WHAT PART DOES THE LAND COURT OF QUEENSLAND PLAY IN LAND ACCESS MATTERS

His Hon. Paul A Smith[1]

Member
Land Court of Queensland

In order to understand the role that the Land Court of Queensland plays in Queensland Land Access matters, it is first necessary to understand just what the Land Court of Queensland is. This question is not as easy as it seems.

As can be found by reference to various scholarly works, conference papers, and in the Annual Reports of the Land Court of Queensland, the Land Court is the second oldest court in Queensland, having been first established in 1897 to deal mainly with issues relating to Crown leasehold land. As the years and decades have passed, so to has the role and jurisdiction of the Land Court changed.

The most recent legislation establishing the Land Court is the *Land Court Act 2000*. Section 4 of the *Land Court Act* is of particular interest. It provides as follows:

> "**4 Establishment of Land Court**
> (1) A specialised judicial tribunal called the Land Court is established.
> (2) The court is a court of record.
> (3) The court has a seal that must be judicially noticed."

So, in short, the Land Court is a specialised judicial tribunal and court of record. What does that mean?

I could easily fill the conference paper with legal reasoning as to the question of the status of what the Land Court actually is, and what the proper way to refer to the persons who preside on the Land Court is.

The position has been made clearer by the relatively recent Court of Appeal decision in *Owen v Menzies & Ors*; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170. Part of the decision in *Owen* related to the question as to whether or not the Queensland Civil and Administrative Tribunal (QCAT) can be characterised as a court under chapter III of the *Commonwealth Constitution*. The Court of Appeal found that QCAT is a court of Queensland under section 77(iii) of the *Commonwealth Constitution*. The reasoning of the Court of Appeal gives the strongest indication that, similarly understood, the Land Court of Queensland is also a court of Queensland for the purposes of chapter III of the *Commonwealth Constitution*.

Next comes the vexed question as to what a person appointed to the Land Court should be called. The question is easily answered by reference to the form of address during formal court proceedings which, by way of Practice Direction, is to "your Honour". The more complicated question that I am regularly asked is "so you are a

[1] The views expressed in this paper are my own and not necessarily those of the Land Court of Queensland

judge?". To make matters as clear as possible, I should state categorically that my title does not include that of Judge, as in Judge Smith, but nevertheless I am part of the Queensland Judiciary and a judge (please note the small j) of the Land Court of Queensland. An example of such a reference to judge as relating to the Land Court is found in the *Land Valuation Act 2010* in section 174 as follows:

> "**174 Judge not disqualified for owning land**
> (1) This section applies for a valuation appeal or any appeal to the Land Appeal Court or the Court of Appeal concerning a valuation appeal.
> (2) A judge is not interested in, or disqualified from, dealing with a matter upon which the judge may be called to decide on the appeal merely because the judge owns land subject to a valuation.
> (3) In this section—
> ***judge*** means the president or a judge of the Court of Appeal or a member of the Land Court."

Land Court generally

Under the *Land Court Act* 2000 the Court as currently established consists of a President, and three Members as well as a Judicial Registrar. The latter is mainly responsible for the Court ADR process.

The Land Court has two divisions, a general division to which the vast majority of cases are referred and a cultural heritage division. Additional indigenous assessors can be appointed to sit on cultural heritage matters as required.

Appeals from the Land Court lie to the Land Appeal Court comprising a Supreme Court Judge (presently Justice Peter Lyons in the Southern District) and two Land Court Members. The Central, Northern and Far Northern Supreme Court Judges and two Land Court Members make up the Land Appeal Court in those districts. On average, about six to eight cases go to this level on appeal each year. Further appeal is to the Queensland Court of Appeal on questions of law and by leave. About two cases per year are appealed to the Court of Appeal. Very occasionally, a case proceeds to the High Court of Australia after grant of special leave.

Currently, jurisdiction is granted to the Court in well over 40 statutes.[2] There is no monetary limit on the Court's jurisdiction in any of its matters.

The vast majority of the Court's caseload revolves around four main areas. In brief, these are:

(a) compulsory acquisitions of land under the *Acquisition of Land Act 1967*;

(b) statutory valuations under the *Land Valuation Act 2010*;

(c) energy and resource matters under various acts including the *Mineral Resources Act 1989* (MRA). the *Petroleum Act 1923*, the *Petroleum and Gas (Production and Safety) Act 2004*, the *Geothermal Energy Act 2010* and the

[2] See the Land Court website www.landcourt.qld.gov.au and its Annual Report, 2012 – 2013.

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Greenhouse Gas Storage Act 2009, as well as other mining project specific acts; and

(d) environmental matters relating to mining under the *Environmental Protection Act 1994* (EPA).

