wanted to---

KINGHAM P: I'm not minded to let you go any further than that.

RESPONDENT GULLO: Okay. Fair enough. That's all I wanted to know, your Honour. Just to confirm that Mr Pott's knowledge [indistinct] his time there. Thank you.

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104 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-166 / line 1 – 8.

KINGHAM P: He's stated that very clearly.

RESPONDENT GULLO: Yes. Okay.

KINGHAM P: Ms Smith, are you wanting to ask any questions?

MS SMITH: Yes, your Honour.

Mr Pott, when did you sell the property or when did you vacate the property?—Two thousand and six.

Yes. Okay?—It was sold on the 6th of July 2006.

Thank you very much for that answer. So to your knowledge, since that time, have there been any dry years?—Since we've sold?

Yes?—They've been better years actually.

Okay. Well, I don't - that's all, your Honour, for Mr Pott.[105]

[196] After Mr Pott was excused as a witness, Ms Smith stated:

> "But just before we proceed with that, given this new evidence has been provided, I'd like to recall Mr Murphy just for one question, your Honour, if that's all right."[106]

[197] The President allowed for Mr Murphy to be recalled as a witness. Mr Murphy produced a photo that purportedly showed Wards Bore dry. The President noted that the photograph should have also been put to Mr Pott.[107] Mr Pott was then recalled and his evidence was that the photograph didn't look like the location that he was talking about, and it did not change his evidence.

The applicant's contention – the Mr Pott issue

[198] The applicant submits that Ms Smith had no real opportunity to prepare to question Mr Pott or to lead evidence in contradiction or qualification of Mr Pott's evidence.

[199] Ms Smith deposes that while she did not object to the evidence at the time, this position was adopted without the benefit of any legal advice and without having formed any considered views about the ultimate significance of the evidence to the hearing.

[200] The applicant submits that they were denied natural justice because they were not afforded a reasonable opportunity to cross examine or lead evidence in response to Mr Pott, as a result of not being adequately notified of the prospect of Mr Pott being called as a witness.

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105 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-166 – 2-167.
106 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-168 / line 1 – 3.
107 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-169 / line 19 – 22.

[201] The applicant cites the case of *Tomasevic v Travaglini* (2007) 17 VR 100 ("*Tomasevic*"), where Bell J at [89] describes the duty of a trial judge or adjudicators of tribunals to assist self-represented persons, including in circumstances where all parties before the court are litigants in person:

> "[89] As part of their overriding obligation to ensure a fair trial, trial judges have a positive duty to give proper assistance to self-represented litigants, both in criminal and civil trials and also in interlocutory proceedings, such as in applications to strike out pleadings. The same duty applies to masters, magistrates, commissions and tribunals, but of course the application of the duty would have to take into account the particular demands of those jurisdictions. The duty applies even when all the parties are litigants in person."[108]

[202] The applicant notes that in *Tomasevic*, one of the tests as to whether procedural fairness has been extended is whether the person has been given the opportunity to make an effective choice, in a situation where a presiding judge is required to give the litigant appropriate advice and assistance.[109]

[203] The applicant submits that the President indicated a preparedness to accept Mr Pott's evidence before knowing the background of how the evidence had been prepared, and without receiving an explanation as to why it had not been provided earlier.[110]

[204] The applicant submits that the President should have:

1. Required an explanation as to why the evidence was being called late, when it was being called and when the witness statement had been prepared;[111]
2. Outlined Ms Smith's options, including whether she could object on the basis that the explanation for the delay in providing Mr Pott's evidence was unsatisfactory;
3. Informed Ms Smith that she could request more time before she cross-examined Mr Pott; and
4. Informed Ms Smith that the calling of Mr Pott could be conditional upon her ability to recall her own witness, who, by that stage, had already given evidence and was not recalled at the hearing.[112]

[205] The applicant also submits that the conclusion at paragraph 52 of the Land Court decision indicates the evidence of Mr Pott was relied upon and preferred over the evidence of the applicant's lay witness, Mr Cross:[113]

> "[52] Because of the lack of information from Symbolic Resources about its proposed project, it is not possible to assess the

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108 *Tomasevic v Travaglini* (2007) 17 VR 100 at [89] per Bell J (footnotes omitted).

