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Dr Mick Millington has an extensive background in Systems Engineering working in high technology areas in the aerospace, maritime and land systems domains within Defence, Border Protection and Antarctic sectors. Mick earnt his PhD working in the early days of optical fibres and has since obtained qualifications in commercial law, business administration and aquaculture. He was recently accepted as a Lawyer into the Queensland Courts. Mick has been active in community projects and in development of a property in Eumundi, practicing Permaculture and sustainable practices in forestry, bamboo and aquaculture; the property won the Sunshine Coast Environment for the environment in 2016. He is a mentor at the University of the Sunshine Coast Innovation Centre involved in numerous start-up projects.

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Amelia is a Senior Associate in the Planning, Environment and Sustainability group at Holding Redlich, specialising in town planning, development and environmental law. Amelia also has significant experience in land acquisition and compensation matters.

Amelia is known for her successes in appeals and enforcement proceedings in the Planning and Environment Court, Land Court and Magistrates Court, as well as her forward-thinking advice surrounding strategic planning, development assessment and infrastructure delivery.

EDITORIAL

Welcome to this edition of the QEPR.

The last quarter of the year has seen the Planning and Environment Court publishing almost as many decisions in three months as it had in the first half of the year. A summary of the decisions from the last three months appears in this edition of the QEPR and looks at a number of important issues including demolition of pre-war dwellings, indefeasibility of title, jurisdictional errors, Wednesbury unreasonableness, permissible changes, enforcement, costs and a Federal Court decision involving the judicial review of the decision of the Minister for the Environment to approve Adani's open-cut and underground coal mine in central Queensland.

We are also fortunate to have a paper prepared by Dr Mick Millington providing an overview of the Queensland CSG industry and the issues relating to water and fraccing.

We welcome contributions to the QEPR and invite all QELA members as well as non-members to submit papers for consideration for future editions.

Gerard Timbs – Editor
Holding Redlich

GUINEY v BRISBANE CITY COUNCIL [2016] QPEC 26
(Rackemann DCJ – 3 June 2016)

Planning and environment – proposed demolition of a pre-1947 dwelling in the traditional building character overlay – where subject house is a fine example of traditional building character in a street in which post-1947 houses predominant – whether a street has no traditional character – whether subject house contributes positively to the visual character of the street

Facts: This was an appeal against the respondent Council's refusal of a development application to demolish a pre-1947 house within the Traditional Building Character Overlay of the planning scheme.

The subject house was located at 26 Williams Avenue, Hendra in a street composed mainly of dwellings which were a mix of pre-1947 traditional character buildings and more modern dwellings, some of which were quite contemporary. The post-1947 buildings were a result of infill residential development rather than demolition of pre-1947 buildings and as a result the overlay applied to only some properties within the street. The subject dwelling was situated in a row of three pre-1947 traditional character buildings and was a fine example of traditional building character.

There was a numerical predominance of post-1947 buildings within Williams Avenue however the buildings within the street did not conform to a single unifying built form character.

The appellant contended that, in accordance with the Traditional Building Character (Demolition) Overlay Code, the house did not contribute positively to the visual character of the street (PO5(c)) and the street had no traditional character (AO5(d)).

The appellant also argued that:

(1) a street can only have one character, which must be either a traditional character or a non-traditional character, rather than being of mixed character or as featuring any realistic co-existing character;

(2) whether a street is characterised overall as being of traditional character or non-traditional is determined by reference to what predominates; and

(3) accordingly, the street is of modern character only.

Decision: The Court held in dismissing the appeal:

1 The appropriate way to approach assessment of PO5(c) and AO5(d) is to consider the house in the context of the whole of the street (*Leach and Ors v Brisbane City Council* [2011] QPELR 1) and not simply segments of the street (*Mariott v Brisbane City Council* [2015] QPELR 910).

2 In order to satisfy AO5(d) it must be demonstrated that the street could not realistically or reasonably be described as having any traditional character (*Lucas*).

3 A predominance of post-1946 dwellings could not, of itself, necessarily lead to a conclusion that a street had a homogenous modern character *(Lucas v Brisbane City Council)* or that a house of traditional character did not contribute positively to the visual character of the street.

4 The appellant's expert mistakenly regarded the decision in *Mariott v Brisbane City Council* as requiring that the assessment of character to be undertaken on an 'all or nothing' basis, by reference to what predominates the street, such that a particular type of building character must predominate in order to be assessed as influencing the character of the street. The Court considered that was an over-reading of the Court's approach in *Mariott v Brisbane City Council* and was not reflective of the tests in the relevant provisions of the planning scheme. It did not follow that numerical predominance inevitably justified a finding that a given street has no traditional character.

5 The appellant's expert was of the view that the character of the street was predominantly modern and the other two character houses in the group of three, being in a state of disrepair and potentially susceptible to demolition, displayed limited traditional building character and weakened the case to retain the subject house.

6 The Court found there was insufficient evidence to establish the character houses were susceptible to approval for demolition and in any event, assessment of the character of the street must be based on the present visual character, not what might happen in the future.

7 The Court preferred the respondent council's expert opinion that the street was of a mixed character but as a whole retained a strong traditional character and that the subject house made a positive contribution to the character of the street.

8 In coming to this conclusion, the Court considered the influence of the character houses on the street with reference to the attributes of the character houses, their location, consistency of character, relationship with each other and visual exposure to the street.

9 The Court found the subject house, being a fine and readily visible example of traditional building character, contributed positively to the visual character of the street. Accordingly, the Court was satisfied that the proposal did not meet AO5(d) and failed PO5(c) of the assessment criteria.

KINKA BEACH PTY LTD v LIVINGSTONE SHIRE COUNCIL [2016] QPEC 27
(R S Jones DCJ – 27 May 2016) (Ex *Tempore*)

Catchwords – Planning and environment – application to strike out a notice of appeal – conduct of appellant – non-compliance with Court orders – disregard for Council correspondence – delay – guillotine order

Facts: This was an application brought by the respondent Council to strike out a notice of appeal filed in respect of a significant development near the township of Kinka Beach.

The substantive appeal was against Council's decision to refuse the appellant's development application on a number of grounds including that the proposed development was in material conflict with the planning scheme.

During the course of the proceeding the appellant persistently failed to comply with Court orders for directions to progress the matter. As the initial development application had been filed in 2007, at the time of the strike out application the proposed development had been on foot for nine years.

The respondent Council now sought to strike out the appellant's notice of appeal, relying on:

(1) the appellant's poor conduct during the appeal including its non-compliance with Court orders and its disregard for Council correspondence in relation to that non-compliance; and

(2) the appellant's delay in progressing the appeal.

The appellant resisted the application and relied on affidavit evidence to demonstrate the appellant was experiencing financial hardship and was attempting to sell the subject land.

Decision: The Court found:

1 The appellant had a history of failing to comply with the orders of the Court and had also shown total disregard for correspondence sent by the respondent Council's solicitors in which they sought to progress the matter.

2 There is an overriding obligation on the parties to a proceeding to comply with the rules of the Court to avoid undue delay and expense (Rule 4 *Planning and Environment Court Rule 2010* (Qld)). The periods of delay that had characterised the proceedings were solely the result of the conduct of the appellant.

3 Based on affidavit material provided by the appellant there was a grave concern that the appellant would be able to comply with the orders of the court within a reasonable timeframe.

4 There was no certainty that the sale of the land would proceed and if it were sold, whether or not the purchaser would be interested in prosecuting the appeal.

5 While the Court sympathised with the respondent Council's position, it was reluctant to dismiss the appeal. Rather, the Court ordered the appellant to fully comply with all outstanding orders of the Court by 4pm, 30 June 2016 (approximately one month after the hearing). Failure to fully comply within the timeframe would result in the dismissal of the appeal

HAMILTON v BRISBANE CITY COUNCIL [2016] QPEC 28
(RS Jones DCJ – 3 June 2016)

Appeal against refusal of an application to demolish a pre-1947 house – where house located in Brisbane suburb of Kedron – where house located in an area dominated by pre-1947 houses

Where house situated within Brisbane City Plan 2014 – where houses situated in a Character Residential (CR1) Zone – where house located within the Lutwyche Road Corridor neighbourhood plan area – whether the demolition of house would conflict with relevant provisions of City Plan 2014

Facts: This was an appeal against the respondent Council's refusal of a development application to demolish a pre-1947 house located in Kedron, Brisbane. The subject house

was situated in a Character Residential (CR1) zone, in the Lutwyche Road Corridor neighbourhood plan area and was affected by the Traditional Building Character overlay.

Within the relevant streetscape the parties' expert heritage architects found there were 30 houses, 28 of which were constructed on or before 1946, the majority of which were of a recognisable "interwar timber and tin" character. The subject house, also constructed pre-1946, differed in that it was "clearly a 1920 or 1930 stucco and tin, character house".

Located at the "dead end" of the street, the subject house was virtually concealed by vegetation from the north, visibility from the west was virtually non-existent from about 30 to 35 metres away, and only 50% of the front of the house presented to Eighth Avenue.

The substantive issue to be determined was whether there was genuine conflict with the respondent Council's City Plan 2014 (**CP2014**). That is, whether the proposed demolition was in conflict with the Lutwyche Road corridor neighbourhood plan code (**the neighbourhood plan**) and the Traditional Building Character Demolition Overlay Code (**the demolition code**).

The expert heritage architects agreed that the relevant assessment criteria was:

(1) whether the subject house was a building which did not contribute positively to the visual character of the street (PO5(c) of the demolition code); and

(2) whether the subject house was a building which, if demolished, would not result in the loss of traditional character (AO5(c) of the demolition code);

Decision: The Court held in allowing the appeal:

1 While it was true that the neighbourhood plan placed an emphasis on retaining character houses and particularly character houses that are not of the more typical "tin and timber" construction, it was not a case of retention for retention's own sake. Rather, the relevant town planning instruments (CP2014 and the demolition code) must be construed broadly and in a common sense way which best achieves its purpose and objects. Whether or not a conflict exists is to be determined by a consideration of the relevant provisions of the scheme in light of all the relevant facts.

2 The test in determining visual character was, what would the average person passing along the street and taking the trouble to look about, make of the visible character of the house (*Lonie v Brisbane City Council* [1998] QPELR 209 at 212). Further, in assessing the contribution a character house makes to the visual character of the street, the issue was whether the contribution was a positive one. That is, it added to the visual character of the street rather than being neutral or detracting from it.

3 Accordingly, the way the subject house presented to Eighth Avenue was of most relevance. The house was not clearly visible from Eighth Avenue, being obscured by dense vegetation and had very little connection to the street. Further, due to its location at the "dead end" of Eighth Avenue, there would be little passing vehicular or pedestrian traffic. The Court preferred the evidence of the Appellant's expert that any contribution the subject house made to the street was very small. However, for the purposes of PO5(c), the contribution was still a positive one.

4 In determining whether demolition of the subject house would result in the loss of traditional character (AO5(c)) the relevant loss had to be one that was meaningful or of significance. The Court found that the ordinary person walking down Eighth

Avenue would regard the absence of the house as having no meaningful impact on the visual character of the street. The house was in a significantly rundown condition, even if structurally sound. Accordingly, demolition of the house would not result in any meaningful or significant loss of character for the purposes of AO5(c).

BODY CORPORATE FOR SURFERS INTERNATIONAL COMMUNITY TITLES SCHEME 12247 & ANOR v GOLD COAST CITY COUNCIL & ANOR [2016] QPEC 29
(Searles DCJ – 9 June 2016)

Environment and planning – environmental planning – development control – applications – objections – where the respondent Council approved a development application for a material change of use for apartments – where the development application was approved by way of Code Assessment under the relevant planning scheme – where the applicant applied to the Planning & Environment Court for a declaration that the Council's Decision Notice approving the development was invalid and of no effect – whether the decision maker of the Council fell into jurisdictional error – whether the decision maker failed to establish a jurisdictional fact – whether the subject building consisted of an apartment use above or within podium level – whether level 4 of the subject building was above or within the building podium – whether level 4 was characterised as apartment use – whether the Council failed to properly assess the development application

Facts: The applicants sought a declaration that the respondent Council's decision notice approving a development application for a development permit for material change of use authorising apartments (693 units), café, restaurant, shop and tourist shop was invalid and an order setting aside the decision notice.

The development application was assessed against the 2003 Gold Coast Planning Scheme (**planning scheme**) and the Surfers Paradise Local Area Plan (**LAP**) under which the land was included in *Precinct 1 – Entertainment and Sub-precinct 2 – Beachfront Resort*. Under the LAP, an application was only code assessable where the apartment use is located 'above podium level'.

The proposed development included a podium level containing three levels of retail and food outlets and a recreation level on level 4 beneath a tower of residential levels. Both the developer and the respondent Council's assessment manager identified the appropriate level of assessment as code and the development application was assessed on this basis.

The applicants claimed that level 4 was an apartment use located within the podium level and the development application should have been assessed as impact assessable.

The applicant sought relief based on the following grounds:

(1) the respondent Council misinterpreted the term 'podium';

(2) the respondent Council improperly assessed the development application against the planning scheme, in particular the LAP;

(3) the respondent Council's decision was a decision no properly informed assessment manager could have made;

(4) the respondent Council was wrong to regard the application as code assessable.

Decision: The Court held:

1 The nature of the proceedings was akin to judicial review and the Court was limited to reviewing the legality of the administrative action. It was not concerned with the merits of the approval as in a hearing anew (*Wheldon & Anor v Logan City Council & Anor* [2015] QPELR 640).

2 The Court considered the authorities setting out the general principles of jurisdictional error and jurisdictional fact.

3 In order to determine the appropriate level of assessment it was necessary to establish whether or not the apartment component of the proposed development was above the podium level. That was the jurisdictional fact that preconditioned the assessment manager's exercise of jurisdiction to code assess the application.

4 The Court preferred the evidence of the applicant's town planner and architect that the plans clearly indicated that level 4 was intended to be part of the podium. The Court also found that the use of level 4 was 'incidental to and necessarily associated with the use of the premises' (consistent with Schedule 3 *Sustainable Planning Act 2009*), that is the apartment use, as the dominant purpose of level 4 was to exclusively serve the apartment levels.

5 As level 4 was an apartment level located within the podium level, the development application should have been assessed as impact assessable. In assessing the development application as code assessable, the assessor made a jurisdictional error and the resulting decision was a nullity.

6 It was not appropriate for the Court to waive the non-compliance under s 440 of SPA as the legal error was a jurisdictional error which went to the heart of the matter. To waive the non-compliance would prevent any submitter a right to appeal the respondent Council's decision. It was a matter of public interest that the community should be involved in the decision making process.

7 The Court:

(1) declared that the respondent Council's decision notice was invalid and of no effect;

(2) ordered that the decision notice be set aside; and

(3) ordered that the development application to be remitted to the respondent Council to be determined according to law.

PIKE & ANOR v TIGHE & ORS [2016] QPEC 30
(Durward SC DCJ –9 March 2016)

Environment and planning – reconfiguration of a lot – subdivision – development approval condition – on-sale by developer of two lots to bona fide purchasers for valuable consideration – where one of two lots landlocked – where easement made for access to that benefited lot – where development approval condition required an easement for access, on-site manoeuvring and connection of service and utilities to be provided – where owner of burdened lot purchased without knowledge of the condition – where Local Authority approved the development with the easement for access only – where owner of benefited lot unable to construct a residence

Environment and planning – development approval condition – particular benefit intended in easement – whether a development offence has been committed – whether condition that an easement granting access and other benefits in respect of a subdivision lot be provided is enforceable

Environment and planning – development approval condition – future buyers – where subdivision into two lots completed and approved by Local Authority – where both lots on-sold by developer – whether a development approval condition runs with the land so as to bind future buyers in context of reconfiguration of a lot – whether principle distinguishable from the context of a minor change of use condition

Land law – indefeasibility of title – subdivision – easement – where registered titles issued for each lot with easement for access only endorsed – where two lots in subdivision on-sold by developer – where 'purpose' stated in easement document is different and narrower than condition in development approval – whether 'purpose' stated in registered easement document amounts to an "omission from the document" or is a "misdescription in the document" in terms of s185(3) of Land titles Act 1994

Property – sale and purchase – obligation of a buyer to inquire – whether a buyer has an obligation to go behind the registered title to ascertain or confirm rights, interest and title – principles relating to sale and purchase of land and prudent enquiry

Land law – easements – nature of – where developer/seller was both grantor and grantee of easement proposed upon registration of survey plan – whether easement 'private' or 'public' – distinction between the two descriptions – whether distinction relevant in circumstances or generally

Facts: This was an application for a Declaration and Enforcement Order to compel a subsequent buyer of land to comply with a condition in development approval obtained by the previous owner, which required the grant of an easement.

The previous owner of the land made a development application for a reconfiguration of lot subdivide land to form 2 separate lots. The development approval was subject to a condition that an easement was granted to "allow pedestrian and vehicle access, on-site manoeuvring and connection of services and utilities for benefited Lot (2) overburdened Lot (1)". The easement document prepared and registered on the title for both lots described the purpose of the easement only as "access" and did not include a reference the other purposes as required by the development approval.

The first respondents subsequently purchased and became registered owners of Lot 1 and the applicants purchased and became registered owners of Lot 2. Without the ability to connect services and utilities through the easement area, the applicant was not in a position to construct and service a dwelling on their land.

The key issues for consideration were:

(1) indefeasibility of title;

(2) effect of registration of an easement;

(3) whether a development approval for the reconfiguration of a lot runs with the land so as to bind subsequent purchasers; and

(4) whether non-compliance with the development approval condition by the subsequence purchasers was a development office.

The applicants argued that:

(1) the registered easement did not comply with the development approval by omitting certain rights and the development approval runs with the land; and

(2) indefeasibility was not a bar to the court enforcing a condition of a development approval on the basis that it runs with the land.

The first respondents argued that:

(1) although they had no issue with existing authorities about the application of s 245 of the *Sustainable Planning Act 2009* (**SPA**) in respect of conditions of minor change of use applications applying to subsequent owners, there should be a distinction between those applications and an application for a reconfiguration of a lot because registration of the survey plan protects the titles made in a subdivision on the basis of indefeasibility; and

(2) the applicant should have been aware of the extent of the benefit in the easement when they purchased the land and there was no evidence that the applicants relied on the development approval condition when purchasing the land.

Decision: The Court held in granting the application:

1 Section 245 of the SPA, which provides that a development approval attaches to the land and binds the owner and the owner's successors in title, applies generally and does not distinguish between reconfigurations of lot and minor change applications. The first respondents as subsequent owners of the land are bound by the conditions of the development approval.

2 There is no inconsistency between s 245 of the SPA and the principal of indefeasibility as contained in s 184 of the *Land Title Act 1994* (**LTA**). In this case, s 184 allows for an exception to indefeasibility where the easement particulars are omitted from or misdescribed on the freehold land register. As the description of the easement was inconsistent with the development approval, there is arguably a "misdescription in" the easement in relation to its purposes as the purpose described in the development approval runs with the land. Accordingly, the purposes of the easement is capable of being corrected. The first respondent's indefeasibility is otherwise protected.

3 A subsequent buyer that does not comply with a condition in a development approval has committed a development offence.

CAIRNS REGIONAL COUNCIL v LIU & ORS [2016] QPEC 31
(Dean P Morzone QC –31 May 2016) (*Ex Tempore*)

Planning and environment – application – declaratory and consequential relief pursuant to ss 456, 601 & 604 of the Sustainable Planning Act 2009 (Qld) – characterisation of balcony enclosure as assessable development – whether the respondent carried out assessable development without an effective development permit for the development – expert opinion evidence – whether declaratory and enforcement orders should be made in the exercise of discretion - costs

Facts: This was an application filed by the applicant Council seeking declarations and enforcement orders requiring the respondent to demolish and remove a structure enclosing his first floor unit balcony.

The respondent and the third respondent are the registered owners of Unit 17 in The Winston (Cairns) Community Title Scheme 37263, situated at 261-265 Sheridan Street, North Cairns. The third respondent had lodged documents to transfer her interest in the unit to the respondent and the applicant Council did not seek any orders against the second or third respondents.

In 2011, the respondent undertook building work to enclose a balcony of the subject unit without any building permit. Following inspection of the structure in December 2011, the applicant Council issued a show cause notice which was followed by an enforcement notice.

From December 2011 to the date of commencement of the proceedings in March 2016, the applicant Council gave the respondent multiple opportunities to regularise the non-complying structure.

The respondent denied the structure was assessable development and claimed it was merely a storage area and therefore a class 10a structure which was self-assessable development. However, the respondent also claimed that if it was assessable development, he should be permitted to regularise the structure rather than be forced to demolish it.

The issues in dispute were:

(1) Was the work assessable development that required development permits?

(2) Were declarations and/or enforcement orders required in the exercise of the court's discretion?

(3) Should the respondent pay the council's costs of the application?

Decision: The Court held:

Assessable development

1 The structure did not constitute development that was exempt from requiring a building permit under s578 of the *Sustainable Planning Act* 2009 (**SPA**).

2 In determining whether the structure was a Class 10a Structure under the Building Code, the Court applied the *ejusdem generis* rule of construction (if general words follow specific words, those general words may be restricted to things of the same kind as those that precede them) to the words "*or the like*" contained in the definition of Class 10a building. The specific structures noted in the definition ("*private garage,*

carport, shed") denoted simple, supported, roofed structures used for non-habitable shelter or storage. The Court was not satisfied that the subject structure was of the same kind.

3 In any event, the structure could not be classed as self-assessable development as under Item 13 of Schedule 1 of the *Building Regulation* 2006 (**Building Regulation**) the structure was located within Wind Region C and was precluded development. The structure also exceeded the allowed plan area.

4 Rather, the Court found the structure was an extension to the habitable area of a class 2 building and was subject to code assessment against various codes, laws, policies and prescribed matters (Schedule 5, item 1 of the Building Regulation).

5 The Court declared that the structure constituted code assessable development for which a development permit was required.

Declarations

6 The applicant Council sought declaratory relief and mandatory injunctive relief. The standard of proof is the civil standard, modified by the "sliding scale" in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

7 The Court accepted the applicant Council's expert engineering and building evidence that the structure posed an unacceptable risk to the public and property. The respondent's building work to date had been unqualified, crude and he had used sub-standard building methods. The result was dangerous and grossly non-compliant with regulatory and building standards. In spite of the applicant Council giving, in effect, the respondent over four years to bring the building to a state of compliance he had failed to do so.

8 The Court ordered the first respondent to remove the structure from the property, making good any damage to the common property, and to return the premises to the condition that existed immediately before the erection of the structure.

Costs

9 In considering costs, the Court stated the rule is one of fairness to compensate a successful party for bringing a meritorious proceeding. The Court's discretion must be exercised judicially, taking into consideration the nature and complexity of the case, the relative strengths of competing claims, the outcome of the proceeding, the parties' conduct, misconduct or contravention of any law and anything else the Court considers relevant.

10 The matter involved complex matters of law which required the applicant Council to undertake significant investigation. The respondent's position was shown to be unmeritorious and the applicant Council ultimately succeeded in the proceeding.

11 The respondent's conduct throughout the proceeding demonstrated a lack of understanding of the building standards and the process of obtaining an effective development permit, he also consistently demonstrated an arrogant attitude and some wilful blindness.

12 On the other hand, the applicant Council made every effort to enforce compliance with its requirements and had no alternative but to commence proceedings on

14 March 2016. The originating application set out clearly the remedy sought and the grounds upon which that remedy was being prosecuted. The applicant Council's Calderbank offer of 4 May 2016 was further reflective of the remedy it sought but was rejected by the respondent who maintained his argument and presented a counter-offer.

13 The Court ordered the first respondent to pay the applicant Council's costs of the proceeding on and from 4 May 2016 to be assessed on the standard basis. However, it found that even if the respondent had accepted the Calderbank offer, the applicant Council would have been burdened with proving the case and the Court was not persuaded that it was appropriate to include the costs of investigation or all of the costs of the proceeding.

BLUE SKY PRIVATE EQUITY LIMITED v BRISBANE CITY COUNCIL [2016] QPEC 32
(Rackemann DCJ – 8 June 2016)

Planning and environment – permissible change – whether incorporation of open rooftop communal area resulted in an additional storey so as to trigger impact assessment

Facts: This was an application for a "permissible change" to an existing development approval.

