SUPREME COURT OF QUEENSLAND

CITATION:	*Lonergan v Stilgoe & Ors* [2020] QSC 86
PARTIES:	**PATRICK JOSEPH LONERGAN AND PRUE MADELINE LONERGAN** (applicant) **v** **PETA G STILGOE, OAM, MEMBER OF THE LAND COURT OF QUEENSLAND** (first respondent) **GERALD DAVID GEORGE SKILTON** (second respondent) **DIRECTOR GENERAL, DEPARTMENT OF ENVIRONMENT AND SCIENCE** (third respondent)
FILE NO/S:	BS No 7386 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application for a statutory order of review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2020; 2 April 2020
JUDGE:	Applegarth J
ORDER:	**1. The further amended application for a statutory order of review filed 23 March 2020 is dismissed.** **2. Any submissions as to costs are to be made within 14 days.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where s 252A of the *Mineral Resources Act* 1989 (Qld) requires an applicant for a mining lease to give certain documents and information to affected persons - where s 252B of the *Mineral Resources Act* 1989 (Qld) requires an applicant for a mining lease to give a statutory declaration that they have complied with s 252A - where the Land Court made a recommendation that a mining lease be granted to the second respondent – where the applicant submits that the second respondent did not comply with s 252A and s 252B – where the applicant submits that the Land Court's decision was not authorised because there was no evidence that a s 252B declaration was given - whether there was a basis for the Land Court be satisfied of compliance with s 252A –

whether compliance with s 252B is a jurisdictional fact

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – FAILURE TO CONSIDER – where the applicant objected to the grant of a mining lease on the ground that the proposed mining activities would have certain adverse environmental impacts – where the applicant submits that the Land Court failed to consider the impact of the proposed mining lease on the local koala habitat – where the applicant's objection did not refer to a loss of koala habitat – whether the Land Court was precluded from considering a submission about loss of koala habitat

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the Land Court did not consider evidence in relation to the proposed mining lease area being an essential habitat for koalas – where the Land Court Member did not advise the parties in advance of delivering reasons that such evidence would not be considered – whether failing to advise the parties was a breach of procedural fairness

Environmental Protection Act 1994 (Qld), s 152
Mineral Resources Act 1989 (Qld), s 252, s 252A, s 252B, s 268(3), s 269(4)

ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation [2002] 1 Qd R 347; [2001] QCA 119, cited
BHP Billiton Nickel West Pty Ltd v KN (Deceased) and Others (2018) 258 FCR 521; [2018] FCAFC 8, cited
Coast and Country Association of Queensland Inc v Smith [2016] QCA 242, cited
Forrest & Forrest Pty Ltd v Wilson (2017) 262 CLR 510; [2017] HCA 30, considered
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302; [2009] QSC 205, cited
New Acland Coal Pty Ltd v Smith & Others (2018) 230 LGERA 88; [2018] QSC 88, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Roads and Maritime Services v Desane Properties Pty Ltd (2018) 98 NSWLR 820; [2018] NSWCA 196, cited

COUNSEL: S W Trewavas for the applicant
The second respondent appeared for himself
M Hickey for the third respondent

SOLICITORS: Marland Law for the applicant
The second respondent appeared for himself
Crown Solicitor for the third respondent

[1] Mr Gerald Skilton is a small scale gold miner. He has been mining for gold on Rolfe Creek, 31 kilometres north-west of Clermont, for many years under two mining leases negotiated with the previous owners. He applied for a grant of a new mining lease on the property. He also applied for an environmental authority. The current owners of the property, Patrick and Prue Lonergan, objected to the grant of a new mining lease and objected to the conditions in the draft environmental authority. Their objections proceeded to a hearing before the Land Court. The Court's task was to decide whether or not to recommend a grant of the proposed mining lease, and also to consider whether or not to recommend that an environmental authority issue, either in terms of the draft EA or with additional conditions.

[2] The Lonergans advanced many matters in their objections to the grant of the mining lease and in their objections to the draft EA. Some of those objections were not the subject of evidence directed to the objection or the objection was not pressed in their final submissions. In summary, the objections that were pressed and required the consideration of the Land Court were issues in relation to:

- mineralisation of the site;
- Mr Skilton's past performance;
- environmental considerations; and
- Mr Skilton's financial and technical resources to carry out the mining operations.

The environmental considerations raised in their objections to the draft EA particularly concerned:

- the area of disturbance;
- erosion and sediment control;
- topsoils and overburden management; and
- rehabilitation.

[3] The Land Court considered the Lonergans' objections in relation to these matters and whether the conditions contained in the draft EA were adequate. After addressing the Lonergans' objections to the grant of the mining lease and their concerns with the draft EA, and dealing with the parties' submissions, the Land Court member:

(a) recommended pursuant to s 269(1) of the *Mineral Resources Act* 1989 (Qld) ("*MRA*") to the Minister that the mining lease be granted over the application area; and

(b) recommended pursuant to s 190(1)(a)(i) of the *Environmental Protection Act* 1994 (Qld) ("*EPA*") that the environmental authority be issued in terms of the draft EA without amendment.[1]

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1 *Skilton v Lonergan & Ors* [2019] QLC 28.

[4] On 12 July 2019, the Lonergans applied for a statutory order of review of the decision of the first respondent. They sought an order that the decision be set aside. The original application canvassed a wide range of matters. Most of these have been removed by way of amendment. The further amended application filed by leave on 23 March 2020 relates to two matters, although different grounds of review are advanced in relation to each of them. They are:

(a) that the decision to recommend that the mining lease be granted was not authorised because there was no evidence or other material from which the Member could be reasonably satisfied that the declaration required to be given pursuant to s 252B of the *MRA* had in fact been given; and

(b) that the Member failed to take into account a relevant consideration, namely the impact of the proposed mining lease on the local environment in relation to koala habitat.

Statutory context

[5] Chapter 6, Part 1 of the *MRA* provides for the granting of mining leases.[2] Under s 234(1), the Minister may grant to an eligible person or persons, a mining lease for all or any of the purposes stated in that section. Section 235 sets out the general entitlements of the holder of a mining lease.

[6] The requirements of an application for a mining lease are set out in s 245.

[7] Upon being satisfied of certain matters, the chief executive must give to the applicant a mining lease notice for the application which must contain certain information.[3] The notice states the last day for lodging objections to the application.[4]

[8] The applicant for a mining lease is obliged to give a copy of the notice and other documents to the landowners and other affected persons and also to publish a copy of the notice in an approved newspaper.

[9] Objections to the application may be made.[5] If objections are properly made, the chief executive must refer the application and all properly made objections to the Land Court for hearing.[6]

[10] According to s 268, the Land Court is:

(a) obliged to hear the application and the objections;

(b) permitted to receive such evidence, hear such persons, and inform itself in such manner as it considers appropriate in order to determine the merits of the application and the objections to it;

(c) not bound by any rule or practice as to evidence;

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2 The scheme of the *MRA* is more fully discussed by Bowskill J in *New Acland Coal Pty Ltd v Smith and Others* (2018) 230 LGERA 88 at 102 [22] – 105 [38] ("*New Acland*").