109 *Tomasevic v Travaglini* (2007) 17 VR 100 at [91]; Transcript of proceedings, 14 April 2020 at 1-33 / line 36 – 44.

110 Transcript of Proceedings, 14 April 2020 at 1-35 / line 23 – 36.

111 Transcript of Proceedings, 14 April 2020 at 1-35 / line 13 – 14.

112 Transcript of Proceedings, 14 April 2020 at 1-35 / line 16 – 21.

113 Transcript of Proceeding, 14 April 2020 at 1-33 / line 7 – 10; *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 29 at [46] – [47].

> magnitude of the risk to either water quantity or quality and, accordingly, its impact on the grazing operation. I am satisfied, though, that the proposed mining operation has a potential to affect the grazing operations outside as well as inside the [Mining Lease Application]. That is a relevant consideration when assessing whether the operations will conform with sound land use management."[114]

[206] The applicant submits that the circumstances of Mr Pott being called as a witness amount to a breach of procedural fairness.

The applicant was not denied procedural fairness in relation to the Mr Pott issue

[207] Pursuant to section 268(2) of the MRA, the President has a wide discretion to take such evidence, hear such persons and inform itself in such a manner as it considers appropriate in order to determine the relative merits of the application, objections and other matters. The Land Court shall not be bound by any rule or practice as to evidence. It was within the ambit of the President's power to consider the evidence of Mr Pott.

[208] In determining the extent to which a trial judge must assist a self-represented litigant, Chesterman JA in *Ross v Hallam* [2011] QCA 92[115] endorsed Applegarth J's summary in *Mbuzi v Hall* [2010] QSC 359:[116]

> "[25] A self-represented litigant, like any other litigant, impliedly undertakes to the Court and to the other parties to proceed in any expeditious way.[117] The purpose of the rules of civil procedure is to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".[118] The just resolution of the real issues in civil proceedings may on occasions require a judge to give proper assistance to self-represented litigants to ensure that the proceedings are conducted fairly and to avoid "undue delay, expense and technicality".[119] The proper scope for assistance depends on the particular litigant and the nature of the case.[120] The judge cannot become an adviser to the self-represented litigant, for the role of the judge is fundamentally different to that of a legal adviser. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented.[121]"

[209] In my view, the President adequately assisted the self-represented litigants at the hearing. I note that at the beginning of the hearing, the President of the Land Court stated:

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114 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 29 at [52].
115 *Ross v Hallam* [2011] QCA 92 at [21] per Chesterman JA.
116 *Mbuzi v Hall* [2010] QSC 359 at [25] per Applegarth J.
117 UCPR r 5(3).
118 UCPR r 5(1).
119 UCPR r 5(2).
120 *Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337 at [141].
121 *Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337 at [142].

> "So in effect, everybody here in this hearing is representing themselves, and that places an obligation on this court to make sure that everybody understands the procedure. And so I'll start out by saying if at any point you're not sure of what the right thing is to do, you just ask. Even though we're separated across the courtroom by this large void, I can assure you that I will be very responsive to you. So if you need advice about the procedure that we're following at any time, I can assist you with that."[122]

[210] Accordingly, at the beginning of the hearing, the President outlined that she would be available to assist all parties with their questions at any point in the proceedings.[123] Ms Smith sought no such assistance in relation to the Mr Pott issue.

[211] In my view, the President provided appropriate assistance to all of the self-represented litigants throughout the course of the proceedings.

[212] The President provided an adjournment for Ms Smith to review the short affidavit material. In my view, the ten-minute adjournment granted to Ms Smith to review the affidavit material was sufficient in light of the brevity of the material. Ms Smith, upon reading the three paragraph statutory declaration, whilst not happy with the late tendering of the statement, raised no objection.

[213] Ms Smith noted that this matter had been discussed a number of times during the hearing.