The applicant sought to change the approval to include a communal open space with a pergola and furniture on the rooftop of the building. The proposed conditions to be included in the development approval, if changed, would restrict the hours of use of the rooftop area and would ensure the pergola structure remained unenclosed, with the intention that the area not be a storey.

The issue for the Court was whether the proposed change would result in the rooftop becoming a "storey" which would cause the formerly code assessable development to be impact assessable development.

At the time the approval was given City Plan 2000 was in force.

Decision: The Court held:

1 When the definition of "storey" provided by City Plan 2000 was applied in accordance with the decision of *The Body Corporate for the Village of Langler Drew Community Titles Scheme 16700 v Brisbane City Council and others* (20140 QPEC 54, the proposed change does not constitute an additional storey.

2 The definition of "storey" was amended by City Plan 2014 however the proposed change would not constitute an additional storey under City Plan 2014.

3 Accordingly, the proposed change would not increase the number of storeys and therefore would not trigger impact assessment.

4 The change was a permissible change.

JOHN BOURBOULAS & ORS v BRISBANE CITY COUNCIL [2016] QPEC 33
(Everson DCJ – 14 July 2016) (*Ex tempore*)

Environment and planning – appeal – where respondent council refused an application for preliminary approval for building work involving the relocation of a pre-1946 residential building – where the development application was code assessable under the relevant planning scheme – whether compliance with the applicable code could be achieved by imposing appropriate conditions

Facts: This was an appeal against the respondent Council's decision to refuse a development application for a preliminary approval for building work involving the relocation of a pre-1946 residential building (**the building**).

The building the subject of the development application was located on two lots at 37 and 37A Nicholson Street, Greenslopes (**existing site**) and was affected by the Traditional building character overlay (**overlay**). It was proposed to move the building to 39 Nicholson Street (**proposed site**), which was not affected by the overlay.

The development application was assessed pursuant to the Traditional building character (demolition) overlay code (**the code**) and was refused by the respondent Council on the grounds that it did not comply with Performance Outcome PO5 of the code, or with the overall outcomes of the code in so far as it did not protect a residential building that contributed to the traditional character of the area.

While the appellants accepted that the development application did not comply with PO5 of the code, they asserted that compliance could be achieved through the imposition of conditions to protect the building. They also submitted the relocation of the building complied with PO10.

Decision: The Court allowed the appeal.

1 The heritage experts agreed the building was of traditional character and contributed positively to the street. However, the relocation of the building would not result in any loss of traditional character to either the building or the street. They were of the view that conditions could be drafted to provide the building appropriate character protection.

2 The Court agreed that the combination of different styles of house in the street was such that the building did not form part of a cohesive streetscape of similar buildings and moving it to the proposed site would not impact adversely on the character of the street.

3 The proposal was best classified as a repositioning of the building and not a demolition. However as the proposed site was outside the overlay area, it was arguable that the code and PO10 would apply.

4 In any event, the Court was satisfied that compliance with the purpose and overall outcomes of the code could be achieved through the imposition of appropriate lawful conditions which would, in effect, offer the same level of protection as other such buildings in Nicholson Street enjoy as a result of their location within the overlay area. It was not necessary to decide the most appropriate categorisation.

MTAA SUPERANNUATION FUND PTY LTD v LOGAN CITY COUNCIL & ANOR [2016] QPEC 34
(Everson DCJ – 22 July 2016)

Environment and planning – application – where the appellant seeks the determination of preliminary legal issues – whether the development application included the lawful consent of land owners – whether the assessment of the development application and any court proceedings consequential upon the making of the development application are futile

Facts: This was an application seeking the determination of preliminary issues brought by the submitter appellant.

The substantive appeal was against the respondent Council's decision to approve a development application for a development permit for material change of use – Shopping Centre (Expansion) on land located at 1-15 and 17-33 Bushman Drive, Jimboomba being Lots 0 and 6 on SP 146553, Lot 8 on SP 198926 and Lots 155-157 on RP 848032 (**the land**).

Aside from Lots 155 and 156 on RP 848032 (**the adjoining land**), all of the land was within the Body Corporate for Flagstone Village Community Titles Scheme 33183 (**the body corporate land**). Lot 1 on SP 146553 was common property of the Flagstone Village Community Titles Scheme 3318 (**the common property**).

The preliminary legal issues for which the appellant sought determination were:

(1) whether the development application failed to include the consent of the owners of the land;

(2) whether the development application properly identified all aspects of the proposed development; and

(3) whether the assessment of the development was futile.

Decision: The Court held in dismissing the application:

1 As the land included not only the body corporate land but the common property and the adjoining land, the appellant asserted that the consent of the body corporate was void. It was the appellant's view that the body corporate could only consent to making a development application over the body corporate land, not the adjoining land. Therefore, the committee's decision was not a decision to consent to the making of the development application.

2 The Court considered the body corporate's jurisdiction to make such decisions and noted that the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) conferred broad discretion on the body corporate committee. The appellant asserted the committee did not have the power to pass the resolution providing consent because it was a decision on a restricted issue pursuant to the BCCM Act. A decision of the committee on a restricted issue was not taken to be a decision of the body corporate.

3 A decision was taken to be a decision on a restricted issue if it was a decision to change rights, privileges or obligations of the owners of lots included in the community titles scheme.

4 The appellant was unsuccessful in distinguishing the case from the decision of *Rakaia Pty Ltd v Body Corporate for 'Inn Cairns" CTS 16010* [2012] QCA 306. In that decision,

it was found the decision did not effuciate a change to anything. It only manifested a consent to the making of a development application. The appellant sought to argue that here, the effect of giving consent to the development application was to immediately place the consequential limitation of rights and privileges then existing and the assumption of additional obligations beyond the control of the body corporate. The Court found this argument was somewhat fanciful and at odds with the interpretation in *Rakaia*.

5 The appellant further alleged the consent of the owners of the land was incomplete as it failed to expressly mention the adjoining land. The Court found that the *Sustainable Planning Act* 2009 (Qld) confers a broad obligation to provide the consent of the owner of the land and there was no requirement for the consent to refer to land other than the land owned by the body corporate that is the subject of the development application. The consent was deemed to be both sufficient and lawful.

6 At the hearing, the appellant conceded that the application for material change of use could be assessed without the inclusion of the application for a reconfiguration, as this could be made by a separate development application at a later date. As a result, the Court found that the appellant had abandoned its application for determination of the second preliminary issue.

7 The appellant indicated it would not agree, now or in the future, to a resolution of the members of the body corporate to give effect to a reconfiguration approval which would ultimately be required to record a new community management statement. The appellant argued that without their consent the development application would be futile. The Court was generally reluctant to accede to such arguments (*Walker v Noosa Shire Council* [1983] 2 Qd R 86). In any event, it regarded the broad powers provided to an adjudicator to resolve such a dispute (s276 *Body Corporate and Community Management Act* 1997) as sufficient to refute this argument. It could not be said that the appellant's position would necessarily result in the futility of the development application.

UNIVERSITY OF QUEENSLAND v BRISBANE CITY COUNCIL & CBUS PROPERTY BRISBANE PTY LTD [2016] QPEC 35
(Everson DCJ – 22 July 2016)

Planning and environment – application – where the respondent Council approved a development application for a material change of use for Multiple Dwellings – where the applicant applied to the Planning & Environment Court for a declaration that the Council's Decision Notice approving the development was invalid and ought to be set aside – whether the decision maker of the Council fell into jurisdictional error – whether the Council failed to properly assess the development application

Facts: This was an application for declarations and consequential orders pursuant to s 456 of the *Sustainable Planning Act* 2009 (**SPA**) in relation to the respondent Council's decision to approve a development application for a material change of use for Multiple Dwellings (264 units) and Centre Activities (Retail and Food and Drink Outlet) on land situated at 443 Queen Street, Brisbane (**the land**). The applicant sought the setting aside of the Decision Notice on the basis that it was invalid.

The land was immediately adjacent to Brisbane Customs House (which is on the Queensland State Heritage Register and the Brisbane City Council Local Heritage Register) and was

located in the PC1 Principal Centre Zone – City Centre Precinct and within the City Centre Neighbourhood Plan (**CCNP**), NPP-002 Customs House Precinct under the Brisbane City Plan 2014 (**CP2014**).

The proposed development was described as a high density, high rise, multi-unit residential building.

During the assessment of the development application, the co-respondent changed the development application. As part of the change, the co-respondent nominated Transferable Site Area (**TSA**) and the delegate who approved the transfer of the TSA ultimately decided to approve the development application.

The applicant challenged the validity of the decision of the respondent Council's delegate on the following grounds:

(1) The changed development application was wrongly treated by the delegate as being a code assessable development application;

(2) The delegate had no power to approve the allocation of TSA;

(3) The delegate failed to properly assess the request to approve the allocation of TSA;

(4) The delegate's decision to approve the allocation of TSA was an unreasonable decision;

(5) The delegate failed to properly assess the development application; and

(6) The delegate's decision to approve the development application was an unreasonable decision.

Decision: The Court held in dismissing the application:

1 *The level of assessment point*

The co-respondent sought to change the development application upon receipt of a 'not properly made' notice from the respondent Council on the basis the proposed development exceeded the thresholds for code assessable development in the City Centre Neighbourhood Plan (**CCNP**) and was therefore impact assessable.

The co-respondent sought to nominate 300m^2 of TSA to be transferred to the proposed development. There were no other significant changes to the development application. The respondent Council's delegate formed the view that the additional TSA meant that the gross floor area (**GFA**) complied with AO1 of the CCNP Code and therefore the changed development application was code assessable.

In considering whether the respondent Council's delegate fell into error in deciding that the development application was code assessable, the Court relied on the parties' admissions simplifying the GFA calculations.

The first issue in calculating the GFA was whether or not carpark level 1 should be included as one of the storeys that have the largest areas. The Court analysed the relevant provisions of CP2014 and found that carpark level 1 should not be included in the calculation of GFA.

The Court also disagreed with the applicant's assertion that the allowable maximum GFA above maximum podium height was exceeded was in the calculation of the development ratio.

The Court was satisfied that based on GFA, the changed application was code assessable.

The applicant also alleged the development application was impact assessable because the Multiple dwelling use was located in the portion of the building below maximum podium height. It argued the provision of car parking below maximum podium height was part of the Multiple dwelling use since it was incidental and necessarily associated with it.

The Court noted the purpose of the CCNP Code contemplated not only car parking but also retail, commercial and community uses below the Multiple dwellings in code assessable developments. The Court found that in circumstances where the use definition did not refer to car parking or access facilities such as lobbies and lifts as part of the use and given the impossibility of constructing dwellings above maximum podium height which do not have access to either motorists or pedestrians below podium height, it was necessary to adjust the definition of 'use' in the SPA. This was even in circumstances where the car parking below maximum podium height could be seen as necessary and incidental to the Multiple dwelling uses above.

The Court held that read as a whole, CP2014 demonstrated that car parking is not considered to be part of a Multiple dwelling use in the CCNP area, so no part of the proposed Multiple Dwelling use was intended to be located in a portion of the building below the maximum podium height.

2 *The instrument of delegation point*

The applicant alleged the respondent Council's delegate's decision to approve the allocation of TSA was ultra vires because the delegated authority he acted under did not extend to the approval of a request to allocate TSA.

The instrument of delegation stated that each of the functions and powers delegated included the power to do things 'if doing so is incidental to or entailed by the exercise of the functions and powers'.

The Court acknowledged that TSA was not a concept recognised by the SPA. The purpose of additional TSA was to increase the capacity for development of a site that was or may be the subject of a development application, and was therefore incidental to an application under the SPA.

The Court found that the delegate's assessment and determination of the application to transfer TSA was incidental to the exercise of his delegated functions and powers to assess and decide the development application under the SPA and therefore not unlawful.

3 *The TSA proper assessment point*

The applicant alleged that the respondent Council's delegate did not consider specific criteria which he was required to consider in determining whether to approve the application to transfer TSA. In particular, the delegate did not consider the deleterious effect of the additional yield afforded to the land on the adjoining Customs House.

The Court was satisfied that even though the additional TSA did not change the yield contemplated by the development application, it was clear the delegate compared what was proposed with a theoretical building which could be built with the additional TSA. It

found there was no specific requirement that he consider the deleterious effect of the additional yield afforded to the land on the adjoining Customs House.

4 *The TSA Wednesbury point*

The applicant further alleged that the delegate's decision to approve the allocation of TSA was unreasonable and relied on the concept of 'Wednesbury unreasonableness'. The applicant submitted that the delegate's decision was unreasonable because he approached the question of whether or not the TSA should be allocated to the land on the basis of the approval of the allocation being inextricably linked to the development application.

To the extent the delegate was obliged to consider the capacity of the site to accommodate an acceptable development proposal, as opposed to the relative increase to development yield as a consequence of the TSA in the context of the development application being considered by him, the Court was satisfied he did so.

5 *The proper assessment point*

The applicant asserted that the delegate failed to take into account relevant considerations in assessing the development application. In particular, it was asserted the delegate failed to take into account a number of performance outcomes and acceptable outcomes of the CCNP Code. Following review of the relevant provisions and council officer assessment report, the Court found there was no merit in the assertion and it was not demonstrated that the delegate failed to take into account relevant considerations when assessing and approving the development application.

6 *The Wednesbury point*

The applicant was also unsuccessful in alleging that the delegate's decision to approve the development application was unreasonable. The Court noted that although others may have decided the application differently, it simply could not be said that the decision was one which was not reasonably open to the delegate in the circumstances. The decision did not lack an evident and intelligible justification. Given there was no general rule of common law requiring the delegate to give reasons for the decision, and no requirement under the SPA, there was no material before the Court to suggest the decision was unreasonable in the Wednesbury sense.

The Court decided to dismiss the application. It found the development application was always code assessable. The change to it and the transfer of TSA took place in circumstances where there was a misapprehension as to whether that was the case. In any event, the assessment and approval of the application to transfer TSA was conducted lawfully by a delegate operating within his authority.

CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT v AUSTRALIS MINING OPERATIONS QLD PTY LTD & OTHERS [2016] QPEC 36
(Rackemann DCJ – 29 July 2016)

Planning and environment – costs – proceeding for orders to require rehabilitation of a disused mine – proceeding ultimately discontinued after a third party obtained rights to reopen the mine, subject to obligations to rehabilitation – where third party had been discouraged from applying for approvals earlier by an officer of the applicant and the applicant had refused to consent to an adjournment – whether applicant continued the proceeding primarily to delay or obstruct – whether the proceeding or part thereof was vexatious – whether applicant had not properly discharged its responsibilities

Facts: This was a costs application brought by the respondent and third respondent seeking an order that the Chief Executive of the Department of Environment and Resource Management (**DERM**) pay their costs of the proceeding on an indemnity basis or alternatively, on a standard basis.

The costs application related to proceedings instituted by DERM in December 2009 seeking orders to require the respondents to undertake rehabilitation works at the site of a discontinued sapphire mine.

During the course of the matter, on a number of occasions, a third party miner (**Gregcarbil**) expressed an interest in undertaking the rehabilitation work as part of a new mining lease and environmental authority. Despite evidence given by a principal environmental officer of DERM that this would be one way to achieve rehabilitation, DERM discouraged Gregcarbil from applying for a mining lease over the site and in effect provided them with inaccurate advice. It was DERM's contention that while the proceeding against the respondents remained on foot an environmental authority would not be granted to a third party.

DERM was also unreceptive to an alternative financial proposal for the rehabilitation of the site put forward by the respondent. Rather, DERM submitted that the proper course was for the matter to proceed to judgment and if required, an application to vary the orders could be made at a later date.

Ultimately a mining lease was granted over the site to Gregcarbil with conditions requiring the rehabilitation of the site and the proceeding against the respondents was discontinued.

Citing DERM's decision to continue to prosecute the proceeding rather than accept Gregcarbil's proposal, which was ultimately successful, the respondent and third respondent sought costs under the former s 457(2)(a),(b) and (i) of the *Sustainable Planning Act* 2009 (**SPA**):

> (2) However, the court may order costs for the proceeding, including allowances to witnesses attending for giving evidence at the proceeding, as it considers appropriate in the following circumstances –
>
> (a) the court considers the proceeding was instituted, or continued by the party bringing the proceeding, primarily to delay or obstruct;
>
> (b) the court considers the proceeding, or part of the proceeding, to have been frivolous or vexatious;
>
> …
>
> (i) an applicant, submitter, assessment manager, referral agency, coordinating agency for a master plan application, compliance assessor, a person

requesting compliance assessment or a local government does not properly discharge its responsibilities in the proceeding.

Decision: The Court held, in dismissing the application for costs:

1 Despite Gregcarbil's interest in the site dating back prior to November 2009, Gregcarbil did not make an application over the site until March 2011 and any offers to settle the proceeding had up to that stage been no more than expressions of interest.

2 The Court found that DERM did not draw out the proceeding but had on two occasions urged the Court to proceed to judgment leaving the way for Gregcarbil to vary the orders subject to any application they might make in the future.

3 The Court found that up until the time of the hearing there was no evidence that DERM's case lacked merit. It was not until after Gregcarbil made their application in March 2011 when mining rights and rehabilitation obligations were realised that the remedy sought by DERM came to lack utility.

4 The Court was not prepared to infer that DERM had intentionally given Gregcarbil incorrect advice in order to delay or obstruct the third party's application for a mining lease.

5 The Court found that at the time of the hearing there was no offer capable of acceptance by DERM that would bring the proceeding to an end. While DERM could have agreed to adjourn the hearing to enable the Gregcarbil application to progress, there was no obligation for them to do so. Proceeding to hearing was an available course of action and DERM's decision to follow this course could not be considered vexatious.

6 The Court also found that while it was unfortunate that for some time Gregcarbil was discouraged from making its application, it did not make the proceeding vexatious.

7 The Court found that s 457(2)(a), (b) or (i) had not been engaged.

CONQUEST & ANOR v BUNDABERG REGIONAL COUNCIL [2016] QCA 203
(Fraser and Philip McMurdo JJA and Daubney J – 19 August 2016)

Environment and resources – planning law – appeals, offences and enforcement – enforcement notices – specific requirements of enforcement notices – where the applicants were found guilty of an offence against s 4.3.15 of the Integrated Planning Act 1997 ("the Act") for failing to comply with an enforcement notice – where the District Court dismissed their appeals – where the applicants apply for leave to appeal under s 118 of the District Court of Queensland Act 1967 ("the District Court Act") – where the applicants contend that it is a condition of the validity of an enforcement notice that the person to whom the enforcement notice is given has committed a development offence – where the applicants contend that they should be acquitted of the offences because it was not proved beyond reasonable doubt that the relevant works on the property were "building works" rather than "operational works" – where the respondent submitted that the elements of the offence against s 4.3.15 of the Act were that a person was given an enforcement notice and did not comply with that notice – whether it is a condition of validity of an enforcement notice, and an element of the offence against s 4.3.15 of the Act, that the person to whom the notice is given had committed a development offence – whether the work carried out by the applicants amounted to "building work" or "operational work" under the Act.

Environment and resources – planning law – appeals, offences and enforcement – enforcement notices – offences relating to enforcement notices – where the applicants were found guilty of an offence against s 4.3.15 of the Act for failing to comply with an enforcement notice – where the District Court dismissed their appeals – where the applicants apply for leave to appeal under s 118 of the District Court Act – where the applicants raised a new point of contention – whether leave to raise new contention is granted – whether the Court's jurisdiction is limited by ss 118 and 119 of the District Court Act.

Facts: The applicants applied for leave to appeal from the decisions in the District Court dismissing their appeals against decisions in the Magistrates Court finding each of them guilty of an offence under section 4.3.15 of the *Integrated Planning Act 1997* (Qld) (**IPA**)of failing to comply with an enforcement notice.

The key issue was whether all of the work done on the applicants' land was 'for or incidental to' building or underpinning.

The key disputed issue in the Magistrates Court proceeding was whether the applicants had committed a development offence mentioned in the enforcement notice.

The enforcement notice required the applicants to cease works and take action to remove works, including to restore as far as practicable the land to the condition it was in before the development was started and the applicants did not comply with the requirements of the enforcement notice to take action to remove the works. The enforcement notice stated it was given in respect of the applicants committing a development offence under the IPA, namely, the operational works being carried out which was assessable development without a development permit.

The applicant contended that if the work done on the applicants' land was 'for, or incidental to' building or underpinning, then that work was 'building work', it was not 'operational work', and the respondent Council failed to prove that the applicants committed the development offence mentioned in the enforcement notice.

The applicants further contended, and the respondent Council denied, that the applicants should be acquitted of the offences alleged against section 4.3.15 of the IPA because the respondent Council failed to prove beyond reasonable doubt that the relevant work was not for or incidental to building or underpinning works, and therefore building work rather than operational work. The Magistrate found for the respondent Council. They were satisfied that no building works had ever been commenced on or in the vicinity of the excavation or filling works and there was no evidence that the pad area was designed and constructed in a way to accommodate a structure.

On appeal to the District Court, the applicants confined the dispute to a contention that the Magistrate erred in failing to find that the work was building work rather than operational work because the work was for, or incidental to building or underpinning. The primary judge rejected that contention. He found that the extent of the works done on the land was not in issue. He found that there was no development approval authorising the filling works, no building approval for a proposed detached dwelling, no building application on foot and the works required by the enforcement notice had never been completed. The Judge was satisfied that the evidence accepted by the Magistrate was more than sufficient to satisfy the onus upon the respondent Council.

Decision:

In this proceeding, the applicants sought to agitate again the contention rejected both in the Magistrates Court and the District Court. The Court sought submissions from the parties on the preliminary questions of whether it was an element of the offence that the person who was given the enforcement notice had committed a development offence. The Court found that upon proper construction of the IPA, it was not a condition of the validity of an enforcement notice and was not an element of the offence against section 4.3.15(1) of the IPA that the person to whom the notice was given had committed a development offence. The fact that the applicants did not contradict the respondent's submission about the elements of the offence, and that the Magistrate and primary Judge assumed the correctness of those submissions, did not justify the Court granting leave to appeal upon the hypothetical question raised by the application for leave to appeal.

On the preliminary point, the applicants argued that the respondent Council, having assumed the onus of proving the validity of the enforcement notice in the Magistrates Court, failed to prove that when the enforcement notice was given the respondent Council reasonably believed that the applicants had committed the development offence.

In the Magistrates Court and the District Court, the applicants did not make any similar submission and they did not seek to challenge the validity of the enforcement notice on that ground. The Court found that militated against the grant of leave to appeal to permit the applicants to litigate such questions.

The applicants also argued that the enforcement notice on its face revealed that the respondent Council misdirected itself in law as to the circumstances in which filling or excavation was building work rather than operational work and that this misdirection revealed that the respondent Council did not hold the necessary reasonable belief that the applicants had committed a development offence. The suggested misdirection was that excavation and filling for a dwelling could not amount to building work unless at the time when the excavation and filling was done there was an extant development permit or development application for approval to build a dwelling.

For the reasons given in relation to the applicants' first new point, the Court refused to grant the applicants leave on that point.

The Court was satisfied that the enforcement notice did not have the effect advocated by the applicants. It expressed factual conclusions which the respondent Council considered were relevant to the question whether the works carried out on the land were operational work because those works were not for or incidental to building work. That did not evidence a misdirection in law and the enforcement notice was not invalid on its face upon the ground articulated by the appellant applicant.

The applicants also argued that the Magistrate found no more than a possibility that the work could have been done for a purpose other than the construction of a dwelling and that this finding itself revealed that the respondent Council could not reasonably have believed that the work was not for or incidental to the construction of a building. Again, the Court did not grant leave to appeal on that point.

The Court refused the application for leave to appeal.

TELSTRA CORPORATION LTD v BRISBANE CITY COUNCIL & ORS [2016] QPEC 37
(Bowskill QC DCJ – 26 August 2016)

Planning and environment – whether public notification requirements had been complied with – where the public notices contained only one of two relevant street addresses – where the public notices were placed on street frontages on different days – where the public notices did not describe the exact heights of the existing and proposed monopoles – whether it is appropriate to excuse any non-compliance.

Facts: This was the hearing of an application to determine a preliminary issue raised in respect of an appeal.