Land Court's Role in Energy, Mining and Resources Law

The Land Court plays an important role in Queensland's energy, mining and resources law. It has a wide array of jurisdiction under the various pieces of legislation that make up this area of law. The jurisdiction relates to questions such as whether or not it is appropriate for various mining and petroleum tenements to be granted and, if they are granted, what compensation should be payable to landholders as a result of such grants. The Land Court also has important jurisdiction relating to land access at the exploration stage of energy and resource projects.

Looking first at the question of compensation, the Land Court deals with everything from the most simple of awards of compensation which may amount to only very small awards of compensation indeed, sometimes being under $100, to those in large projects where compensation may be in the hundreds of thousands or even millions of dollars. As already mentioned, there is no limit on the monetary award that may be made by the Land Court. Indeed, in one piece of special litigation currently before the Land Court, rough estimates have put the compensation claimed in that case within the realms of the hundreds of millions of dollars or billions of dollars. It should be noted that that is a special matter not relating to the usual landholder compensation but instead relating to compensation potentially payable by one mining company to another.

For those who are interested in reading more about determinations of compensation by the Land Court generally, I would refer to you to the recent Land Appeal Court decision of *Glencore Coal Queensland Pty Ltd & Ors v Keys & Ors* which can be found at [2014] QLAC 2 on the Land Court of Queensland's website under the decisions subheading (see – http://www.landcourt.qld.gov.au/decisions.asp).

The Land Court also plays an important role in considering objections to the grant of various tenures under the *Mineral Resources Act 1989* (MRA). After conducting a hearing on the objections, the Land Court either gives an instruction to the Minister responsible for the MRA (in the case of mining claims) or a recommendation to the same Minister (in the case of mining leases) as to what should occur with respect to the mining application in light of the objections. In short, the Land Court either instructs or recommends to the Minister that the mining tenement be granted; be granted on conditions; or refused.

It is worth noting that there has been some confusion as to the role of the Land Court when it comes to mining leases in only making a recommendation and not a determination, which one would normally expect a court to make. To appreciate how this has come about, one needs to understand the development of jurisdiction for mining matters in Queensland which for many decades resided in the Warden's Court, which was followed by a seven year period from the year 2000 when the jurisdiction was held by the Land and Resources Tribunal of Queensland, with that jurisdiction transferring to the Land Court in 2007.

Cases of interest regarding Land Court recommendations to the Honourable the Minister responsible for the MRA with respect to mining lease matters include the *Xstrata* case [2012] QLC 13 and that of *Hancock Coal* [2014] QLC 12, while a recent case of the Land Court deals with instructions to the Minister with respect to mining claims, that case being *Everest v Kowtun & Anor* [2014] QLC 22.

Land Access Law and the Land Court

Having hopefully explained what the Land Court is and the general nature of its jurisdiction, I now finally get to the point of this paper; that is, what role does the Land Court play in Land Access law in Queensland. My answer may however disappoint many of you, particularly if you have attended this forum hoping to receive a comprehensive dissemination of how the Land Court has decided (or better still will decide) all matters relating to Land Access and energy and resource law.

A couple of points should be abundantly clear regarding land access law in Queensland insofar as it relates to energy and resource law. Firstly, only a few cases have made their way to the Land Court under the relatively new legislative provisions relating to land access, and secondly, in light of the *Mineral and Energy Resources (Common Provisions) Bill 2014* significant aspects of land access law in this State will change in the event that that Bill is enacted. By the time I deliver this paper, you will already have heard from representative of government and other experts in the field explaining the impacts of the proposed legislative changes under the *Mineral and Energy Resources Bill*. There is no need for me to comment further on the proposed legislation. Further, in light of both that proposed legislation, and the excellent papers delivered already not only at this year's conference but at previous conferences, there appears to be little need for me to go into detail as to precise wording of each relevant section of each piece of legislation relating to land access and the Land Court. Besides, if I were to do so, in all likelihood all I would achieve would be to put most members of this esteemed audience to sleep!

A fundamental question though does need to be asked; that is, why have only a handful of cases been lodged with the Land Court relating to land access, and why have only one or two of those ever resulted in actual decisions of the Court? In my view, the answer to this question lies at the heart of the nature of the activities undertaken by exploration companies under the various resources and energy legislative frameworks. Take the case of *Peabody West Burton Pty Ltd & Ors v Mason & Ors*[3] for example. In *Peabody*, I determined compensation payable to the landholder under Schedule 1 of the MRA in the sum of $3,220. Although the Land Court seeks by its rules and procedures to be as user friendly as possible, it is a simple fact that the great majority of the population do not like the thought or concept of having to go to court to settle a matter. Often, of course, parties who would not otherwise choose to go to court do so because of the amount of compensation that they may be seeking in a matter. Where the amount of compensation sought is relatively high, it is much easier to justify the amount of time and expenditure on legal fees that may be required to peruse a case in the Land Court.[4]

Although there were a number of findings of the Land Court under various heads of compensation in *Peabody*, clearly, in my view, the main thrust of that case related to

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3 [2012] QLC 23.