[214] Ms Smith was aware of the importance of recalling a witness if there was any further relevant evidence to add. Subsequent to Mr Pott's evidence, Ms Smith appreciated that she needed to recall Mr Murphy. The President gave her leave to do so.[124] Ms Smith made no application to recall Mr Cross in light of Mr Pott's evidence.

[215] Mr Pott and Mr Murphy gave evidence about whether Ward Creek was dry or not:

(1) Mr Murphy said he had seen it dry;

(2) Mr Pott said that Milwarpa relied totally on springs and surface water up until the late 60s; and

(3) The President noted that Mr Pott's evidence only related to his time on the property.[125]

[216] Furthermore, the President found Mr Cross an unimpressive witness, irrespective of Mr Pott's evidence:

> "[45] Mr Cross stated there are only limited intermittent flows in the watercourses on the [Mining Lease Application] during periods of heavy and cumulative rain. The closest water point to the mining lease is Wards Bore, approx. 2.7km from the nearest [Mining Lease Application] boundary, and a "soak" (Ward's spring) fed from intermittent seepage located upstream and on a separate

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122 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS4 at 1-3 / line 23-29.
123 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-4 at 1-3 / line 23-31.
124 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-168 / line 1 – 3.
125 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-5.2 at 2-166 / line 31-32.

> draining system to the [Mining Lease] drainage area. Further, he said "the seepage only shows in exceptional years or back to back better than average years although it does not present soak water for the whole year in most cases generally drying up anytime from autumn to late spring depending on the season".
>
> [46] In response to my questions, Mr Cross conceded he did not know the source of the spring and that it was "probably the wrong thing to say" that it was fed from a different drainage system. Contrary to Mr Cross's evidence about Ward's Spring, Mr Pott said in his 53 years on Milwarpa he had never seen the spring go dry.
>
> [47] Mr Cross was not an impressive witness about either grazing capacity or water. His written statement included assertions that he later agreed were wrong or had no foundation. Where there is a conflict in the evidence of Mr Cross and Mr Pott, I prefer that given by Mr Pott who lived on the property for 53 years."[126]

[217] In my view, in all of the circumstances, the President did not deny the applicant procedural fairness in respect of the Mr Pott issue.

The expert report issue

The applicant's contention – the expert report issue

[218] The applicant also submits that they were denied procedural fairness by not being afforded a reasonable opportunity to lead expert evidence in reply to that of Mr Lucas and Mr Patterson.

[219] The applicant submits that this was inconsistent with "the principles of equity, good conscience and the substantial merits of the case and the manner in which the Land Court's jurisdiction is to be exercised in light of section 7 of the *Land Court Act* 2000 (Qld)".[127]

[220] The applicant outlines that before the trial, the President ordered the parties to file and serve a written notice of the expert witnesses they intended to engage for the hearing by 15 February 2019. The order stated:

> "By 4:00pm on Friday 15 February 2019 each party must file in the Land Court Registry and serve on any other party a written notice of the expert witnesses they intend to engage for the hearing. The notice must deliver the following details with respect to each expert witness nominated:
>
> (a) the name of the expert witness;
>
> (b) their discipline or area of expertise; and
>
> (c) a short statement of each specific issue or assertion the expert witness will address."

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126 *Symbolic Resources Pty Ltd v Burston & Anor* [2019] QLC 29 at [45] – [47] (footnotes omitted).

127 *Piggott v Fraser Coast Regional Council* [2012] QLC 69 at [21] per Member Smith; Applicant's Primary Written Submissions, 20 March 2020 at 24 [95].

[221] On 1 March 2019, the President also ordered that:

> "[...]
>
> 2. By 4:00pm on Friday, 17 March 2019, each party must file in the Land Court Registry and serve on any other party a statement of evidence sworn or affirmed by their nominated experts.
>
> 3. By 4:00pm on Friday, 17 March 2019, each party must provide to any other party a copy of the brief of instructions provided to the expert witness and any document included or referred to in the brief that has not already been disclosed.
>
> 4. The filed statement of evidence sworn or affirmed by the experts in orders 2 and 3 will be their evidence in chief at the hearing, unless the Court orders otherwise."

[222] The third respondent submits that this Order contained an administrative error, incorrectly stating that the expert witness reports were due by 17 March 2019. The third respondent states that the Order was subsequently amended to 17 May 2019.