The substantive appeal was instituted by Telstra Corporation Ltd (**Telstra**). Telstra appealed against the respondent Council's decision to refuse Telstra's development application for a development permit –material change of use for a telecommunications facility over its land located at 4 Hayward Street and 297A Given Terrace, Paddington (described at lot 36 on RP 19572 and lot 24 on RP 179525).

The development application proposed the removal of an existing telecommunications monopole from lot 24 and placing a new, taller, monopole on lot 36.

During public notification of the development application, there were 427 lodged submissions lodged objecting to the development and there are 62 co-respondents to the appeal.

A co-respondent applied for an order that the development application was not publicly notified in a manner so as to comply with the *Sustainable Planning Act 2009* (Qld) (**SPA**).

Section 440 of the SPA enables the Court to deal with development application matters and non-compliance with the Act, in a way the Court considers appropriate.

Under section 297(1) of the SPA, an applicant for development approval must give public notification of the proposed development (in a prescribed format) in the following three ways:

(i) publish a notice in a newspaper circulating generally in the locality of the land; and

(ii) place a notice on the road frontage of the land; and

(iii) give notice to the owners of all land adjoining the land.

The issues for the Court to determine were whether there had been compliance with the public notice requirements, and if not, whether it was appropriate to excuse any non-compliance.

Decision:

1 *Public notice being placed on street frontages on different days*

A notice was placed on 4 Hayward Street frontage on 16 June 2016 and the second notice was placed on 297A Given Terrace frontage on a separate date, being 17 June 2016.

Despite the possible confusion, the notification period (in which a submission could be made) was calculated from the last date (17 June 2016), which was consistent with the requirements of section 298(1) and 299(3) of the SPA.

2 *Notification given during off-peak period (school/university holidays)*

The only limitation under the Act is that the notification period not include any business day from 20 December to 5 January the following year. As this notification period was from 18 June to 9 July 2015, there was no basis to find non-compliance.

3 *Issues with descriptions of heights of existing and proposed monopole*

The Court found the minor inaccuracy in the description of the monopole height in the notices did not amount to non-compliance with the notification requirements.

What was required to be included in the notice is a short-hand description of the proposed development which must not contain an inaccuracy that would deter an otherwise interested person from pursuing further information to make a decision as to whether, and if so, on what basis, to lodge a submission.

4 *Inclusion of only one street address – 297A Given Terrace only*

The approved form of the notice required the inclusion of the street address and real property description. The failure to include the street address of 4 Hayward Street, meant the form was not properly completed and amounted to non-compliance.

The Court held it was appropriate to exclude such non-compliance under section 440 of the SPA, given that:

(i) The notices included sufficient information to identify the land affected by the proposed development (by including both lot on plan descriptions) and included the application number. This was sufficient to enable an interested person to access further detailed information about the development application.

(ii) The omission of the address was not done deliberately by Telstra to obfuscate or confuse, but was due to a "glitch" in the PD online database.

(iii) There were 427 properly made submissions and no evidence of anyone being denied an opportunity to make a submission.

The Court held that pursuant to section 440 of the SPA, the appeal should proceed, notwithstanding any non-compliance with the public notification requirements.

PHIPPS PASTORAL v SOMERSET REGIONAL COUNCIL [2016] QPEC 38
(Bowskill QC DCJ – 26 August 2016)

Planning and environment – development approval granted by the Court for a poultry farm to be operated as a free range facility, with no more than 250,000 birds - where the applicant requested changes to the approval, with the effect that the farm would not be operated as a free range facility, and with an increase in the number of birds to 300,000 – whether the proposed changes constituted a permissible change

Facts: This was an application to the Court for a permissible change to an existing development approval. The applicant operated a poultry farm under the existing Court ordered development approval which included conditions that the development operate as a free range facility with limitations on the number of birds housed at the facility.

Prior to obtaining the approval, the demand for free range chicken was high however, while the applicant's sheds were being constructed, market demand changed with major supermarket chains electing to primarily sell RSPCA-accredited chicken. As a result, the applicant was unable to secure a contract to produce free range chickens and proceeded to operate the facility as an RSPCA accredited commercial farm outside the existing development approval.

Following an inspection of the property, the respondent Council advised the applicant it would commence enforcement action in relation to the applicant's non-compliance with the conditions of the existing development approval.

The applicant subsequently sought to change the existing approval to provide that the facility was not required to be operated as a free range facility and in that case, a higher number of birds could be housed.

The applicant argued that the changes sought were permissible changes on the basis that (among other things):

(1) an increase from 250,000 birds to 290,000 would be a "minor change";

(2) it was highly unlikely that a person would make a properly made submission as:

(i) the farm was already existing and operating under environmental regulations;

(ii) the applicant was unaware of any ongoing complaints; and

(iii) the original application for a 300,000 bird farm had received only one submission and that person had left the district.

The respondent Council argued that:

(1) the changes would result in a "substantially different development" as they involved a new use with additional impacts and an increase in the severity of known impacts; and

(2) it could not be said that the changes would not be likely to cause a person to make a properly made submission objecting to the proposed change as the respondent Council had received emails indicating the owners of three nearby properties would object.

The relevant issues for the court were whether the proposed change would result in a substantially different development (s 367(1)(a) *Sustainable Planning Act 2009*)(**SPA**) or if it was likely to cause a person to make a properly made submission objecting to the proposed change, if the circumstances allowed (s 367(1)(c) SPA).

Decision: The Court held in dismissing the application:

1 The change from a free range facility to the RSPCA accredited facility with an additional 40,000 birds would result in a fundamentally different facility. In an RSPCA accredited facility the birds were not removed from the sheds each day and it was clear from the evidence before the Court that this would have an impact on odour emissions.

2 While Ministerial Guideline 06/09 (issued under s 759(1) of SPA) provided some assistance in defining a substantially different development, it was necessary to consider the changes fairly and broadly having regard to the overall development application and considering the physical degree of change and its impacts (*Emaas Pty Ltd v Brisbane City Council* [2014] QPELR 579). As the facility would remain a poultry farm the Court found it was arguable that the proposed changes involved a new use, however the changes would increase the severity of the known impacts. On this basis the proposed changes would result in a substantially different development.

3 The onus was on the applicant to demonstrate that, on the balance of probabilities, the proposed changes would not be likely to cause a person to make a properly made submission objecting to the change. It was not necessary to consider whether a submission would be upheld, but simply whether a submission would be made (*Scanlon Group Pty Ltd v Sunshine Coast Regional Council* [2012] QPELR 394).

4 Having regard to the evidence of the respondent Council, the Court was satisfied that, on the balance of probabilities, at least three people would object to the proposal if given the opportunity.

5 The proposed changes failed to satisfy the test set out in s367 of the SPA and were not permissible changes.

NEILSENS QUALITY GRAVELS PTY LTD v BRISBANE CITY COUNCIL & ORS [2016] QPEC 39
(Robertson DCJ – 26 August 2016)

Planning and environment – where appellant has conducted extractive industry use on the western side of the South Pine River since 1980 with many approvals from the Pine Rivers Shire Council and other State permits - where proposal and land on western side of the river is designated in relevant State Planning Policies as a Key Resource Area (KRA) for sand and gravel – where Council consented to a similar use on Lot 11 on the eastern side of the river in its Local Government Area after resolving very similar disputed issues in an appeal to this Court as are raised in this appeal – where Council refused an application for MCU for extractive industry on a much larger portion of the site than Lot 11 in the KRA – where a number of disputed issues relating to groundwater, flora and fauna, acid sulphate soils and traffic were all resolved as a result of expert conclaves – where disputed issues focussed mainly on flooding and water quality, impact on visual amenity and landscape values of the site, noise and dust, quarry plans and management – where Council alleges irretrievable conflict with CP2000, CP2014 and other planning instruments – characterisation of conflict and consideration of disputed grounds, planning need

Facts: This was an appeal against the respondent Council's decision to refuse the appellant's development application for a development permit for a material change of use to extract sand and gravel from its land at Bald Hills.

The appellant already had the benefit of a number of planning approvals from Moreton Bay Regional Council and various environmental authorities over its land located at Brendale. The appellant proposed to extract sand and gravel from its land in Bald Hills and truck it across the river. All processing, screening and washing would be undertaken using the established infrastructure on the land at Brendale (covered by the existing approval).

The development application as lodged sought approval for the establishment of a 70 hectare extraction area (including buffer zone).

There was also a concurrent development application seeking approval for sand and gravel extraction from another lot on the eastern side of the river referred to as lot 11.

There were a number of dwellings overlooking the site. A number of those residents joined the appeal but none of them provided affidavits or gave evidence.

Council's decision to refuse the Lot 11 development application was the subject of an appeal. It was resolved by a consent judgment. The significance of the respondent Council's consent to the Lot 11 development approval was a matter of dispute between the parties. However, the Court noted land use in the vicinity of the subject land would always be a relevant consideration. Given many of the same experts were engaged by the parties in that matter, the expert opinions expressed in relation to the Lot 11 approval may be relevant to the weight to be given to the opinions of the same experts on similar issues in this appeal.

There were a number of changes to the development application following the joint expert report process. At the hearing, the proposal was for a total extraction area of 46.4 hectares with an extraction rate of up to 400,000 tonnes per annum and in five stages. The staged extraction would involve progressive rehabilitation over each stage. Extraction would occur over 12 years with full rehabilitation completed in 16 years. It was proposed to develop the site of a series of small pits or cells developed within stages and then sub-stages. The Court heard from expert witnesses on the disputed issues which included matters relating to flooding and hydrology, water quality, acoustics and air quality, visual amenity and landscape values and town planning.

The Court assessed the development application against the relevant provisions of the City Plan 2000. It also noted that relevant provisions of the City Plan 2014 were entitled to be given weight.

The Court analysed the issue of whether the development application conflicted with the relevant planning instruments having regard to the expert evidence. The Court concluded that the proposed development was generally inappropriate in the rural area and not actively discouraged or encouraged in the relevant Local Plan area but it is, with stringent conditions to be imposed, capable of protecting and enhancing the waterway and visual amenity, such that impacts would be reduced to acceptable levels.

With respect to the extraction stage, the proposed development conflicted with the whole of the planning scheme in that the proposal did not 'protect and enhance' landscape values of the site, but was capable of doing so once the final stage of the rehabilitation plan took effect. The Court categorised that conflict as approaching moderate.

In the circumstances, the Court considered the only ground advanced as capable of overcoming the conflict was 'need'. In its submissions, Council relied on cases that noted that demand was not the same as need. The appellant's expert characterised the need as strong and Council's expert characterised the need as demonstrable which he conceded in cross examination meant the same as significant. Council adopted its expert's evidence that characterised it as 'some need' and then proceeded to in its submission to set out the reasons why the need was diminished. The evidence was that most of the material to be extracted from the site would be used by the appellant in its concrete batching plant. Council relied heavily on a statement made by a witness for the appellant that if the appeal is dismissed, the appellant would source sand and gravel from its other outlets and the concrete batching plant would continue on the Brendale site. The Court found that to a certain extent, the respondent Council, in seeking to diminish the effect of the evidence of its own need expert witness, fell into the same trap as he did in conflating the concept of planning need with the private interests of Neilsens, and the effect on them of a refusal. The Court comfortably accepted the appellant's expert's evidence that in a planning sense, the appellant had established a strong need for the proposed development.

In the circumstances, the Court found there was a strong need for the resource and that need was sufficient to overcome conflict with the planning instrument. The appeal was adjourned to a later date to enable the parties and the Department of Environment and Heritage Protection to formulate conditions consistent with the Court's reasons and as a response to them and including conditions agreed to by the parties outside the disputed issues at the trial.

AUSTRALIAN CONSERVATION FOUNDATION INCORPORATED v MINISTER FOR THE ENVIRONMENT [2016] FCA 1042 (Griffiths J –29 August 2016)

Administrative law – judicial review challenge to Minister's decision to approve coal mine project – failure to apply ss 82 and 527E of the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act) in assessing impact of combustion emissions – failure to apply the precautionary principle as required by ss 136(2)(a) and 391 of the EPBC Act – failure to comply with s 137 of the EPBC Act regarding inconsistency with the World Heritage Convention – judicial review application dismissed

Environmental law – construction and application of ss 82, 133, 136, 137, 391 and 527E of the EPBC Act in assessing effects of climate change on the Great Barrier Reef

Facts: This was an application for judicial review of the decision of the Minister for the Environment to approve the proponent, Adani Mining Pty Ltd ('Adani') taking an action. The action was the proposed construction of a new open-cut and underground coal mine in

central Queensland and a rail link and associated infrastructure to transport coal between the mine and coal export terminals ('action').

The applicant alleged that the Minister failed to comply with the requirements of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). The applicant was primarily concerned with the likely impacts of the action on the Great Barrier Reef ('reef'), in particular the likely impacts of greenhouse gas emissions arising from the transport and combustion overseas of coal produced at the mine ('combustion emissions').

The applicant's amended originating application contained four grounds. The fourth ground was abandoned before the hearing commenced. The Court addressed the grounds in the order in which they were presented at the hearing.

Ground 2 alleged that the Minister made an error of law by:

(1) characterising the combustion emissions as 'not a direct consequence of the proposed action', without applying the test in section 527E of the EPBC Act; and

(2) failing to comply with the requirement in section 136(2)(e) of the EPBC Act in respect of the information about the emissions and the impact those emissions would have or were likely to have on the matter protected.

Ground 3 alleged that the Minister, in finding that it was difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance, the Minister made an error of law in failing to consider or apply the precautionary principle to that conclusion as required by sections 136(2)(a) and 391 of the EPBC Act.

Ground 1 alleged that the Minister made an error of law by failing to apply the statutory prohibition on the Minister acting inconsistently with the World Heritage Convention ('WHC'). In particular, ground 1 alleged that the Minister's decision was inconsistent with:

(1) Australia's obligations under the WHC, in particular the obligation under Article 4 to do 'all it can to the utmost of its resources to identify, protect, conserve, present and transmit to future generations the outstanding universal value of the Great Barrier Reef World Heritage Area; and

(2) the World Heritage Management Principles, particularly that the identification, protection, conservation, presentation and transmission to future generations must be the 'primary purpose' of the management of the Great Barrier Reef World Heritage area.

Submissions

Ground 2

The applicant submitted that in order to comply with section 136(2) of the EPBC Act, the Minister had to ask whether the consequence of the combustion emissions on the Reef were 'relevant impacts' of the proposed action on the Reef, within the meaning of sections 82 and 527E of the EPBC Act. The applicant contended that instead, the Minister applied a range of criteria beyond the EPBC Act to justify a differential treatment of the combustion emissions. This caused him to dismiss from further consideration the consequences of the proposed action notwithstanding that they posed 'the greatest threat to the Reef'.

The applicant submitted that the proper approach was for the Minister, having taken into account the additional information, to have then asked whether the combustion emissions were impacts within the meaning of section 527E of the EPBC Act. The applicant said the consequences for the Reef of climate change resulting from the combustion emissions were impacts of the action in the same sense as 'downstream' consequences identified in the litigation relating to the Nathan Dam.

With respect to ground 2, the applicant's key argument was that the Minister failed to properly consider whether the impacts of the combustion emissions on the Reef were relevant impacts in circumstances where new information before him indicated that they were relevant impacts.

In reply, the Minister submitted that the applicant's submissions were based on a misconstruction of section 527E of the EPBC Act and his statement of reasons. The Minister relied on the decision of *Tarkine National Coalition Inc v Minister for the Environment* [2014] FCA 468 in asserting that the relevant 'events or circumstances' for the purpose of section 527E of the EPBC Act were the effects of climate change in producing increased ocean temperatures, ocean acidification and more intense weather events and that those events or circumstances would only be an impact if the proposed action was a 'substantial cause' of them within the meaning of section 527E of the EPBC Act.

The Minister submitted that the part of his statement of reasons should be construed as involving a finding on his part that the proposed action would not be a substantial cause of climate change effects. The Minister said his reasons demonstrated that he did consider and apply section 527E in the context of combustion emissions and that he found that the proposed action would not be a substantial cause of any climate change effected and would not have a relevant impact on the Reef.

The Minister went on to submit that the applicant's submissions were misguided in contending that climate change itself constituted the event or circumstance. The Minister said the relevant event or circumstance was the effect of climate change, being the increase in sea temperature and ocean acidification. The allegations were therefore misdirected as it was not the emissions themselves that were the relevant event or circumstance, but rather the increase in sea temperature and ocean acidification.

The Minister's approach was that there was no event or circumstance within the meaning of section 527E of the EPBC Act if there was no net increase in emissions in circumstances where the relevant event or circumstance was the consequences of climate change increasing sea temperature and ocean acidification.

Adani also submitted that ground 2 misunderstood the Minister's conclusion and also involved an attempt to have the Court review the merits of the Minister's conclusions about combustion emissions, which was not permitted in judicial review proceedings.

Ground 3

The applicant submitted that part of the Minister's statement of reasons was in identical terms to the Minister's first statement of reasons concerning his earlier decision to approve the project, in circumstances where the first statement of reasons did not involve any evaluation of the impact of combustion emissions. The applicant contended that the Minister's reliance on the Coordinator-General's report and consideration of the precautionary principle was confined to scope 1 and scope 2 emissions and necessarily involved a failure to deal with the precautionary principle in respect of the combustion emissions, which resulted in a failure to comply with sections 136(2)(a) and 391 of the EPBC Act.

In reply, the Minister submitted that his obligation to take account of the precautionary principle did not require him to take measures or consider taking measures if he found that a proposed action would not have any adverse effect on matters of environmental significance. The Minister relied on the fact that his reasons addressed sections 136(2)(a) and 391 of the EPBC Act and stated that he agreed with the Coordinator-General's report (which, as discussed above, only dealt with scope 1 and scope 2 emissions).

The Minister relied on observations in the decision of *Minister for Planning v Walker* [2008] NSWCA 224 in support of the contention that it was unnecessary to apply the precautionary principle to every issue which arises in the decision making process.

The Minister submitted that the applicant's contentions were based on a misapprehension of Australia's international obligations and the operation of section 137 of the EPBC Act. The Minister further submitted that the WHC must be construed in accordance with the general principles of treaty interpretation. Therefore, Article 4 of the WHC made to be construed in its context, including in the light of Article 5, which created a flexibility in implementing the WHC obligations.

With respect to the operation of section 137 of the EPBC Act, the Minister submitted that the section did not have the effect of making any inconsistency with Australia's obligations under the WHC a jurisdictional fact but rather required the Minister to determine whether the giving of approval for the taking of the proposed action and the conditions to attach to any approval would be inconsistent with Australia's obligations under the WHC.

In any event, the Minister submitted that nothing in Article 4 of the WHC suggested that the approval of the proposed action placed Australia in breach of its obligations because, on its proper construction, Article 4 imposed an overarching duty not to act in the manner manifestly contrary to the purpose of the WHC. The Minister said he had properly concluded that the proposed action should not be refused having regard to the speculative nature of any net increase in global greenhouse gas emissions resulting from the relevant combustion emissions.

Adani refuted the allegation and relied on the fact the statement of reasons stated that the Minister had considered the precautionary principle. Further, Adani contended that the statement of reasons indicated that the Minister did not confine his consideration of the precautionary principle to the Coordinator-General's report alone.

Ground 1

With respect to ground 1, the applicant's key argument was that the Minister failed to comply with section 137 of the EPBC Act because the Minister relied entirely on the assessment in Adani's EIS and the evaluation in the Coordinator-General's report, but those materials contained no consideration of the combustion emissions (which were only addressed in the new material).

In reply, the Minister submitted that the prohibition imposed by section 137 did not arise in circumstances where he concluded the action would not affect the Reef, as set out in his statement of reasons.

Adani rejected the applicant's submissions about ground 1 and submitted that:

(1) the Minister's statement of reasons needed to be read as a whole; and

(2) the applicant's approach offended well established principles regarding the proper approach to the construction of such reasons.

Decision:

1 The Court analysed the relevant provisions of the EPBC Act in detail before considering the applicant's grounds for review.

2 At the outset, the Court commented that the nature of the proceeding was such that the Court could not step into the shoes of the Minister and decide for itself whether Adani's action should be approved, and if so, what conditions should apply. The Court's function was confined to reviewing the legality, not the merits of the Minister's decision.

3 The Court found that the applicant did not deny the force of those principles. However, it sought to dilute them to some extent by reference to the events leading up to the Minister making his decision in October 2015.

4 The Court distinguished the case from the decision of *Soliman v University of Technology, Sydney* [2012] FCAFC 146, on which the applicant sought to rely, on the basis that:

(1) in this case, the Minister provided a statement of reasons in respect of an administrative decision made by him based upon information obtained by his Department not only from the proponent but also from other government agencies and the public, including information supplied by the applicant (different to the process in an adversarial hearing); and

(2) in *Soliman*, one of the parties had provided detailed legal submissions on the topic of mitigating circumstances, which was described as a submission which was 'central to the party's case'. In circumstances where the decision maker made no reference to the submissions in the written statement of reasons, the Full Court inferred that the submission had not been addressed and it amounted to jurisdictional error.

5 In particular, the Court found the Minister's statement of reasons was not devoid of material indicating the Minister's path of reasoning, even though there was no reference in the reasons to specific sections of the EPBC Act, such as section 527E.

Ground 2

6 The physical effects associated with climate change, namely increased ocean temperature and ocean acidification could only be an 'impact' if Adani's action was a substantial cause of those events or circumstances. In construing the statement of reasons in accordance with the principles discussed above, the Court determined that the Minister found that he could not determine that the action would be a substantial cause of the relevant events or circumstance for the reasons set out in his statement of reasons. The Minister was unable to draw firm conclusions as to the likely contribution of Adani's action to a specific increase in global temperature. This meant that it was difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant environmental matters, including the Reef.

7 The Court was satisfied that the statement of reasons, while not expressly referring to section 527E of the EPBC Act, evidenced that the Minister had sufficiently addressed section 527E.

8 The Court did not accept the applicant's contention that the Minister erred in not accepting and acting upon the new information as establishing that the combustion emissions would, or were likely to, have an adverse impact on the Reef. It was a matter for the Minister to make relevant findings of fact, including whether or not to accept that the new material established that combustion emissions would, or were likely to, have the adverse impact on the Reef as claimed by the applicant. Having regard to the limited role of the Court in reviewing findings of fact in a judicial review proceeding, the Court was not satisfied that the applicant demonstrated any reviewable error concerning this aspect of the Minister's reasoning of his decision to approve the action.

Ground 3

9 Similarly, the Court found that the references to the precautionary principle in the Minister's statement of reasons should be read as references to the Minister's consideration of that principle in the context of his assessment of direct impacts of the project and not any indirect impacts such as greenhouse gas emissions.

10 The Court accepted the Minister's submission that the absence of any explicit reference in the statement of reasons to him having taken into account the precautionary principle in relation to combustion or greenhouse gas emissions did not mean that his decision to approve the action was invalid.

11 Since the Minister did not find that there was any threat of serious or irreversible damage to the Reef which would be caused by the combustion emissions, the necessary precondition to the application of the precautionary principle did not exist. Therefore, even if the Minister did not take account of the principle is approving the action (at least insofar as combustion emissions were concerned), it would not vitiate his decision.

12 On that basis, the Court rejected ground 3.

Ground 1

13 The Court accepted that the WHC imposed obligations on Australia but considered that the applicant overstated the nature of them.

14 The applicant's claim that the Minister breached section 137(1) of the EPBC Act turned on the asserted inconsistency between the Minister's approval of the action and the obligations imposed on Australia by Article 4 of the WHC. The applicant invited the Court to adopt a literal construction of the obligations set out in Article 4. The Court did not adopt that construction.

15 The Court followed the general rule of treaty interpretation in Article 31 of the *Vienna Convention on the Law of Treaties 1969*, which required a treaty to be interpreted in good faith and in accordance with the ordinary meaning of the words of the treaty in their context and in light of the treaty's object and purpose.

16 Adopting this approach, Article 4 was to be construed having regard to Article 5. Article 5 made it plain that State Parties were to endeavour, in so far as possible, and as appropriate for each country, to do the matters specified. In that sense, the nature of the obligation was non-absolute.

