SUPREME COURT OF QUEENSLAND

CITATION:	*BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107
PARTIES:	**BHP BILLITON MITSUI COAL PTY LTD** ACN 009 713 875 (applicant) **v** **WILLIAM ANGUS ISDALE, MEMBER OF THE LAND COURT OF QUEENSLAND** (first respondent) **RAYMOND JOHN BAULCH and MARJORIE BERYL BAULCH** (second respondents) **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (third respondent)
FILE NO/S:	SC No 12316 of 2014
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2015
JUDGE:	Philip McMurdo J
ORDER:	**1. It is declared that r 13 of the Land Court Rules 2000 (Qld) does not apply to the consideration of the matters referred to the Land Court on or about 20 March 2014 and in which the first respondent made a decision on 9 December 2014.** **2. It is ordered that the decision of the first respondent on 9 December 2014 be set aside.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – REVIEW OF PARTICULAR DECISIONS – where the applicant sought judicial review of the decision of the Land Court, constituted by the first respondent – where the applicant's application for additional surface area in relation to its mining leases and the second respondents objections to that application had been referred to the Land Court under the *Mineral Resources Act* 1989 (Qld) and the *Environmental Protection Act* 1994 (Qld)

– where the Land Court declared that r 13 of the *Land Court Rules* 2000 (Qld) applied and that each party therefore had a duty of disclosure under r 211 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the decision of the Land Court was a reviewable decision or reviewable conduct under s 20(1) or 21(1) of the *Judicial Review Act* 1991 (Qld) – whether the function exercised by the Land Court was of an administrative character – where the Land Court was acting in an advisory capacity in order to provide advice to an administrative decision maker who makes the ultimate decision, and not to determine existing or future rights and obligations – where the decision or conduct was reviewable – where the first respondent erred in law in determining that rr 4 and 13 of the *Land Court Rules* 2000 (Qld) applied in circumstances where the Land Court was acting in an advisory capacity – where there was no "proceeding" for the purpose of rr 4 and 14 of the *Land Court Rules* 2000 (Qld) – where the decision of the first respondent was set aside

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – decision referred to the Land Court in an advisory capacity to provide advice to the Minister who decides whether to grant the mining lease – where the Land Court's task was to make a recommendation and not to determine existing or future rights and obligations – whether the function exercised by the Land Court was of an administrative character – where the decision of the first respondent was set aside

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – whether applications referred to the Land Court constituted a "proceeding" for the purpose of rr 4 and 13 of the *Land Court Rules* 2000 (Qld)

Acts Interpretation Act 1954 (Qld)
Environmental Protection Act 1994 (Qld), s 185, s 186, s 188, s 190, 194
Judicial Review Act 1991 (Qld), s 20, s 21
Land Court Act 2000 (Qld), s 4, s 7A, s 21, s 22
Land Court Rules 2000 (Qld), r 4, r 13
Mineral Resources Act 1989 (Qld), s 265, s 268, s 269, 271A
Uniform Civil Procedure Rules 1999 (Qld), s 209, s 211

Paul Matthews and Hodge Malek, *Disclosure* (Thomson Reuters, 4th ed, 2012)

BHP Billiton Mitsui Coal Pty Ltd v Baulch [2014] QLC 43, discussed
Blake v Norris (1990) 20 NSWLR 300, considered
Cheney v Spooner (1929) 41 CLR 532, cited
Chief Executive, Queensland Health v Jattan [2010] QCA 359, cited

Corporate Affairs Commission (NSW) v Prime Commodities Pty Ltd (1987) 11 ACLR 584, considered
Dunn v Burtenshaw (2010) 31 QLCR 156
Eastman v Somes (No 1) (1992) 106 FLR 346, adopted
Forrest v Kelly (1991) 32 FCR 558, considered
Griffith University v Tang (2005) 221 CLR 99, considered
Herbert Berry Associates Ltd v Inland Revenue Commission [1977] 1 WLR 1437, cited
Lougher v Bender (1937) 54 WN (NSW) 96, considered
R v Deemal [2010] 2 Qd R 70, considered
Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473, applied

