EAST END MINE ACTION GROUP (INC)
1415 East End Road
MT LARCOM QLD 4695

SUBMISSION TO
Productivity Commission
Draft Report on Access to Justice Arrangements

15 May 2014

Access to Justice Arrangements
Productivity Commission
LB 2 Collins Street East
MELBOURNE VIC 8003

Dear Sir/Madam,

EEMAG members wish to thank you for the opportunity to respond to your Draft Report on Access to Justice Arrangements.

From our position as landholders experiencing entrenched regulatory failure and ongoing inability to access fair and equitable administrative justice under development / operations of a long term mining project, the Draft Report has a number of commendable recommendations, such as the view that there are grounds for Government to play a role in helping to meet legal costs in environmental disputes involving matters of substantial public interest.

- However, your Recommendations do not provide an effective remedy for our case and others in a similar situation of being adversely affected by a (mining) company with a confidential agreement/*contract* with Executive Government that is not concerned with the welfare of third parties.

The following experiences derive from a dispute that flared in 1995 between the East End Mine Action Group Inc, the East End Mine owned by Cement Australia and the Queensland Government and its Regulatory and Administrative Agencies. The dispute revolves around a failed duty of care, contested widespread off-lease mine dewatering impacts and a covert minimum compliance strategy for the project that cannot be changed without consultation and approval by the company.

In 1976 Executive Government in Queensland approved a $110 m project for an open cut limestone mine and cement manufacturing plant by Queensland Cement & Lime in the Gladstone area. At grant of lease in 1976 a water monitoring scheme governed by special conditions were attached and in 1977 a Franchise Act was entered into between the company and the state. The state joined the consortium board and funded 47.5% of the project. These arrangements bound the regulatory and administrative agencies to government policy which includes a confidential (and unofficial) policy of minimum compliance for the project.

Baseline water monitoring began over an eighty five sq km area of the project area in 1977; site development and dewatering began at East End in 1979 and limestone production commenced at East End from 1980.

On 8 May 1995 on my own behalf and others I wrote a four sentence letter to DPI Water Resources expressing concerns about uncharacteristic difficulties in accessing underground water and asking for a public presentation of the results of the water monitoring scheme.
.
On 15 May 1995 DPI Water Resources made the following startling admission in their three page response, quote**:**

> "As you are aware, the mine has been monitoring water resources in the area for a considerable period of time. We have only ever received one formal review and that was in 1980 prepared by the mine relating to review of the hydrology of impacts on the district's resources. In response I have requested (by 30 June 1995) such assessment from the mine through the DME and will investigate the need and frequency for these assessments and their distribution." (my underline)

As can be seen from reading the special conditions below, the company was in severe breach of their conditions. Although the water monitoring data was routinely collected **it had not been analysed for 15 years** nor were the findings presented or distributed in reports. It is also noteworthy that the regulators failed in their supervisory role and to honour the 31 August 1977 reassurances of the Irrigation and Water Supply Commission to the Mt Larcom & District Mining Protest Group quote**:**

> "The Commission will ensure that a proper and adequate investigation of the groundwater resources is carried out, that the water supplies are preserved as far as possible, and for those cases where groundwater supplies have been injuriously affected, that replacement supplies are provided etc."

SPECIAL LEASE TERMS AND CONDITIONS 1976-1997

Within two months of the Lease being granted the Lessee shall:-

9 (a) "Provide to the satisfaction of the Commissioner of Irrigation and Water Supply hereinafter called the Commissioner a proposal for the detailed investigation of the behaviour of groundwater levels and quality under the conditions existing in and adjacent to the Lease prior to the commencement of mining operations. Upon approval of the proposal with such modification as the Commissioner considers necessary, the Lessee shall forthwith arrange to carry out the investigation in a professional manner to the satisfaction of the Commissioner. The results and interpretation of the investigation are to be provided to the Minister, the Commissioner and landholders in the area who may, in the opinion of the Commissioner be affected by subsequent mining under the terms of the Lease.

