Mining & CSG – Landholder Update

November 2017

p&e Law

planning, environment & native title law

Welcome to the November Issue of the p&e Law Mining and CSG Landholder Update

NOTHDURFT v QGC–REVIEW OF COMPENSATION

Background

On 18 August 2017 judgment has handed down by the Land Court in the matter of *Nothdurft & Anor v QGC Pty Limited & Ors* [2017] QLC 41.

Mr and Mrs Nothdurft brought an application in the Land Court seeking a review of compensation under their 2006 Compensation Agreement with QGC in relation to their property "Bellara" near Chinchilla, arguing a material change in circumstances due to:

- Noncompliance with noise limits
- Discontinuance of the supply of untreated CSG water
- Emission of gases
- Incorrect well locations
- Owners time and resources
- Dust causing contamination of rainwater tanks
- Perceived health risks in living in or around the gasfield
- The need to relocate their place of residence and business due to noise impacts

Mr and Mrs Nothdurft submitted that the Court must assess compensation 'afresh' on the changed circumstances. QGC disagreed and argued that the correct approach required the Court to review the original compensation to the extent it is affected by the change (i.e. whether additional compensation should be paid for that particular change).

The Decision

The Court found that to trigger a review of compensation, the court must be satisfied of two things: firstly, that the circumstances have changed; and secondly, that the change is material to the agreement about compensation. When considering whether a change is a material change, the focus is on the effect rather than the activity, and the change must be of significance or importance.

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Of the changes in circumstance raised by Mr and Mrs Nothdurft (listed above), only two were accepted as material changes by the court: the cessation of access to untreated CSG water and past exceedances of noise conditions. The Nothdurfts contended that noise impacts rendered "Bellara" uninhabitable. The Court rejected that contention and found that, based on expert evidence, noise exceedances had occurred on an irregular basis from 2015, but that QGC were now operating in compliance with the noise conditions contained in its environmental authority. This finding had a significant bearing on the determination of additional compensation.

The final question for the court to consider was whether the material change in circumstances justified an award of additional compensation due to "compensatable effects". The Court accepted QGC's submission that it could only review compensation to the extent it was affected by the change. The Court could not assess the entire compensation 'afresh'.

Despite there being a material change in relation to the loss of supply of untreated CSG water, the Court found that there was no associated compensatable effect that justified an award of additional compensation. This is because alternative treated water sources were now available to Mr and Mrs Nothdurft through a separate agreement with SunWater as part of the Chinchilla Beneficial Use Scheme. The Court accepted the scheme would not exist without QGC's activities on "Bellara" and other properties. The Court awarded no additional compensation.

Based on the Court's findings in relation to the historical noise exceedances, and having accepted the evidence that QGC were now complying with its noise limits, President Kingham awarded Mr and Mrs Nothdurft $60,500 for the past exceedances, calculated at $55,000 for noise attenuation costs plus 10% for Mr Nothdurft's time in raising and responding to noise impacts.

Implications of Decision

Importantly, *Nothdurft* confirms the court's power to review compensation where there has been a material change in circumstances, limited to the compensatable effects caused by the material change.

The case highlights a number of critical issues for landholders involved in Land Court proceedings, including:

1. the court's reluctance to accept opinion evidence from a lay witness, particularly in relation to breaches of conditions, including in relation to noise, dust and health impacts;
2. the reliance of the court on expert evidence;
3. the role of experts to act independently when assisting the court and to not stray into the realm of advocacy;
4. the importance of analysing evidence correctly; and