17 The Court accepted the Minister's submission that, properly construed, Articles 4 and 5 of the WHC gave considerable latitude to State Parties as to the precise actions they may take to implement their 'obligations' under the relevant provisions of WHC. The Court also accepted that the Minister was mindful of the prohibition imposed by section 137 of the EPBC Act, given it was expressly referred to in his statement of reasons.

18 However, the omission of any reference to combustion emissions in the relevant part of the statement of reasons did not mean that the Minister did not turn his mind to combustion emissions in concluding that the approval would not be inconsistent with the WHC.

19 For those reasons, the Court held that the applicant failed to establish any breach of the statutory prohibition imposed by section 137 of the EPBC Act. There was therefore no need to determine whether, if there had been such a breach, it would have had the effect of invalidating the Minister's approval decision.

Conclusion

20 The Court dismissed the Originating Application for judicial review and directed the parties to seek to agree proposed orders for costs. Failing agreement, the Court would deal with the matter on the papers.

BOND v CHIEF EXECUTIVE DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION [2016] QPEC 40
(Everson DCJ – 30 August 2016)

Application – Administrative Law – decision – natural justice – procedural fairness – review of decision to issue an Environmental Protection Order – whether the Environmental Protection Order was unlawful

Facts: This was an application in a pending proceeding seeking the determination of a preliminary point in an appeal; the respondents decision, made pursuant to s 521(10) of the Environmental Protection Act 1994 (**EPA**), to confirm the decision to issue an Environment Protection Order (**EPO**) to the appellant.

(1) The EPO was issued to the appellant pursuant to s 363AD of the EPA, as a related person of a high risk company, Linc Energy Limited.

(2) The EPO requires the appellant to take action to rehabilitate or restore land at 357 Kummerows Road, Chinchilla because of environmental harm and/or contaminates on the land where Linc Energy Limited carried out an underground coal gasification plant.

(3) The operation of the EPO is stayed pending the final determination of this application.

(4) Relevantly, s 360 of the EPA states that the EPO must provide the details of the rights to review or appeal the decision. Inter alia, the EPO gave the appellant 10 business days from the date of notification of the decision to apply for review (opposed to a longer period if they deemed a "*special circumstance*" existed in accordance with s 521 of the EPA).

(5) The appellant applied for a review and made a submission that the characteristics of the case should constitute "special circumstances", since there was not a sufficient period of time to enable the appellant to consider the contents of the EPO, take advice from their consultants and formulate grounds in support of this application for internal review.

(6) In response (by letter dated 22 June 2016) the respondent provided the appellant with the requested documents and granted a longer period of time for the appellant to complete the application for internal review (20 business days from the date of the letter).

(7) The appellant sought an order that the appeal be allowed based on the following assertions:

(a) That the EPO was unlawful because it did not comply with s 360 of the EPA. The appellant alleged that the EPO was unlawful because the respondent 'wrongly' gave the appellant 10 business day to lodge a review, since the respondent 'admitted' (by letter dated 22 June 2016) that there were "*special circumstances*" that warranted a longer period of time. Therefore the appellant alleged that s 360(1)(d) of the EPA was not complied with making the EPO invalid.

(b) The appellant was denied procedural fairness. The appellant alleged that the EPA did not authorise the changing or extending of an internal review period that has already commenced. They submitted that the extension was *ultra vires* or otherwise unlawful under the EPA. Therefore if the provisions of the EPA were not complied with the appellant would lose his right to appeal the decision to the Planning and Environment Court in accordance with s 521(10) of the EPA.

Decision: The Court held in dismissing the application:

1 There is no evidence to suggest that the EPO was defective at the time it was issued. This is because the respondent apprehended the "*special circumstances*" at that stage, as compared to later, when it received the application to review.

2 The EPO complied with s 360 of the EPA and was not invalid because it failed to acknowledge "*special circumstances*" in stating the review or appeal details.

3 While the appellant had a right to apply for a review of the original decision to issue the EPO, there was no right to compel the administering authority to make a review decision as a consequence of s 521(10) of the EPA. In the absence of a mandatory provision that this occur, the appellant was not denied a procedural fairness as a consequence of the deemed refusal of his application for review of the original decision.

4 Not every departure from the rules of natural justice warrants a remedy, if such a remedy would be futile. Nothing in the circumstances suggest that it is likely that the appellant would have received a favourable decision on review in any event.

5 That it would be futile to grant relief which contemplated the respondent now undertaking a review of the original decision to issue the EPO to the applicant or

which contemplated the issuing of a new EPO solely because the applicant was not afforded a review of the original decision.

6 The Court held that the EPO did comply with s 360(1)(d) of the EPA and the appellant was not denied procedural fairness.

GOLD COAST CITY COUNCIL v LEAR & ANOR [2016] QDC 215
(Everson DCJ – 30 August 2016)

Appeal – where respondents failed to comply with an Enforcement Notice – where the Magistrate dismissed the complaint on the basis that there was no case to answer- where appellant seeks to appeal against the order of the Magistrate – whether there was jurisdiction to challenge the Enforcement Notice before the Magistrate

Facts: This was an appeal by the appellant Council against an order of the Magistrates Court that the respondents had no case to answer in respect of a prosecution brought by the appellant Council for failing to comply with an enforcement notice.

The enforcement notices related to a timber sleeper retaining wall which straddled the boundary between the respondents' land and their neighbour's land. It was a timber post and rail wall that varied in height from 0.5 metres to 2.7 metres. It was infested with termites and in danger of collapse.

Part of the wall was located on the respondents' land and part of the wall was located on the neighbour's land. The appellant Council issued identical enforcement notices to the respondents and their neighbour.

During the course of the hearing before the Magistrates Court, it was clear neither the respondents nor their neighbour could unilaterally replace the wall without trespassing on the property of the other part. In the circumstances, a better approach would have been to issue one enforcement notice addressed to both of them.

The Magistrate found there was no case to answer as:

(1) the notice referred to the whole wall and not only part of the structure owned by the defendants (respondents in this proceeding); and

(2) to comply with the notice, the defendants (respondents in this proceeding) had to go on to their neighbour's land to find a solution.

In the circumstances, the appellant Council could not enforce compliance with the notice and the defendants (the respondents in this case) had no case to answer.

The District Court was required to determine the following issues:

(1) whether the enforcement notice was defective; and

(2) whether the lawfulness of the enforcement notice was capable of challenge before the Magistrates Court.

Decision:

1 The Court allowed the appeal and ordered that the matter be remitted to the Magistrate for determination according to law.

2 The appellant Council argued that each of the enforcement notices should be read down as only referring to that part of the retaining wall on the property of the recipient of each notice, to address the problems identified by the Magistrates Court. However, the Court found that the enforcement notice directed the respondents to unlawfully carry out work on the land of their neighbour and it was therefore defective.

3 The appellant Council argued that the enforcement notice could not be challenged in the prosecution before the Magistrates Court. This was because the legislative scheme allowed the recipient of an enforcement notice to appeal against the notice pursuant to the *Building Act 1975* (Qld) or otherwise challenge its validity under the *Judicial Review Act 1991* (Qld) (**JRA**).

4 The elements of the offence for failing to comply with an enforcement notice were that a person was given an enforcement notice and that the person failed to comply with it. Therefore, the appellant Council submitted that there was no right to challenge the lawfulness of it upon prosecution for the offence.

5 In determining whether the language of the Building Act and the SPA expressed an intention that an enforcement notice was formally valid on its face may not be challenged in a proceeding in the Magistrates Court upon prosecution for an offence for failing to comply with it, the Court considered a series of decisions.

6 The Court found that the correct approach was that adopted in the decision of *R v Wicks* [1998] AC 92 and applied in the decision of *Krulow v Glamorgan Spring Bay Council* [2013] 23 TAS R 264. It held that in circumstances where the appellant Council reasonably believed the retaining wall was dangerous, it was entirely appropriate that a challenge to the enforcement notice be started promptly by an appeal to the Building and Development Committee. An appeal to the Planning and Environment Court would lie from any decision on the appeal. The validity of the enforcement notice could also be challenged under the JRA. It was not in the public interest that the recipient of an enforcement notice be permitted to do nothing in response to it and only challenge its validity much later, when the offence of failing to comply with it finally comes before the Magistrates Court.

7 The Court concluded that the lawfulness of the enforcement notice was not capable of being challenged before the Magistrates Court. There was therefore no jurisdiction to challenge it before the Magistrates Court.

Fracing Hell – Let's Kill the Goose and Flog the Egg!

Dr Michael Millington[1]

Australia, as the goose, provides many golden eggs based on its fresh air and water, fertile plains, scenic marginal lands, forests, abundant fisheries, diverse wildlife and its resourceful population. Even its mineral wealth has been relatively freely given by taking from the surface and digging into specific, discrete and targeted seams. But a recently discovered golden egg, coal seam gas, must be "fractured" from the goose. Economically fraccing looks like a good proposition to exploit Coal Seam Gas (CSG) and Shale Gas, however there are many issues to consider. Arguably laws supporting fraccing, and in ignorance of the precautionary principle, and where the health of the population is at risk, should be ruled unconstitutional. This report provides overview of the Queensland situation and summarises a number of legal issues relating to water used in fraccing.

1. Overview

Though Government is issuing licences and may see fraccing as a 'golden egg', the problem is that the social and environment effects are real issues and long term consequences are largely unknown with a "learn by mistakes", otherwise known as an "adaptive approach" which is somewhat consistent with the precautionary principal in accordance with the *Rio Declaration on Environment and Development*.[2] Consuming non-renewable resources before reasonably exploiting the sustainable and renewables to service an ever increasing demand for energy, needs careful consideration. Because of the potential for an irreversible situation, a very cautious approach should be taken to avoid killing our environment ('the goose'). Water is one of Australia's important, if not the most precious commodity. The risk of polluting limited water resources to achieve political objectives without reasonably considering the future must be managed through legislative protection, thereby avoiding the risk of irreversible long term environmental and health issues.

An example of negative consequences denying risk is the 1930's asbestos mine at Witternoom,[3] the Department of Health had the knowledge but little authority to instigate change. CSR had knowledge of malignant mesothelioma and other asbestos-caused diseases but chose to ignore it, an example that should never be repeated. The James Hardie executives knew, but also ignored the asbestos risk.[4] Australian Bureau of Statistics (ABS) shows 9627 new cases of mesothelioma 1982-2006 and 5273 deaths 1997-2007.[5]

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[2] *Rio Declaration on Environment and Development*, opened for signature 4-19 June 1992, E.73.II.A.14 (entered into force on 21 March 1994)

[3] McCulloch J, "The Mine at Wittenoom: Blue Asbestos, Labour and Occupational Disease" (2006) 47(1) *Labor History* 1-19.

[4] Engel S and Martin B, "Union Carbide and James Hardie: lessons in politics and power" *Global Society: Journal of Interdisciplinary International Relations*, (2006) 20(4) 475-490, https://www.uow.edu.au/~bmartin/pubs/06globalsociety.html

We must ask the question, 'why are some first world countries banning fraccing if it is so good, and why are we so anxious to progress an industry when nobody to date can quantify the effects on the environment?' There are many lessons to be learnt. Statistics can be utilised using US experience of fraccing since 1947. [6] Therefore much data in this report uses US information. Apparently, hell is a place with no water;[7] care should be taken to avoid poorly considered legislation, otherwise a hell on earth may be created in Australia and we have killed our only goose.

Legislation around CSG is extensive and complex, it's a lawyer's smorgasbord. In dealing with the issues taking an adversarial approach, just protecting the law, needs balancing with moral activism and ethics of care given the potential for irreversible environmental effects.[8]

Any law which purports to condone any action which is contrary to the good health of people, animals and the water table and soil to such a degree that it causes provable environmental harm on a mass scale so as to jeopardise our GDP and the health of every Australian cannot, in my view, be for the "good governance" of Australia. It follows that on this construction, any such law should be ruled unconstitutional.

This report will touch on the problems and will discuss some legal issues around water use in fraccing.

2. What is Fraccing and the Issues it Raises

2.1 Overview

Prior to discussing the issues of fraccing it is important to distinguish between CSG and shale gas. Your Say AGL provides the following explanations:

> 'CSG is natural gas found in coal seams deep below the earth's surface. The gas is formed as a by-product of the conversion of plant material to coal, and is trapped in the structure of the coal seams. It primarily consists of methane, which is a naturally occuring, non-toxic gas that is present in the atmosphere in low concentrations…
>
> …Shale gas is found in shale rock layers (around 1500 metres below ground, far deeper than CSG) and is generally less porous than coal seam gas. There are also many differences in the drilling, production, storage and treatment of shale gas.
>
> Shale gas is the dominant type of production referenced in American examples.'[9]

Due to the varying geology of coal seams, fraccing is not carried out in all coal seam gas (CSG) operations. For deep gas and oil activities (such as production of shale gas and oil, tight gas and basin-centred gas) fraccing is undertaken in almost every well.[10] For CSG

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[5] Work Safe Australia, Mesothelioma In Australia Incidence 1982 to 2006 Mortality 1997 to 2007 (My 2010), http://www.safeworkaustralia.gov.au/sites/swa/about/publications/Documents/339/MesotheliomaInAustralia_Incidence1982-2006_Mortality1997-2007_PDF.pdf

[6] Montgomery C and Smith M, "Hydraulic fracturing: History of an enduring technology" (December 2010) *JPT Online (Society of Petroleum Engineers)* 27, http://www.ourenergypolicy.org/wp-content/uploads/2013/07/Hydraulic.pdf

[7] Luke 16:24.

[8] Luban D, "Lawyers and Justice: An Ethical Study" (1988) *Princeton University Press*.

[9] Your Say AGL, The difference between CSG and shale gas production (4 March 2015) http://yoursayagl.com.au/the-difference-between-csg-and-shale-gas/

[10] Department of Environment and Heritage Protection, "Fraccing and B-TEX fact sheet", https://www.ehp.qld.gov.au/assets/documents/regulation/rs-is-fraccing-and-btex.pdf

extraction it is estimated that up to 80% of all natural gas wells in the next 10 years will use fracking.[11] Shale gas is also produced by fraccing. The environmental issues associated with shale gas fracking are similar to CSG fracking.[12]

For the purpose of this paper we will use CSG but this generally includes shale gas in the discussion.

Hydraulic fracturing, also called "fracture stimulation", "fraking", "hydrofracking", "fracturing", " fracking" or "fraccing" is illustrated in Figure 1.[13] Water, sometimes as much as 25Ml/well[14] (around 10 Olympic swimming pools), is injected into a well at high pressure to fracture a coal seam and extract gas.[15] Chemicals and a granular proppant substance, 136 metric tonnes/well reported,[16] is added to the injected water to keep the cracks open once the hydraulic fluid is withdrawn. Injected radioactive tracers are reportedly used for monitoring.[17]

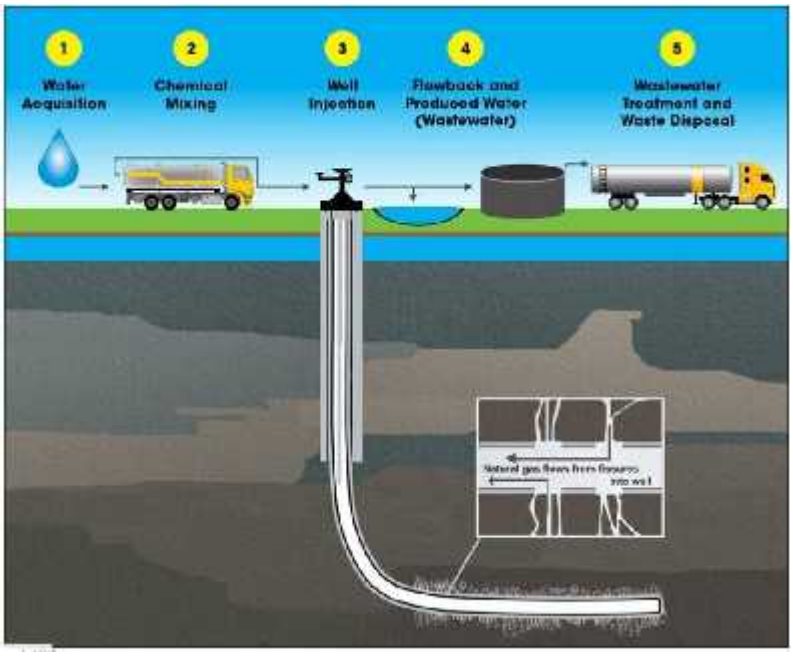

Figure 1 – The Hydraulic Fraccing Water Cycle

[11] Hydraulic Fracturing for Natural Gas Development, Investor Environmental Health Network 2011 IEHN, http://iehn.org/overview.naturalgashydraulicfracturing.php

[12] Mariann Lloyd-Smith and Rye Senjen, "Hydraulic Fracturing in Coal Seam Gas Mining: The Risks to Our Health, Communities, Environment and Climate" NTN National Toxics Network (2011), http://s3.amazonaws.com/academia.edu.documents/30256385/ntn-csg-report-sep-2011.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1462000050&Signature=e6QVqtoTDWc7MeU K5MxoqAhv3DA%3D&response-content-disposition=inline%3B%20filename%3DHydraulic_Fracturing_in_Coal_Seam_Gas_Mi.pdf

[13] United States Environmental Protection Agency, *The Hydraulic Fracturing Water Cycle* (23 February 2015), https://www.epa.gov/hfstudy/hydraulic-fracturing-water-cycle%234

[14] Campin D, Environmental Regulation of Hydraulic Fracturing SPE 166146 (2013) Society of Petroleum Engineers 3.

[15] The amount of water usage varies significantly 0.1-20ML is reported see Australian Government, Hydraulic fracturing ('fraccing') techniques, including reporting requirements and governance arrangements' Department of the Environment (June 2014) 541, http://www.environment.gov.au/system/files/resources/de709bdd-95a0-4459-a8ce-8ed3cb72d44a/files/background-review-hydraulic-fracturing_0.pdf

[16] Law B and Spencer C, "Gas in tight reservoirs-an emerging major source of energy, Future of Energy Gasses" (1993) Professional Paper 1570 *US Geological Survey* 233-252.

[17] Campin, n 13 at 6.

The Australian National Water Commission (NWC) summarises many issues:

> 'Potential impacts of CSG developments, particularly the cumulative effects of multiple projects, are not well understood.
>
> Potential risks to sustainable water management:
>
> - Extracting large volumes of low-quality water will impact on connected surface and groundwater systems, some of which may already be fully or overallocated, including the Great Artesian Basin and Murray-Darling Basin.
> - Impacts on other water users and the environment may occur due to the dramatic depressurisation of the coal seam, including:
>   - changes in pressures of adjacent aquifers with consequential changes in water availability
>   - reductions in surface water flows in connected systems
>   - land subsidence over large areas, affecting surface water systems, ecosystems, irrigation and grazing lands.
> - The production of large volumes of treated waste water, if released to surface water systems, could alter natural flow patterns and have significant impacts on water quality, and river and wetland health. There is an associated risk that, if the water is overly treated, 'clean water' pollution of naturally turbid systems may occur.
> - The practice of hydraulic fracturing, or fraccing, to increase gas output, has the potential to induce connection and cross-contamination between aquifers, with impacts on groundwater quality.
> - The reinjection of treated waste water into other aquifers has the potential to change the beneficial use characteristics of those aquifers.'

In addition to these water management risks, CSG development could also cause significant social impacts by disrupting current land-use practices and the local environment through infrastructure construction and access.

The Commission is concerned that CSG development represents a substantial risk to sustainable water management given the combination of material uncertainty about water impacts, the **significance** [my emphasis] of potential impacts, and the long time period over which they may emerge and continue to have effect. Therefore, an adaptive and precautionary management approach will be essential to allow for progressive improvement in the understanding of impacts, including cumulative effects, and to support timely implementation of 'make good' arrangements.'[18]

2.2 Legislative Issues

The term 'significant' as it relates to impact and risk is difficult to quantify. It is not clearly defined in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC) Act. "Significant and adverse impacts" are discussed in depth by Chris McGrath, but open

[18] National Water Commission, *Coal Seam Gas* (2012), http://www.nwc.gov.au/nwi/position-statements/coal-seam-gas

interpretation remains, '[b]oth context and impact therefore need to be considered to decide if there is a "significant impact".[19] Attempted explanations by the court in the *Flying Fox Case*, *Booth v Bosworth* (2001) 114 FCR 39; 117 LGERA 168; [2001] FCA 1453 64 and the *Natham Dam Case*, *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; 134 LGERA 272; [2004] FCAFC 190 [53] have done little to adequately clarify or clearly define the meaning, allowing interpretation by the decision maker.

Though administration guidelines, to some extent, clarify the meaning of significant, it is difficult to judge what is significant if the monitoring is inadequate and effects are unknown or understood, and maintain risk within the application of the precautionary approach, this is further discussed in Section 7.

> 'A 'significant impact' is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts. You should consider all of these factors when determining whether an action is likely to have a significant impact on matters of national environmental significance.'[20]

Queensland has a bilateral agreement with the Commonwealth for consistent processes of environmental assessment and approval.[21] As such, the EPBC Act overrides Queensland environmental acts. Commonwealth Government has established the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) as a statutory body under the EPBC Act. The IESC provides advice to Commonwealth and State government regulators on the water-related impacts of coal seam gas and large coal mining development proposals.[22]

2.3 Pollution Issues

Each CSG stage has potential impacts on drinking water resources,[23] notably underground acquifiers.[24] After water is introduced during the fraccing stage, a portion of that is returned to the surface over the next days and weeks. Flowback water contains additional chemicals created or modified by the original chemicals. The US Environmental Protection Agency (EPA) has published documents[25] identifying up to 930 known chemicals commonly

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[19] McGrath C, "Avoid the legal pitfalls in the EPBC Act by understanding its key concepts" (22 September 2005) NELA (WA) Conference, Perth, http://learnline.cdu.edu.au/tourism/uluru/downloads/Key%20concepts%20of%20the%20EPBC%20Act.pdf

[20] Australian Government, Department of the Environment, *Matters of National Environmental Significance Significant impact guidelines 1.1 Environment Protection and Biodiversity Conservation Act 1999* (2013) 2, http://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/nes-guidelines_1.pdf

[21] Australian Government, Department of the Environment, Queensland Bilateral Agreement Information (accessed 30 April 2015), http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/qld

[22] Australian Government, "Hydraulic fracturing ('fraccing') techniques, including reporting requirements and governance arrangements" Department of the Environment (June 2014) 43, http://www.environment.gov.au/system/files/resources/de709bdd-95a0-4459-a8ce-8ed3cb72d44a/files/background-review-hydraulic-fracturing_0.pdf

[23] United States Environmental Protection Agency, *The Hydraulic Fracturing Water Cycle* (23 February 2015), 1-3, http://www2.epa.gov/hfstudy/hydraulic-fracturing-water-cycle#4.

[24] Lexis Nexis, *Energy & Resources Law* (20 June 2012) 448 [301,951].

[25] United States Environmental Protection Agency, *EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources, Appendix A: Chemicals Identified in Hydraulic Fracturing Fluids*

used in the input,[26] up to 132 in the waste,[27] with 36 common in input and waste. A UK study, see Section 2.9, found from 260 substances listed, 58 were of concern being toxic, carcinogens, mutagens with reproductive effects.[28] In a report by Earthworks on Texas in the US,[29] flowback, samples of dissolved methane (1,580 ppb) tested more than 316 times higher than EPA maximum contaminant (5 ppb)[30] for drinking water. In the US, chemicals may be injected at concentrations anywhere from 4-13,000 times the acceptable concentration in drinking water.'[31] Flowback water typically only accounts for about 10%[32] of the total water injected. The remaining injected water with additives, can neither be treated nor dilution levels controlled because it not accessible, so what remains underground remains problematic.

The fracturing fluid consists of approximately 98-99.5% water and sand[33] and 0.5-2% chemical additives.[34] A fraccing operation utilising around 15 ML (a medium size well) would use approximately 72-300 tonnes of chemicals.[35] Schlumberger, a leading oil and gas company, recommends in disposal of many fraccing fluid chemicals that they be treated as hazardous waste.[36] Earthworks stated '[e]ven if these chemicals are diluted it is unconscionable that EPA [in the US] is allowing these substances to be injected directly into underground sources of drinking water.'[37]

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and Wastewater (Excel file) (23 February 2015), http://www2.epa.gov/hfstudy/appendix-chemicals-identified-hydraulic-fracturing-fluids-and-wastewater-excel-file.