(b) Provide to the satisfaction of the Commissioner a proposal to regularly monitor changes in water levels and water quality within and adjacent to the Lease. Upon approval of the proposal, with such modification as the Commissioner considers necessary, the Lessee shall forthwith institute and maintain the monitoring program. The results of the monitoring program are to be made available to the Minister, the Commissioner and landholders in the area who in the opinion of the Commissioner may be affected by the mining operation.

Without in any way limiting the obligation of the Lessee, the program described in (a) and (b) may require the collection, storage and interpretation of data relating to rainfall, evaporation, existing bores, wells and springs, the carrying out of surveys and pumping tests, the drilling and casing of observation bores, the measurement of water levels, the
chemical analysis of water quality and the instillation and operation of equipment to record rainfall, evaporation and water level variations.

10 Before mining operations are commenced within 500 metres of a bore, well or spring existing at the date of the granting of this lease, other than one owned by the lessee, the Lessee shall notify the Commissioner of Irrigation and Water Supply. The Lessee shall then conduct such tests on the bore, well or spring as the Commissioner may direct.

11 If in the opinion of the Commissioner of Irrigation and Water Supply the operations of the Lessee cause depletion of any underground supply, other than a supply belonging to the Lessee, so as to affect injuriously the owner of such supply, the Lessee shall, at his own expense, provide an alternative supply of water to the satisfaction of the Commissioner."

On 14 August 1995, on the very same day that the hydrology report demanded by DPI Water Resources was being presented to a small gathering at the mine, the executive government of a different political persuasion agreed to an incentive package for a $220m expansion and trebling of production of the East End Mine (with environmental conditions unchanged and without public objections permitted against the expanded mine) to phase out coral dredging from Moreton Bay. Although local knowledge suspected mine dewatering was responsible for a widespread loss of underground water table levels, in the absence of a hydrology assessment no one could be certain of the cause. The mine consultant's hydrology report found that dewatering impacts were mostly confined to a steep drawdown cone immediately around the mine pit within the lease boundaries and that impacts rapidly attenuated with distance from the mine. More widespread declines in water levels – as far away as Bracewell (some five kilometres) – in the opinion of the mine consultant were mostly due to drought.

In early September 1995 an IAS (with the 14 August 1995 hydrology report included) was announced for Queensland Cement Limited's $220 m Gladstone Expansion Project. This proposed development inflamed the passions of indignant farmers who were angry over the continuous discharge of mine pit water as waste and refused to accept the hydrology report without independent verification.

- It was not until 2005-6 that EEMAG finally understood that the *contract* between Executive Government and the company entered into in 1977 and reinforced in 1955 controlled the whole conduct and response of the government and its agencies.

The following website review by Nick Seddon entitled *The Interaction of Contract and Executive Power* of Commonwealth Executive Government contracts provided information on contacts, their prevalence and how the states have even wider powers.
Website http://www.austlii.edu.au/au/journals/FedLRev/2003/21.html
Brief extract quote,

"The list of public law values includes openness, fairness, participation, impartiality, accountability, honesty and rationality
[36]< http://www.austlii.edu.au/au/journals/FedLRev/2003/21.html#fn

"Contract contradicts these values almost perfectly, with honesty being the only value common to both contract and public law [37]< http://www.austlii.edu.au/au/journals/FedLRev/2003/21.html#fn38

"Contract is traditionally about secrecy, no duty to act fairly, participation of the immediate parties but otherwise not concerned with third parties, no duty to act impartially, accountability only to the extent required by the contract and then only to the other party and no duty to act rationally. When traditional contract values are combined with the public purpose, the mix does not necessarily work very well. There is no, or at least a very limited, special law of contract that applies to government contracts as there is in France and to a lesser extent in the United States. The safeguards for the protection of citizens' interests and wellbeing inherent in public law are simply absent with contract and there has been no adaptation of contract to fill the gap [38]< http://www.austlii.edu.au/au/journals/FedLRev/2003/21.html#fn39>

"Official reports and enquiries have pointed to the adverse consequences for public accountability of the use of contract by government but with little to show for such criticism.[39]< http://www.austlii.edu.au/au/journals/FedLRev/2003/21.html#fn40>"

On 31 July 1997 the bulk of QCL's leases expired but with a July 1997 report by Dr Peter James conducted under the auspices of the East End Mine Community Liaison Group identifying some seventy odd sq kms of off-lease impacts meant the minister was unable to renew the leases. However, the minister allowed the leases to continue under his discretionary powers. Legal advice held that under the requirements of the MRA the minister exceeded his legal powers because of the company's severe non compliance.