COUNSEL: A Pomerenke QC, with A Stumer for the applicant
A Skoien, with M Batty for the second respondents
No appearance for the first or third respondents

SOLICITORS: Ashurst for the applicant
SB Wright & Wright and Condie for the second respondents
No appearance for the first or third respondents

[1] The applicant (BHP) holds a mining lease for which it is applying for additional surface area. Mr and Mrs Baulch, whom I will call the respondents, have lodged objections to that application and BHP's related application under the *Environmental Protection Act* 1994 (Qld). The applications and objections are now before the Land Court.

[2] The Land court, constituted by the first respondent, has ruled that BHP must make disclosure of documents under Chapter 7 of the *Uniform Civil Procedure Rules*. BHP says that the Land Court had no power to do so and seeks judicial review of that ruling. The first and third respondents are not active participants in this application.

[3] The respondents say that the Land Court's ruling is not susceptible to judicial review as a decision to which the *Judicial Review Act* applies or as conduct for the purpose of making such a decision. And they argue that the Land Court was correct in law to rule that Chapter 7 of the UCPR applied.

Mineral Resources Act

[4] Mining leases are granted under s 234 of the *Mineral Resources Act* 1989 (Qld) ("MRA"). By s 275 of the MRA, the holder of a mining lease may apply for an additional part of the surface area to be included in the lease and by s 275(2), such an application is to be dealt with as if it were an application for a mining lease. The provisions of the MRA as to objections and the referral of an application and objections to the Land Court thereby apply.

[5] By s 260 of the MRA, an objection to such an application may be lodged with the Chief Executive of the Department of Environment and Heritage Protection. By s 260(3), an objection is to state the grounds of objection and the facts and circumstances relied on by the objector in support of those grounds.

[6] By s 265, if a properly made objection is made, the chief executive must "refer the application … and all properly made objections to it to the Land Court for hearing …".[1] Section 265(5) provides:

> "(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;
>
> (c) each person who has lodged a properly made objection to the application."

[7] The hearing in the Land Court must be conducted according to s 268 which relevantly provides as follows:

> "268 Hearing of application for grant of mining lease
>
> (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."

[8] Section 269 provides for the outcome of such a hearing. By s 269(1), the Land Court is to forward to the Minister any objections, the evidence adduced at the hearing including any exhibits and "the Land Court's recommendation".

[9] The content of the Land Court's recommendation must be according to s 269(2) and (3) as follows:

> "(2) For subsection (1)(d), the Land Court's recommendation must consist of -
>
> (a) a recommendation to the Minister that the application be granted or rejected in whole or in part; and
>
> (b) if the application relates to land that is the surface of a reserve and the owner of the reserve has not consented to the grant of a mining lease over the surface area, the following -

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[1] s 265(2), (4).

(i) a recommendation to the Minister as to whether the Governor in Council should consent to the grant over the surface area;

(ii) any conditions to which the mining lease should be subject.

(3) A recommendation may include a recommendation that the mining lease be granted subject to such conditions as the Land Court considers appropriate, including a condition that mining shall not be carried on above a specified depth below specified surface area of the land."

By s 269(5), where the Land Court recommends that an application be rejected in whole or in part, it must furnish the Minister with the court's reasons for that recommendation.

[10] Section 269(4) relevant provides as follows:

"(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 -

…

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

…

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

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

(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

…

(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."

[11] It is the Minister who decides whether to grant the mining lease: s 271A. The Land Court's task is to make a recommendation and not to determine existing or future rights and obligations.

Environmental Protection Act

[12] At the same time BHP applied to amend an associated environmental authority under s 224 of the *Environmental Protection Act* 1994 (Qld) ("EPA"). This engaged, amongst other provisions, s 182 through 192 of the EPA.