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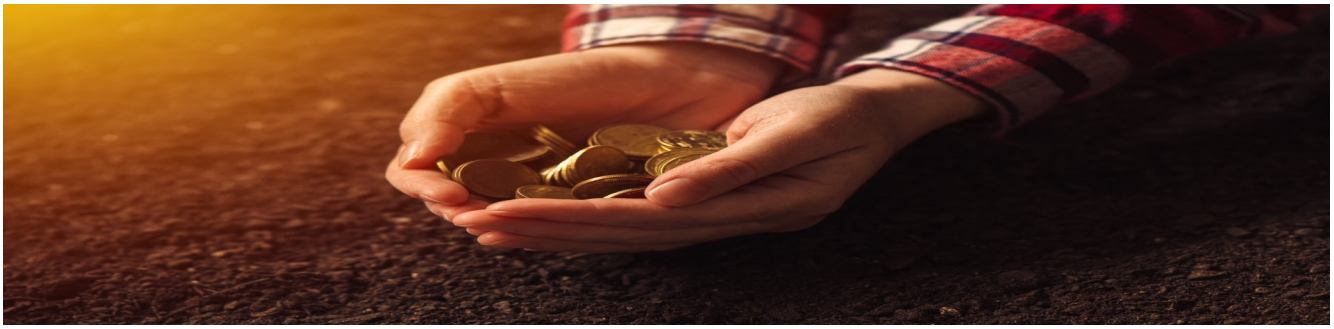
5. the expectations of the court in relation to honesty and candour from representatives.

"Material change of circumstances" arising from CSG activities may give rise to an additional compensation liability for CSG companies. The *Nothdurft* decision provides further guidance to landholders about how a claim for material change should be assessed.



NEW CHANGES PROPOSED TO MINERAL AND WATER LEGISLATION

The Mineral, Water and Other Legislation Amendment Bill was introduced into the Queensland Parliament on 22 August 2017. The Bill proposes a number of changes that will impact on the way conduct and compensation agreements (CCA) and make good agreements (MGA) are negotiated.

The Bill is in response to some of the recommendations of "The Independent Review of the Gasfields Commission Queensland and Associated Matter" conducted by retired member of the Land Court of Queensland, Robert Scott. Those recommendations sought to improve the statutory negotiation process of a CCA and a MGA under the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCP Act) and chapter 3 of the *Water Act 2000* respectively.

Proposed changes to the negotiation of CCAs

Of particular relevance to landholders will be the proposed changes to introduce an option for arbitration as an alternative to the ADR process. The amended process removes the "conference" with an authorised officer of DNRM as a necessary step prior to applying to the Land Court. The pathways for negotiation of CCAs under the new approach will still begin with a notice of intention to negotiate (**Notice**), but there will be different options if agreement is not reached. Arbitration is now proposed as an alternative to applying to the Land Court for a determination, but both parties will have to agree to submit the matter to arbitration.

If agreement has not been reached by the end of the statutory negotiation period under the Notice, landholders or resource authorities may now choose to issue an Alternative Dispute Resolution (ADR)

NEW CHANGES PROPOSED TO MINERAL AND WATER LEGISLATION (CONT'D)

election notice (limited to non-determinative ADR such as case appraisal, mediation or conciliation) or an arbitration election notice (which is a non-judicial determination of an arbitral award). There is no requirement to proceed through ADR prior to issuing an arbitration election notice. But there is also no prohibition on seeking arbitration after a failed alternative ADR.

The amendments will require the resource authority holder to pay the costs of the ADR practitioner if the parties choose to participate in an ADR process. Where an arbitrator is used to determine the agreement without a prior ADR process, the costs of the arbitrator will be the responsibility of the resource authority holder. Where a prior ADR process has failed, the costs of the arbitrator will be shared equally, unless agreed between the parties or the arbitrator determines otherwise. Parties will be responsible for their own costs of arbitration unless agreed otherwise.

The amendments also propose to make resource authority holders responsible for other professional fees necessarily and reasonably incurred, such as the costs of an agronomist. These costs will now be payable even if the negotiations of the CCA are abandoned rather than on execution of a CCA.

Proposed changes to the negotiation of MGAs

The Bill seeks to gain consistency between the negotiation of MGAs and CCAs by:

- excluding arbitration as a form of ADR; and
- including arbitration as an alternative to the Land Court if both parties agree.

Under these proposed changes it will be important to consider carefully whether arbitration is used as there will be no rights of appeal to the Land Court of an arbitral decision.

This Bill has been referred to the Infrastructure, Planning and Natural Resources Committee for consideration. That committee was required to report on the Bill by 3 November 2017. We will continue to monitor this Bill and any changes to the legislation that may occur as a result.

If you have questions, please do not hesitate to contact

Matt Patterson, Adam Phillips, Renee Wallerstein or David Knobel

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We would like to take this opportunity to wish you a safe and festive Christmas.Please note our office will close on Friday 22 December 2017

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