Concurrent studies by the mine's consultants, the Department of Natural Resources and independent experts produced widely differing results due in part to claims of drought, uncertainty about landholder consumption and lack of discharge figures from the mine. The water monitoring data was proven to be the equivalent of the magic pudding with findings able to be produced by selective use of data. In the absence of any consensus on the findings the dispute dragged on and worsened into social impacts and collapsing real estate values that lasted for a decade and should have triggered administratively determined compensation under injurious affection clauses within the special conditions.

The official opening of the expanded East End Mine, new railway connection and kiln at Fisherman's Landing occurred in March 1998.

In our naivety EEMAG members believed that once the extent of the company's mine dewatering liability was established the Government would act to ensure that the company met their obligations and were brought back into compliance. However this was not the case. Rather the government operated like an interstate truckie with a broken down rig and two sets of log books. The government used one set of books, that is, the DNR 1998 Final Position Paper and the Dr Frans Kalf QCL Groundwater Flow Model September 1999 to reluctantly support entitlements to replacement water supplies at the company's expense and the other set of books, i.e, the QCL 1996 Impact Assessment Study to falsely assess and issue benign Environmental Approvals.

The issue above all else, was political and there is evidence that EEMAG's right to justice has been / continues to be traded off by the Queensland Executive Government under the

confidential *contract* between Cabinet and the mining company under terms highly advantageous to their project.

The ongoing delays in evaluating the science enabled to project to proceed to fruition despite the expired leases. For their part the regulators claimed**:**

- approvals provided to the company shows them in compliance
- the regulators are adequately performing their duties.

When in fact the real purpose of the officially recognised hydrology findings and actions were to**:**

- issue a benign and falsely assessed Environmental Authority in preparation for lease renewal.
- facilitate lease renewals in 2003
- frustrate landholder compensations claims through inactivity and minimising the extent of company and departmental liability arising from their failed duty of care
- provide the regulators with a means of conforming to the (unofficial) government policy on minimal compliance.

The officially accepted Bruce Pearce, *Review of Groundwater in the Mount Larcom-Bracewell Area (2011)* for Department of Environment and Resource Management produced findings to 2008, of approx 50 sq kms of off-lease impacts on the East End water table. In spite of the availability of this information the *current* benign East End Mine Environmental Authority remains fixed on the 1995 study within the 1996 IAS.

The Queensland Government's current White Paper proposes to disallow philosophical objections and allow objections under the Mineral Resources Act only to landholders within the actual mining lease area and local councils. It is also disturbing that mention is made of whether complex science should be admissible.

We interpret that stakeholders suffering adverse / potential off-lease impacts will be denied participation in the public objection process under the MRA. This will further insulate projects and regulatory processes from objective scrutiny and deny appeal rights to the detriment of public interest. It is however proposed to expand the grounds of objections under the EP Act but little confidence can be expressed as the devil is in the detail. Link to the White Paper is**:** mines.industry.qld.gov.au/…mining-lease-notification-and-objection-discussion-paper.pdf (EEMAG's response to the White Paper is attached)

Given our inability to obtain administrative justice, EEMAG has lobbied widely since 2003 for an affordable and accessible appeal on the merits as a remedy to protect fundamental Human Rights (to fairness and justice) of adversely affected stakeholders. The Productivity Commission in your December 2013 Report on Major Project Development Assessment Processes examined this issue in Chapter 9, Regulatory decisions: review and appeal rights, beginning on Page 263. However the situation remains unsatisfactory for people in our situation.

Despite the provision of some 24 replacement water supplies at the company's expense that were won through persistent endeavour and the compilation of some forty hydrology studies since 1995 (many by EEMAG or their consultants) the on-going minimisation of liability associated with the East End mine continues through the mine and the regulating agencies hydrology studies based on inappropriate Darcian flow methodology (think predictable flow

as in a sand aquifer). EEMAG and its three internationally recognised experts on limestone hydrology disagree with the chosen methodology and the official findings. Local aquifers are karst limestone with random conduit flows that can only be properly assessed using karst aquifer principles.