[13] By s 185, the "administering authority" refers the application to the Land Court for an "objections decision". Section 185(4) provides that "the referral starts a proceeding before the Land Court for it to make the objections decision". Section 186 stipulates who should be the parties to the Land Court "proceeding". By s 188(2), the Land Court may make an order or direction that the objections decision hearing happen at the same time as a hearing under the MRA for the relevant mining tenure.

[14] Section 191 prescribes the matters which the Land Court must consider for an objections decision. They include "the standard criteria", a term which is defined within Schedule 4 of the EPA to include not only the "submissions made by the applicant and submitters", but also certain "principles of environmental policy" and "the public interest".

[15] Although the Land Court in this context is to make a "decision", it is a "recommendation" rather than an adjudication: s 190(1). The ultimate decision upon the application is made by the administering authority under s 194.

The Land Court

[16] The Land Court is established as a court of record by s 4 of the *Land Court Act* 2000 (Qld) ("LCA"). Section 5 of the LCA relevantly provides as follows:

> "5 Jurisdiction of Land Court
>
> (1) The Land Court has the jurisdiction given to it under this Act or another Act.
>
> (2) If jurisdiction for a proceeding is expressly conferred on the court under this Act or another Act, the jurisdiction is exclusive. …"

[17] Section 7A(1) of the LCA provides that "the Land Court has, for exercising jurisdiction conferred under [the LCA] or another Act, all the powers of the Supreme Court". By s 7A(2), the court has power to grant specifically certain types of relief, including "a declaration of rights of the parties".

[18] Section 21 of the LCA provides that rules may be made for the Land Court by which the "procedures of the court" are to be governed. It further provides that "the rules may be uniform rules that apply to other courts".

[19] Section 22 confers a directions power as follows:

> "22 Directions
>
> (1) To the extent a matter about Land Court procedure is not provided for by the rules, the matter may be dealt with by a direction under subsection (2) or (3).

(2) The president may issue directions of general application about the procedure of the court.

(3) A member may issue directions about a particular case before the court when constituted by the member."

[20] Rules have been made for the Land Court, being the *Land Court Rules* 2000 ("LCR"). Rule 3(1) provides that:

> "These rules, other than parts 6 and 9, apply to *proceedings* in the Land Court and, with necessary changes, to *proceedings* in the Land Appeal Court."
>
> (Emphasis added)

[21] Rule 7 provides that a "proceeding is started by filing an originating process in the registry". The content of the originating process is prescribed by r 8. By that rule, an applicant or its lawyer or agent must ensure certain details as to service are included within the originating process and by r 10, the originating process must be signed by the applicant or its lawyer or agent, who must serve a copy "on each other party" according to r 11.

[22] The application of the UCPR is the subject of r 4 which provides as follows:

> "4 Application of Uniform Civil Procedure Rules
>
> (1) If these rules do not provide for a matter in relation to a *proceeding* in the court and the *Uniform Civil Procedure Rules 1999* (the *uniform rules*) would provide for the matter, the uniform rules apply in relation to the matter with necessary changes.
>
> (2) For subrule (1), an originating process under these rules is to be treated as if it were a claim under the uniform rules."
>
> (Emphasis added)

[23] Rule 13 is critical to the present case. It provides as follows:

> "13 Disclosure
>
> Chapter 7 of the uniform rules applies, with necessary changes, to disclosure in relation to a *proceeding* in the court."
>
> (Emphasis added)

Disclosure under the UCPR

[24] By r 209 of the UCPR, Part 1 of Chapter 7 applies to a proceeding started by claim, a proceeding which the court has ordered to be continued as if started by claim and, if the court directs, a proceeding started by application.

[25] Rule 211 of the UCPR defines the duty of disclosure under Part 1, Chapter 7 as follows:

> "211 Duty of disclosure

> (1) A party to a proceeding has a duty to disclose to each other party each document -
>
> (a) in the possession or under the control of the first party; and
>
> (b) directly relevant to an allegation in issue in the pleadings; and
>
> (c) if there are no pleadings - directly relevant to a matter in issue in the proceeding.
>
> …
>
> (2) The duty of disclosure continues until the proceeding is decided.
>
> (3) An allegation remains in issue until it is admitted, withdrawn, struck out or otherwise disposed of."