3 *MRA* s 252.

4 *MRA* s 252A.

5 *MRA* s 260.

6 *MRA* s 265(1) – (4).

(d) not to entertain an objection to an application (or any ground 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.

[11] Section 269(4) provides:

> "The Land Court, when making a recommendation to the Minister that an application for a mining lease be granted in whole or in part, shall take into account and consider whether –
>
> (a) the provisions of this Act have been complied with; and
>
> (b) the area of land applied for is mineralised or the other purposes for which the lease is sought are appropriate; and
>
> (c) if the land applied for is mineralised, there will be an acceptable level of development and utilisation of the mineral resources within the area applied for; and
>
> (d) the land and the surface area of the land in respect of which the mining lease is sought is of an appropriate size and shape in relation to –
>
> (i) the matters mentioned in paragraphs (b) and (c); and
>
> (ii) the type and location of the activities proposed to be carried out under the lease and their likely impact on the surface of the land; and
>
> (e) the term sought is appropriate; and
>
> (f) the applicant has the necessary financial and technical capabilities to carry on mining operations under the proposed mining lease; and
>
> (g) the past performance of the applicant has been satisfactory; and
>
> (h) any disadvantage may result to the rights of –
>
> (i) holders of existing exploration permits or mineral development licences; or
>
> (ii) existing applicants for exploration permits or mineral development licences; and
>
> (i) the operations to be carried on under the authority of the proposed mining lease will conform with sound land use management; and
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> (j) there will be any adverse environmental impact caused by those operations and, if so, the extent thereof; and
>
> (k) the public right an 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."

However, it has been held that, subject to the Land Court's overriding obligation to exercise its power reasonably, the weight to be given to the various considerations it must take into account is a matter for the Land Court on the hearing.[7]

[12] Thereafter, the Land Court is obliged to forward to the Minister the objections, the evidence adduced at the hearing and the Land Court's recommendation as to whether the application should be granted or rejected in whole or in part, or upon conditions.

[13] Under s 271, in considering an application for the grant of a mining lease, the Minister must consider the Land Court recommendation and the matters mentioned in s 269(4).

[14] Under s 271A, after having considered the matters prescribed by s 271, the Minister may decide to grant the applicant a mining lease for the whole or part of the land in the application, reject the application or refer the matter to the Land Court to conduct a hearing or further hearing.

Section 252A and Section 252B

[15] Sections 252A and 252B assume significance for the purpose of the Lonergans' first grounds to judicially review the recommendation to grant the mining lease.

[16] As may be seen, s 252A is important in giving an "affected person" (such as an owner of the subject land) certain documents and information. Absent such a provision, it is possible to imagine a mining lease being granted over a person's land without their receiving notice of the application. Compliance with s 252A enables an affected person who has received the documents and information stated in s 252A(1), or a person who has read or heard of the newspaper publication required by s 252A(3), to object to the application, if so minded.

[17] Section 252B requires the applicant for the proposed mining lease to give the chief executive a statutory declaration that the applicant has complied with s 252A. It facilitates compliance with s 252A, and allows authorities to proceed on the basis that affected persons have been given the required documents and information.

"**252A Giving and publication of mining lease notice and other information**

(1) The applicant for a proposed mining lease must give the following documents and information to each affected person—

(a) a copy of the mining lease notice;

(b) a copy of the application for the mining lease, other than any part of it—

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7 *New Acland* at [35]; *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 at [46].

(i) that states the applicant's financial and technical resources; or

(ii) the chief executive considers is commercial in confidence;

(c) the documents and other information stated under section 252(3)(c) in the mining lease notice.

(2) The documents and other information mentioned in subsection (1) must be given within 5 business days after the mining lease notice is given to the applicant.

(3) The applicant for a proposed mining lease must, in an approved newspaper circulating generally in the area of the subject land, publish—

(a) a copy of the mining lease notice; or

(b) if a map or sketch plan is to be included in the publication—

(i) a notice in the approved form about the mining lease notice; and

(ii) the map or sketch plan.

(4) The publication must take place at least 15 business days before the last objection day.

(5) The chief executive may decide an additional or substituted way, or a longer or shorter period, for the giving of the documents and other information mentioned in subsection (1) or the publication of the documents mentioned in subsection (3).

(6) If the chief executive makes a decision under subsection (5)—

(a) the chief executive must give the applicant written notice of the decision no later than the giving of the mining lease notice to the applicant; and

(b) the applicant must comply with the decision instead of subsections (2) to (4).

(7) In this section—

***adjoining land*—**

(a) means private land that adjoins—

(i) subject land; or

(ii) a lot, within the meaning of the *Land Act* 1994 or the *Land Title Act* 1994 that contains any part of subject land; and

(b) includes land that would adjoin land mentioned in paragraph (a)(i) or (ii) if it were not separated by a road, watercourse, railway, stock route, reserve or drainage or other easement; and

(c) does not include land only because it adjoins land necessary for—

(i) access to subject land; or

(ii) transporting things to subject land.

affected person means—

(a) an owner of the subject land; or

(b) an owner of land necessary for access to the subject land; or

(c) an owner of adjoining land; or

(d) the relevant local government; or

(e) an entity that provides infrastructure wholly or partially on the subject land.

approved newspaper means a newspaper approved by the chief executive.

infrastructure means infrastructure relating to the transportation, movement, transmission or flow of anything, including, for example, goods, material, substances, matter, particles with or without charge, light, energy, information and anything generated or produced.

subject land means land the subject of the proposed mining lease.

252B Declaration of compliance with obligations

(1) The applicant for a proposed mining lease must give the chief executive a statutory declaration that the applicant has complied with section 252A.

(2) The declaration must be given within the later of the following periods to end—

(a) 5 business days after the last objection day for the application for the mining lease;

(b) if the chief executive at any time decides a longer period—the longer period.

(3) If the chief executive considers the declaration given under subsection (2) may not identify each person to whom a document, information or notice must be given under section 252A, the chief executive may require the applicant to give the chief executive another declaration under subsection (1) within the period decided by the chief executive.

(4) Until a declaration mentioned in subsection (2) or (3) is given—

(a) the Land Court must not make a final recommendation to the Minister about the application for the mining lease, other than a recommendation to reject the application; and

(b) the Land Court may refuse to hear any matter about the application."

The Lonergans' objections

[18] The Lonergans' objections to the application for the mining lease were that:

"(a) The application does not comply with the provisions of the MRA.

(b) The proposed mining area is not mineralised.

(c) The proposed mining area is not of an appropriate size and shape.