Historically EEMAG and its experts have never been empowered in sporadic consultative processes that include only departmental science and the findings of company consultants in official reports.

My historical publication, *Road to Exploitation* subtitled *political capture by mining in Queensland* released in July 2013, is supported by a vast amount of detailed documentation that provides grounds and calls for a Royal Commission. The book is available world wide and in numerous different languages. Months ago printed copies were supplied to each of the eighty nine Queensland politicians. To date no one has challenged its contents or accuracy.

Mediation

It is recognised that in Mediation the weaker party is often bullied.

EEMAG is opposed to compulsory mediation of cases up to $50,000.

EEMAG believes that recent Queensland legislation where appeal cases may have adverse cost awards imposed is intended to stampede more people into mediation through fear of an adverse cost award.

The Queensland Land & Environment Court say they are disinclined to do so but have the power to direct litigants into a Court controlled mediation. Under such circumstances, there is no transcript and participants are bound by confidentiality. For nineteen years EEMAG has persisted to unmask the actual circumstances of the terms and conditions under which the East End Mine operates. We have also become enlightened about how the government and their Regulatory Agencies continued to allow the mine to operate while in flagrant breaches of our understanding of the Special Lease Terms and Conditions and under an Environmental Authority that bears no relevance to the mine's widespread off-lease impacts.

At a Country Cabinet meeting at Tannum Sands in 2008, EEMAG sought a political solution through having the East End Mine's minimum compliance conditions dismantled. Then Queensland Attorney General Hon Kerry Shine did not dispute the existence of such arrangements but advised that, "such contracts are notoriously difficult to unravel."

Recently EEMAG and some of its members provided submissions to the Draft East End Mine No 5 Project for Mining Lease Application 80156, Environmental Impact Study. EEMAG is not opposed to the mine's continued development but wants co-existence in mutual best interests terms under a sustainable environment. In view of how the East End mine proposes to operate from the existing site for a further lifetime we want a grout curtain installed.
Submissions available on link www.parliament.qld.gov.au/docs/find.aspx?id=5414T4598 (documents submitted by EEMAG Inc, B&M Lashford, F Lenz, RW Geaney, and AP Kelly)
The Company has obtained an extension until the 1 August 2014 to prepare their Final EIS.

- Under the Queensland Government's White Paper proposal these above parties whose submissions relate to off-lease impacts, will be prevented from participating in public

objections under the MRA and as landholders suffering residual issues may be thwarted from attempting to negotiate a fair and just settlement with the Company under the leverage of the public objection process.

The proponent's EIS hydrology assessment concludes that future mine dewatering impacts associated with deepening the existing mine from 45m AHD to 90m AHD and the new MLA 80156 to 90m AHD will have only negligible additional drawdown effects. These findings are based upon assumptions that permeability decreases with depth. Yet the company (and EEMAG) has copious data to the contrary that the EIS consultants have chosen not to bring forward.

In our EIS submission EEMAG challenges the mining company's consultants' use of Darcian Flow methodology and contour levels as a principal means of evaluation. In EEMAG's local knowledge opinion and the findings of our three expert limestone hydrogeologists, local aquifers are complex karst systems and must be assessed on that basis. We contend that all local hydrology studies and risk assessment based on Darcian Flow are invalidated through the use of the wrong methodology, omissions of contrary data and the selectivity of presented findings.

Whilst EEMAG will attempt to resolve outstanding differences via negotiations (as we also tried to do in 2006) the greater likelihood is that the company and government are locked into their long term *contract* and denial strategy under the covert minimum compliance strategy for the project and will play hard ball in the Land Court.

Presuming that EEMAG can lodge public objections under the pending environmental legislative changes for expanded environmental provisions**:** The really important part is that after years of being denied a valid forum in which to present our issues we face the very real prospect of either having:

- that opportunity curtailed by new State legislation or
- being forced into an unwanted mediation.
- uncertainty remains about what actually constitutes complex science
- the admissibility of such science and process for evaluating the integrity of the science

Mediation would effectively prevent any *precedential* judgement that might arise out of our years of blood sweat and tears. In the absence of any precedent we see the likelihood of similar circumstances arising again and again due to Executive Government *contracts* and how, under Queensland law, objections to an *amended* Environmental Authority can only be made against the amendment and not against a deficient existing Environmental Authority. In essence, we are entirely dependent upon the Department of Environment and Heritage Protection conducting a proper environmental assessment. To date they have failed at every hurdle so we justifiably have no confidence in their integrity or performance.