4 Although of course many landholders, as well as small miners, self represent quite successfully before the Land Court.

the question as to whether or not compensation was payable in that case by the explorer to the landholder under the head of compensation "diminution of its value".[5]

The landholder in *Peabody* claimed $50,000 for diminution of value of the land. The miner argued that nothing was payable with respect to diminution of value. Indeed, as I pointed out at paragraph 34 of the decision in *Peabody*, the miner in that case argued that it was difficult to contemplate any circumstances which would result in a monetary award for diminution in value being made with respect to advanced exploration activities undertaken under an EPC.

The question as to whether the significant sum of $50,000 was payable to the landholder for diminution in value of the land thus became the central issue for determination under the *Peabody* case and, it would seem, the reason why the matter proceeded to formal decision and was not earlier settled via an ADR process. In short, *Peabody* became a form of test case as to the ability of landholders to recover money with respect to diminution of value.

At this point, it is worth noting an important aspect of the decision in *Peabody*. Although no amount was awarded to the landholder as regards diminution of value of the land, the Court rejected the miner's submissions that Schedule 1 of the MRA should be read as narrowly as the miner sought. As I noted in *Peabody*:[6]

> "[35] In my view, s.13 is not to be read as narrowly as the applicants would have the Court believe. There can be no doubt that Parliament clearly inserted diminution of value of the land as a head of compensation under s.13, Schedule 1. It did so for a purpose. In my view, it is easy to conceive of circumstances where the activities undertaken under an EPC may lead to a diminution in value of the land. One example springs readily to mind. I am of course speaking hypothetically, but if during the course of drilling activities an explorer inadvertently caused a fracture in an aquifer which was the major source of water supply for the subject property, and as a result of that fracture the capacity of that aquifer to hold water was severely diminished, then I would have no doubt that such hypothetical exploration activities would cause an actual diminution in the value of the subject land compensatable under s.13 of Schedule 1.[7] In such circumstances, I would expect that valuation evidence as to the diminution of value of the land as a result of the loss of the aquifer would be quite easily identifiable through sales evidence of comparable properties with and without access to a like aquifer.
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> [36] The question then falls to be answered: does the evidence in this matter support any award for diminution in value of the respondents' land?
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> [37] In my view, Mr Jinks has done an admirable job in establishing a causal link between exploration activities; the mining in the general area; and a risk that, if the exploration activities find a workable level of coal, there is a real risk of additional mining activity being undertaken on the respondents' land. In my view, however, the nature of the risk as set out by Mr Jinks is beyond the scope of that envisaged by s.13 of Schedule

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5 See Schedule 1, s 13(4)(a)(ii) of the MRA.

6 At paragraphs 35 – 38.

7 In these hypothetical circumstances, the compensation would arise under s.23 of Schedule 1.

1. Try as he did, in my view, Mr Jinks was unable to link any diminution in value to the actual exploration activities to be undertaken on the land. His concept of diminution of value, in the particular circumstances of this case, more readily arises, in my view, in light of the heavy mining activities already being undertaken on and around the subject property, as well as the significant Government infrastructure (including the recently opened "missing link" coal freight line) in the locality, and therefore outside the scope of Schedule 1.

[38] Strictly on the evidence before me in this matter, I am not satisfied that the respondents have successfully made out a claim for diminution in value of the subject land in any amount whatsoever."

If you undertake a simply Google or other search engine enquiry for cases in Queensland relating to land access, your query will inevitably be linked to both the reported decision in *Peabody* and to the numerous articles that have been written relating to that decision. However, very little reference, if any, seems to be made to the other Land Court case in which a decision has been written relating to land access, that being *Endocoal Limited v EMIN Pastoral Company Pty Ltd & Ors*.[8] Importantly, *Endocoal* relates only to a preliminary point. The miner commenced Land Court proceedings in order to gain access to a landholder's property for the purpose of exploration activities. The landholder sought to strike out the miner's application on the basis that the miner had not properly complied with the provisions of Schedule 1 of the MRA. From a legal purists perception, *Endocoal* may be of little value given that the dispute between the miner and landholder was subsequent settled at court ordered mediation. However, *Endocoal* does show the complex arguments that can arise when interpreting legislative provisions such as Schedule 1 of the MRA, as well as the strength of powers that the Land Court has in dealing with matters relating to its jurisdiction, which is apparent from the *Endocoal* case by the Land Court's order restraining advanced exploration activities for a period of ten days.