The ruling in the Land Court

[26] The applications by BHP under the MRA and the EPA, together with the objections by the respondents, were referred to the Land Court on 20 March 2014. On 10 September 2014, the respondents applied for orders for disclosure by BHP under the UCPR. The Land Court member reserved his decision and on 9 December 2014, made orders in the respondents' favour. The orders were in the form of declarations as follows:[2]

> "1. It is declared that:
>
> (i) Rule 13 of the *Land Court Rules* 2000 applies to the mining lease matters.
>
> (ii) Each party in the mining lease matters has a duty of disclosure under Rule 211 of the *Uniform Civil Procedure Rules* 1999, requiring each party to disclose each document, in the possession or under the control of that party, which is directly relevant to a matter in issue in the mining lease matters.
>
> …"

[27] BHP submitted in the Land Court, as it does here, that r 13 of the LCR has no application because it applies only to a "proceeding" and the subject case in the Land Court was not a proceeding in the relevant sense. But the Land Court member held that it was. He referred to the definition of "proceeding" in Schedule 1 of the *Acts Interpretation Act* 1954 (Qld), namely "a legal or other action or proceeding". He wrote:[3]

> "Considering the Rules presently in question, rules for the conduct and procedures of the Court and its Registry with the procedures of the Court governed by the Rules, the proceedings referred to in Rule 3 will be those matters which come before the Court."

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2 [2014] QLC 43.
3 Ibid 11-12 [43].

A "proceeding" in the Land Court?

[28] Essential to BHP's argument is the contention that the two applications by BHP, as referred to the Land Court, were in neither case a "proceeding in the court" as referred to in r 13. If that contention is accepted, it would follow that neither r 4(1) nor r 13 of the LCR would apply and therefore Chapter 7 of the UCPR would not apply.

[29] As the Land Court member noted, the *Acts Interpretation Act* provides a relevant definition of "proceeding". But it does so by the use of the word "proceeding" itself, so that in the present case the definition does not assist.

[30] The traditional meaning of the word was discussed by O'Loughlin J in *Forrest v Kelly*[4] as follows:

> "Historically, the word 'proceedings' has meant the 'invocation of the jurisdiction of a court by process other than writ': see *Herbert Berry Associates Ltd v Inland Revenue Commission* [1977] 1 WLR 1437 at 1446; [1978] 1 All ER 161 at 169-170, per Lord Simon of Glaisdale; or 'any application by a suitor to a court in its civil jurisdiction for its intervention or action': see *Cheney v Spooner* (1929) 41 CLR 532 at 538-539, per Starke J."

[31] But the word has a broad range of possible meanings. In *Blake v Norris*,[5] Smart J said that the word "proceeding" was:

> "capable of such a variety of meaning that dictionary definitions as to its ordinary or natural meaning are not of much use."

And in *Corporate Affairs Commission (NSW) v Prime Commodities Pty Ltd*,[6] Young J said that although:

> "'proceeding' usually involves a *lis* between parties, to be heard before a third party, usually a judge or arbitrator … this is not necessarily so."

Each of those passages was cited with apparent approval by Holmes JA in *R v Deemal*.[7]

[32] Therefore, the present matter before the Land Court could be described as a proceeding according to at least one ordinary meaning of the word.

[33] Indeed s 185(4) of the EPA provides that "[t]he referral starts a proceeding before the Land Court …" and s 186 refers to "the Land Court proceeding".