Summary of the EEMAG dispute:

The special conditions attached to the leases represent a legal contract under Queensland law. The three interested parties, or stakeholders, are the government representing the public interest, the mine owner and the affected community represented by EEMAG. Two of the three stakeholders are gaining from a breach of contract to the detriment of the third party viz EEMAG Inc.

The injustice of this should be taken to a court. **For EEMAG the possible legal costs would be prohibitive and beyond our very slender resources.** EEMAG does not have access to justice in the same way the Queensland Government and the mining company do – whereas if EEMAG and the government were breaching the contract and, for example, demanding the mining leaseholder progressively restore most of the pre-mine vegetation (something not included in the special conditions) the mine owner would not hesitate to take the matter to the highest court to protect their interest and obtain justice. This is not a level playing field.

It is further suggested *contracts between Executive Government and proponents* may now be commonplace *particularly* in regard to those of Significant Project Status. Since Significant Project Status denies public objections the question must be asked.

- Are the contractual arrangements of such projects cast in stone so that the NSW Gateway process and Federal Government Water Trigger cannot significantly alter their agreed structure?

In response to your Information Request No 17.2 - feedback from stakeholders on jurisdictional arrangements for planning and environmental matters:

EEMAG's legal experiences

The court system is complex, expensive, intimidating, ill equipped and not cost effective in dealing with technical matters. Legal practitioners warn clients that the legal process is fraught with uncertainty and risk and that there is no surety, regardless of how strong the prima facie evidence may appear. In addition there is a great disparity between the experienced and well resourced while those unfamiliar and inexperienced need to understand that justice can be influenced by superior skills, mere technicalities or the above factors. It is extremely difficult for a lay person to receive a valid assessment on the costs and prospects of a case because those opinions are, by necessity, qualified by the uncertainties involved.

In 1998 EEMAG hired a Brisbane Queen St firm of lawyers but despite the case being assessed as having good prospects and over $50,000 being expended no legal shot was ever fired in anger due to lack of funding for a case projected to cost hundreds of thousands of dollars. EEMAG would have had to debunk not only the company and departmental science but the falsely benchmarked environmental approvals provided by government.

The difference between the expectations of the uninitiated and the experienced practitioner is aptly illustrated by a 2004 conversation with Andrew Grech a senior partner with Slater & Gordon who asked, "What do you want?"
"Justice," I replied.
"Well," he said, "You can't get that. It's not how things work."

Logically if such a well connected practitioner considers the legal process unable to deliver justice, then prudently one seeks an alternative.

Having vigorously pursued the alternatives, both before and after the 2004 date, EEMAG has first hand experience of the effectiveness of such alternatives and whether they offer scope for satisfaction or in some way alleviate the need for legal action.

Ombudsman:

The Office of the Ombudsman cannot investigate private or public companies, the decisions of a minister, the crown or cabinet. Both EEMAG members as individuals and EEMAG as an organisation from 2000 onwards, took over a score of complaints against the Regulating Agencies to the Ombudsman who was most reluctant to become involved. However, we were very persistent and eventually the Ombudsman accepted a number of individual member's grievances against the Regulating Agencies and one facet of EEMAG's many complaints. I.e. against the mine's proposed lease renewal, on 23 May 2001.

Under his legislation the Ombudsman can discontinue investigations if there are other avenues etc. In all instances, the Ombudsman declined to continue his investigations. On 18 February 2002 the Ombudsman expressed his frequent contention that the Land and Resources Tribunal (as it was then) had the capacity to resolve our issues and that based upon the EEMAG executive's performance in opposing unimproved valuation increases in the Land Court in 2001, the executive had demonstrated competency to self represent EEMAG or its members.