For the benefit of those who have not been previously aware of the *Endocoal* decision, set out below are paragraphs 1 to 12 of that ex tempore decision:

"[1] In this matter, the applicant Endocoal Limited filed an originating application in the Land Court on 17 February 2012. The application was pursuant to schedule 1 s.22 (3) of the *Mineral Resources Act 1989*. In response to that originating application the respondent landholders, EMIN Pastoral Company Pty Ltd & Ors filed a general application on 12 March 2012 seeking a strike out of the originating application. The hearing of the strike out application was listed for today before myself. At the commencement of the hearing of the strike out application I granted leave to the applicant to file an amended originating application. The main force of the difference between the originating application and the amending application is that the documents make it clear that the parties have been unable to agree to the terms of the conduct and compensation agreement.

[2] When one reads the material and the originating application in light of the amendment, the position appears to be that the dollar amount of compensation for the impact of the activities on the land has been

[8] [2012] QLC 11.

agreed between the parties but the manner in which the advance activities are to be undertaken on the land has not been agreed or in simple terms the conduct of the parties has not been agreed to.

[3] Of course there are statutory provisions which apply to the conduct of the applicant in these proceedings. In itself, schedule 1 has a complicated arrangement with respect to the determination by the Land Court of compensation which is dealt with under s.22 of schedule 1 as well as questions relating to the conduct and compensation which is dealt with under s.25, s.26 and s.27.

[4] The manner in which these sections inter-relate with the provisions in s.5 of schedule 1, which refers to a Land Court application exemption which then links to s.11 of schedule 1 relating to a s.22 application is one which has never been considered by any Court in this State and is a matter of considerable importance.

[5] In the circumstances of this case I considered it appropriate to allow both Mr Stork for the applicant and Mr Houen for the respondents an opportunity to take further instructions and to undertake further detailed research into the inter-relationships between the various provisions of schedule 1 and the legislative differences relating to compensation as opposed to conduct.

[6] Of course this is at the heart of Mr Houen's strike out application as he is in effect saying that there has been no valid referral to the Court and in the absence of a valid referral to the Court the applicant is not able to rely upon the Court exemption as referred to s.5 and s.11. This is obviously a serious matter for the explorer in this case and for the landholders and is not a matter I wish to consider lightly.

[7] Both parties have indicated a desire to proceed to mediation; certainly the applicant has and Mr Houen has indicated that his client would be prepared to enter into mediation if so ordered by the Court. It has also become clear that some advanced activities may already have begun.

[8] In accordance with the notice that has been issued, it is my view that until the determination of Mr Houen's general application, the status quo should remain in place between the parties particularly when complex law is being considered as in this case.

[9] On the basis of the limited facts that I have before me, I understand that all the applicant is undertaking at this stage is preliminary activities and that there will not be major difficulties placed on the applicant by ordering the non-carrying out of advanced activities until this matter is determined.

[10] Accordingly, I have decided to refer this matter to urgent mediation before Member Isdale of this Court. Such mediation is to commence at 11am on Tuesday, 20 March 2012.

[11] I further propose making orders specifically allowing the applicant to proceed with preliminary activities in accordance with its notice.

[12] I propose ordering that advanced activities be restrained until 5pm on Monday, 26 March 2012. "

I expect that, whatever the legislative provisions are relating to land access and energy and resource matters, the bulk of cases will be settled as a result of discussions between explorers and landholders, whether those discussions are on an informal basis or more formally before any independent person, mediator, or whatever. However, there will always be cases, when either legislation is being considered for the first time and important questions are raised as to the impact of the legislation, or where circumstances are such that an explorer wants to explore on a certain piece of land that a landholder considers should never be explored on, or other pertinent circumstances, where the Land Court is called upon to determine a dispute between an explorer and a landholder. This indeed is the proper role of the Land Court; to be the decision maker when all other avenues of resolution of a matter have failed.

I am sure that participants at this conference eagerly await the next decision of the Land Court relating to land access, whether it be a decision under the existing legislation, or the resolution of a dispute under the proposed new legislation should it be passed into law.

Conclusion

I hope that this brief foray into the jurisdiction of the Land Court of Queensland has helped shed some understanding onto the reader of the role that the Land Court of Queensland plays in Land Access matters in Queensland.