[34] The administrative nature of the function exercised by the Land Court in the present case (or under corresponding laws in other jurisdictions) has been important in the reasoning in several judgments which have concluded that there was no "proceeding" in the relevant sense. One of those cases is the decision of the Land Appeal Court in *Dunn v Burtenshaw*.[8] In that case, the Land Court had made a recommendation that two mining leases be granted, after a hearing under s 268 of the MRA. An objector, Mr Dunn, lodged

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4 (1991) 32 FCR 558, 568.
5 (1990) 20 NSWLR 300, 306.
6 (1987) 11 ACLR 584, 586.
7 [2010] 2 Qd R 70, 77 [19]; see also *Chief Executive, Queensland Health v Jattan* [2010] QCA 359, 7 [23] (Boddice J).
8 (2010) 31 QLCR 156.

an appeal in respect of that recommendation. The question was whether this was a decision for which there was a right of appeal. Section 64 of the LCA provides that "a party to a *proceeding* in the Land Court may appeal to the Land Appeal Court against all or part of the *decision* of the Land Court". The Land Appeal Court held that the recommendation was not a "decision" of the "sort contemplated by s 64 of the LCA as it is not a proceeding but rather than administrative step consequent upon a statutorily prescribed inquiry conducted by the learned Land Court member".[9]

[35] Rules 47 and 48 of the LCR provide for appeals from the Land Court to the Land Appeal Court in a "proceeding". Consistently with *Dunn v Burtenshaw*, those rules do not apply to matters of this kind and the word "proceeding", at least in rules 47 and 48, has the limited meaning for which BHP contends. On that premise, BHP argues that the word should not be given a different meaning in other rules particularly r 13 of the LCR.

[36] Another case confining the meaning of "proceeding" in the present context was the decision of Owen AJ (as he then was) in *Lougher v Bender*.[10] In that case, a mining warden was obliged to conduct a hearing and to forward a report and recommendation to the relevant Minister as to an alleged non-compliance with the conditions of a mining lease. Owen AJ said:[11]

> "It is obvious from a consideration of the Act that the warden has to perform administrative as well as judicial functions and there is a clear distinction between a 'warden' and a 'Warden's Court'.
>
> …
>
> In my opinion an enquiry into a complaint under s 124A is not such a 'proceeding' as is contemplated by s 168. It is not a proceeding in a warden's court, nor is there any such determination as is mentioned in s 168. It seems to me that in acting under s 124A the warden is merely exercising administrative functions. He is holding an enquiry as an administrative officer. He makes no determination on that enquiry, but merely makes a recommendation and report, which the Minister is not bound to accept. If the complainant or the lessee is dissatisfied by anything done by the warden in the course of those proceedings, his only remedy is, I think by an appeal to the Minister in the manner provided by the section."

[37] It must be kept in mind that the Land Court has what is described as a substantive jurisdiction according to s 363 of the MRA as follows:

> "363 Substantive jurisdiction
>
> (1) The Land Court shall have jurisdiction to hear and determine action, suits and proceedings arising in relation to prospecting, exploration or mining or to any permit, claim, licence or lease granted or issued under this Act or any other Act relating to mining.

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9 *Dunn v Burtenshaw* (2010) 31 QLCR 156 [47].
10 (1937) 54 WN (NSW) 96.
11 Ibid 97.

> (2) Without limiting the generality of subsection (1), the Land Court shall have jurisdiction to hear and determine actions, suits and proceedings with respect to -
>
> …
>
> (3) The Land Court also has jurisdiction to hear and determine actions, suits and proceedings with respect to any demand for debt or damages arising out of or made in respect of -
>
> (a) the carrying on of prospecting, exploring or mining;
>
> (b) any agreement relating to prospecting, exploring or mining."

Therefore, BHP's argument would not deprive the LCR of an extensive operation even in respect of matters arising from the MRA. It was submitted for the respondents that if r 13 of the LCR does not apply in this context, then none of the LCR would apply leading to an absurd result because the LCR is "a legislative instrument that is essential to the efficient and proper functioning of the Land Court" in such matters.[12] This assertion is unsubstantiated and was not developed by reference to any other rule of the LCR.