EEMAG did not agree and resisted the Ombudsman's conclusions in further representations (including legal opinion) that pointed out that the Land & Resources Tribunal had no jurisdiction to consider or act on our grievances against the Regulating Agencies. EEMAG believes that once the Ombudsman became aware that the Regulating Agencies were bound by contractual minimum compliance policy arrangements entered into by Executive government it was debatable whether he had any jurisdiction. He did not discuss or explain those realities to us.

On 27 September 2002 EEMAG and the Regulating Agencies ultimately received same day correspondence stating the Ombudsman could not form an opinion on the contested science and had decided to discontinue his investigations into EEMAG's complaint and therefore could no longer require lease renewal to be further delayed. (The leases expired in July 1997 and were renewed in 2003). Subsequently EEMAG received letters from public servants, ministers and the premier, quoting the Ombudsman as saying, "we have done nothing wrong."

Under Freedom of Information EEMAG obtained a copy of the same day correspondence. Through the use of ambiguous statements and clever play of words (that differed from EEMAG's correspondence) the Ombudsman gave the Government and its Regulating Agencies grounds to claim that, "we have done nothing wrong," thus allowing the mining lease renewals to be approved on weakened special conditions and inadequate environmental approvals.

On 15 February 2004 EEMAG lodged a complaint against the Ombudsman over his conduct. Although the matter was internally investigated, our grievance was dismissed with advice that no further correspondence would be entered into. EEMAG then looked beyond the Ombudsman to see what body was responsible for the performance of the Ombudsman. Although we made representation to the Legal Constitutional and Administrative Review Committee they do not possess this oversight power. The only body with power over the Ombudsman is the Executive Government that appoints him.

Criminal Justice Commission

On 9 November 2000 EEMAG lodged a comprehensive submission with the CJC alleging the Mines Minister has exceeded his discretionary powers due to the East End Mine's serious on-going non compliance and their disinclination to comply with the requirements of the Mineral Resources Act. We alleged departmental bias and abuse of process was infringing natural justice and through preferential treatment in favour of the East End Mine via falsely assessed science, the Regulating Agencies were manipulating environmental approvals and minimising and frustrating landholder claims for alternative water supplies / compensation.

Despite the explicit nature of the supportive documentation the CJC response of 27 November was dismissive. They also made this intriguing comment quote,

- The Commission is of the view that the information provided by you does not reasonably raise a suspicion of official misconduct on the part of any office holder within a unit of public administration. In the Commission's view your complaint relates to concerns about government policy and administrative decisions, rather than official misconduct by any Member of Parliament or Departmental officer.
  Accordingly, the Commission has no jurisdiction to take any action in the matter.

In saying that they considered it a policy matter and that they has no jurisdiction it could be construed that the CJC understood that the Executive decision of Government overrode everything else and that the Regulating and Administrative Agencies were bound by that policy decision. They did not however openly spell out those circumstances.

In the *Connelly Ryan Inquiry Drew Hutton and Jim Leggate came close to extracting a legal determination on what constitutes the actual responsibility of the Regulating Officer when that officer is bound by policy on one hand and on the other required by a charter to enforce environmental or compliance issues in conflict with that policy. *To date there has been no Australian legal determination of where the law stands on this issue.* In the absence of such a determination, demonstrably the status quo prevails. I.e, political decisions hold sway. In the case of the East End Mine the capacity of departmental officers to act according to their charter is undoubtedly compromised by the sap flowing in the wrong direction. I.e, from the top down, rather than upwards as recommendations from the public servants to the minister. If, as we suggest, conscientious departmental officers are constrained from upholding the law and operating in good conscience, then they too, are victims of this process.
* See two page attachment of transcript of Connelly Ryan Inquiry in 1997.

Once again the question arises, is Executive Government entering into pre-emptive *contracts* between executive government and proponents to provide "project certainty" so as to facilitate funding for these massive projects?