[223] On 15 February 2019, the third respondent filed documents that outlined the expert witnesses they would be engaging for the Land Court hearing. These witnesses were:

(a) Alan Irving (environmental consultant);

(b) Alan Robertson (geochemist);

(c) Rohan Lucas (environmental engineering and geomorphology consultant);

(d) James Tomlin (hydrogeologist);

(e) Grant Paterson (ecologist and environmental scientist); and

(f) Michael Holzsapfel (mining and exploration geologist).

[224] The applicant did not make any nomination about expert witnesses on 15 February 2019.

[225] On or about 10 May 2019, the second respondent filed in the Land Court an amended notice of appointment of expert witnesses, pursuant to which the second respondent notified the Land Court that it proposed to adduce evidence from three expert witnesses being:

(a) Alan Irving in the field of Environmental Management;

(b) Rohan Lucas in the field of Environmental Geomorphology; and

(c) Grant Paterson in the field of Ecology.

[226] On or about 17 May 2019, the second respondent filed in the Land Court an amended notice of appointment of expert witnesses, pursuant to which the second respondent notified the Land Court that it proposed to adduce evidence from two expert witnesses being:

(a) Rohan Lucas in the field of Environmental Geomorphology; and

(b) Grant Paterson in the field of Ecology.

[227] On or about 17 May 2019, the applicant received from the second or third respondent the expert report of:

(a) Grant Paterson; and

(b) Rohan Lucas.

[228] The applicant submits that the orders of the President of the Land Court dated 7 December 2018 and 1 March 2019:

(a) did not allow for nomination of any expert witnesses by the applicant in reply to any expert witnesses nominated by the second respondent or the third respondent; and

(b) did not allow for the filing by the applicant of any evidence or material in reply to the expert witness statements provided by the second respondent or the third respondent.

[229] Furthermore, the applicant submits that they were precluded from leading expert evidence in response to either Mr Paterson or Mr Lucas until such time as the reports were delivered. The applicant was not aware of the case against it and, in any event, the applicant had been denied access to the property until at least June 2019.

[230] The applicant submits that the respondents disregarded the well-structured case management of the matter and, without seeking permission from the Land Court, delivered expert evidence outside Court direction and in circumstances that were quite proximate to the hearing of the matter. The applicant submits this amounts to a breach of procedural fairness.

[231] The fourth respondents submit that by at least 15 February 2019, the applicant was aware that the second and third respondents were going to engage both Mr Patterson and Mr Lucas as expert witnesses for the hearing. This was in compliance with the orders of the Land Court dated 7 December 2018.[128]

[232] The Land Court orders dated 7 December 2018 and 1 March 2019 gave the applicant an opportunity to engage any expert witness for the hearing. The Land Court orders were not limited to the respondents.

[233] The fourth respondents submit that the applicant made a strategic decision not to call any expert witnesses to contradict Mr Patterson and Mr Lucas. The applicant does not appear to have made an application during the Land Court proceedings to engage any expert evidence.

[234] Although the Land Court orders did not provide an express mechanism for the applicant to call evidence in reply, the fourth respondents submit that such a mechanism was not necessary. The applicant was entitled to call witnesses and to cross-examine witnesses at the hearing, and therefore the expert report issue does not given rise to a breach of procedural fairness.

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128 Transcript of proceedings, 15 April 2020, at 2-9 / line 7 – 15.

The applicant was not denied procedural fairness in relation to the expert report issue

[235] In my view, there has been no breach of procedural fairness in respect of the expert report issue.

[236] Under section 268(2) of the MRA, the Land Court has a wide discretion to inform itself as it sees appropriate.

[237] By at least 15 February 2019, the applicant was aware that the second and third respondents were going to engage both Mr Patterson and Mr Lucas as expert witnesses for the hearing. This was in compliance with the orders of the Land Court dated 7 December 2018.[129]

[238] The Land Court orders dated 7 December 2018 and 1 March 2019 gave the applicant an opportunity to engage any expert witness for the hearing. The Land Court orders were not limited to the respondents.