(d) The proposed mining Applicant does not have the financial and technical capabilities to carry on mining operations.

(e) The Minister cannot be satisfied that the past performance of the Applicant has been satisfactory.

(f) The proposed mining activities do not conform with sound Land use management.

(g) The proposed mining activities will cause adverse environmental impact.

(h) The public right and interest will be prejudiced.

(i) There is a good reason for the refusal to grant the Mining Lease.

(j) The proposed mining activities are not an appropriate Land use taking into consideration the current and prospective uses of the Land."

[19] The first ground of objection asserted respects in which Mr Skilton was alleged to have not complied with s 252A.

[20] The objection in (g) in respect of adverse environmental impact stated:

"(g) Section 269(4)(j) – The proposed mining activities will cause adverse environmental impact.

(i) It has not been sufficiently demonstrated that there will be no adverse environmental impact caused by the proposed activities. A copy of our Environmental Authority Application Objection is attached (AT-13).

(ii) The size of the lease area, the nature of the activities coupled with the related soil types and topography will make the avoidance of adverse environmental impacts impossible."

[21] The attached Environmental Authority Application Objection was several pages long and dealt with a variety of matters, including the area of disturbance, financial assurance, erosion and sediment control, topsoils and overburden management, hazardous contaminants, roads and tracks, waste management and rehabilitation. One paragraph concerned nature conservation and stated:

> "(f) Nature Conservation – The application does not indicate a dedicated wash down area for entering the property, nor are weed control measures provided. The applicant has repeatedly failed to provide weed control certificates and follow wash down procedures under previous Mining Leases and Environmental Authorities held on the landholder's property (AT-11 and AT-12). The landholders are concerned about the dispersal of weeds on their commercial farming property and the applicant's history in not complying with existing Environmental Authorities makes it likely that he will not comply with a new Environmental Authority. The proposed lease area should also be fully fenced to protect local fauna and cattle from hazardous materials, machinery, vehicles and other introduced dangers."

[22] As may be apparent from the Lonergans' approach to the matter, Mr Skilton's application for the mining lease and his application for an environmental authority proceeded in tandem. As was explained by an officer of the Department of Environment and Science in evidence in the Land Court, the subject application for an environmental authority for mineral activities is received by the Department of Natural Resources and Mining and forwarded to the Department of Environment and Science which assesses the application.

[23] Mr Skilton provided a combined notice of his application for a mining lease under the *MRA* and his application for an environmental authority under the *EPA*. The document advised of the process for any person wishing to make an objection to the grant of the mining lease and/or a submission about the application for an environmental authority.

[24] The fact that Mr Skilton had notified the Lonergans of his applications and provided them with certain documents and information is apparent from the fact that they objected and the terms of their objections.

[25] The first objection taken in the mining lease objections, namely that provisions of the *MRA* in relation to the giving of the mining lease notice and other information

were not complied with, was not raised at the hearing and was not developed in closing submissions. For example, compliance with s 252A was not raised in the cross examination of Mr Skilton or with any other witnesses. The Lonergans did not say in their evidence that they had not been given the documents and information required by s 252A.

[26] The Lonergans' written closing submissions provided to the Land Court and to the other parties on 14 May 2019, some weeks after the hearing concluded on 4 April 2019, did not advance any objection about non-compliance with s 252A or s 252B.

[27] Unsurprisingly in the circumstances, the Land Court in its decision stated the following in respect of the Lonergans' original objection that Mr Skilton had not complied with the provisions of the *MRA*:

> "Although the Lonergans raised this as an issue in their objection to the grant of the mining lease, Mr Marland did not direct me to any specific evidence on the point and the Lonergans' submissions do not take the point."[8]

[28] The further amended application for a statutory order of review does not raise in the relevant grounds of review (grounds 1, 2 and 3) that there was non-compliance with s 252A. Instead, it contends that there was non-compliance with the procedural requirements contained in s 252B, which concern the giving of a declaration by the applicant for a mining lease to the chief executive that the applicant has complied with s 252A.

[29] Despite this, the Lonergans' written submissions assert that there was a failure to comply with the notice requirements under s 252A, and that the failure to comply with s 252A prevents the Land Court from making any recommendation to the Minister to grant a mining lease.

Compliance with s 252A

[30] For completeness I should deal with the Lonergans' contention that there was no factual basis upon which the Land Court could be satisfied that the requirements of s 252A had been complied with. In response to the Lonergans' original objections, Mr Skilton stated that he believed that he did supply all documents as required by s 252A, and addressed matters in connection with his pegging the area and lodging the application. As noted, no issue was raised at the hearing about compliance with s 252A, either in cross examination of Mr Skilton or in any oral evidence of the Lonergans about their not being given the documents and information required by s 252A. The matter was not raised in the Lonergans' closing submissions. I conclude that there was a basis upon which the Land Court could be satisfied that the requirements of s 252A had been complied with.

[31] I note that the Land Court mentioned that:

> "Filiz Tansley, the Manager (Assessment) Minerals of DES, was satisfied that Mr Skilton had complied with his obligations under the MRA when he submitted his application."[9]

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8 *Skilton v Lonergan & Ors* [2019] QLC 28 at [5].
9 *Skilton v Lonergan & Ors* [2019] QLC 28 at [6].

and referenced in this regard paragraph 10 of Ms Tansley's affidavit, which in turn exhibited a statutory declaration by Mr Skilton of compliance with the public notice requirements for resource activities and other documents. The Lonergans submit that Ms Tansley's evidence was limited to compliance with the notice requirements of the *EPA*, not the *MRA*.

[32] Three things that may be said about this. First, if this is so, then there was a slip in [6] of the Land Court's reasons and the reference to the *MRA* should have been to the *EPA*. Second, if the reference was intended to be to the *MRA*, and if paragraph 10 of Ms Tansley's affidavit was confined to compliance with the public notice requirements of the *EPA* and a declaration of compliance with the public notification requirements in ss 152 and 153 of the *EPA*, then the Land Court erred in relying on that declaration as evidence of compliance with the notice requirements under the *MRA*. However, such an error of fact is not a ground for judicial review. Also it is of no consequence for the purpose of judicial review because, in the absence of that declaration, there was a basis upon which the Land Court could be satisfied that the requirements of s 252A has been complied with. Third, the material exhibited to Ms Tansley's affidavit was not confined to compliance with the EPA. It included the application for the mining lease, the notice of mining lease under s 252 of the *MRA* and the form of notice which was given by Mr Skilton both under s 152 of the *EPA* and s 252A of the *MRA*. Incidentally, the form of declaration that Mr Skilton completed directed him to forward it to the Department of Natural Resources and Mines where there was a "Certificate of Public Notice" under the *MRA*. The material exhibited to Ms Tansley's affidavit, combined with the other evidence, tended to indicate that there had been compliance with the notice requirements of both s 152 of the *EPA* and s 252A of the *MRA*.