- *The most outstanding requirement as of this moment is a legal determination of whether Executive power overrides legislation and the regulatory and administrative role of the public servant that is supposed to be enforcing these purportedly "stringent conditions and strong regulatory enforcements."*

If power is considered to rest with existing legislation and the role of the public servant then Executive Government in Queensland and elsewhere may be operating *Ultra Vires.*

On 11 December 2000 EEMAG lodged a second submission tailored to the CJC guidelines naming individuals and circumstances that we believed constituted official misconduct. On 22 December 2000 the CJC replied

- … that the information in relation to your complaint does not reasonably raise a suspicion of official misconduct by any public officer… In the absence of any cogent evidence of an improper or corrupt association between any public servant involved in the handling of this matter and any officer of Queensland Cement Limited, I am respectfully of the view a meeting with you would not be a productive use of the CJ C's resources.

Taking to its logical extension CJC required overwhelming prima facie evidence on a virtually proven criminal matter – in advance of any investigation. This level of proof is surely an unrealistic expectation that not only invites crime but must result in grave levels of corruption going unchallenged.

In 2006 the East End Mine applied for a new mining lease. EEMAG lodged public objections in the Land & Resources Tribunal that I drafted as a layperson when legal opinion was difficult to obtain over the Xmas New year period. In the hearing before the LRT it became apparent the grounds of objection under the individual sections of 269 of the Mineral Resources Act severely disadvantaged the presentations of those objections. Customarily, objections are drafted under the general provisions of Section 269 without recourse to the various individual components. As a consequence, some of our grounds were struck out and we had to abort the case without being heard. Contrary to the Ombudsman's conclusion the EEMAG executive did not prove sufficiently competent to be self represented.

Recommendations about easing the burden on the Courts.

In recent times the proliferation of mega sized mining projects and coal seam gas proposals has enlivened the debate about private right v public interest. What we are seeing on a grand scale is the erosion and distortion of public interest. The various States and Federal Government have enthusiastically adopted as policy**:** reduction of red tape, (based on the pretext of unnecessary duplication and delays) and abbreviated time frames for major projects and approvals granted under 'significant project status' via Coordinator General Departments and the likes without public objections.

The Federal government has indicated transitioning approvals to the states under a one stop shop process. From our experience, to entrust Queensland, where there is no Upper House, little effective opposition and executive government prevails, with a one stop shop without any oversight is a gross dereliction of duty.

In our view, our natural heritage, environment and public interest is being blatantly usurped and distorted by approvals to mine on strategic cropping land like the Darling Downs and Liverpool Plains while the risk of permanent damage to aquifers is for such landholders and others who value our clean green image for food production an untenable proposition. In consequence there is an unparalleled groundswell of opposition through the likes of Lock the Gate that has more than 160 member organisations, Get Up and Change Org etc as social media unites individual voices.

Lock the Gate's activities have lead to legal challenges by individuals supported by the Environmental Defenders Organisation. The response of Governments has been to reduce or cease funding of such organisations, obviously in the hope that such fiscal controls will curb their activities.

Yet this is not being borne out in practice. For instance, within the space of a couple of weeks campaigning social media was able to procure sufficient money to fund the Qld EDO to challenge the dumping of dredged spoil within the precincts of the Great Barrier Reef. This in turn appears to have triggered the Qld Government's proposed legislation to prevent public objections based on "philosophical objections." See EEMAG's response to the Qld White Paper on the hobbling of public objections where we highlight inherent dangers, including the increased risk of more legacy mines lumbering the taxpayer with unwanted remediation costs.

The actions of governments in trampling on democracy and disregarding the private right through intentionally and knowingly adopting a short term view as to what constitutes the real public interest is to be deplored. It can be seen such actions are contributing massively to unease as demonstrated by rallies and civil disobedience as honest and ultra conservative John Citizen takes offence and tries to protect the environment and his way of life. There is increased litigation as desperate individuals after failing through political representations or alternative means are driven to the desperate measures of seeking legal intervention or redress. Unlike the past where isolated individuals were subjected to divide and conquer tactics the large scale invasion of mining companies upon the primest and best land and aquifers is pitting them against whole communities – or other rich and powerful interests like cotton farmers, grape growers and horse studs.

If there is a genuine desire to reduce the incidence of litigation, but no political will to do so, then governments of all persuasions must be held accountable for the repercussions of their actions and contribute to offsetting the cost of the litigation that they are unwittingly provoking.

- EDO and the likes should be annually allocated a small percentage of funding through the States and Federal budgets. This should come as a matter of right for education and legal purposes and without strings attached as to what legal cases are financed.