[26] United States Environmental Protection Agency n 24 at Table A-1.

[27] United States Environmental Protection Agency n 24 at Table A-3.

[28] Wood R, Gilbert P, Sharmina M and Anderson K, "Shale gas: a provisional assessment of climate change and environmental impacts" (2011) *The Tyndall Centre University of Manchester* 56, http://www.tyndall.ac.uk/sites/default/files/tyndall-coop_shale_gas_report_final.pdf.

[29] Earthworks, "How the Texas Natural Gas Boom Affects Health and Safety" *Texas Oil and Gas Accountability Project* (April 2011) 9, https://www.earthworksaction.org/files/publications/FLOWBACK-TXOGAP-HealthReport-lowres.pdf

[30] United States Environmental Protection Agency, *Basic Information about 1,2-Dichloroethane in Drinking Water* (13 December 2013), http://water.epa.gov/drink/contaminants/basicinformation/1-2- dichloroethane.cfm.

[31] Earthworks, *Hydraulic Fracturing 101* (accessed 15 March 2015) 9, http://www.earthworksaction.org/issues/detail/hydraulic_fracturing_101#.VTbrZM -Jipo.

[32] Campin, n 13 at 9.

[33] Silica Sand as a proppant but could be resin coated sand, bauxite and man-made ceramics, Horiba Scientifics *Frac Sand and Proppant Applications* (at 14 April 2015), http://www.horiba.com/scientific/products/particle-characterization/applications/frac-sand/

[34] Ground Water Protection Council & ALL Consulting "Modern Shale Gas Development in the United States: A Primer" *DOE Office of Fossil Energy and National Energy Technology Laboratory* (April 2009) DE-FG26-04NT15455 61.

[35] New York City Department of Environmental Protection, *Impact Assessment of Natural Gas Production in the New York City Water Supply Watershed, Final Impact Assessment Report* (22 December 2009) Hazen and Sawyer Environmental Engineers and Scientists 5, imperial to metric conversion applied, http://www.nyc.gov/html/dep/pdf/natural_gas_drilling/12_23_2009_final_assessment_report.pdf

[36] Reference from Earthworks, *Hydraulic Fracturing 101* (accessed 15 March 2015) 5 Footnote 2, In October of 2004, OGAP filed a Freedom of Information Act request with EPA to obtain the Material Safety Data Sheets (MSDS) supplied to the agency by hydraulic fracturing companies. (Freedom of Information Act, 5 U.S.C. 552, Request Number HQ-RIN-00044-05). The information in this table were contained in MSDS sheets from Schlumberger, http://www.earthworksaction.org/issues/detail/hydraulic_fracturing_101#.VTbrZM-Jipo.

[37] Earthworks, n 30 at 5.

In a 2013 submission on the review of CSG activities in NSW, Doctors for the Environment Australia (DEA) quoted:

> 'The Australian Senate report noted "there is a risk that residues of chemicals used in fraccing may contaminate groundwater and aquifers used for human or stock consumption or irrigation. There are examples where water has been contaminated. It is acknowledged that in one case in Australia, fraccing resulted in damage to the Walloon Coal measures, causing leakage between that and the Springbok aquifer." http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/mdb/interim_report/report.pdf' [38]

In 2010 environmental approval was given for discharging the equivalent of eight olympic swimming pools from the Walloon Gasfields into the Condamine River, subsequently an EIS report stated that Australian and New Zealand Environment and Conservation Council (ANZECC) guidelines were exceeded.[39] The report was deemed ill-informed as the Queensland Government argued the standards should be applied to the "receiving environment", once discharged into the river. The approval relating to boron and cadmium levels in excess of guidelines was questioned in an attempt to prompt approval amendment, however the data and survey proved inconclusive given seasonal variations and impact over time.[40] This illustrates the importance of public overview.

Of concern would be drilling operations in places such as the Gulf of Carpentaria where water is seasonal with flooding for as much as six months each year, see the extent of CSG mining leases in Figure 3. In these conditions control of waste water would be problematic.[41] These considerations must inform decisions relating to "significant impact".

Pollution effects of flaring need to also be taken into account. Flaring of oil and gas test wells is managed under the *Petroleum and Gas (Production and Safety) Act 2004* (PGA) ss 72, 151, which requires that gas should be commercially used wherever possible, and flared if it is not. Venting the gas (i.e. allowing the gas to escape directly into the atmosphere without burning) is only allowed when flaring is not technically possible or for safety reasons.

Evidence of contamination from CSG activity are a reality. Examples have been reported in Wyoming,[42] Utah, Colorado,[43] Texas (see Figure 2 – Photo of Drinking Water taken near a fracturing operation in Texas[44]) and there has been a class action against BHP in Arkansas.[45]

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[38] Doctors for the Environment Australia, "Health effects of chemicals used in or generated by CSG operations and hydraulic fracturing", Submission on the Review of Coal Seam Gas Activities in NSW By the NSW Chief Scientist and Engineer, 8th May 2013, 9, http://dea.org.au/images/uploads/submissions/Review_of_CSG_in_NSW_-_Chief_Scientist_Submission_05-13.pdf

[39] Newton G, Queensland Coordinator-General/Director-General of the Department of Infrastructure and Planning, and CEO of Queensland Water Infrastructure.

[40] ABC, "Queensland reveals Condamine water quality report", *ABC News* 4 April 2012 (Wendy Carlisle), http://www.abc.net.au/news/2011-11-24/chinchilla-condamine-water-quality-report/3677838

[41] Campin, n 13, at 8.

[42] Doctors for the Environment Australia, n 37 at 9.

[43] Doctors for the Environment Australia, n 37 at 12.

[44] Earthworks, "How the Texas Natural Gas Boom Affects Health and Safety" *Texas Oil and Gas Accountability Project* (April 2011), https://www.earthworksaction.org/files/publications/FLOWBACK-TXOGAP-HealthReport-lowres.pdf

[45] Wood L and Fitzgerald B, "Class actions shake BHP" *The Sydney Morning Herald* (Sydney), 25 May 2011, http://www.smh.com.au/business/class-actions-shake-bhp-20110524-1f2gk.html

Glass of water from the Smith's tap in Dish, Texas after Devon Energy completed nearby fracturing operation.
Photo by Sharon Wilson

Figure 2 – Photo of Drinking Water taken near a fracturing operation in Texas USA

Though this report focuses on water issues, there are additional substantial pollution issues related to air quality and waste disposal.[46]

2.4 CSG Locations

In Queensland a total gasfield area of 572,000 ha (about 0.33% of land-surface) is predicted to 2034[47] see Figure 3.[48] The extent of the contamination radius has not been quantified, this should be of great concern to adjacent landholders and residents.

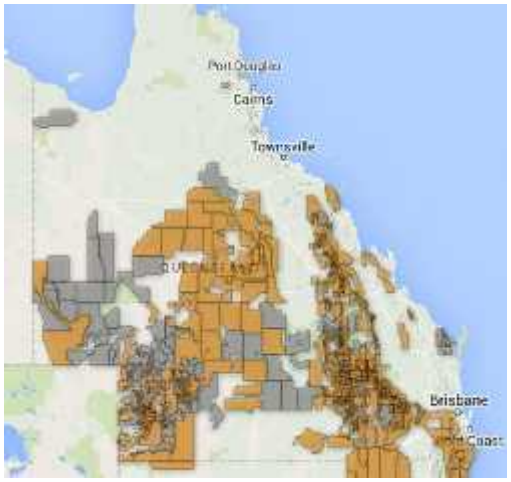

Figure 3 – CSG Leases 2012

[46] As an example see Earthworks, "How the Texas Natural Gas Boom Affects Health and Safety" *Texas Oil and Gas Accountability Project* (April 2011) 6-7, https://www.earthworksaction.org/files/publications/FLOWBACK-TXOGAP-HealthReport-lowres.pdf; Campin D, *Environmental Regulation of Hydraulic Fracturing* SPE 166146 (2013) Society of Petroleum Engineers 20-22.

[47] Australia Pacific LNG Project Coordinator-General's report on the environmental impact statement November 2010 § 7.1, http://www.statedevelopment.qld.gov.au/resources/project/australia-pacific-lng/coordinator-generals-report.pdf

[48] ABC, "What's the promise of coal seam gas?" *ABC News* 3 April 2012 (Brisbane) Map Data© Basarsoft, Google, INEGI, ZERIN, Queensland Government Sources, http://www.abc.net.au/news/specials/coal-seam-gas-by-the-numbers/#sources

2.5 Economics

Australia's non-renewable economic demonstrated resource (EDR) of CSG is estimated at 16,590 PJ[49] (4,490,000,000,000,000 watt/hours) with 100 year resource lifetime at 2008 production rates, having total reserves estimated at 168,600 PJ;[50] Queensland accounts for 95%.[51] In the outlook to 2030, CSG is expected to remain the most important sector of the unconventional gas industry.[52] In 2008, CSG accounted for about 12% of the total conventional and unconventional gas EDR in Australia.[53]

It is estimated in CSG exploration and development that an average cost per well of around $500,000,[54] and up to $10M for shale or tight gas,[55] demonstrating considerable industry investment.

The Queensland Government states:

> 'Economic studies indicate a medium-sized 28 million-tonnes-per-annum (Mtpa) CSG to liquefied natural gas (LNG) industry could:
>
> - generate over 18,000 jobs in Queensland with 4,300 jobs in the Surat Basin alone,
> - increase gross state product by over $3 billion or 1%,
> - generate private sector investment of over $45 billion,
> - provide royalty returns of over $850 million per annum, which could help fund schools, hospitals and other vital services.'[56]

What the Queensland Government fails to report is that these jobs are short term primarily in the establishment of the infrastructure, the ongoing maintenance is likely to be a small fraction of that workforce.

The emotive words used 'which could help fund schools, hospitals and other vital service' to make CSG "all right" must of course be offset by potential effects on children, being the most venerable and the likelihood that the pollution effects will need more hospitals for treatment.

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[49] Australian Government, Department of Resources, Energy and Tourism, Geoscience Australia, *Australian Energy Resource Assessment* (2010) ch 2 para 2.3 18, http://www.ga.gov.au/image_cache/GA16725.pdf.
[50] Australian Government, Department of Resources, Energy and Tourism, Geoscience Australia n 48 at ch 4 para 4.1.2 84.
[51] Australian Government, Department of Resources, Energy and Tourism, Geoscience Australia n 48 at ch 4 para 4.3.2 97.
[52] Australian Government, Department of Resources, Energy and Tourism, Geoscience Australia n 48 at ch 4 para 4.4.3 119.
[53] Australian Government, Department of Resources, Energy and Tourism, Geoscience Australia n 48 at ch 4 para 4.3.2 96.
[54] Australian Government, Department of Resources, Energy and Tourism, Geoscience Australia n 48 at ch 4 para 4.1.5 88.
[55] Campin, n 13 at 7.
[56] John Williams Scientific Services Pty Ltd, "An analysis of coal seam gas production and natural resource management in Australia Issues and ways forward" (A report prepared for The Australian Council of Environmental Deans and Directors, October 2012) 67, http://aie.org.au/AIE/Documents/Oil_Gas_121114.pdf

The costs as a result of contaminates on health of the population have not been taken into account in tendering these "benefits". The costs may be significant if we consider experience with asbestos compensation, this is discussed above. But future damage and costs are not this Government's problem today.

The CSG industry promises a financial gain to Queensland offering a source of unexploited energy. The overall return to Government must be considered in light of costs in rectifying any damaging peripheral effects, of pollution, invasiveness, water and health issues.

2.6 Invasiveness on the Land and its Other Uses

CSG activities are invasive and there is much public concern regarding water pollution issues and perceived land invasion. The Lock the Gate Alliance[57] provides much information on the controversy.

Figure 4[58] and Figure 5[59] illustrate the intensity of CSG wells in Roma Queensland and another unidentified site.

Figure 4 - Grid pattern of coal seam gas wells, the Roma Region, Queensland, showing an example of land use intensity

[57] http://www.lockthegate.org.au/
[58] Lexis Nexis, n 23 at 449 [301,951].
[59] Google Earth, original photo location unknown, ABC Television, 'Gas Leak', *Four Corners*, 1 April 2013 (Matthew Carney and Connie Agius), http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm

Figure 5 – Another example of gas well intensity

Other fraccing countries[60] have reported noisy equipment is used typically on between 800-2,500, 24 hour days during fraccing affecting wildlife and residents. There is also noise due to transport of materials with potentially 7,000-10,000 truck movements[61] to site emitting carcinogens and forming ground level ozone.[62] This leads to traffic hazards and regional infrastructure costs.[63] Queensland should note the European Commission report assessing noise and traffic risk as high.[64]

Government has not identified in economic benefits the costs to the public for introduction and maintenance for roads that are necessary for trucks to transport equipment and product. These costs are 'hidden' and if disclosed would degrade the financial benefit being claimed.

Though legislation attempts to ensure mines are remediated there is no guarantee this would occur. A Discussion Paper on Abandoned Mine Management in Australia by AusMMI[65] highlights a number of issues resulting from mining operations.

> At the end of its life, a mine has the potential to leave a legacy, either positive or negative. History has shown that in most cases the legacy left has been negative due to the following:
>
> - Human health risk – contaminants from poorly maintained mines, tailing dams and tailings;
>
> - Safety risks – open holes (pits and shafts), collapsing tailings, impoundments, machinery and machinery parts;

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[60] Broomfield M, *Support to the identification of potential risks for the environment and human health arising from hydrocarbons operations involving hydraulic fracturing in Europe* (11 February 2013) European Commission DG Environment 07.0307/ENV.C.1/2011/604781/ENV.F1 x, http://ec.europa.eu/environment/integration/energy/pdf/fracking%20study.pdf

[61] Broomfield, n 59.

[62] Haswell M and Shearman D, "Chief Scientist CSG report leaves health concerns unanswered" *The Conversation*, 8 October 2014, http://theconversation.com/chief-scientist-csg-report-leaves-health-concerns-unanswered-32422

[63] Broomfield, n 59 at viii.

[64] Broomfield, n 59 at viii.

[65] Corinne Unger and Ashley Van Krieken, *A Discussion Paper on Abandoned Mine Management in Australia* AusIMM, 8 March 2011, http://www.ausimm.com.au/content/docs/abandoned_mine_management_in_australia.pdf

- Environmental risks – contaminated soil and water, loss of biodiversity;
- Socio-economic impacts – communities left without livelihoods;
- Political risks – where a country or state may be open to accusations of breaching international environmental legislation; and
- Reputational risks – in particular for companies as a whole and leading to potential restrictions on their licence to operate

These impacts are significant and paint a very negative picture of the industry…

…On the other hand, several projects have left a positive legacy both here in Australia and overseas. These positive externalities have included:

- Reduced impacts through the removal of hazards such as open pits, contaminated water and potential earth and soil movement;
- Contributions to community throughout the operation of the mine – employment, training, investment in sporting and community groups; infrastructure; targeted employment of indigenous populations, women etc;
- Increased economic benefit to the local community and broader region through tourism and/or other industry moving into the area;
- Improved community facilities and environment – parklands and native ecosystems established on mine landforms;
- Improved environmental outcomes where work around the mine site has facilitated broader environmental work within the region;
- Energy supplies and other infrastructure which remain after mining ceases; and
- Mining heritage tourism for new economies.

Landowners whose land has been accessed for CSG wells may be left with the clean-up costs depending on the mining companies' actions.

> The Queensland Government's current estimate is that there are approximately 12,000 abandoned mines located on private land, and 3,000 on state-owned land in Queensland… The Department of Employment, Economic Development and Innovation will take action under the program in respect of abandoned mines on private land only if there is an associated public hazard; it can act with the permission of the landholder or without permission under section 344B of the *Mineral Resources Act 1989*. The department determines what rehabilitation action to take at the site.[66]

Australia currently has more than 50,000 abandoned mines.[67]

The legislation does not require remediation. The PGA s 294B, 'Authorised person to carry out remediation activities:

(1) The chief executive **may authorise** [my highlighting] a person to remediate any of the following bores or wells…'

[66] Queensland Floods Commission of Inquiry, Final Report, 2012, Para. 13.8.2, http://www.floodcommission.qld.gov.au/__data/assets/pdf_file/0017/11717/QFCI-Final-Report-Chapter-13-Mining.pdf, references omitted.
[67] The Conversation, What should we do with Australia's 50,000 abandoned mines?, July 2014 http://theconversation.com/what-should-we-do-with-australias-50-000-abandoned-mines-18197

The *Petroleum Act 1923* s 44, 'Form etc. of lease

…

(ii) [provides for] the **right** [my highlighting] to plug and abandon, or otherwise remediate, a bore or well…'

There does not appear to be a mandatory requirement to remediate, just a right.

The Code of Practice for constructing and abandoning coal seam gas wells and associated bores in Queensland, 2013, s 6.9.2, Mandatory requirements states that a) Wells must be abandoned in accordance with this Code and all relevant legislative requirements (i.e. Schedule 3 and s.69 and 70 of the P&G Regulation).

'Best endeavours' relating to equipment removal and 'reasonably practical' relating to plugging the well are used in the Regulation ss 69 and 70, the requirement to actually remediate not just the well head, but the whole of the area affected is not addressed, and there is inconsistency between the legislation, regulation and code.

Neither the *Environmental Protection Act 1994* (Qld), nor the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), address mitigation of environmental impacts associated with abandoned mines.

In the event that the mining company does not meet their legislated obligations then remediation is at public expense.

All of costs, present and future, should be taken into account when assessing the real value of an industry.

Once completed, on average around 3.6 hectares[68] of land requiring remediation is retained around the well head during the gas extraction[69] following 5-20 years[70] of operation. Figure 6-10[71] illustrate the operations.

Figure 6 – Well Drilling

Figure 7 – Fracturing Operation

[68] Broomfield, n 59 at vii.
[69] Broomfield, n 59 at 138
[70] Abdalla C and Drohan J, *Water Withdrawals for Development of Marcellus Shale Gas in Pennsylvania, Introduction to Pennsylvania's Water Resources* (2010) College of Agricultural Sciences, The Pennsylvania State University 3.
[71] Wikipedia, Hydraulic Fracturing (15 March 2015) 1-4, https://en.wikipedia.org/wiki/Hydraulic_fracturing

Figure 8 – Well Head Once Operational

Figure 9 – Well Head, Fluids Being Injected

Figure 10 – Water Tanks in Preparation

In America, the increase in earthquakes has been linked to CSG activities.[72] Reported in Oklahoma, earthquakes have increased from an average of 50/year to around 1000/year in 2009/2010,[73] with an apparent significant increase in intensity since 2009, increasing from around 5-190 events greater than 3 ML (on Richter scale, minor often felt, but rarely cause damage) in 2014.[74] In the Eola field, fifty 1-2.8 ML earthquake events were reported 7 hours after fracturing and were felt on the surface.[75] There are other examples[76] and Queensland

[72] Holland A, *Examination of possibly induced seismicity from hydraulic fracturing in the Eola Field, Garvin County, Oklahoma* (2011), http://www.ogs.ou.edu/pubsscanned/openfile/OF1_2011.pdf
[73] Holland A, *Potential for induced seismicity within Oklahoma* (22-24 January 2013) Ground Water Protection Council UIC Conference, http://www.gwpc.org/sites/default/files/event-sessions/Holland_AustinFINAL.pdf
[74] Oklahoma Geological Survey-Leonard Geophysical Observatory, "FAQ - Frequently Asked Questions" (2014), http://www.okgeosurvey1.gov/pages/earthquakes/faq.php.
[75] Holland, n 72.
[76] Campin, n 13 at 15-18.

is not exempt, see Figure 11[77] depicting all earthquakes, not necessarily CSG activity related, and with only one monitoring site in Queensland resolution and location is difficult to attribute to CSG activities.[78]

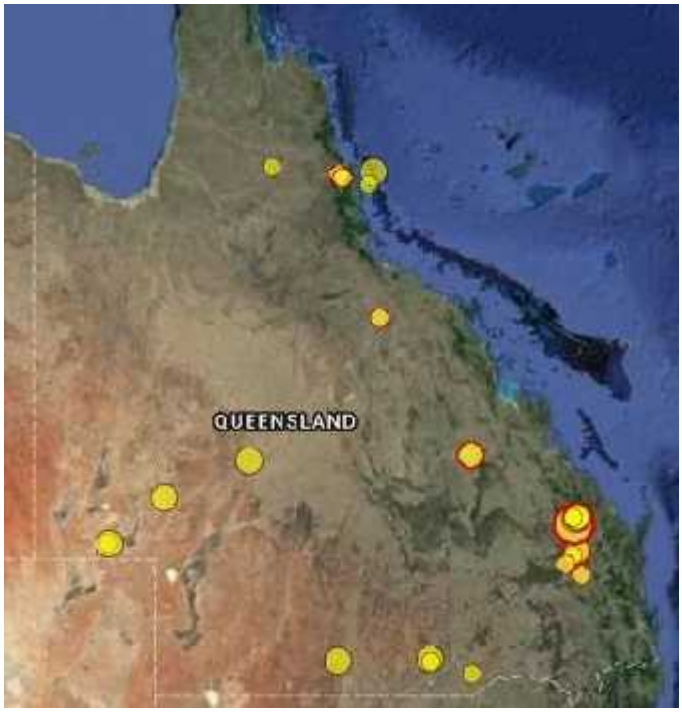

Figure 11 – Earthquakes in Queensland since September 2012

In 2010, the University of Texas at Arlington was featured in the news for drilling 22 wells on a single drill pad that will drain natural gas from 1100 acres [445 ha] beneath the campus. Over a 25 year life-time the wells are expected to produce a total of 110 billion cubic feet [3.1 billion cubic meters] of gas.'[79] In British Columbia a 2.8 ha development site has 12 wells drawing gas from over 2,300 ha of shale resources with a footprint of 0.14 ha;[80] contamination testing needs to extend beyond mined areas, 2.7 km radius in this case plus potentially another 10km,[81] >50,000 ha. Over such a large area and just for one well testing

[77] Australian Government, Department of Resources, Energy and Tourism, Geoscience Australia, Earthquake search results (accessed 27 May 2015), http://www.ga.gov.au/earthquakes/searchQuake.do?isNewSearch=false&region=4&stateTerritory=QLD&regionSelect=&westLon=110.0&eastLon=157.0&northLat=-7.0&southLat=-45.0&magnitudeMin=0.0&magnitudeMax=9.9&startDate=1%2F1%2F1900&startTime=00%3A00&endDate=27%2F05%2F2015&endTime=23%3A59&depthMin=0&depthMax=1000&allEarthquakes=true&tsunamigenicEarthQuakes=false&significantEarthQuakes=false&sortAttributeName=utcdate&sortType=desc&rowsPerPage=25&paging=true&prevPage=1

[78] Campin, n 13 at 18.

[79] Geology.com, "Directional and Horizontal Drilling in Oil and Gas Wells" (accessed 14 April 2015) *Geoscience News and Information*, http://geology.com/articles/horizontal-drilling/

[80] King G, "Hydraulic fracturing 101: What every representative, environmentalist, regulator, reporter, investor, university researcher, neighbour and engineer should know about estimating frac risk and improving frac performance in unconventional gas wells" Paper SPE 152596 presented at the SPE Hydraulic Fracturing Technology Conference, The Woodlands, Texas, 6-8 February 2012, http://dx.doi.org/10.2118/152596-MS.

[81] SDíaz-Cruz S and Barceló D, "Trace organic chemicals contamination in ground water recharge" (June 2008) 72(3) Chemosphere, http://www.sciencedirect.com/science/article/pii/S0045653508002233

costs are a factor in economic benefits. Government economics and the need for energy weighs high, there is a risk to the environment for short term gain.

Though somewhat aligned with the economic issues there is the issue of the high energy usage and invasiveness of production and transport systems related to gas conversion to liquid.

Liquefied Natural Gas or LNG is natural gas stored as a super-cooled (cryogenic) liquid. The temperature required to condense natural gas depends on its precise composition, but it is typically between -120 and -170°C (-184 and –274°F). The advantage of LNG is that it offers an energy density comparable to petrol and diesel fuels, extending range and reducing refuelling frequency.