[33] In summary, I do not accept the Lonergans' contention (as raised in their submissions but not in the application for judicial review) that there was no factual basis upon which the Land Court could be satisfied that the requirements of s 252A had been complied with.

The Lonergans' grounds of review concerning compliance with s 252B

[34] In their Statements of Facts, Issues and Contentions filed in the Land Court on 28 August 2018, the Lonergans raised no issue concerning compliance with s 252B. They reproduced, in the form of contentions, the objections made by them in their mining lease objections and in their Environment Authority objection.

[35] As noted, Mr Skilton said that he supplied the documents required by the *MRA*. Mr Lonergan's statement of evidence conceded a number of matters in Mr Skilton's evidence and did not take any point about lack of notification. At the hearing before the Land Court the Lonergans did not take any point about compliance with s 252A or with s 252B. The closing submissions did not take any point in relation to compliance with either section. In particular, no point was taken that the Land Court could not make a final recommendation to the Minister to approve the application for a mining lease until a statutory declaration had been given by Mr Skilton to the chief executive under s 252B that he had complied with s 252A.

[36] If the point had been taken at any stage before the Land Court then Mr Skilton might have addressed the point and given specific evidence that a declaration had

been given to the chief executive, or sought further time from the chief executive under s 252B(2)(b) to give one.

[37] The evidence is in an unsatisfactory state. In this proceeding the Lonergans do not prove that the declaration required by s 252B was not given. Mr Skilton does not clearly prove that it was. The evidence may suggest that it was, possibly in the form of a statutory declaration that was treated by Mr Skilton and the government departments that dealt with his applications as doubling as a declaration of his compliance with notice requirements under both Acts. However, the evidence is deficient as to whether a statutory declaration specifically directed to compliance with s 252A was given by Mr Skilton to the chief executive.

[38] The Lonergans' grounds for judicial review are that:

(a) procedures required by law were not observed by the Land Court in that it failed to consider whether the procedural requirements in s 252B(4) had in fact been satisfied (ground 1);

(b) the decision was not authorised by the *MRA* because the Land Court was not satisfied on the evidence before it that the declaration required by s 252B had in fact been given and there was no evidence before the Land Court that the declaration was in fact given (ground 2); and

(c) there was no evidence or other material from which the Member could be reasonably satisfied that the declaration required by s 252B had in fact been given (ground 3).

[39] Their grounds of review concern non-compliance with s 252B, whereas their written submissions concern non-compliance with s 252A. They submit that compliance with s 252A was "a jurisdictional fact that had to be considered before any further steps could be taken in relation to the application for the mining lease". Particular reliance is placed upon the decision of the High Court in *Forrest & Forrest Pty Ltd v Wilson*[10] that when a statute that provides for the disposition of interests in the resources of a State "prescribes a mode of exercise of the statutory power, that mode must be followed and observed", and that a grant will be effective if the regime is complied with, but not otherwise. The Lonergans submit that there was no basis upon which the Member could be satisfied that the requirements of s 252A of the *MRA* had been complied with and that compliance with s 252A was a "jurisdictional fact".

[40] In oral submissions the point was developed that compliance with s 252A was a "jurisdictional requirement" that had to be established to the satisfaction of the Land Court. The importance of compliance with s 252A was said to be reflected in the requirement in s 252B(4) that until the declaration is given, the Land Court must not make a final recommendation to the Minister about the application for the mining lease, other than a recommendation to reject the application.

[41] Because Mr Skilton was self-represented and not in a position to assist the Court on these issues of law, counsel for the third respondent assisted the Court with submissions about the statutory context, the decision in *Forrest & Forrest* and cases which have considered it. The cases were submitted to reveal that a close

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10 (2017) 262 CLR 510 at 528 [63] – 529 [64] ("*Forrest & Forrest*").

consideration of the language of the Act, in context, was required to determine whether the relevant provision has the "rule-like quality" possessed by the provisions that were applied in *Forrest & Forrest*.

[42] The Lonergans' submissions, both written and oral, raise two issues:

1. Is compliance with s 252A a "jurisdictional fact", such that a recommendation to grant a mining lease will be ineffective unless s 252A is complied with?

2. Is compliance with s 252B a "jurisdictional fact", such that a recommendation to grant a mining lease will be ineffective unless s 252B is complied with?

Each question requires close consideration of the language of the relevant provision in context, including the legislation's objects and purpose.[11] Therefore, the same answer will not necessarily be given to both questions.

[43] The test is to ask whether it was a purpose of the legislation that an act done in breach of a provision should be invalid. In determining that question, a necessary inquiry is whether the statutory purpose would or would not be advanced by holding an exercise of decision-making power affected by a breach to be invalid.[12]

Forrest & Forrest

[44] *Forrest & Forrest* concerned non-compliance with s 74(1)(ca)(ii) of the *Mining Act* 1978 (WA) which required an application for a mining lease to be accompanied by a "mineralisation report" prepared by a qualified person. The High Court emphasised the central place of a mineralisation report in the statutory scheme. The Director, Geological Survey, had neither an obligation nor a power to provide a report to the Minister if an application for a mining lease was not accompanied by a mineralisation report.[13] In that case a warden issued a report holding that he had jurisdiction, notwithstanding that the application was not accompanied by a mineralisation report, and made a recommendation to the Minister that the application should be granted. An application was made to quash the warden's report and recommendation.

[45] The High Court ruled that compliance with s 74(1)(ca)(ii) was an essential preliminary to the exercise of the power conferred upon the Minister to grant a mining lease. The Court emphasised the importance of legislation which prescribes a mode of exercise of the statutory power which grants exclusive rights to exploit the resources of the State.[14] This supported parliamentary control of the disposition of lands held by the Crown in right of the State. It also recognised that the public interest "is not well served by allowing non-compliance with a legislative regime to be overlooked or excused by the officers of the executive government charged with its administration".[15] The Court observed that to permit such a state of affairs "might imperil the honest and efficient enforcement of the statutory regime, by

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11 *Roads and Maritime Services v Desane Properties Pty Ltd* (2018) 98 NSWLR 820 at 860 [204] ("*Roads and Maritime Services*").

12 *Forrest & Forrest* at 534 [83], citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93] ("*Project Blue Sky*").

13 *Forrest & Forrest* at 518 [18].