[38] The provisions of the LCR relating to the starting of a proceeding are difficult to reconcile with the view that the present matters are a "proceeding". Rule 7 provides that a proceeding is to be started by filing an originating process in the registry. Rule 8 provides for the content of that originating process and rules 9 and 10 require, in effect, the applicant or appellant (or a lawyer or agent for them) to complete and sign the originating process. Further, r 8 requires the originating process to state the orders or other relief sought in the proceeding. The applications by BHP, of course, state the outcomes which it seeks. But that is different from a statement of the orders or other relief to be sought from the Land Court. There is no document of that kind, because the function of the Land Court here is not to make orders or to grant other relief. It is an advisory function. Each of the applications reach the Land Court by a referral by the relevant agency rather than by anything filed by BHP as the applicant. It therefore seems that the word "proceeding" in rules 7-11 cannot extend to a matter which has been referred to the court under the subject provisions of the MRA and EPA. The respondents submitted that the applications which were referred to the Land Court in this case were in fact commenced by an "originating process" under the LCR. That submission cannot be accepted. The present matters are before the Land Court because they were referred there by the chief executive under s 265 of the MRA, the administering authority under s 185 of the EPA. An originating process must be served by the party which files the document, according to r 11 of the LCR. But with a referral under s 265 of the MRA, the Land Court must fix a date for the hearing and then give written notice to the chief executive, the applicant and each objector. Under s 187 of the EPA, the administering authority must give to the applicant and any objector a copy of the notice of referral.

[39] There is no apparent basis for the word "proceeding" being used in a different sense in r 13 of the LCR from its use in rules 7-11. Instead, the provisions of Chapter 7 of the UCPR do not seem to be readily applicable to matters of the present kind.

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[12] Written Submissions for the second respondent, para 52.

[40] Rule 209 of the UCPR provides that Part 1 of Chapter 7 applies only to certain kinds of proceeding. There is a relevant distinction between a proceeding started by or which continues as if started by claim and a proceeding started by application. Rule 4(2) of the LCR does provide that "an originating process under these rules is to be treated as if it were a claim under the uniform rules". But in the present matters, there is no originating process in the sense in which that term is used in the LCR.

[41] There is a further difficulty in the notion that the duty of disclosure imposed by r 211 of the UCPR is to be imposed in the present context. The content of that duty is defined by what is "in issue". A party must disclose a document which is directly relevant to an allegation in issue in the proceedings, or if there are no pleadings, directly relevant to a matter in issue in the proceeding.[13] In adversarial civil litigation, it is for the parties to determine what should constitute the matters in issue. In turn, that leaves it to the parties to effectively define the scope of the duty of disclosure because if an allegation by one party is admitted by the other, it is not a matter in issue.[14]

[42] But in referrals to the Land Court of the present kind, the scope of the court's factual inquiry is not defined by the parties. Their respective arguments and the evidence which they present are to be considered. But the Land Court must have regard to considerations which extend beyond the respective interests of the applicant and the objectors. In particular, it must consider the public interest.

[43] In *Sinclair v Mining Warden at Maryborough*,[15] the High Court held that a writ of mandamus should be granted and directed to a mining warden who had erred in a case of the present kind. That was an application for a mining lease for which the appellant was an objector. One error of the warden was found to be in his failure to consider whether the granting of the application would prejudicially affect the public interest. Barwick CJ said that the warden was bound to consider that matter "irrespective of the interests of the objectors or their number and, indeed, irrespective of the existence of an objection on [the public interest] ground".[16]

[44] Therefore the process of disclosure under Chapter 7 of the UCPR is seemingly inapt, where the Land Court is not asked to adjudicate upon matters in issue but instead to provide an advice to an administrative decision maker. This fortifies the view that the word "proceeding" in rules 4 and 13 of the LCR does not extend to these applications presently before the Land Court.

[45] For these reasons, I conclude that rules 4 and 13 of the LCR do not apply, so that Chapter 7 of the UCPR do not apply to these matters in the Land Court. The first respondent thereby erred in law.