For governments to take refuge behind reassurances of "stringent approvals and enforcement of conditions" in today's climate as we witness the raft of broken promises by politicians and members of the major parties resigning through graft, fraud, official misconduct, acceptance of bribes and capture by lobbyists as revealed by NSW's ICAC and other inquiries it is not reassuring or persuasive. Commonly, mining projects and fly in and fly out procedures are being imposed upon communities who will not give them a social license and do not want them. Through no fault of their own, affected community members may become blameless victims in the same way as those affected by the insulation scheme.

The water monitoring scheme associated with the East End Mine has operated for the past thirty seven years and is considered one of the best in Australia. Despite that, disputation continues over interpretation of the science, the extent of the mine's liability arising from mine pit dewatering and its continuous discharge as waste. Under the above average rainfall conditions of several consecutive years mine pit discharges have been authorised up to 30 megalitres a day. Given our evidence, for politicians and governments to offer bland reassurances of stringent conditions and safeguards to landholders whose much deeper aquifers may be potentially affected by coal and csg projects where monitoring is company sourced, minimal or non existent is duplicitous and misleading.

- For the above reasons we support the proposal that the commonwealth and the states should act as model litigants and that protective cost orders be introduced to protect individuals in public interest cases.

We also think it is wrong (and discriminatory) that no funding or awards of costs are made to pro bono or self represented litigants.

On the basis of the EEMAG experience this means that:

- an initially, poorly assessed project with subsequent adverse impacts that exceeds those projected (as will commonly occur) will continue to operate without the Environmental Authority ever being made accountable as has demonstrably happened in the case of the East End Mine. From our viewpoint the whole system is an art form of corruption.

EEMAG participated in a lengthy mediation within the East End Mine Community Liaison Group and later received one days training under the auspices of the Justice Department.

The recourse to mediation is further proof of a slippery slope within a Court system that already favours the rich and powerful and seeks to avoid precedential judgements.

Expert witnesses and presentation of evidence

For the duration of the conflict EEMAG has never had the opportunity to have the hydrology properly debated and analysed / decided in a suitably constituted and impartial forum. At one stage we spent eighteen months negotiating and preparing for an Open Technical Forum to clarify technical issues while being groomed to participate in arbitration that was being misrepresented as mediation.

This arrangement ultimately was aborted by government.

The only consultations offered to EEMAG came without empowerment of EEMAG delegates and our experts. Consultation without empowerment dishonestly preserves the status quo. After having been exposed to “placebo consultation” where debate occurs without genuine consideration of differing views it is obvious that such opportunities are a futile exercise.

- We suggest that expert witnesses should be exposed to “hot tubbing,” a process where the merits of the technical issue is discussed conjointly and when a particular point of view is unsustainable that the expert must concede on that point. It is therefore an accelerated progression towards a determination based on a process of elimination.

See Link for description, analysis, results www.aat/gov./au/Publications/SpeechesAndPapers/Downes/concurrent.htm

We are not opposed to a court appointed expert to assist with such supervision and guidance. However we do point out that an expert witness that might in some manner preside over and assist the court in a case like ours would need to be well rounded in say, both Darcian Flow and Karst aquifer characteristics.

Self representation

The basis of self representation is simple. The individual cannot afford the legal fees but feels so strongly about the issues that he feels compelled to participate. This participation may be a one in a lifetime event or so sporadic that past experiences prove of little or no benefit. This lack of funding can result in say, a preliminary hearing in Brisbane with the litigant participating via a phone hook up or by video conferencing. Whilst video conferencing is a poor substitute for being present in the Court, a phone hook up is entirely unacceptable. In our experience we had to purchase the transcript to find out what really happened.

The other points is that a self represented litigant who may have genuine prospects of appeal

1. cannot afford to participate
2. under newly introduced Qld law will be intimidated by the prospect of an adverse cost award.

Conversely, these limitations do not apply to the rich and powerful who have the added advantage and insurance of skilled professional representations.

Thank you for accepting our Submission.

Yours sincerely,

Alec Lucke,
Research & Communications Officer for
East End Mine Action Group Inc