14 At 529 [64].

15 At 529 [65].

allowing scope for dealings between miners and officers of the executive government in relation to the relaxation of the requirements of the legislation".[16]

[46] Attention to the language of the statute showed that the Director, Geological Survey was obliged to provide a s 74A report based upon a mineralisation report that accompanied the relevant application, not some other mineralisation report provided at some unspecified other time.[17] This conclusion about the construction of the Western Australian legislation was informed by an understanding of the objects of the Act. Compliance with the requirement to accompany an application for a mining lease with a mineralisation report was "apt to reduce the administrative burden upon the Department".[18] Insistence upon a mineralisation report as an accompaniment to the application also served the purpose of ensuring "that owners and occupiers of subject land were not troubled unnecessarily or prematurely by half-baked proposals".[19] Requiring compliance with the provision for a mineralisation report to accompany an application would avoid disadvantage to miners in competition for access to the same resources.[20] Compliance with the regime was necessary to prevent "land-banking" by holders of existing licences who had not yet encountered a specific geological foundation for lodgement of a mineralisation report.[21]

[47] *Forrest & Forrest* provides authoritative guidance as to the relevant test in the context of a statutory regime for the granting of a mining lease. It also shows that close consideration is required of the particular provisions, their purpose and the consequences of non-compliance with them. In undertaking that exercise in *Forrest & Forrest*, the High Court identified that the statutory regime was built on the foundation that an application for a mining lease be accompanied by a mineralisation report.[22]

[48] Other authorities, including intermediate courts of appeal, have considered *Forrest & Forrest* in different contexts including legislation governing the compulsory acquisition of land[23] and native title legislation.[24] The Full Court of the Federal Court in *BHP Billiton Nickel*[25] indicated that it was necessary to not focus on certain statements in *Forrest & Forrest* in isolation. I adopt that approach. *Forrest & Forrest* is not authority for the general proposition that non-compliance with any provision in legislation governing the granting of a mining lease spells invalidity for the grant. Instead, it requires a close consideration of the language of the relevant provision, in context, including its objects and purpose. This includes consideration of the consequences of non-compliance on the administration of the Act and the interests of other parties. Having had regard to the language of the relevant

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16 At 529-530 [65].
17 At 531 [71].
18 At 535 [85].
19 At 535 [86].
20 At 536 [89].
21 Ibid.
22 *Roads and Maritime Services* at 858 [201].
23 *Roads and Maritime Services*.
24 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) and Others* (2018) 258 FCR 521. An appeal to the High Court was allowed on other grounds: *KN (deceased) and others (Tjiwarl and Tjiwarl #2) v Western Australia* [2019] HCA 12.
25 At 533-534 [44].

provision and its purpose, the ultimate question is whether it was a purpose of the legislation that an act done in breach of a provision should be invalid.

Is compliance with s 252A a "jurisdictional fact"?

[49] The present context of compliance with s 252A relates to the jurisdiction of the Land Court to make a recommendation to the Minister to grant a mining lease in circumstances in which the Lonergans argue that the material before the Court did not establish that the requirements of s 252A had been complied with.

[50] A substantial argument may be made that the purpose of the statutory scheme would be advanced by holding that an exercise of decision-making power by the Land Court affected by a failure to comply with s 252A is invalid. While in a different statutory context to the statutory context of the mineralisation report considered in *Forrest & Forrest*, similar arguments exist to the effect that the public interest is not served by allowing non-compliance with a legislative regime that requires certain documents and information to be given to an affected person and that the provision of the informed views of those who object to an application is apt to improve the quality of decision-making by those charged with the administration of the Act.

[51] A competing argument is that the requirements in s 252A of the *MRA*, or at least some of them, are not as foundational as the mineralisation report considered in *Forrest & Forrest*. In that context, the regime established by the legislation which required an application to be accompanied by a mineralisation report was necessary to prevent "land-banking". Close consideration of the language and the purposes of those provisions led to the conclusion that the warden did not have jurisdiction to hear the relevant application.

[52] It is unnecessary to resolve this issue for two reasons. First, the application for judicial review concerns non-compliance with s 252B, not s 252A. Second, even if the Lonergans' application for a statutory order of review had relied upon non-compliance with s 252A, the material before the Land Court and also before this Court allows the conclusion to be reached that s 252A was complied with.

Is compliance with s 252B a "jurisdictional fact"?

[53] Close consideration is required of the purpose of the relevant provision. Section 252B facilitates proof of compliance with s 252A. Section 252A is an important provision requiring an applicant for a proposed mining lease to give affected persons certain documents and information and to publish certain documents in an approved newspaper circulating generally in the area of the subject land. Requiring an applicant for a mining lease to provide a statutory declaration to the chief executive helps ensure compliance with s 252A.

[54] While both s 252A and s 252B might be characterised as "procedural", s 252A imposes important requirements which serve the public interest, protect the interests of affected parties and initiate a process in a statutory regime by which the State may grant exclusive rights to exploit the resources of the State. Section 252A imposes important requirements for the giving and publication of a mining lease notice and other information. Section 252B facilitates proof of compliance with s 252A.

[55] Analogies may be unhelpful. However, in the context of a question about the jurisdiction of a court, the requirement to give documents and information to affected persons has an analogy with service of proceedings in a civil case. In that context, service of proceedings upon a defendant is ordinarily an essential requirement for the Court to exercise jurisdiction over the defendant. Proof of service may be required in certain situations, for example, where the defendant does not appear. Service may be proven by a particular means, such as an affidavit of service. However, where service is proven by other means the absence of an affidavit of service does not deprive the Court of jurisdiction.

[56] The present issue, in effect, is whether the absence of a declaration of compliance under s 252B necessarily deprives the Land Court of jurisdiction to make a final recommendation to the Minister. Was it a purpose of s 252B that absent proof of a declaration under s 252B having been given, a recommendation of the Land Court is invalid?

[57] In my opinion, it was not. The better view is that the absence of a declaration does not necessarily deprive the Land Court of jurisdiction to recommend the granting of a mining lease. It would be an odd and apparently unintended consequence for this to be the result in a case in which there was no dispute that there had been compliance with s 252A. It would be an odd result if a proceeding in the Land Court, having been conducted by the parties on the basis that there had been compliance with s 252A, and in which there had in fact been compliance with s 252A, was declared invalid, along with the recommendation made at the end of that proceeding, because of a lack of evidence that a statutory declaration had been given that the applicant had complied with s 252A.

[58] This view does not make light of the requirement in s 252B in the context of a regime by which the State may grant exclusive rights to exploit the resources of the State. It attempts to interpret s 252B in its statutory context and have regard to its apparent purpose of facilitating proof of compliance with s 252A and ensuring compliance with s 252A. Section 252B is a procedural requirement in aid of compliance with s 252A. If it be assumed for the purpose of argument that compliance with s 252A is a "jurisdictional fact" and an essential prerequisite for the granting of a mining lease, then s 252B stands in a different category. Non-compliance with s 252B does not necessarily spell invalidity of a recommendation to grant a mining lease or a subsequent grant of a mining lease.