The disadvantage, however, is the high cost of cryogenic storage on vehicles and the major infrastructure requirement of LNG dispensing stations, production plants and transportation facilities.[82]

Before multinationals commence activities in Australia their performance in other countries should be examined to judge their behaviour. Should the public determine if multinational company profit is more important than the benefit to Australia?

2.7 Water Issues

Approximately 97.5% of water on earth is salt, and of the 2.5% remaining freshwater mostly is present in icecaps, soil moisture and underground aquifers and is inaccessible for human use. Only 1% of the world's fresh water is accessible for human use. Renewable water, through rainfall,[83] totals only 0.025% of all usable water. Australia's groundwater is estimated at 1,200,000km^3 with wetlands, large lakes, reservoirs and rivers estimates at 221km^3.[84] In Queensland alone over the next 15 years potentially as much as 160 to 300Gl of water will be consumed in fraccing operations[85] (0.16-0.3km3) with 8,000-12,000 wells fractured.[86]

Brisbane's current annual water usage is around 165.353G/year with a sustainable yield of 165Gl/year. A population increase is around 46% is expected by 2030,[87] but Brisbane has insufficient water supply even today. In 2009 the water usage for all Queensland households was estimated at 308Gl/year. Farmers consumed 540Gl/year while CSG companies estimate

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[82] Alternative Fuel Systems Inc., "What's the difference between CNG, LNG, LPG and Hydrogen?", http://www.afsglobal.com/faq/gas-comparisons.html

[83] University of Michigan, *Human Appropriation of the World's Fresh Water Supply* (1 April 2006), 2, http://www.globalchange.umich.edu/globalchange2/current/lectures/freshwater_supply/freshwater.html.

[84] United Nations Environment Programme , *Vital Water Graphics An Overview of the State of the World's Fresh and Marine Waters - 2nd Edition – 2008 Freshwater resources: volume by continent* (2008), http://www.unep.org/dewa/vitalwater/article32.html Source: Shiklomanov I, State Hydrological Institute (SHI, St Petersburg) and United Nations Educational, Scientific and Cultural Organisation (UNESCO, Paris) 1999; World Metrological Organization (WMO); International Council of Scientific Unions (ICSU); World Glacier Monitoring Service (WGMS); United States Geological Survey (USGS)

[85] Campin, n 13 at 1-3

[86] Campin, n 13 at 1.

[87] Australian Government, Department of the Environment, Indicator: HS-42 Water consumption per capita (2003), http://www.environment.gov.au/science/soe/2006-report/indicator/water-consumption-per-capita

their usage at 1,500Gl/year (compared to the National Water Commission estimate for CSG water usage of 300Gl/year).[88] The National Water Commission stated:

> '[c]urrent projections indicate the Australian CSG industry could extract in the order of 7,500 gigalitres of co-produced water from groundwater systems over the next 25 years, equivalent to ~300 gigalitres per year. In comparison, the current total extraction from the Great Artesian Basin is approximately 540 gigalitres per year.'[89]

Two years later the National Water Commission confirmed that the predicted CSG water usage was still unknown but would become better known as the industry develops;[90] a learn by mistakes[91] or adaptive approach.[92] A Pennsylvania State University paper stated, '… some Marcellus wells may need to be hydrofractured several times over their productive life (typically five to twenty years or more)',[93] the usage is not a one-off event.

Fraccing is a large water consumer. However the issue is not just the consumption of water and reduction of the water table, but the pollution caused by adding chemicals and then discharge into river systems where humans consume, and farmers take water for irrigation. A report to the European Commission has assessed the overall cumulative risk to groundwater contamination, surface water contamination and water resources as high.[94]

Although polluted water can be treated, the cost is high. Treated water cannot be restored to its original state even though it might be suitable for drinking, and then there is the issue of disposal of the extracted contaminants. A system that at full capacity will treat 28 Gl/year, much the same amount of water needed for a single well, called The Advanced Water Recycling Plant (AWRP), is proposed.[95]

The complexity of aquifers and the reason for AWRP is illustrated in Figure 12.[96] Flowback water should be treated before disposal or reuse and may account for approximately 10%[97] of water injected, the rest remains in subterranean groundwater or potentially leaks into aquifers. Disposal transport costs may be high in remote locations so expensive treatment plants may be necessary. Between 2,500 and 3,000 m^3 of cement will be used in a single

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[88] Australian Broadcasting Commission, *The coal seam gas rush* (28 June 2012), http://www.abc.net.au/news/specials/coal-seam-gas-by-the-numbers/ Sources Water use: Current annual water use by Queensland households (Source: ABS 4610.0 - Water Account, Australia, 2008-09); "On-shore co- produced water: extent and management" National Water Commission, Australian Government Sept 2011;" Projected water use by Santos, QGC and Origin Energy" cited Water Group Advice on EPBC Act Referrals, September 2010." Prepared by Department of Sustainability, Environment, Water, Population and Communities for Minister Tony Burke. Tabled in the Australian Senate, 2010.) National Water Commission "Onshore co-produced water extend and management" Waterlines Report September 2011.
[89] National Water Commission, n 17.
[90] National Water Commission, n 17.
[91] Haswell and Shearman, n 61.
[92] First proposed by USEPA, Queensland Government, *Adaptive Environmental Management Regime for theCoal Seam Gas Industry* Department of Environment and Natural Resources, 2011 1.
[93] Abdalla C and Drohan J, *Water Withdrawals for Development of Marcellus Shale Gas in Pennsylvania, Introduction to Pennsylvania's Water Resources* (2010) College of Agricultural Sciences, The Pennsylvania State University 3.
[94] Broomfield, n 59 at F1.
[95] Durrant P, *Changing the Water Mindset* (March 2013) Engineers Australia 42-44.
[96] Durrant, at 42.
[97] Campin, n 13 at 9.

AWRP plant.[98] But as Dr Stuart Khan reportedly said,[99] "There's a common saying in the water industry, that you can take any quality of water and treat it to a higher level by filtering it through money".

Figure 12 – Perth's Groundwater System

Without tight regulation and monitoring, there may be incentive for the miners to expel polluted water without adequate treatment, particularly in remote locations where the cost of treatment would be high. Treated water can be used for cattle and aquaculture production.[100]

If farmers were enticed to use untreated flowback or settled water for stock feed or aquaculture, then any contaminates enter the food system and may be consumed by humans.

Although regulation and guidance is available[101] to farmers the extent of contamination is largely unknown and therefore an issue that needs to be addressed.

The Department of Environment and Resource Management (DERM) in the Coal Seam Gas Water Management Policy[102] have management options for water disposal, including injection, surface water disposal, reuse, treatment and damming. An interesting dilemma for DERM is to make appropriate decisions when the long term effects of the chemicals are still unknown.[103] Only flowback water, or 10%, is the focus of the *Water Act 2000* (Qld)[104] (WAct)

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[98] Durrant, n 94 at 44.
[99] Durrant, n 94 at 40.
[100] Queensland Government Energy Regulation and Implementation, Department of Environment and Heritage Protection, "General beneficial use approval, Associated water (including coal seam gas water) (2014)", http://www.ehp.qld.gov.au/management/non-mining/documents/general-bua.pdf
[101] Queensland Government, *CSG health and safety information for landholders*, https://www.business.qld.gov.au/industry/csg-lng-industry/csg-lng-information-landholders/csg-health-safety-information
[102] Department of Environment and Resource Management, *Coal Seam Gas Water Management Policy* (2010), http://sixdegrees.org.au/sites/sixdegrees.org.au/files/water-management-policy-1.pdf.
[103] National Water Commission, n 17.
[104] *Water Act 2000* (Qld).

and the *Environmental Protection Act 1994* (Qld)[105] because they consider water that goes back into the 'system' and less so water trapped or stored in the coal seam or what might leak into aquifers or ground water systems. However good management practices is the intent of the WAct,[106] see Section 5.

Proposals to use waste CSG water under the *Waste Reduction and Recycling Act 2011* (Qld)[107] for agriculture or stock[108][109] would be of great concern without extensive long term testing of products for human consumption because the chemicals' effects are largely unknown.[110] The ocean outfall dumping suggestion by Arrow[111] may degrade Queensland's marine life.

However, if respect to reuse of CSG water the Queensland Governments policy[112] in 2011 was:

> "The changes to our Water Management Policy follow a number of strict regulations the government has already introduced to ensure the CSG industry develops sustainably.
>
> "It means that CSG companies will have to look first at whether reinjection is feasible before considering other ways of dealing with CSG water.
>
> "While reinjection will need to be addressed as the first priority, the treatment of water for beneficial re-use will be part of a suite of preferred options for the use of CSG water.
>
> "This means opportunities for CSG water to be used by farmers, for industry like coal mining and power generation and to supplement town water supply will remain.
>
> "But we want groundwater extracted through the CSG process to return as groundwater as the option that must always be considered first.

The media statement above does not distinguish between treated or untreated water but the concern is untreated water being reinjected.

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[105] *Environmental Protection Act 1994* (Qld).
[106] *Water Act 2000* (Qld) s 10(2)(c)((iv).
[107] *Waste Reduction and Recycling Act 2011* (Qld).
[108] Arrow Energy, "Coal Seam Gas Water Management Strategy" (accessed 4 May 2015) [2.7.3.1] 16, https://www.arrowenergy.com.au/__data/assets/pdf_file/0017/2627/Attachment2000920-20Coal20Seam20Gas20Water20Management20Strategy.pdf
[109] Queensland Government, "General Beneficial Use Approval— Irrigation of Associated Water (including coal seam gas water)" Department of Environment and Heritage Protection (2014), https://www.ehp.qld.gov.au/management/non-mining/documents/general-bua-irrigation-of-associated-water.pdfhttps://www.ehp.qld.gov.au/management/non-mining/documents/general-bua-irrigation-of-associated-water.pdf
[110] Kibble A, Cabianca T, Daraktchieva Z, Gooding T, Smithard J, Kowalczyk G, McColl M, Singh M, Mitchem L, Lamb P, Vardoulakis S and Kamanyire R, *Review of the Potential Public Health Impacts of Exposures to Chemical and Radioactive Pollutants as a Result of the Shale Gas Extraction Process* (Public Health England PHE-CRCE-009 June 2014) 22 27 30 38 43, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332837/PHE-CRCE-009_3-7-14.pdf
[111] Arrow Energy, n 107.
[112] Media Statements, Environment, The Honourable Vicky Darling Tuesday, August 09, 2011 CSG water reinjection first priority to protect landholders and the environment, http://statements.qld.gov.au/Statement/Id/76029

2.8 International Trends

Fraccing is banned in France, Bulgaria, Germany and Scotland,[113] reportedly also in Ireland, the Netherlands and New York State.[114] Scotland's Energy Minister reportedly said:

> 'While we are calling for an outright ban [on fraccing], a halt on the industry while a full examination of health and environmental impacts is carried out is very welcome. Scotland joins France, Ireland, the Netherlands and New York State in a long list of countries and regions which have acted to stop the unconventional gas industry. We are convinced that a proper examination of the mounting evidence of health and environmental concerns must lead to a full ban.'[115]

2.9 Health Issues

Where potential risks have been identified in the literature, the reported problems are typically a result of operational failure and a poor regulatory environment.[116]

Health risks from subsurface and surface groundwater contamination and air emissions must be reduced with properly managed and regulated operations. Reliance on the good will of mining companies is problematic, compliance auditing and measurement by independent persons is warranted.

'The published literature on the risk to human health from shale gas extraction is limited but increasing.'[117] (Author's note, though the report referenced was specifically related to Shale Gas and although there are differences with CSG extraction there are also similarities. The chemicals may be a different mix but still contain products detrimental to human health.) Over 600 chemicals are used[118] and levels and types of emissions during production is still not fully categorised.[119] Much is still unknown with many gaps of knowledge relating to the health issues.[120] Drinking water in Pennsylvania registered higher levels of methane in homes within 1 km of a gas well[121] raising concerns regarding birth defects, cancer, radon exposure. Studies found a high number of symptoms in local populations experiencing fatigue, eye, nose and throat irritation, with tiredness and headache particularly prevalent.[122] In New Brunswick Canada, full disclosure of chemicals used is required 'with sufficient lead time to be included in human health and environmental risk assessments.'[123] Disclosure in Queensland is a regulatory requirement.[124] A key recommendation of the UK Public Health report was that '[t]he presence of aquifers should be a key consideration of siting any wells in the UK.'[125]

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[113] One Green Planet, *These 4 Countries Have Banned Fracking … Why Can't the U.S. Get On Board?* (at 14 April 2015), http://www.onegreenplanet.org/environment/countries-except-united-states-that-have-banned-fracking/

[114] Brooks L, 'Scotland announces moratorium on fracking for shale gas', *The Guardian* (Scotland) 8 April 2015.

[115] Brooks, n 113.

[116] Kibble et al, n 109 at iii.

[117] Kibble et al, n 109 at 17.

[118] Kibble et al, n 109.

[119] Kibble et al, n 109 at 22.

[120] Kibble et al, n 109 at 22 27 30 38 43.

[121] Kibble et al, n 109 at 33.

[122] Kibble et al, n 109 at 21.

[123] Kibble et al, n 109 at 42.

[124] Australian Government, n 21 at 39.

[125] Kibble et al, n 109 at 37.

In the Department of Environment Australia submission the NSW Chief Scientist andEngineer stated:

> 'Effects on human health of chemicals depend on a range of factors including dose, route and duration of exposure. Long-term concerns of some chemicals used in or generated by CSG mining include hormonal system disruption, fertility and reproductive effects, and development of cancer. These types of effects may not be immediately obvious, but can nevertheless occur with very low chemical exposures and have far reaching consequences.
>
> It is currently not possible to undertake adequate health risk assessments of these operations as insufficient information has been gathered on the nature and doses of chemicals entering water and air and the exposures of people to these chemicals. One of the biggest problems is the lack of transparency around the chemicals used, and the lack of monitoring under the normal protections afforded to drinking water supplies…
>
> …Colborn et al attempted to review the chemicals used in gas extraction and found the available data fraught with gaps. However, they managed to independently compile a list of 944 products used, containing a total of 632 chemicals. They noted that more than 75% of the chemicals could affect the skin, eyes, respiratory and gastrointestinal systems. Approximately 40-50% could affect the brain and nervous system, immune and cardiovascular systems and kidneys. Over a third could affect the endocrine (hormonal) system and a quarter could lead to cancer and mutations. http://www.endocrinedisruption.com/files/Oct2011HERA10-48forweb3-3-11.pdf
>
> A recent UK study reviewed information on chemicals supplied to New York State using a European chemical substances database and found that 58 of the 260 substances listed were of concern: 17 were classified as toxic to aquatic organisms, 38 were classified as acute toxins to humans, 8 were known carcinogens, 6 were suspected carcinogens, 7 were classified as mutagenic and 5 were classified as having reproductive effects. http://www.tyndall.ac.uk/sites/default/files/tyndall-coop_shale_gas_report_final.pdf
>
> Lloyd-Smith found extremely limited data available about fracking fluids used in Australia and a lack of any comprehensive hazard assessment of the chemical mixtures used and their impacts on the environment or human health. Only two of the 23 most commonly used fracking chemicals said to be used in Australia have been assessed by the National Industrial Chemical Notification and Assessment Scheme (NICNAS), and neither of these has been specifically assessed for use in fracking. This leaves the population vulnerable to a range of potential health threats…'[126] http://www.ntn.org.au/wp/wp-content/uploads/2013/04/UCgas_report-April-2013.pdf

Given the lack of knowledge should legislation in Australia ban chemicals that have proven negative health effects? Queensland has taken steps in this direction, **or have they**? There are legislated restrictions on the use of BTEX additives and they 'cannot be added to fraccing fluids'.[127] On the other-hand the *Environmental Protection Act 1994* amendments to address fraccing at s 206(1) excludes mining, and even so s 206(4):

> **restricted stimulation fluids** means fluids used for the purpose of stimulation, including fracturing, that contain the following chemicals in **more than the maximum amount** [author's highlighting] prescribed under a regulation—
>
> (a) petroleum hydrocarbons containing benzene, ethylbenzene, toluene or xylene;
>
> (b) chemicals that produce, or are likely to produce, benzene, ethylbenzene, toluene or xylene as the chemical breaks down in the environment.

[126] Doctors for the Environment Australia, n 37 at 4-5.

[127] Queensland Government, Department of Environment and Heritage Protection, "Regulating fraccing" (2013) http://www.ehp.qld.gov.au/management/non-mining/regulating-fraccing.html

'BTEX refers to the chemicals benzene, toluene, ethylbenzene and xylene. Benzene is a known carcinogen (cancer causing)… The ADWG specify that it should not be detected in drinking water at more than 1 part per billion (ppb). The remaining chemicals (toluene, ethylbenzene and xylenes) are not recognized as carcinogenic and their drinking water health guidelines are much higher—between 300 and 800 ppb.'[128]

The CSG industry is in early days in Queensland and understanding of the total environmental effects is complex because of the diversity and pervasiveness of the whole industry. There is much emotion and inaccurate reporting of facts[129] and scaremongering, so accurate figures are difficult to determine; much of which is not publically available. Given the lack of knowledge and availability of accurate data, it is reasonable to adopt a precautionary approach as required by the *Environmental Protection Act 1994* (Qld) sch 4 656, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391 and the *Environmental Protection and Biodiversity Act 1999* (Cth) s 391 (1)-(3)[130] to the industry supported by all CSG legislation.

As an absolute minimum, Australia should learn from the experiences of other countries that have a longer history of CSG and Shale gas extraction and not make the same mistakes. Unfortunately, the short-term financial incentives to industry and Government may be too attractive, but at the health detriment to the general population.

The issue of contaminants entering the food system was addressed above in water issues at section 2.7.

3. Current Legislation

3.1 Controlling Legislation and International Obligations

The extent and complexity of the Queensland environmental management system is listed in Appendix A, identifying 75 related legislation, treaties and plans concerning water protection associated with CSG.

The documents above marked * in Appendix A legislate water access for CSG activities in Queensland but the others identified may also have various influences. A Queensland Competitive Authority (QCA) Report at the reference[131] provides a full list of CSG regulations.

Further to the above legislation, Australia also has international treaty obligations, for such as under the *Rio Convention*.[132] Australia agreed Principle 15 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[133]

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[128] Queensland Government, Department of Environment and Heritage Protection, "BTEX chemicals" (2016) http://www.ehp.qld.gov.au/management/non-mining/btex-chemicals.html
[129] See footnote amendments to ABC News for instance, n 39 at 46.
[130] As required by the *Environmental Protection Act 1994* (Qld) sch 4 656; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391; *Environmental Protection and Biodiversity Act 1999* (Cth) s 391 (1)-(3).
[131] Queensland Competition Authority, "Coal Seam Gas Review" (January 2014) 24, http://www.qca.org.au/getattachment/aaaeab4b-519f-4a95-8a65-911bc46cc1d3/CSG-investigation.aspx
[132] *Rio Declaration on Environment and Development*, opened for signature 4-19 June 1992, E.73.II.A.14 (entered into force on 21 March 1994).
[133] *Rio Declaration on Environment and Development*, n 131 at art 15.

Though not a signatory to the *UN Watercourses Convention*[134] Australia is in favour,[135] and protection is applied to groundwater systems and aquifers connected to surface water.[136] Although international in character the treaty supports implementation of regional or watercourse agreements.[137]

3.2 Queensland's Regulatory Framework

CSG as a relatively new industry has regulations and Government agencies regulating the industry needing rationalisation. The CSG report illustrates current and proposed reorganisation for such rationalisation, see Figure 13.[138]

[134] *Convention on the Law of Non-navigational Uses of International Watercourses*, opened for signature 21 May 1997 A/51/49 (entered into force 17 August 2014) art 5, 7, 20, 21, http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf

[135] Rieu-Clarke A, Moynihan R and Magsig B, *UN Watercourses Convention User's Guide* (2012) ISBN Paperback 978-0-9572603-0-6 37, http://www.gwp.org/Global/Our%20Approach/Strategic%20Allies/User's%20Guide%20to%20the%20UN%20Watercourses%20Convention%20(2012).pdf

[136] UN Watercourses Convention *On-Line Users Guide Frequently Asked Questions* (2015) Q13, http://www.unwatercoursesconvention.org/faqs/; *Convention on the Law of Non-navigational Uses of International Watercourses*, opened for signature 21 May 1997 A/51/49 (entered into force 17 August 2014) art 2 (a), http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf

[137] Loures F, Rieu-Clarke A and Vercambre M, *Everything you need to know about the UN Watercourses Convention* (January 2009) WWF International 14, http://www.unwater.org/downloads/wwf_un_watercourses_brochure_for_web_1.pdf

[138] Queensland Competition Authority, n 130.

Figure 13 – Queensland's CSG Regulatory landscape, Present and Proposed

3.3 Complexity of Queensland's CSG Processes

Queensland's agency processes are complex, interrelated and have potential for overlap and causing delays, and increased cost, see Figure 14.[139]

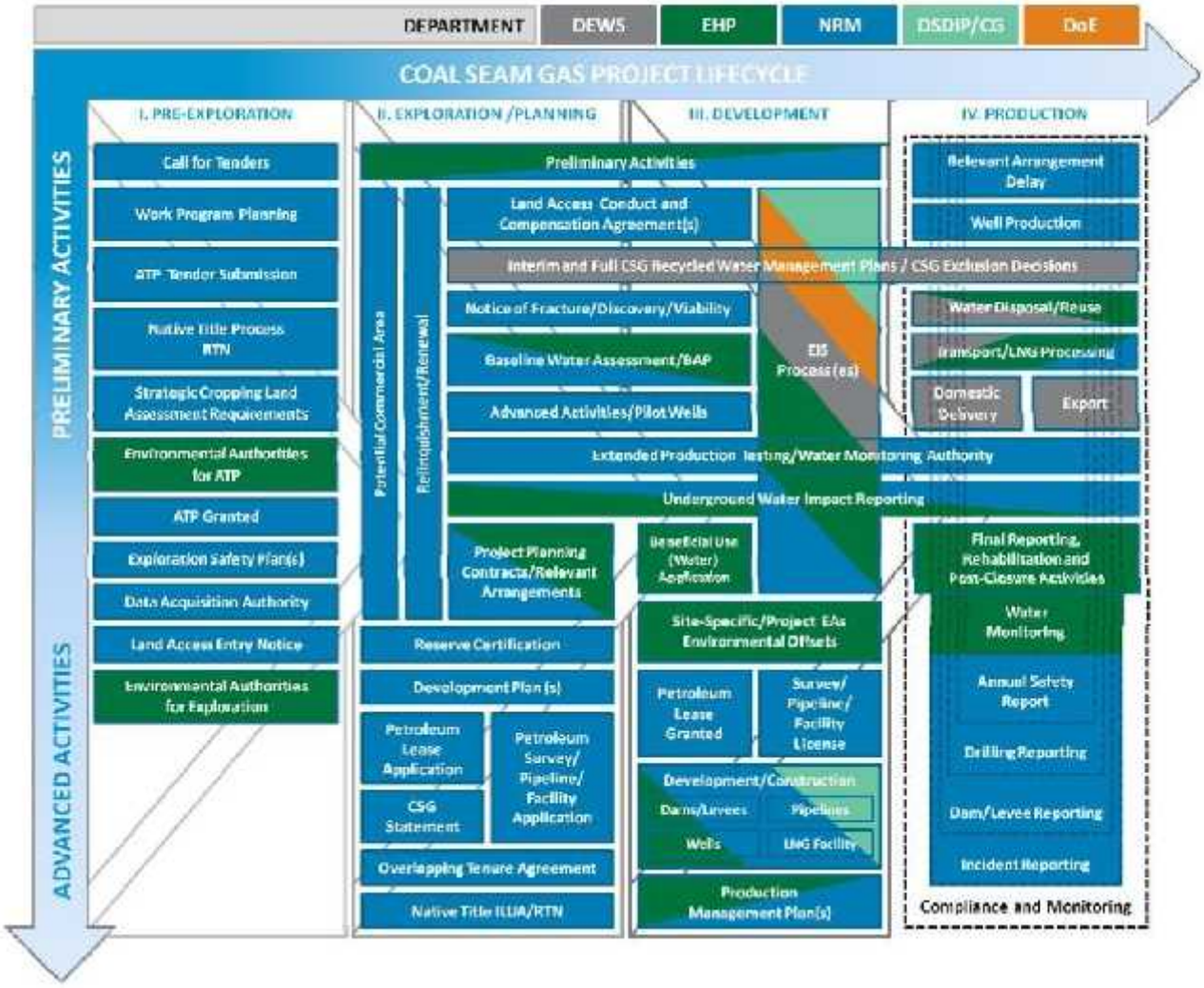

Figure 14 – CSG project life cycle – by agency participation

4. The Politics of Water Rights

The *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (MERCP) became effective on 12 December 2014. Some community groups see the legislation as an attempt to bypass reasonable process by preventing objections. An article by Owen Jacques raised the concern prior to enactment that the MERCP was designed to stop green groups challenging mining leases. Reportedly the Minister for Mines Minister Andrew Cripps said "extreme greens" from interstate and overseas were fighting proposed mines in court as part of a larger strategy to bog down the coal industry.[140] It is reported that Minister Cripps said "What was being unfairly distorted by a vocal minority is that nine out of 10 mining proposals affected are low impact and impact on an area of less than 10ha and have less than 20

[139] Queensland Competition Authority, n 130 at 25.
[140] Jacques O, "Laws to stop green groups challenging mining leases", *The Queensland Times* (online) 6 March 2014, http://www.qt.com.au/news/laws-strip-green-groups-mounting-final-fight-again/2189518/

employees"[141] and "[t]hese types of objections stall the application process, hinder economic development and deny Queenslanders potentially billions of dollars of royalties that could be put back into building hospitals, schools and road infrastructure."[142] Cripps reportedly said, "[w]e have listened to the concerns of landholders and have amended the Bill to ensure adjoining landholders are notified of an application for a mining lease and will continue to have a right to object to that application."[143]

The MERCP does not specifically require notification to the landowner nor adjoining landholders, initial notification to the landholder would be when access agreement is required, to which the landowner must not unreasonably refuse, *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 48.[144] The *Mineral Resources Act 1989* (Qld) s 252A(2) requires the mining lease applicant to inform the occupier of the land and owner of adjacent land.[145]

The DEA report[146] considered water issues and stated, '[a]ccumulation of contaminants in aquifers can have long-term impacts. Studies on the transport and fate of volatile organic compounds have found they can persist in aquifers for more than 50 years and can travel long distances, exceeding 10 km.'[147] Potentially, landholders well beyond their property and their neighbours could be effected without notice, particularly in being small an EIS is not required.