Relief

[46] BHP's primary position was that the ruling of the Land Court involved a decision which is subject to a statutory order of review because it was an administrative decision under

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13 r 211(1)(b), (c).
14 Paul Matthews and Hodge Malek, *Disclosure* (Thomson Reuters, 4th ed, 2012) 143 [5.09].
15 (1975) 132 CLR 473.
16 Ibid 480.

an enactment within the meaning of s 20(1) of the *Judicial Review Act*. Section 20(1) states:

> "A person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to the decision."

"A decision to which this Act applies" is defined by s 4(a) of the *Judicial Review Act* to mean:

> "(a) A decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion) …"

[47] The respondents submitted that the Land Court's decision was not one of an administrative character. Their argument appeared to accept, as it had to, that the Land Court here is performing an administrative rather than a judicial function. But they did not accept that every decision made in the course of the performance of the administrative function must itself be also administrative in character. They submitted that this particular decision was the exercise of judicial power under the Land Court's power to make declarations conferred by s 33 of the LCA. Section 33(1) provides:

> "33 Land Court may make declarations
>
> (1) Any person may bring proceedings in the Land Court for a declaration about -
>
> (a) a matter done, to be done, or that should have been done under this Act or another Act giving jurisdiction to the court; and
>
> (b) the construction of any legislation for the purpose of proceedings in which the court has exclusive jurisdiction."

[48] In the Land Court, the respondents did apply for orders for disclosure. But that could not be characterised as the bringing of proceedings in the Land Court. In any event, it is difficult to consider that in the performance of an administrative function, the Land Court can be required to occasionally exercise judicial power. I adopt the reasoning of Miles CJ in *Eastman v Somes (No 1)*,[17] who said of a decision of a magistrate made in the course of a committal hearing:

> "[T]he hearing was of an administrative nature and not part of the judicial process. Accordingly, any decision made during the course of the committal hearing was administrative and the decision to commit for trial was a decision reviewable under the [ADJR] Act …"

[49] It appeared to be accepted by the respondents that this ruling by the Land Court was a decision "made … under an enactment". In *Griffith University v Tang*,[18] Gummow, Callinan and Heydon JJ said that for a decision to be "made … under an enactment", it must be expressly or impliedly required or authorised by the enactment and the decision must itself confer, alter or otherwise affect legal rights or obligations. The decision affected obligations in the sense that it obliged BHP to disclose documents. And it was

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[17] (1992) 106 FLR 346, 351.
[18] (2005) 221 CLR 99, 130-131.

impliedly authorised by s 22(3) of the LCA, which provides that a member may issue directions about a particular case before the court when constituted by the member. More generally, it must be accepted that the Land Court has by necessary implication, a power to control its own process, including in matters of this kind.

[50] Alternatively, BHP argues that the ruling is reviewable conduct under s 21(1) of the *Judicial Review Act* which provides:

> "(1) If a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies … a person who is aggrieved by the conduct may apply to the court for a statutory order of review in relation to the conduct."

I accept the submission for BHP that the declarations made by the Land Court member involved conduct for the purpose of making a decision to which the Act applies, namely the recommendations required to be made by the Land Court under the MRA and the EPA. In particular, s 6 of the *Judicial Review Act* provides:

> "If a provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision."

[51] Therefore, if the declarations made by the Land Court are not reviewable under s 20(1), they are reviewable under s 21(1).

[52] It was submitted, apparently as a discretionary consideration for the granting of relief under the *Judicial Review Act*, that the decision of the Land Court member could be appealed to the Land Appeal Court. That submission seemed to be based upon the proposition, which I have rejected, that the decision here of the Land Court member was an exercise of judicial power.

Conclusion

[53] The orders will be:

1. A declaration that r 13 of the *Land Court Rules* 2000 (Qld) does not apply to the consideration of the matters referred to the Land Court on or about 20 March 2014 and in which the first respondent made a decision on 9 December 2014.

2. An order that the decision of the first respondent on 9 December 2014 be set aside.