[59] The Lonergans understandably place reliance upon the language of s 252B(4)(a) that until a declaration is given the Land Court "must not make a final recommendation to the Minister …". However, in determining whether departure from a statutory requirement renders an act invalid, the Court is required to apply the test in *Project Blue Sky*,[26] as followed in *Forrest & Forrest*.[27] In applying that test in a wide variety of statutory contexts, courts consider legislation which imposes requirements, often in emphatic terms. The issue is not whether the requirement exists, but whether non-compliance with it spells invalidity. The use of

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26 At 390 [93].
27 At 534 [83].

imperative language in the form of "must" is instructive. However, it is "merely the beginning of the task of construction and not determinative".[28]

[60] An apparent purpose of s 252B(4) is to avoid the administrative cost and consequences of the Land Court proceeding to make a recommendation, only to later find out that there had been non-compliance with s 252A, for example, because only some affected persons had been provided with the notice and information required by s 252A. It may avoid in such a case the Land Court having to restart proceedings with a new set of objectors who were not initially given notice of the application for a mining lease.

[61] In short, s 252B is essentially procedural and facilitates proof of compliance with s 252A. In a case in which no issue exists at the conclusion of a hearing that s 252A has been complied with, or in a case in which compliance with s 252A is in contest and compliance is proved by satisfactory evidence, the absence of a declaration under s 252B should not spell invalidity for a recommendation made by the Land Court.

[62] Compliance with a procedural provision such as s 252B is important in proving compliance with s 252A. However, compliance with s 252A can be proved in other ways. It would be an odd and apparently unintended result if a recommendation of the Land Court to grant a mining lease was declared invalid due to non-compliance with s 252B when it was proven before the Land Court that there had in fact been compliance with s 252A. It is difficult to suppose that the Parliament intended such an outcome. The setting aside of the Land Court's recommendation, with possible implications for the mining lease granted as a result of it, is unlikely to have been intended in a case in which, for example, s 252A was complied with but, through oversight, the applicant before the Land Court neglected to prove that a statutory declaration was given to the chief executive.

[63] In summary, the purpose of s 252B is to facilitate proof of compliance with s 252A, and also to help ensure compliance with s 252A. The purpose of the provision is not to render a recommendation invalid where compliance with s 252A is otherwise proved. I am not persuaded that the purpose of the legislation was that the Land Court lacked jurisdiction or was deprived of jurisdiction in a case in which there was insufficient proof that a declaration required by s 252B was given, but in which there was other evidence that the applicant had complied with s 252A and, at the conclusion of the hearing before the Land Court, compliance with s 252A was not an issue.

[64] Accordingly, I conclude that compliance with s 252B is not a "jurisdictional fact" such that a recommendation to grant a mining lease will be invalid unless s 252B was complied with.

Other matters

[65] Had I reached the conclusion that compliance with s 252B was a "jurisdictional fact", then the fact that the Lonergans did not take any point before the Land Court about compliance with s 252B would not have been a sufficient basis to deny them

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28 *Road and Maritime Services* at 856 [191] citing *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 112 [26].

relief. If the Land Court lacked jurisdiction then, although this Court retains a discretion to refuse relief under the *Judicial Review Act* 1991 (Qld) ("*JRA*"), the appropriate course would have been to set aside the recommendation to grant the mining lease on the basis that the Land Court lacked jurisdiction.

[66] Leaving aside their unsuccessful jurisdictional argument, the Lonergans' conduct in not raising any point about non-compliance with s 252B in advance of the Land Court hearing, at that hearing or in their submissions to the Land Court is a basis to decline discretionary remedies under the *JRA* for matters which do not constitute jurisdictional error in circumstances where non-compliance with s 252B does not automatically render a recommendation invalid. Had the s 252B point been raised before the Land Court, then evidence of compliance with s 252B might have been given or an extension of time granted under s 252B(2)(b). Any deficiency in evidence before the Land Court that the declaration required by s 252B had been given was related to the Lonergans not raising any issue at the hearing about compliance with s 252A or s 252B.

The Lonergans' grounds of review in relation to koala habitat

[67] As already outlined, the Lonergans' objections to the application for the mining lease that the proposed mining activities "will cause adverse environmental impact" asserted that it had not been sufficiently demonstrated that there would be no adverse environmental impact, attached a copy of their Environmental Authority Application Objection and stated that "the size of the lease area, the nature of the activities coupled with the related soil types and topography will make the avoidance of adverse environmental impacts impossible". To the extent that the objection adopted by reference matters raised in the Environmental Authority Application Objection, there were many matters in relation to areas of disturbance, erosion and sediment control, topsoils and other matters. There also was one paragraph devoted to nature conservation, which I have earlier quoted in [20]. Most of it related to weed control measures. The final sentence read:

> "The proposed lease area should also be fully fenced to protect local fauna and cattle from hazardous materials, machinery, vehicles and other introduced dangers."

That sentence was, in substance and effect, contending that the conditions in the draft Environmental Authority were inadequate and that any Environmental Authority should contain an additional condition that the lease area be fully fenced. It was not an objection that the grant of a mining lease and the operations to be carried on under its authority would lead to a loss of vegetation and consequent loss of endangered species.

[68] Section 269(4) of the *MRA* states that 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 a number of matters. These matters are listed in subparagraphs (a) – (m). Relevantly, subparagraph 269(4)(j) is whether:

> "there will be any adverse environmental impact caused by those operations and, if so, the extent thereof"

[69] The Court of Appeal has confirmed that s 269(4)(j) allows consideration only of operations to be carried on under the authority of the proposed mining lease.[29] This refers to the physical activities associated with winning and extracting minerals from the place in which they occur or their natural state.[30]

[70] Section 268(3) assumes importance for the purpose of disposition of the Lonergans' ground of review as to whether the Land Court was required to consider an objection in relation to the loss of koala habitat. Section 268(3) provides:

> "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."

This provision means that the Court cannot hear submissions or evidence on a question from an objector who has not raised that matter in a duly lodged notice of objection.[31] The provision directs attention to the grounds of objection lodged in relation to the mining lease application. As noted, the objection contained a number of grounds in relation to adverse environmental impact including erosion and topsoil conditions and the extent to which areas disturbed by mining could be rehabilitated. The one paragraph of the objection to the Environmental Authority Application concerning nature conservation dealt with weeds. Neither it nor any other part of that document contended that the mining lease application should be refused because of the adverse effect of mining operations on koala habitat caused by vegetation removal. Assuming it was appropriate to read into the mining lease objections, by cross-reference, the objections in the Environmental Authority Application, the closest the objections came to saying anything about koala habitat was that the proposed lease area should be fully fenced to protect local fauna and cattle from dangers. There was no objection that preparation for mining operations, let alone the carrying on of the operations to be carried on under the authority of the mining lease, required clearing of vegetation which would threaten endangered species.

[71] Mr Skilton responded to the suggestion about a condition about fencing by contending that totally fencing the lease area would decrease the available feed to the Lonergans' cattle. The issue of fencing does not appear to have been taken any further.