The *Environmental Protection Act 1994* (Qld) EPAct[148] allows for a submitter[149] to object but may be struck out if outside of the Land Court's jurisdiction, is frivolous or vexatious, or an abuse of the court system, *Environmental Protection Act 1994* (Qld) s 188A.[150] Public notice of an application is required,[151] but not for a mining related amendment.[152] If an Environmental Impact Statement (EIS) is conducted, both the information[153] and notification[154] stages do not apply. The Chief Executive[155] decides if an objection is properly made before referring to the Land Court, *Mineral Resources Act 1989* (Qld) s 265(1)(a)[156] and must decide if the objection is frivolous or vexatious or an abuse of the court system, *Environmental Protection Act 1994* (Qld) s 188A.[157] Under the MERCP, objections are only open to the public on environmental grounds, unless the parties are directly affected, this includes only landowners, adjoining landowners and government, *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 64A(3) 252A(6);[158] as such an objection

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[141] Note however a 0.14 ha site could affect an area of 50,000 ha, see Section 2.1 discussion.
[142] Phelps M, "Controversial mining bill passes" *Queensland Country Life* (online) 11 September 2014, http://www.queenslandcountrylife.com.au/news/agriculture/general/news/controversial-mining-bill-passes/2711695.aspx.
[143] Phelps n 141.
[144] *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 48.
[145] *Mineral Resources Act 1989* (Qld) s 252A(2).
[146] Doctors for the Environment Australia, n 37 at 9.
[147] Díaz-Cruz S, and Barceló D, "Trace organic chemicals contamination in ground water recharge" (June 2008) 72(3) Chemosphere, http://www.sciencedirect.com/science/article/pii/S0045653508002233
[148] *Environmental Protection Act 1994* (Qld) s 182.
[149] *Environmental Protection Act 1994* (Qld) sch 4 658, submitter, for an application, means an entity who makes a properly made submission about the application.
[150] *Environmental Protection Act 1994* (Qld) s 188A.
[151] *Environmental Protection Act 1994* (Qld) s 152.
[152] *Environmental Protection Act 1994* (Qld) s 230(1)(a).
[153] *Environmental Protection Act 1994* (Qld) s 139.
[154] *Environmental Protection Act 1994* (Qld) s 260.
[155] Queensland Government, Natural Resources and Mines.
[156] *Mineral Resources Act 1989* (Qld) s 265(1)(a).
[157] *Environmental Protection Act 1994* (Qld) s 188A.
[158] *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 64A(3) 252A(6).

cannot be lodged by the general public including environmental groups *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 260.[159]

The Intergovernmental Agreement on a National Water Initiative[160] between the Commonwealth and Queensland and others, agrees to; take into account environmental, social and economic impacts of use, including on downstream users;[161] have transparent and contestable processes in place to establish whether a proposed activity is to be approved;[162] and have avenues for appealing approval decisions,[163] but MERCP limits this agreement.

4.1 Government Policy

Government strongly supports the CSG industry for perceived economic benefits but cautions an environmental balance.[164] The National Water Commission stated '[t]he Coal Seam Gas (CSG) industry offers substantial economic and other benefits to Australia. At the same time, if not adequately managed and regulated, it risks having significant, long-term and adverse impacts on adjacent surface and groundwater systems.'[165]

At State level Government is in strong favour of CSG with statements in 2009, 'grab with both hands' and '…exporting at 28 million tonnes a year could add more than $3 billion…and offer us around $850 million a year in royalties…' and '…could offer as many as 18,000 direct and indirect jobs…'.[166] Ms Bligh said:

> 'Queenslanders can be assured when it comes to the environment that each and every proponent and their proposals will have to undergo extensive environmental scrutiny and address community concerns. The community will have every opportunity to provide input into every proposal. As I have said, this is an exciting new era for Queensland. We want to grab this opportunity with both hands but we want to do that carefully and ensure that we get the balance right.'[167]

It seems Government has found a golden goose in Australia and has streamlined legislation by minimising public interference with the process before the full effects are known. Of concern is that even small CSG mines because of water injection may potentially affect ground and subterranean water courses for wide areas;[168] if the site is small, many local properties may still be affected without the ability to object and a possibility of avoiding an EIS because the drill site is classified as 'small'.

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[159] *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 260.
[160] Intergovernmental Agreement on a National Water Initiative, Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory- *Schedule D: Principles For Regulatory Approvals For Water Use And Works* (25 June 2004), http://www.water.wa.gov.au/PublicationStore/first/82387.pdf
[161] Intergovernmental Agreement on a National Water Initiative, n 159 at iii.
[162] Intergovernmental Agreement on a National Water Initiative, n 159 at vii.
[163] Intergovernmental Agreement on a National Water Initiative, n 159 at viii.
[164] Letts L, "Coal seam gas production – friend or foe of Queensland's water resources" (2012) 29 *Environmental and Planning Law Journal* 101-112, http://www.carternewell.com/icms_docs/184021_Coal_Seam_Gas_Production_-_friend_or_foe_of_Queensland_s_water_resources.pdf
[165] National Water Commission, n 17.
[166] Queensland, *Parliamentary Debates*, Legislative Assembly, 17 September 2009, 2396 (Hon. AM Bligh).
[167] Queensland, *Parliamentary Debates*, n 165.
[168] Take the Arlington example above, a single drill pad is expected to extend 1100 acres underground.

There is already evidence of licencing process failure made public in an ABC Four Corners interview with Simone Marsh who was previously responsible for environmental assessment with State Government and now Senior Environmental Specialist. Some interview extracts follow:

> 'Simone Marsh played a critical role in the approval process of Australia's largest coal seam gas developments - Santos' $18 billion project and QGC's $20 billion project in Southern Queensland.
>
> …SIMONE MARSH, SENIOR ENVIRONMENTAL SPECIALIST: I think the truth is that it's not an ecologically sustainable activity.
>
> Obviously they didn't want to say that. They wanted approval to come in and conduct that activity. They didn't want anyone to understand what the long-term, um, impacts were going to be and the long-term costs associated with this activity…
>
> SIMONE MARSH: It was an impossible task. Firstly, the information wasn't there so you can't do an assessment without the basic site information, the baseline studies and an understanding of where the infrastructure was going to be laid, and which environmentally sensitive areas were going to be impacted…
>
> SIMONE MARSH: It was quite frightening that they would consider approving such a project without the basic information that a normal mining project would have been asked to submit, given that this was like 600 times the size of your standard large mine.
>
> And for a large mine, you would normally have the boundaries clearly articulated. You would have done all the baseline studies beforehand…
>
> SIMONE MARSH: I was taken into a meeting room, sat down and told that there wasn't going to be a chapter on groundwater and I was... stunned.
>
> I said "What are you talking about? What do you mean there's not going to be a chapter on groundwater? It's one of the biggest issues for the project".
>
> And he just repeated the words that there was not going to be a groundwater chapter in the Santos Coordinator General's report and wouldn't give me any reason why or why not…
>
> SIMONE MARSH: They're after a bankable outcome, which is not anything to do with an environmental impact assessment process. They basically just want an approval.
>
> That's all they want is an approval with some conditions that the companies can live with. MATTHEW CARNEY[ABC]: When Simone Marsh learnt the timeframes for the Santos assessments were going to be cut short, she decided to act and wrote this email to her superiors listing 26 concerns.…
>
> SIMONE MARSH: I wrote that email to make sure that the deputy's Coordinator Generals, the assistant Coordinator Generals and the project directors were aware that the information I had been preparing and that I had been drafting and sending through to the project directors was not making it into the final report.
>
> And that key information that- and conclusions that I had drawn from the material that I could access was being altered or ignored, and that the proponents themselves were having a large role in dictating the information that went into the report and into the conditions as, as well.
>
> MATTHEW CARNEY: Three days before the Santos report was due, Simone made one last attempt with this document to warn about the potential damage to the water table. The next day there was this response.
>
> "I have significant concerns with the words proposed by Simone."
>
> MATTHEW CARNEY: On the 28th of May, the Coordinator General at the time, Colin Jensen, delivered his report on the Santos project.

> There was no ground water assessment, only a half a page dealing with policy and legislation. But surprisingly the Coordinator General said "he was not convinced that there was sufficient detail...to determine impacts on environmental values." '[169]

The above interview was a 'blow'[170] to a senate inquiry that argued that State control was adequate, prompting the Commonwealth to step in on coal and CSG projects requiring large amounts of water, known as the 'water trigger' and amending the EPBC Act.[171] This situation illustrates that the Queensland Government may be prepared to bypass due process to get the golden egg.

5. Issues that should Inform Policy

> In 2010 the NWC stated, 'Potential impacts of CSG developments, particularly the cumulative effects of multiple projects, are not well understood.'[172] The NWC also stated 'To meet NWI objectives, the Commission recommends that industry, water and land-use planners, and governments adopt a 'precautionary approach' to CSG developments, ensuring that risks to the water resource are carefully and effectively managed.' The EPAct, EPBC Act and treaty obligations require a precautionary approach be taken, *Environmental Protection Act 1994* (Qld) sch 4 656; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391(1)-(3); *Rio Declaration on Environment and Development*.[173]

'There is no limit to the volume of water that may be taken under the underground water rights [for petroleum and gas tenures]', *Petroleum and Gas (Production and Safety) Act 2004* (Qld) s 185(3)[174] (PGA) as a statutory right, no licence is required and may be granted without public notice, *Water Act 2000* (Qld) s 209(3)(a).[175] Recent amendments to the PGA require a licence for 'associated water' but for non-associated water usage, if minor, no licence or permit is required. Non-associated water includes the following list of extraneous water use:

- washing down vehicles, equipment or plant for weed control and safety purposes.
- constructing certain infrastructure or plant for example, mobile and temporary camps and power lines.
- constructing roads within mining or petroleum tenures.
- water supply for exploration camps (not mineral development or production purposes) that do not support permanent structures.
- drilling of wells (including site establishment[176]

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[169] ABC Television, "Gas Leak", *Four Corners*, 1 April 2013 (Matthew Carney and Connie Agius), http://www.abc.net.au/4corners/stories/2013/04/01/3725150.htm

[170] McGrath C, "Regulating water: debate swirls around Commonwealth's role", *The Conversation* 20 May 2013, http://theconversation.com/regulating-water-debate-swirls-around-commonwealths-role-14214

[171] Australian Government, "Water resources - 2013 EPBC Act amendment - Water trigger", *Department of the Environment*, 22 June 2013, http://www.environment.gov.au/epbc/what-is-protected/water-resources

[172] National Water Commission, n 17.

[173] *Environmental Protection Act 1994* (Qld) sch 4 656; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391(1)-(3); *Rio Declaration on Environment and Development*, opened for signature 4-19 June 1992, E.73.II.A.14 (entered into force on 21 March 1994).

[174] *Petroleum and Gas (Production and Safety) Act 2004* (Qld) s 185(3).

[175] *Water Act 2000* (Qld) s 209(3)(a).

[176] Department of Natural Resources and Mines, "Proposed changes to underground water management— what the reforms mean for petroleum and gas tenures",

Non-associated water, particularly water for drilling of wells, may be a significant proportion of water used, a survey of four shale gas wells in the USA consumed an average of 10% of water usage during drilling.[177]

However, a landholder practicing agriculture, requires licencing, *Water Act 2000* (Qld) s 206[178] and permits[179] depending on resource plans,[180] or if a moratorium has be granted.[181] Fees **may** be payable.[182] The WAct is integrated into the *Sustainable Planning Act 2009* (Qld) and requires two approvals for resource entitlement and development permit. Schedule 3 of the *Sustainable Planning Regulation 2009* (Qld) defines assessable development to include, 'all work in a watercourse, lake or spring that involves taking or interfering with water (e.g. a pump, stream re-direction, weir or dam) and all artesian bores, no matter what their use', *Sustainable Planning Regulation 2009* (Qld) sch 3 47[183] [184] CSG miners may to some extent avoid the WAct, which includes water in a watercourse, lake or spring, underground water, overland flow water, and water that has been collected in a dam. The WAct does not include CSG by-product water, *Water Act 2000* (Qld) sch 4,[185] unless dammed and would then be considered waste, left over, or an unwanted by-product, from an industrial, commercial, domestic or other activity under the *Environmental Protection Act 1994* (Qld) s 13(1)(a).[186] The WAct requires sustainable management that contributes to 'protecting water, watercourses, lakes, springs, aquifers, natural ecosystems and other resources from degradation and, if practicable, reversing degradation that has occurred' *Water Act 2000* (Qld) s 10(2)(c)((iv).[187] Importantly the WAct allows for the allocation and use of water for the physical, economic and social wellbeing of the people of Queensland and Australia within limits that can be **sustained indefinitely**.[188] Interestingly, CSG activities are non-renewable, water is lost so not sustainable indefinitely.

The DEA stated,[189] '[t]he Queensland government reported that in the first six months of 2011 there were 45 CSG compliance-related incidents…the stated plan was to track and manage the environmental performance of the CSG industry…In fact no unscheduled audits of fracking activities were actually carried out "due to occupational health and safety difficulties associated with attending unscheduled fracking operations".'[190] 'In 2013, the P&G

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https://www.dnrm.qld.gov.au/__data/assets/pdf_file/0009/228375/water-managementpetroleum-gas.pdf.

[177] Ground Water Protection Council & ALL Consulting, "Modern Shale Gas Development in the United States: A Primer" *DOE Office of Fossil Energy and National Energy Technology Laboratory* (April 2009) DE-FG26-04NT15455 64.

[178] *Water Act 2000* (Qld) s 206.

[179] *Water Act 2000* (Qld) s 237.

[180] *Water Act 2000* (Qld) s 38.

[181] *Water Act 2000* (Qld) s 26.

[182] *Water Act 2000* (Qld) s 110((2)(a)(iv).

[183] *Sustainable Planning Regulation 2009* (Qld) sch 3 47.

[184] McGrath C, *Synopsis of the Queensland Environmental Legal System* (Environmental Law Publishing, 5th ed, 2011) 40, http://www.envlaw.com.au/sqels5.pdf

[185] *Water Act 2000* (Qld) sch 4.

[186] *Environmental Protection Act 1994* (Qld) s 13(1)(a).

[187] *Water Act 2000 (Qld)* s 10(2)(c)((iv).

[188] *Water Act 2000 (Qld)* s 10(2)(a).

[189] Health effects of chemicals used in or generated by CSG operations and hydraulic fracturing, Submission on the Review of Coal Seam Gas Activities in NSW, the NSW Chief Scientist and Engineer, 8th May 2013, 3, http://dea.org.au/images/uploads/submissions/Review_of_CSG_in_NSW_-_Chief_Scientist_Submission_05-13.pdf

[190] Queensland Government, "CSG/LNG Compliance Report January – December 2011" 2 5, http://www.ehp.qld.gov.au/management/non-mining/documents/csg-compliance-report-jan.pdf

Inspectorate dealt with 96 incidents specific to drilling and work-over rigs including a fatality on a drill rig.'[191]

Letts compares the adaptive and learning from mistakes approach against a complete ban 'until the science is certain that CSG can be accessed and used in such a way as to guarantee no harm will occur to groundwater.'[192] This will only work if the timeliness, quality and veracity of the monitoring of pollutants is conducted **before** irreversible damage to critical water supplies. Swayne states in her article[193] that Queensland's regulatory approaches are based upon the philosophy of adaptive environmental management. An adaptive approach is encouraged because of uncertainty of long term CSG impacts and is a system 'to monitor and instigate change where necessary'.[194] Swayne states it is an 'approach of "learning by doing" which is heavily reliant on the implementation of a systematic approach to continuous monitoring, evaluation and enhancement of the regulatory framework.'[195]

The health issues discussed in Section 2.9 are of great concern given the chemicals used in fraccing are required to be disclosed to the National Chemicals Notification and Assessment Scheme (NICNAS) but only two of the 23 most commonly used chemicals have been specifically assessed.[196] The long term effects depend on usage[197] are therefore possibly not determinable and there are many unknown chemical effects.[198]

Pollutants can travel long distances and legislation only requires limited area notice, the area of potentially affected properties should be widened beyond adjacent properties.

Queensland is signatory to the National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development and agreed as follows:

4. Decision making about CSG and coal mining developments that are likely to have significant impact on water resources will be strengthened by:

   (a) more closely identifying potential and actual impacts on water resources, and supporting Parties to avoid or minimise significant and actual impacts through a transparent process that builds public confidence;

   (b) substantially improving their collective scientific understanding of the actual and potential impacts of CSG and coal mining developments on water resources; and

   (c) ensuring that the best scientific information and expertise underpins all relevant regulatory processes and decisions.[199]

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[191] Department of Natural Resources and Mines, "Report on the coal seam gas engagement and compliance plan 2013 January to December 2013" 11, https://www.dnrm.qld.gov.au/__data/assets/pdf_file/0007/171646/report-csg-engagement-compliance- plan.pdf.
[192] Letts, n 163 at 111.
[193] Swayne N, "Regulating coal seam gas in Queensland: Lessons in an adaptive environmental management approach?" (2012) 29 *Environmental and Planning Law Journal* 163, 163.
[194] Queensland Government, *Adaptive Environmental Management Regime for the Coal Seam Gas Industry* Department of Environment and Natural Resources, 2011 1.
[195] Swayne, n 192 at 164.
[196] Australian Government, n 21 at 50.
[197] Australian Government, n 21 at 39.
[198] Australian Government, n 21 at 51.
[199] Commonwealth of Australia and the States and Territory, National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development, 2, http://www.federalfinancialrelations.gov.au/content/npa/environment/csg_and_lcmd/NP.pdf

Despite some legislation, common law, specifically included in *Environmental Protection Act 1994* (Qld) s 24,[200] still informs Queensland law, so that "causes of action" 'relevant to environmental issues are:[201]

- Private nuisance (unreasonable interference with the use of property, including due to smoke, noise or vibration from a neighbour's property);
- Public nuisance (unreasonable interference with a public right, including due to pollution, where the person affected has suffered some special damage greater than the public generally);
- Riparian user rights (rights of a person owning property adjoining a watercourse to use water and to prevent other users from unreasonably interfering with the quantity or quality of the water);[202]
- Negligence (breach of a duty to take reasonable care to avoid damage to people or property, for example, manufacturing goods that cause cancer);[203]
- Trespass (a direct interference with or invasion of private land, including by pollution).'[204]

In the *QCoal Case*, *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* (2006) 232 ALR 510 [7] there was complete failure to mention greenhouse impacts, determined errors of law, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(f)[205] and improper exercise of power[206] conferred by s 75 of the EPBC Act and no evidence to justify the decision.[207] Similarly CSG licencing must consider the totality of the issues. The MERCP has superseded many of the common law causes of action. In relation to landowners rights, and although some mandatory compensation is required by law, it is difficult if not impossible to avoid conduct by government avoiding common law rights.

Australia's obligation under the *Rio and Watercourses* treaties, and in particular an obligation to take a precautionary approach to the environment, should inform legislation.

6. Legislation and Politics; The Conflicts and Issues

The *Sustainable Planning Act 2009* (Qld) s 5(1)(f) (SPA) purpose requires application of standards for public benefit[208] and provides for opportunities for public involvement in decision making.[209] The SPA requires decision making to be accountable,[210] apply the precautionary principle,[211] consider long and short term environmental effects including climate change,[212] provide equity between present and future generations,[213] consider alternatives to non-renewable resources,[214] human health,[215] and housing choice.[216] The

[200] *Environmental Protection Act 1994* (Qld) s 24.
[201] Bates G, *Environmental Law in Australia* (7th ed, Butterworths, Sydney, 2010).
[202] See Fisher D, Water Law (LBC, Sydney, 2000).
[203] In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 the rule of strict liability in *Rylands v Fletcher* was abandoned in favour of general negligence principles. See also *Graham Barclay Oysters PL v Ryan* (2002) 211 CLR 540.
[204] McGrath, n 183 at 41.
[205] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(f).
[206] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(b)(e).
[207] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(h) and 5(3)(a).
[208] *Sustainable Planning Act 2009* (Qld) s 5(1)(f).
[209] *Sustainable Planning Act 2009* (Qld) s 5(1)(g).
[210] *Sustainable Planning Act 2009* (Qld) s 5(1)(a)(i).
[211] *Sustainable Planning Act 2009* (Qld) s 5(1)(a)(iii).
[212] *Sustainable Planning Act 2009* (Qld) s 5(1)(a)(ii).
[213] *Sustainable Planning Act 2009* (Qld) s 5(1)(a)(iv).
[214] *Sustainable Planning Act 2009* (Qld) s 5(1)(b).
[215] *Sustainable Planning Act 2009* (Qld) s 5(1)(c)(ii).

MERCP removes general public involvement relating to location or licencing; *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 260,[217] there is a conflict.

The EPA object, *Environmental Protection Act 1994* (Qld) s 3,[218] '…is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development).' CSG activities clearly conflict, water issues, noise, pollution and health unknowns cannot 'improve the quality of life'. The adaptive approach being taken[219] confirms that the effects are unknown and hence **conflicts** with the EPA.

The *Regional Planning Interests Act 2014* (Qld) s 3(1)(a) (PGA) purpose[220] is to 'identify areas of Queensland that are of regional interest because they contribute, or are likely to contribute, to Queensland's economic, social **and** environmental Prosperity…' Statutory interpretation would consider the **and** as inclusive; it is difficult to see that CSG contributes to environmental prosperity or social prosperity when considering land access issues and unknown pollution effects. Even for areas determined for strategic cropping, that is highly suitable for crops, PGA s 10(2),[221] under the PGA s 13(e),[222] a resource authority can be an exempt resource activity,[223] if an agreement is made with the land owner and if not a 'significant' impact[224] on strategic cropping or priority agriculture, highly productive land, PGA s 8(2)[225] land. So Queensland's prime agricultural land is not fully protected and open to financial deals, unless there is a narrow interpretation of 'significant'.