[239] The respondents called expert witnesses in compliance with the Land Court orders.

[240] The third respondent notes that the President asked the applicant on a number of occasions during the Land Court directions hearing if the applicant wished to provide expert witnesses for the hearing:

> "In response to the Applicant's paragraph 23, the First Respondent asked the Applicant on many occasions during the Directions Hearing if the Applicant wished to provide expert witnesses for the Trial. The Applicant declined to provide Expert Witnesses for the Trial, even though the Applicant was well aware the Second Respondent and the Third Respondent were engaging Expert Witnesses for the Trail [...]. The Applicant stated on many occasions during Directions Hearings that Symbolic Resources would not be engaging Expert Witnesses for the Trial."

[241] This evidence was not challenged and it is clear that the applicant declined to provide expert witnesses.

[242] The applicants were on notice as to the issues and experts who may be called by the respondents. The applicants decided not to call any expert evidence and clearly the applicant's representative during the Land Court had a forensic plan as to how to deal with the expert evidence:

> MS SMITH: Sorry, your Honour. Throughout this matter we've asked for information, and there's been no factual evidence really provided to us. The objection was basically a series of statements of what could occur or, in their opinion, would occur, but there was nothing that enabled us to actually address and be able to basically answer the question. Like, somebody can say something to you or saying something about something that may happen, but unless they can

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[129] Transcript of proceedings, 15 April 2020, at 2-9, line 7 – 15.

provide the factual evidence to support that and to give you something that you can respond to we haven't had anything until the expert reports were given to us.

KINGHAM P: All right.

MS SMITH: So - - -

KINGHAM P: And you're not proposing to call anything in response to the expert evidence?

MS SMITH: Yes, your Honour. But I'll be dealing with that when the expert evidence is - - -

KINGHAM P: Well, how are you going to deal with that when the – you're giving evidence now. So are you wanting to say something about the expert's report?

MS SMITH: Yes, your Honour.

KINGHAM P: Okay. I think the way to handle that is you'll be asking them questions.

MS SMITH: That's correct, your Honour.

KINGHAM P: All right. And you're sworn in. So when you're asking questions - - -

MS SMITH: Yes.

KINGHAM P: - - - if you're putting – for example, if you say to them – are asking them if they've made certain assumptions and then you say, "Well, that assumption's not correct because of this information," then it'll have to be something that you know personally or can identify what the source of that information is.

MS SMITH: Yes.

KINGHAM P: Okay. All right. Then in your approach the same in relation to the objection by Mr Burston, that is, you've said – other than the thing that you would put to their expert witnesses you have said what you want to in your affidavit which I've marked as exhibit 4."

MS SMITH: Yes, your Honour.[130]

[243] In my view, in all of the circumstances, the applicant was not deprived of any procedural fairness by the Land Court's directions to the parties on expert evidence.

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130 Affidavit of Anna Smith affirmed 22 November 2019, Exhibit AS-4 at 1-80 / line 10 - 1-81 / line 8.

Conclusion

[244] In relation to this judicial review application, I have found that the Land Court exceeded its jurisdiction by entertaining evidence and submissions based on the applicant allegedly misleading the Department of Environment and Science.

[245] As the applicant has established a jurisdictional error, the Land Court's recommendation should be set aside and the matter should be referred back to the Land Court to be decided according to law.

[246] The judicial review application raised four grounds. The applicant has been successful only on ground 2. I note that a considerable amount of material and time at the hearing was expended by the parties in relation to litigating the three unsuccessful grounds.

[247] I will give the parties an opportunity to consider these reasons before they are required to file and serve short written submissions on the question of costs. I encourage the parties to agree on a timetable for the exchange of written submissions and, if it is appropriate, then I will deal with the question of costs on the papers, unless either party requests a hearing.

[248] In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

Orders:

1. The Land Court decision made on 27 September 2019, which recommended to the Minister for Natural Resources, Mines and Energy that the MLA100123 be rejected, be declared void and set aside.

1. This matter is remitted to the Land Court to be decided according to law.

2. The question of costs is adjourned to a date to be fixed.