[72] The Lonergans obtained a report from Mr Spies, who holds a Bachelor of Applied Science (Rural Technology) and an Associate Diploma of Applied Science in the field of agronomy, and who acts as a consultant specialising in soil health, vegetation and pasture management. Mr Spies' report addressed issues of land suitability, soil quality, soil stability and whether the proposed mining activities conformed with sound land use management practices. On the issue of whether the proposed mining activities would cause adverse environmental impacts, Mr Spies expressed the opinion that the subject site could not be properly rehabilitated given the soil types and very shallow texture contrast soils of low fertility. He also

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29 *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242 at [31] – [33].

30 *New Acland* at [32] – [33].

31 *ACI Operations Pty Ltd v Quandamooka Lands Council Aboriginal Corporation* [2002] 1 Qd R 347 at 350 [5] – 351 [6], 351 [14], 360 [57] – 361 [61].

identified a risk of noxious weed species being carried onto the property. The section of his report concerned with adverse environmental impacts did not assert that there would be loss of koala habitat. Instead, another part of his report dealt with whether the subject area was located within a Category B environmentally sensitive area under certain legislation. His report referred to "critical habitat" as defined in the *Nature Conservation Act* 1992 (Qld) ("*NCA*") and "essential habitat" as defined in the *Vegetation Management Act* 1999 (Qld) ("*VMA*"). Paragraph 5.1.5(e) stated:

> "Section 332 of the *Nature Conservation (Wildlife Management) Regulation 2006* requires approval to tamper with an animal breeding place (such as a tree hollow being used by a protected animal to raise its young) and constitutes an offence to tamper without approval. The section provides that approval to tamper with an animal breeding place may be obtained by way of an approved Species Management Program (SMP). Section 332 provides the need for a species management program over all native species and use of spotter/catchers. Utilizing a licensed spotter/catcher ahead of clearing is one of the key actions which industry applies to mitigate potential impacts on animal breeding places, along with avoidance of known breeding places and seasonal timing of works to avoid times when nesting/breeding is underway and young may be present. A species management program would need to be in place before clearing commences, that the plan needs to be submitted (registered) and this would probably involve licensed spotter/catchers."

[73] This section of the report did not contain any positive assertion that mining operations would endanger koala habitat. Instead, it identified that any application for vegetation clearing would, in his opinion, require approval and any disturbance of an animal breeding place would require a species management program before clearing commenced and that such a plan would probably involve a licensed spotter or licensed catchers.

[74] Mr Spies gave evidence at the hearing. The Auscript transcript wrongly records his name as "Spence". It is unnecessary to summarise different aspects of his oral evidence. Like his report, it dealt with areas of disturbance, soils and rehabilitation. At one point of his evidence, Mr Spies was taken to an annexure to his report concerning essential habitat and there was an attempt to tender an additional map which was said to go to the "bio-diversity process". The Member remarked that this was new evidence and would only be permitted to enable Mr Spies to explain evidence that was already in the Court. Mr Spies was taken to paragraph 5.1.5(e) of his statement and the Member remarked that the subparagraph did not actually say that the property was burdened by anything. It identified what might happen. An attempt to justify the tendering of a further map on the basis that it demonstrated that this was a bio-diversity property which triggered certain assessment processes was resisted. The Member observed that if the map simply demonstrated what was happening under paragraph 5.1.5(e), she was not minded to allow it because that subparagraph was a "theoretical exercise". It pointed to some future assessment process, not one which had been undertaken by Mr Spies or anyone else. Nevertheless, the evidence continued with Mr Spies giving some brief evidence about the matters that would need to be dealt with in the event of a development

application, particularly a tree clearing application, and that there would need to be a formal expert trapping and running survey and that any clearance would need to be undertaken by a person licensed under the *NCA*. Mr Spies' evidence then turned to other topics. He was cross-examined briefly by Mr Skilton about whether he was aware of any studies of chlamydia affecting koalas in the subject area. In re-examination he was taken to a map and expressed the opinion that an area of essential habitat marked in blue covered the majority of the mining lease area and that an area of essential habitat is a trigger for further investigation of the site.

[75] In summary, Mr Spies' evidence did not contain any specific evidence that mining operations authorised by the grant of the proposed mining lease would result in a loss of essential koala habitat. Instead, his report and his evidence indicated the process which would apply, in his opinion, if there was an application for vegetation clearance. Mr Spies gave no evidence about the utility of fencing the leased area.

[76] In their closing submissions the Lonergans submitted that Mr Skilton's application for a standard Environmental Authority did not satisfy the eligibility criteria for the standard conditions. The submission addressed whether the area was in an environmentally sensitive area, the proposed area of disturbance, issues in relation to water management, erosion, topsoils and overburden management and rehabilitation. It also dealt with issues relevant to the objection to the mining lease application, including mineralisation of the site. In relation to adverse environmental impact, the submission relied upon Mr Spies' evidence to contend that if an application was received for vegetation clearing on the site it would be rejected due to "the potential erodibility, lack of moisture holding capacity and salinity of the associated soils". Reference was also made to Mr Spies' evidence of shallow soil depth and that restrictions on the land type included slope, rockiness, shallow soil depth, erosivity and low fertility soils. The Lonergans' essential submission in relation to the application for an Environmental Authority was that because the area was within an area of "critical habitat" as defined in the *NCA*, it was not eligible to be approved by the standard conditions and, in any event, the application did not satisfy the eligibility criteria for the standard conditions. The submission added that the application did not satisfy the requirements of the *MRA*. In submissions about the public interest, reference was made to "the potential impact to koala populations".

[77] An issue for the Land Court was whether such a submission about the effect of the proposed mining activities on koala habitat could be made. That depended upon whether loss of koala habitat was a ground of objection in the objections which were lodged. As I have discussed, neither the objection to the application for the mining lease nor the objection to the Environmental Authority objected on the grounds that the authorised mining operations would adversely affect koala habitat (save to the extent there was reference to a need to fence the leased area to protect local fauna and cattle from hazards).

[78] The Land Court stated:

> "[30] Mr Spies' report contained a section on threatened species, and he told the Court that the proposed mine was located in an area of essential habitat for koalas, resulting in the requirement for a 'formal expert trapping and running surveys'.

> [31] The Lonergans' objections did not include a reference to the loss of critical habitat. Section 268(3) of the MRA provides that this Court:
>
> > … shall not entertain an objection or any evidence in relation to any ground if the objection or ground is not contained in the objection duly lodged in respect of the application.
>
> [32] The Court has adopted a strict view of s 268(3). Therefore, I will not consider any evidence relating to this issue." (footnotes omitted)

[79] In their application for judicial review, the Lonergans contend that the Land Court erred in failing to take into account a relevant consideration, namely the impact on koala habitat, which was required to be taken into by virtue of s 269(4)(j) of the *MRA*. Their submissions point to the fact that the Environmental Authority objection stated that "the proposed lease area should be fenced to protect local fauna …", whereas the Court ruled that the issue of environmental impact on koalas was not raised. They submit that, in the circumstances, the Court failed to consider a relevant consideration referred to in the objection to the Environmental Authority which was incorporated into the mining lease objection document.

