

Review of the Mining Objections and Related Jurisdiction of the Land Court of Queensland

*Fleur Kingham
President, Land Court of Queensland
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In August 2016, when I was appointed President of the Land Court, I undertook to conduct a review of procedures for hearing objections to mining leases and associated authorities. This statement reports on the status of the review.

The consultation process

It seemed sensible to start the review by asking for feedback from those with an interest in and experience of Objections Hearings. To encourage frank contributions, the Court engaged Mr Barry Walsh, an independent consultant with a history of working in court registries and extensive experience in consulting stakeholders about court processes. He sought feedback about the strengths and challenges administering the Land Court's procedures and constructive proposals for reforming them. He received 11 written submissions and held 22 meetings with individuals or groups. He provided a report on his consultations with stakeholders who accepted the opportunity to meet and raise issues and ideas on the mining jurisdiction and, drawing on the feedback Mr Walsh received, he made some recommendations for the Court's consideration.

The Land Court's role in hearing objections to mining leases and other approvals is administrative. It occurs before the decision is made by the ultimate decision-maker. So it occurs within the context of a larger administrative regime. It is not surprising, then, that those consulted raised matters beyond the scope of the Court's function or power, such as questions of government policy and legislation.

As an independent judicial tribunal, the Land Court must maintain the distinction between matters relating to the administration of the Court and disposition of its case load, on the one hand, and matters relating to government policy and legislation, on the other. Generally, it is not appropriate for a representative of the Court to publicly comment about government policy and legislation.¹

I undertook to relay feedback about government matters to the Ministers with relevant responsibilities. That has been done; without comment by the Court. The following is a brief summary of government issues raised during consultation:

- identifying, in advance, areas which can and cannot be mined;
- improving the process for preparing, responding to and assessing Environmental Impact Statements;
- reviewing the requirements for objections which trigger an objections hearing;
- reconsidering the administrative role played by the Land Court or reviewing how the Court's function in that role is supported and resourced – particularly for projects of state significance;

¹ Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches Adopted by the Council of Chief Justices of Australia and New Zealand <http://www.jca.asn.au/wp-content/uploads/2013/10/Guidelines-Judicial-Legislative-Executive-Government.pdf>.

- considering the duplication of criteria that must be considered for different approvals;
- considering the extent and nature of involvement of government parties in objection hearings;
- considering whether objection hearings should be the only means of challenging approvals;
- improving enforcement of conditions of approval; and
- supporting regionally located and self-represented parties to participate in objection hearings; particularly by providing legal assistance and better access to transcripts and on-line resources.

The recommendations about Court procedures and the Court's response

The consultation occurred before the objections hearing for the New Acland mine² concluded. Much of the feedback was coloured by the experiences of parties in that case. It is the longest running objection hearing in this Court. The hearing was recently re-opened when the applicant for the mining lease sought to lead further evidence on an important issue.³ While the Court can expect that each year it will be managing a complex objection hearing, most objection hearings are less complex and take less time to finalise.

Based on analysis of mining objection cases lodged since December 2013, the Court processes an average of 11 new mining objection cases a year. 65% of cases are withdrawn, sometimes after mediation, and are finalised without a hearing. This typically occurs within 12 months. On average around four cases a year are likely to go to hearing – and of those, three are likely to require less than 10 days of courtroom hearing time. When cases do proceed to a hearing, they are typically finalised within 24 months after they are lodged.

Although the New Acland hearing is an outlier, Mr Walsh concluded the presiding member had to navigate avoidable obstacles because of factors addressed by his recommendations: such as the absence of a case management policy governing the procedures for objections hearings; inadequate Court rules, such as the power to require production of documents; and limited registry support arrangements to deal with the demands and needs relating to major hearings. In that sense, he concluded the Court as an institution was not well prepared to hear the case.

There is much the Court can do to improve its formal systems of court administration and case management and to provide better information to the parties in Objections Hearings. A summary of the recommendations about those matters and the Court's initial response is set out below.

Case management rules

Mr Walsh recommended the Court make and publish comprehensive rules & Practice Directions dealing with Objections Hearings to provide guidelines for the legal profession and self-represented objectors for the case management of mining objection cases. He proposed the Practice Directions should be comprehensive and expressed in language readily understood by

² New Acland Coal Pty Ltd -v- Frank Ashman and others, MRA496-15, MRA497-15 & EPA495-15, Land Court of Queensland.

³ *New Acland Coal Pty Ltd v Ashman & Ors (No. 3)* [2017] QLC 1.

non-lawyers, incorporating and expanding on the types of information already provided in Court fact sheets.

The Court has established an *Objections Hearing Working Party* to develop special purpose procedures for Objections Hearings. The recommendations by the *Objections Hearing Working Party* will be discussed at the *Resources User Group*, soon to be established by the Court. If the *Objections Hearing Working Party* also recommends changes to the *Land Court Act 2000* or the *Land Court Rules 2000*, I will initiate the necessary processes as soon as practicable.

Court performance standards

Mr Walsh recommended the Court identify the service standards the Court aims to meet, such as timeliness standards for commencing hearings, completing hearings and producing a final decision. He also recommended the Court report on the extent to which it meets those standards in its annual reports.

There are two aspects to Mr Walsh's recommendation. One aspect is the timeliness standard to finalisation. The other is the timeliness standard for delivering a reserved decision. The Court has already adopted a timeliness [standard for reserved decisions](#) modelled on the protocol adopted by most Australian courts and tribunals. That is three months from the date of final submissions.