Following a survey of 54 jurisdictions, 58 rules are applicable to Queensland CSG legislation, 23 are not addressed in legislation,[226] the gaps needing coverage.

CSG activities are open to criticism because the PGA allows proponents to draw an unlimited amount of water and these privileges are not available to other industry sectors, such as Agriculture.[227]

7. Appeal and Legislation Review Processes

McGrath[228] stated, 'standing and lack of substantive laws are not the main obstacles [for appeal] but the threat of adverse costs orders, a general lack of financial resources and the lack of merits review… [t]hese obstacles inhibit public interest litigation enforcing law and promoting good decision-making by Government.'[229] Public involvement is important in achieving 'sustainable development, the overarching objective of environmental legal systems, by increasing enforcement of environmental laws and promoting good decision-making by governments about activities impacting on the environment.'[230]

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[216] *Sustainable Planning Act 2009* (Qld) s 5(1)(d).
[217] *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) s 260.
[218] *Environmental Protection Act 1994* (Qld) s 3.
[219] Queensland Government, 'CSG-LNG legislation' (accessed 3 May 2015), https://www.business.qld.gov.au/industry/csg-lng-industry/regulatory-framework-csg-lng/csg-lng-legislation
[220] *Regional Planning Interests Act 2014* (Qld) s 3(1)(a).
[221] *Regional Planning Interests Act 2014* (Qld) s 10(2).
[222] *Regional Planning Interests Act 2014* (Qld) s 13(e).
[223] *Regional Planning Interests Act 2014* (Qld) s 12(2).
[224] *Regional Planning Interests Act 2014* (Qld) s 22(2)(b).
[225] Highly productive land, *Regional Planning Interests Act 2014* (Qld) s 8(2).
[226] Campin, n 13 at 24-27.
[227] Australian Government, n 21 at 45.
[228] McGrath C, "Flying foxes, dams and whales: Using federal environmental laws in the public interest" (2008) 25 EPLJ 324 *Lawbook Co.* 324-359.
[229] McGrath n 227 at 324.
[230] McGrath n 227 at 324.

However it appears that Queensland may have taken a backward step. Amended legislation gives the Chief Executive wide and discretionary powers, *Environmental Protection Act 1994* (Qld) s 188A[231] and open to political influence. Claims are that CSG related legislative changes were to avoid public involvement given Minister Cripps statement defending the MERCP to not 'bog down the coal industry'.[232] To some extent the concern of reduced regulation has a basis in a QCA report[233] as stated by the Environmental Defenders Office Queensland (EDO) 'to remove regulation and make it even easier for industry to conduct CSG operations in Queensland.'[234] Despite EDO's submission that 'no further reduction in community participation rights on CSG projects should be recommended as it is already near impossible for communities to understand the impacts of CSG projects and effectively engage in the environmental assessment and approval processes'.[235] This lack of proportionality is seriously irrational, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 [102] and detrimental to those adversely affected breaching the *Judicial Review Act* s 23(b)[236] (JRA).

It may also exhibit elements of Wednesbury unreasonableness, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, breaching the JRA s 23(g),[237] making decisions subject to judicial review JRA s 20(2)(e).[238] One recommendation in the QCA report was, '[t]he requirement for EHP [Environment and Heritage Protection] to approve OGIA's [Office of Groundwater Impact Assessment] technical reports be removed',[239]238 thus eliminating an independent check on environmental issues. QCA's report considers reforms will benefit industry and government with costs and timeliness and benefit community with a clearer, more accountable regulatory system.[240] The report stated 'QCA reaffirms that the requirement for further public notification should be on its merits (that is, risk based according to the nature of outcomes, not on how a project is classified).'[241] There is great responsibility in deciding the risks and consequentially public involvement particularly given many of the risks are unknown.[242]

Litigation costs to individuals may be beyond their resources and require support from public interest groups.[243] The difficulty is to determine if a public interest group has standing. An aggrieved person, see definition JRA s 7,[244] and a private interest affected, (for definition of public interest see *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 8-12),[245] will always have standing JRA ss 20(1) 21 22[246] for decision review and conduct under the JRA natural justice and fair hearing rule, JRA ss 20(2)(a) 21(2)(a).[247] Under the JRA a person

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[231] *Environmental Protection Act 1994* (Qld) s 188A.
[232] Jacques O, "Laws to stop green groups challenging mining leases", *The Queensland Times* (online) 6 March 2014, http://www.qt.com.au/news/laws-strip-green-groups-mounting-final-fight-again/2189518/
[233] Queensland Competition Authority, n 130.
[234] Environmental Defenders Office Queensland, "Latest report will cause more headaches for communities grappling with CSG" (20 February 2014), http://www.edoqld.org.au/news/latest-report-will-cause-more-headaches-for-communities-grappling-with-csg/
[235] Environmental Defenders Office Queensland, "Queensland Competition Authority CSG Draft Report" 20 December 2013, http://www.edoqld.org.au/wp-content/uploads/2013/12/EDO-Qld-submission-on-QCA-draft-CSG-report.pdf
[236] *Judicial Review Act 1991* (Qld) s 23(b).
[237] *Judicial Review Act 1991* (Qld) s 23(g).
[238] *Judicial Review Act 1991* (Qld) s 20(2)(e).
[239] Queensland Competition Authority, n 130 at [6.7].
[240] Queensland Competition Authority, n 130 at 4.
[241] Queensland Competition Authority, n 130 at 98.
[242] National Water Commission, n 17.
[243] See discussion, McGrath, n 227 at 335-340.
[244] Definition *Judicial Review Act 1991* (Qld) s 7.
[245] *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 8-12.
[246] *Judicial Review Act 1991* (Qld) ss 20(1) 21 22.
[247] *Judicial Review Act 1991* (Qld) ss 20(2)(a) 21(2)(a).

includes an unincorporated body, JRA s 3.[248] and the EPBC Act provides for injunction application if the appellant is Australian citizen, ordinary resident, an incorporated or unincorporated organisation, see interested person definition EPBC Act ss 475(6)-(7),[249] and engaged in environmental protection, conservation or research for two years prior to making an application, EPBC Act s 475.[250] Under the EPBC, AAT appeals are limited to conservation orders EPBC Act ss 472 473,[251] and permits and declaration decisions EPBC Act s 303GJ.[252] If in the public interest, (note, as there is no clear definition of "public interest" existing in legislation or case law, the courts look at the circumstances of each case)[253] where organisations with adequate funding are attempting to defend issues, they may not have standing as determined by the court, unless joined by the Attorney General, JRA s 51,[254] as the appropriate applicant to enforce public rights, *Boyce v Paddington Borough Council* [1903] 1 Ch 109. Appellants must demonstrate special damage or special interest and not just an emotional connection, *Nth Qld Conservation Council Inc v Executive Director, Qld Parks & Wildlife Service* [2000] QSC 172 [32]. So under the JRA, litigation may be left to the private individual to benefit the public by protecting the environment[255] because traditionally common law focuses on protection of private rights and interests and excludes public interest where no private right exists.[256]

Before judicial review, standing must be established. An example of no standing is the *Australian Conservation Council Case*[257] where 'simply formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment' was insufficient. Whereas in *The Woodchip Case, North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, the North Coast Environment Council was found to have standing because the group was found to be aggrieved persons with special relation to South East forests. In *The North Queensland Conservation Council Case, Nth Qld Conservation Council Inc v Executive Director, Qld Parks & Wildlife Service* [2000] QSC 172, it was found that a person would have standing under the JRA if their '…connection with the subject matter of the suit is such that it is not an abuse of process. If the plaintiff is not motivated by malice, is not a busy body or crank and the action will not put another citizen to great cost or inconvenience his standing should be sufficient', *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 [12]. Note however that the *Acts Interpretation Act*[258] also defines persons as corporations s 32D,[259] as does the EPBC Act s 5(3)(b)(c) recognising corporations as persons outside the exclusive economic zone[260] though persons are not specifically defined.

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[248] *Judicial Review Act 1991* (Qld) s 3.
[249] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 475(6)-(7).
[250] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475.
[251] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 472-473.
[252] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 303GJ.
[253] 'A widely accepted approach is to see whether the case affects the community or a significant sector of the community or involves an important question of law', Australian Law Reform Commission, *Costs Shifting –Who Pays for Litigation*, ALRC Report 75 (1995) [13.2], http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC75.pdf
[254] *Judicial Review Act 1991* (Qld) s 51.
[255] McGrath, n 227 at 327.
[256] McGrath, n 227 at 328.
[257] The action was not brought to assert a private right but to prevent what it alleged was a public wrong, held that the ACF had no standing, *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 [82].
[258] *Acts Interpretations Act 1954* (Qld).
[259] *Acts Interpretations Act 1954* (Qld) s 32D.
[260] *Environmental Protection and Biodiversity Act 1999* (Cth) s 5(3)(b)(c).

A paper by the Queensland Public Interest Law Clearing House Inc (QPILCH) discusses various cases and inconsistencies[261] and recommendations by the Australian Law Reform Commission (ALRC) recommending broad single test for standing[262] and removal of special interest from legislation[263] and a more liberal interpretation of 'person aggrieved'[264] are appropriate. QPILCH states 'that both courts and legislation are slowly recognising the need for a broader approach to standing in public interest matters,'[265] allowing for standing of environmental groups.

Enacting the MERCP, limiting notification, attempting to streamline process and limiting those who can lodge an objection is arguably breaching s 131AA and 134A of the EPBC Act where there are opportunities for public comment before approval and prior to proposed environmental litigation under s 131AA. As McGrath states, in the public interest is 'something of a moving feast'[266] thus somewhat open to the whims of the administrator who is tasked to decide before referring to the Land Court if a submission is frivolous or vexatious or an abuse of the court system EPA s 188A.[267]

The MERCP limits appeals to the Land Court to 'a person whose interests are affected' and includes only Ministers' refusal to approve an application, approve registration of dealings or give indicative approval with or without conditions, *Mineral Resources Act 1989* (Qld) s 318AAZM.[268] So only applicants can apply to the Land Court and reportedly 'hearings will exclude technical, financial and commercial-in-confidence matters.'[269] The owner, whose interests may be affected, has no avenue for appeal to the Land Court.

The ALRC identified three criteria to identify public interest litigation that:

- the proceedings will determine, enforce or clarify an important right or obligation affecting community or a significant sector of the community;
- the proceedings involve the resolution of an important question of law;
- the proceedings otherwise have the character of public interest or test case proceedings.[270]

The ALRC states:

> 4.24 The Commission is sympathetic to these concerns [increasing the potential number of challengers]. In particular it agrees that uncertainty about the finality of government decisions can have serious commercial consequences. However, these concerns will not be solved by narrowing the rules of standing.
>
> 4.36 On balance, the Commission considers that the capacity of a plaintiff to represent the public interest should not form part of the test for standing… The incapacity of a plaintiff to

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[261] Queensland Public Interest Law Clearing House Incorporated, "Standing in Public Interest Cases" (July 2005), http://www.qpilch.org.au/_dbase_upl/standing.pdf
[262] Australian Law Reform Commission Reports "Beyond the Door Keeper. Standing to Sue for PublicRemedies", ALRC Report 78 (1996) [4.4]-[4.8].
[263] Australian Law Reform Commission Reports n 261 at [4.9]-[4.12].
[264] Australian Law Reform Commission Reports n 261 at [3.10]-[3.12].
[265] Queensland Public Interest Law Clearing House Incorporated, n 260 at 18.
[266] McGrath, n 254 at 326.
[267] *Environmental Protection Act 1994* (Qld) s 188A.
[268] *Mineral Resources Act 1989* (Qld) s 318AAZM.
[269] Hopgood Ganim Lawyers, HG Resources and Energy Alert: First tranche of new resources laws passed by Queensland Parliament – 12 September 2014, http://www.hopgoodganim.com.au/page/Publications/HG_Resources_and_Energy_Alert_First_tranche_of_new_resources_laws_passed_by_Queensland_Parliament_12_September_2014/
[270] Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, ALRC Report 75 (1995) [13.13], http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC75.pdf

> represent the interest which he or she espouses should be addressed by the court as part of its management of the litigation process and should not be a ground for denying standing.[271]

Administrators should not decide if an issue is a question of law or test case; that is a matter for the judiciary, making such decisions could be seen as an abuse of power, JRA ss 20(2)(e) 23(i).[272] Under the rule of law and natural justice, individuals have protection from arbitrary government decisions.

The Queensland Premiers Office states:

> 7.2.2 Is the legislation consistent with principles of natural justice?
>
> The principles of natural justice are principles developed from the common law.
>
> Right to be heard
>
> The principles require that something should not be done to a person that will deprive the person of some right, interest, or legitimate expectation of a benefit, without the person being given an adequate opportunity to present the person's case to the decision-maker.[273]

The MERCP removes that right.

Environmental litigation seeking remedies such as damages or injunction of government may be by:[274]

- private individuals enforcing common law or statutory rights, or
- against government administrative decisions by:
  - merits review, or
  - judicial review

Landholders and environmental groups with standing may seek review of a decision based on the relevant facts and correct according to law. Judicial review considers whether decisions were in accordance with the statute, common law - including natural justice. It does not take into account if the decision was 'right or preferable on the facts of the case.'[275] Merit review is not available for controlled actions[276] (parts 7-9 of the EPBC) but judicial review **is** available.[277] Merits review was not available in the *Paradise Dam Case, Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* [2008] FCA 1900 and *Gunns Pulp Mill Case, Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources* (2008) 101 ALD 1; (2008) 157 LGERA 413; [2008] FCAFC 19, but as McGrath stated:

> …It is not possible to say for certain whether the Minister's decisions to approve the dam or the pulp mill subject to conditions were correct or not but it is clear that the transparency, integrity

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[271] Australian Law Reform Commission Reports, *Beyond the Door Keeper. Standing to Sue for Public Remedies*, ALRC Report 78 (1996) [4.24] [4.36], http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html#ALRC78Ch4Asingletes.
[272] *Judicial Review Act 1991* (Qld) ss 20(2)(e) 23(i).
[273] Queensland Government, Department of the Premier and Cabinet, "Queensland Legislation Handbook" (accessed 3 May 2015) [7.2.2,] http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook.aspx
[274] McGrath, n 254, at 328 329.
[275] McGrath, n 254 at 329-330.
[276] An action that a person proposes to take is a controlled action if the taking of the action by the person without approval, *Environmental Protection and Biodiversity Act 1999* (Cth) s 67.
[277] McGrath, n 254 at 332.

> and rigour of the processes by which the decisions were reached would have been markedly improved through merits review by an independent body such as the AAT.[278]

Given the bilateral agreement on environmental assessment and approval, see Section 2.1, and depending on accreditation, the jurisdiction for review would be either the Administrative Appeals Tribunal (Cth) (AAT) or Queensland Civil and Administrative Tribunal (QCAT).

Landholders and environmental groups with standing may seek review of a decision based on the relevant facts and correctness according to law. Judicial review considers whether decisions were in accordance with the statute, common law - including natural justice. It does not take into account if the decision was correct in law, see discussion at Section 4.

Interested persons including individuals EPBC Act s 475(6)[279] and organisations EPBC Act s 476(7)[280] may seek injunctions to prevent offences for governments failing to act under the EPBC Act s 475.[281] Failure by the state and federal government to enforce the EPBC led to federal court determinations in the *Flying Fox Case, Booth v Bosworth* [2001] FCA 1453, and the *Japanese Whaling Case, Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3. These cases, including the *Nathan Dam Case, Queensland Conservation Council Inc & WWF Australia v Minister for the Environment and Heritage* [2003] FCA 1463, which addressed the administrative decision making processes[282] were successful public interest cases.

Australia, as a member of the UN and signatory to the Universal Declaration on Human Rights and in consideration of the Resolution adopted by the General Assembly on 28 July 2010 64/292, the human right to water and sanitation[283], has a continuing responsibility to ensure water is safe:

> In November 2002, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 15 on the right to water. Article I.1 states that "The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights". Comment No. 15 also defined the right to water as the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses.[284]

Because of the unknowns and obligations under international agreements Commonwealth and State legislation, a precautionary approach[285] should be adopted and enforced. If not a moratorium to cease CSG activities until issues are identified and adequately safeguarded should be declared. Adopting an adaptive management approach, though having financial benefits by allowing projects to cautiously proceed, carries potentially irreversible risks in a country with limited water resources particularly considering competition with human and food production needs.

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[278] McGrath, n 254 at 353.
[279] *Environmental Protection and Biodiversity Act 1999* (Cth) s 475(6).
[280] *Environmental Protection and Biodiversity Act 1999* (Cth) s 476(7).
[281] *Environmental Protection and Biodiversity Act 1999* (Cth) s 475.
[282] *Queensland Conservation Council Inc & WWF Australia v Minister for the Environment and Heritage* [2003] FCA 1463 [24].
[283] United Nations, *The human right to water and sanitation*, General Assembly, Resolution adopted by the General Assembly on 28 July 2010, 64/292 <http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E>.
[284] UN Committee on Economic, Social and Cultural Rights, The right to water, General Comment No. 15.
(November 2002) http://www.un.org/waterforlifedecade/human_right_to_water.shtml
[285] See discussion on precautionary principle in following sections.

In the *Hornsby Shire Council Case, Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 13,3 Preston CJ stated:

> *Conditions precedent or thresholds to application of the precautionary principle*
> 128 The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate…
>
> 130 Threats to the environment that should be addressed include direct and indirect threats, secondary and long-term threats and the incremental or cumulative impacts of multiple or repeated actions or decisions. Where threats may interact or be interrelated (for example where action against one threat may exacerbate another threat) they should not be addressed in isolation...
>
> *Scientific uncertainty*
> 140 The second condition precedent required to trigger the application of the precautionary principle and the necessity to take precautionary measures is that there be "a lack of full scientific certainty". The uncertainty is as to the nature and scope of the threat of environmental damage…
>
> *Zero risk precautionary standard inappropriate*
> 157 The precautionary principle should not be used to try to avoid all risks…
>
> *Degree of precaution required*
> 161 The type and level of precautionary measures that will be appropriate will depend on the combined effect of the degree of seriousness and irreversibility of the threat and the degree of uncertainty. This involves assessment of risk in its usual formulation, namely the probability of the event occurring and the seriousness of the consequences should it occur. The more significant and the more uncertain the threat, the greater the degree of precaution required…
>
> 163 One means of retaining a margin for error is to implement a step-wise or adaptive management approach, whereby uncertainties are acknowledged and the area affected by the development plan, programme or project is expanded as the extent of uncertainty is reduced…
>
> *Proportionality of response*
> 167 In applying the precautionary principle, measures should be adopted that are proportionate to the potential threats. A reasonable balance must be struck between the stringency of the precautionary measures, which may have associated costs, such as financial, livelihood and opportunity costs, and the seriousness and irreversibility of the potential threat…[286]

8. Conclusions - Are we Killing the Goose to Flog the Final Egg?

Challenge to administrative decisions is often beyond the financial capacity of individuals and organisations and third party individuals have standing issues to overcome before challenges are available. Legislation and policies relating to CSG activities is prolific and includes that made by international, federal and state organisations. There is a lack of clarity and consistency in definitions throughout legislation with, words like 'public interest', 'standing', 'aggrieved person', allowing decision makers broad discretionary power. This potentially gives more weight to political and financial considerations while neglecting environmental imperatives such as in the situation during Simone Marsh's whistleblowing[287] and the Commonwealth overriding Queensland by including the water trigger into the EPBC Act.[288] Under the EPAct, decisions can be automatic if administrative delays exceed the

[286] *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 [128] [130] [140] [161] [163] [167].
[287] ABC Television, n 168.
[288] Australian Government, n 170.

prescribed period for application approval which meet standard criteria, (which includes the precautionary principle)[289] thus leading to potentially incomplete investigation. This tactic might be employed to avoid disapproval and should be subject to legislative scrutiny and review.[290] A precautionary approach[291] is warranted with implementation of an adaptive approach that requires adequate testing for contaminants, research into possible effects of water use and contamination, and complemented with honesty and transparency by all stakeholders including miners, landholders, environmental groups and Government. Evidence on long term effects is known to be limited, the chemicals used in CSG fraccing are often not disclosed, the anxiousness of government and the fact that other countries are banning fraccing, should dictate a conservative legislative approach.

CSG may benefit the public through the taxes collected by Government and employment and immediate access to a non-renewable energy source but the limited term of the energy resource, together with the invasiveness, pollution, greenhouse gas emissions, water costs and health issues do not benefit the public.

The ability of CSG miners to draw unlimited amounts of water while our Agriculture industry does not have the privilege warrants review. An equitable water access arrangement between the CSG and food and water necessities is warranted. One industry cannot demand an unlimited allocation.

The question must be asked, do we want to be a rich country or a dead country or maybe less rich and a little dead. Perhaps a moratorium on fraccing would allow all decision makers time to gain reasonable certainty of the strategies implemented and their resulting effects before irrecoverable damage is done to the eco-systems that provide fresh water to all sectors of the community. In that way we may take the egg and keep the goose alive.

[289] *Environmental Protection Act 1994* (Qld) sch 4 656.
[290] *Environmental Protection Act 1994* (Qld) s 177.
[291] See discussion at Section 6.

Appendix A

Legislation, treaties and plans related to water protection associated with CSG

Biosecurity Act 2014

Bore Assessment Guideline 2013 (Qld)

Bores in Queensland 2013 (Qld)

Coal seam gas engagement and compliance plan 2014/15

Coal Seam Gas Recycled Water Management Plan Guideline 2013 (Qld)

Coal Seam Gas Water Management Policy 2012 (Qld)

Code of Practice for Constructing and Abandoning Coal Seam Gas Wells and Associated (Qld)

Constitutional Powers (State Waters) Act 1980 (Qld)

Energy and Water Ombudsman Act 2006 (Qld)

Energy and Water Ombudsman Regulation 2007 (Qld)

Energy Efficiency Opportunities Act 2006

Environmental Protection (Water) Policy 2009 (Qld)

Environmental Protection Act 1994 (Qld) *

Environmental Protection and Biodiversity Conservation Act 1999 (Cth)

Gasfields Commission Act 2013

Gold Coast Waterways Authority Act 2012

Greenhouse Gas Storage Act 2009 (Qld)

Guideline Approval of a Resource for Beneficial Use 2012 (Qld)

Mineral and Energy Resources (Common Provisions) Act 2014

Murray–Darling Basin Plan

National Energy Retail Law (Queensland) Act 2014

National Greenhouse and Energy Reporting Act 2007

Native Title (Queensland) Act 1993 (Qld)

Offshore Petroleum and Greenhouse Gas Storage Act 2008 (Cth)

Petroleum and Gas (Production and Safety) (P&G) Regulation 2004 (Qld)

Petroleum and Gas (Production and Safety) Act 2004 (Qld) *

Recycled Water Management Plan and Validation Guidelines 2008 (Qld)

Recycled Water Management Plan Exemption Guideline 2011 (Qld)

Regional Planning Interests Act 2014 (Qld)

Regional Planning Interests Regulation 2014 (Qld)

River Improvement Trust Act 1940 (Qld)

South East Queensland Water (Restructuring) Act 2007 (Qld) *

South East Queensland Water (Restructuring) Regulation 2011 (Qld)

South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld) *

South-East Queensland Water (Distribution and Retail Restructuring) Regulation 2010 (Qld)

State Development and Public Works Organisation Act 1971 (Qld)

Sustainable Planning Act 2009 (Qld)

Sustainable Planning Regulation 2009 (Qld)

The Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971

The Environmental Protection (Waste Management) Regulation 2000 (Qld)

The Kyoto Protocol

UN Watercourses Convention

Underground Water Impact Report and Final Report Guideline 2013 (Qld)

United Nations Framework Convention on Climate Change

Waste Reduction and Recycling Act 2011 (Qld)

Water (Commonwealth Powers) Act 2008 (Qld)

Water Act 2000 (Qld) *

Water Act 2007 (Cth)

Water Reform and Other Legislation Amendment Act 2014 (Qld) *

Water Regulation 2002 (Qld)

Water Resource Plans (23)

Water Supply (Safety and Reliability) Act 2008 (Qld) *

Wet Tropics World Heritage Protection and Management Act 1993 (Qld)