[80] I am not persuaded by this ground. In the paragraphs which I have quoted, the Land Court was not concerned with the suggestion in the Environmental Authority objection that the proposed leased area should be fenced. As discussed, it is difficult to regard the sentence of the Environmental Authority objection as more than a submission about an additional condition which should be imposed, rather than an objection. In any event, as discussed, neither Mr Spies' report nor his oral evidence addressed any proposal for the leased area to be fenced.

[81] The Land Court was concerned with whether it should entertain an objection or evidence in relation to koala habitat, and Mr Spies' evidence about a requirement for there to be a "formal expert trapping and running survey". In my view, it was open to the Land Court to conclude that this was not a matter which had been raised as a ground of objection. The only objection (or more precisely recommendation for a condition) concerning koala habitat was the single sentence that the proposed lease area should be fenced to protect local fauna. That matter was not taken up in evidence. Instead, paragraph 5.1.5(e) of Mr Spies' report dealt with a possible future process if there was an application for clearing of vegetation. When that aspect of his report arose in the course of his oral evidence, the Land Court Member correctly described the matter as theoretical, being concerned with a process that might happen in the future and what, in certain circumstances, legislation would require.

[82] In summary, the objection lodged in relation to the application for the mining lease, which incorporated by reference the Environmental Authority objection, was not an objection that mining operations would involve vegetation clearance which would result in loss of critical habitat for koalas. Instead, the Environmental Authority objections proposed an additional requirement that the leased area be fenced. The Land Court was correct to conclude that s 268(3) precluded it in considering, in the context of s 269(4)(j), an objection or any evidence in relation to the loss of essential habitat for koalas. The Court was required to consider other matters raised

in the objection as to adverse environmental impact caused by the operations to be carried out under the authority of the proposed mining lease, being matters which were contained in the objections which were lodged in respect of the mining lease application. It did so.

[83] The idea that the proposed lease area should be fenced to protect local fauna was raised in the Environmental Authority objection. However, it did not require any substantial consideration because the idea of fencing was not taken up in the evidence or in submissions.

[84] The Lonergans have not established that the Land Court erred in failing to take into account a relevant consideration, being evidence adduced through Mr Spies about koala habitat and legislation that would require a trapping and running survey.

Natural justice in relation to koala habitat

[85] The final ground of judicial review advanced by the Lonergans is related to the issue which I have considered. Their submissions refer to it as a subsidiary issue. It alleges a breach of the rules of natural justice, and says that the Member failed to advise them that she would not consider the evidence relating to koala habitat. The Lonergans submit that had the Member raised this issue with their legal representative before making the decision, the issue could have been addressed. The failure to do so is submitted to amount to a breach of procedural fairness.

[86] As discussed, during the hearing the Member expressed an opinion concerning the relevant part of Mr Spies' report, paragraph 5.1.5(e). This was the only paragraph of his report which dealt in any substantive way with threatened species. His other evidence about mapping and whether all or part of the proposed mining lease area was in an area of "critical habitat" had a relevance to the issue of whether the application for the Environmental Authority should have been assessed according to the eligibility criteria which the department applied.

[87] For the reasons already given, the Court, in considering the mining lease application, was not required to address an objection or any evidence in relation to a ground if the objection or ground was not contained in the objection which had been lodged. In fact, s 268(3) precluded it from entertaining such an objection.

[88] After the hearing on 4 April 2019, the matter proceeded by way of written submissions. If oral submissions had been made then the matters addressed in paragraphs [30] – [32] of the Land Court's decision might have been raised at that point.

[89] The written submissions did not specifically address Mr Spies' evidence that the proposed mine was located in an area of "essential habitat" for koalas, resulting in a requirement under the *NCA* for a formal expert trapping and running survey. It relied on Mr Spies' report and his evidence in other respects. In some respects then, paragraphs [30] – [32] of the Land Court's reasons are an exercise in completeness in explaining why certain parts of Mr Spies' evidence could not be considered by virtue of s 268(3) of the *MRA*.

[90] In any event, to the extent that the Lonergans' written submissions should have been interpreted as relying on those parts of his evidence in relation to koala habitat, and

that an application for vegetation clearance in the future would require a formal expert trapping and running survey, it is difficult to see why the Court was obliged to preview the contents of paragraphs [30] to [32] of its reasons. If the legal representatives of the Lonergans had been told that the Court did not propose to consider the matters in paragraph 5.1.5(e) of Mr Spies' report or his oral evidence about koala habitat, then what could have been said on their behalf? The Lonergans' submissions say that the issue could have been addressed but they do not explain how.

[91] The Court was precluded from entertaining an objection or any evidence in relation to the issue of koala habitat, it not having been the subject of an objection. The position is unlike one in ordinary civil proceedings in which a judge is minded to rule that part of an expert or lay witness's evidence is inadmissible because it is not relevant to an issue in the proceedings or because of the form in which it is presented. Previewing to a party that the Court is minded to rule the evidence inadmissible provides the party with a chance to seek leave to amend pleadings to raise an issue or to "patch up" the evidence by having it given in a proper form. The present position is different. Section 268(3) precludes a new objection being raised or any evidence being given in relation to a ground of objection if the ground is not contained in the objection which was lodged. The Lonergans do not explain how the Land Court's raising the issue with their legal representatives before the decision was made could have made a difference.

[92] In summary, although Mr Spies gave evidence about koala habitat, his evidence was that because the mine was located in what was said to be an essential or critical habitat for koalas and other fauna, there would need to be a formal expert trapping and running survey before any application was granted in the future for vegetation clearance. To the extent the Lonergans' final submissions might be said to have relied upon his evidence in that regard, s 268(3) precluded the Court from entertaining that evidence. The Lonergans have not pointed to what would have been said on their behalf if the point had been mentioned by the Land Court before making the decision.

[93] I am not persuaded that the Land Court was obliged to raise the issue before making its decision in order to accord procedural fairness. However, if I had reached that conclusion, the Lonergans have not established that providing them with the opportunity would have made any material difference. Even if a 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 could have made no difference to the outcome.[32] In my view, this is such a case.

Conclusion

[94] The Lonergans have not established their grounds for judicial review. Their application will be dismissed.

[95] I will allow the parties some time to resolve any issue of costs. I am conscious that Mr Skilton is self-represented and seemingly has not incurred any legal costs. The first respondent abided the order of the Court and seemingly does not seek any order as to costs. Any remaining issue as to costs will be between the applicant and the

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32 *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at 315-316 [40].

third respondent. Absent any consent order as to costs, I will direct the parties to make any submissions as to costs within 14 days. If no submissions as to costs are made within that time, there will be no order as to costs.