As to the time to finalisation, Mr Walsh recommended the Court should adopt the measure that most Australian courts report on: the number of cases which are more than more than 12 months old (the goal being no more than 10%); and the number of cases which are more than 24 months old (the goal being 0%).

The Court is committed to reporting its performance in annual reports. The reporting parameters are being developed for the next annual report (due by 31 October 2017). It is likely they will include reports on the Court's performance overall, as well as in specific jurisdictions.

As well as using the timeliness standard to report against, I will use them proactively to monitor and manage the Court's caseload.

It must be acknowledged, however, that no Australian court could realistically accept that it be bound by general time limits without regard to the nature and complexity of the individual case. Some mining objection cases will be intrinsically complex and vigorously contested. Timeliness is affected by factors which the Court cannot control. For example, the hearing may be delayed while other approval processes are progressed. Further, the Court must accord the parties procedural fairness which may prevent the time standard being achieved. The Court will also look to the parties to ensure that they assist the Court to finalise matters in a timely way. This fits with another recommendation made by Mr Walsh about the Court's expectations of parties.

Roles and expectations of parties

Mr Walsh recommended the Court clarify the roles of parties in Objections Hearings and the standard of conduct expected of them. The *Objections Hearing Working Party* will also address this issue. Rule 5 of the *Uniform Civil Procedure Rules 1999* provides a model for the Court to consider. It implies an undertaking by all parties that they will proceed in an expeditious way. It authorises the Court to impose appropriate sanctions if a party does not comply with

the Rules or an order of the Court. The Court does have the power to order costs as a sanction in an appropriate case. The Court's power to impose other sanctions usually available to courts, such as dismissing a claim, cannot be translated easily to the Land Court's administrative function in Objections Hearings. The *Objections Hearing Working Party* will consider what sanctions would promote parties fulfilling an obligation to proceed expeditiously in Objections Hearings. The Court will consult with parties, including statutory parties, and their representatives about this matter.

Information for parties and procedural advice

Mr Walsh recommended the Court expand the range of information it makes available to the general public about procedures in Objections Hearings. The information on the Court's [website](#) has recently been rewritten to improve its accessibility. However, more specific information about mining Objections Hearings is required. As well as developing a Practice Direction, the Court has now commenced developing further information for parties and for the Court's website.

Another recommendation about procedural matters made by Mr Walsh was that the Court's Registry officers provide procedural advice. A service of that nature is offered for the Supreme and District Court. The Registrar will consider and adapt the model used for those Courts. The Court's response to this recommendation will maintain the critical distinction between procedural assistance and legal advice. It is not appropriate, and the Court's staff will not be able, to give legal advice.

The Land Court Registry staff will be provided with in-depth training on an ongoing basis to ensure the distinction between procedural advice and legal advice is adhered to as part of the commitment to registry excellence.

Court-annexed mediation

Mr Walsh recommended the Court publish a rule or Practice Direction to establish a Court-annexed mediation scheme which defines the procedures for conducting mediations and the qualifications for accreditation as a mediator considered acceptable to the Court.

In the past, the Court has offered mediation by Members, but more often by the Judicial Registrar. Since my appointment, I have assumed case management of all matters before the Court. I have made greater use of Members in mediation in all types of cases. Recently, I have consulted widely on a draft Practice Direction which deals with mediation by a Member or Judicial Registrar. That should be issued within a few weeks.

Mr Walsh's proposal to develop a panel of mediators acceptable to the Court involves a new role for the Court in mediation. That proposal is now under consideration by the Court's ADR Working Party. Already, the Court has received feedback from a number of stakeholders who support the Court developing and using such a panel. Once the ADR Working Party has considered the proposal, I will consult externally about the Court's response to this recommendation.

Concurrent evidence

Mr Walsh recommended the Court should develop and adopt rules and Practice Directions that define and foster the use of concurrent evidence as a technique for hearing the evidence of expert witnesses.

Expert evidence is a key aspect of most Objections Hearings. The Court has issued a [Practice Direction](#) about concurrent evidence. Ultimately, it will be a matter for the Member conducting the hearing; but parties are encouraged to consider and prepare for it at an early stage in the case. A Member presiding over a concurrent evidence session will be trained in the process. The Court also intends to conduct a seminar for legal practitioners and parties who are interested in learning how to prepare for and conduct themselves in a concurrent evidence session.

Disclosure rules

Mr Walsh recommended the Court should make a rule governing the making of orders for disclosure of documents. Recently, the government consulted stakeholders about this issue and, currently, the Court has no general or specific disclosure power for Objections Hearings. The *Objections Hearing Working Party* will consider options for a specific and limited disclosure power which protects confidential and commercially sensitive material. If it proposes a rule of that nature, that would require an amendment to the Land Court Act 2000. I would raise any proposal with both the *Resources User Group* and the government.

Resources User Group

Mr Walsh recommended the Land Court establish a user group to consult on matters of Court administration and case management, including about the content of proposed rules and Practice Directions.

The Court is in the process of establishing a number of consultative groups, including a *Resources User Group*, to provide a channel of communication between the Court and its stakeholders. I will report on the activities of these groups in the annual report.

Conclusion

There is much yet to be done to respond to the issues raised during consultation. I will report on outcomes in the next annual report. I anticipate that, by then, the Court will have:

- clarified the Court's procedure for Objections Hearings;
- proposed amendments to the Court's Act and Rules; and
- implemented administrative systems to better implement and communicate the Court's procedure for Objections Hearings.



Fleur Kingham
President
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