WHAT PART DOES THE LAND COURT OF QUEENSLAND PLAY IN THE 'GAME OF TOMES'

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In an endeavour to keep my paper as relevant and consistent with the theme of this conference as possible, my first issue was trying to work out what on earth a 'Game of Tomes' actually is.

Of course, the logical and scholarly way of answering this question is to turn to an authoritative source such as The Macquarie Dictionary Federation Edition which helpfully has definitions of both keywords, "game" and "tome". A definition of "game" which is most probably relevant, but somewhat boring, is "*a proceeding carried on according to set rules as in a game*". More interesting though is this definition "*a contest for amusement in the form of a trial of chance, skill, or endurance, according to set rules; a match*". Although our legal system, through its courts, attempts to enforce the law in a logical and predictable manner, no doubt many in the audience have at times wondered if going to court is more of a "*trial of chance*". Perhaps more assistance is to be had by looking at the definition of 'tome'?

The Federation Edition again comes to my rescue when I seek a definition of 'tome'. It contains the following definition: "*1. A volume forming a part of a larger work. 2. Any volume, especially a ponderous one*". Does that mean that the purpose of my paper is to look at the role that the Land Court plays in a large, ponderous, game of chance? Perhaps I need to do some further research!

It is time to turn to the font of all wisdom; the internet, using the Google search engine. After typing in the simple Google search of 'game of tomes', I am immediately met with a plethora of valuable information. One entry helpfully informs me that 'game of tomes' is the topic of an upcoming QELA conference. One website gives meaning to the term 'game of tomes' by indicating that the phrase is best described by reference to a quote from Catherynne M Valente's work *The Girl Who Circumnavigated Fairyland in a Ship of her Own Making* as follows:

> "*But no one may know the shape of the tale in which they move. And, perhaps, we do not truly know what sort of beast it is, either. Stories have a way of changing faces. They are unruly things, undisciplined, given to delinquency and the throwing of erasers. That is why we must close them up into thick, solid books, so they canoe get out and cause trouble.*"

I continue my Google searching, and think I have found one of those eureka moments when I see that "game of tones" is the 137th episode of Futurama, where the crew journeys into Fry's dreams to seek the meaning of a mysterious alien melody. My thoughts turn to simply running the episode of Futurama during my allocated time to speak until a dark reality suddenly strikes me – Futurama will be of no assistance at all

as it relates to a **game of tones** and not **tomes**! Perhaps I am best to stick with the dictionary definition of a large ponderous work relating to a game of chance!!

In order to understand the role that the Land Court of Queensland plays in Queensland planning and environment law, 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 be 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.

Although there has been some suggestion made that the Land Court is nothing more than a non judicial tribunal, the position has been made clear 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 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."

Accordingly, the formal title for a Member of the Land Court such as myself is:

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Having hopefully explained what the Land Court is, I now finally get to the point of this paper; that is, what role does the Land Court play in planning and environmental law in Queensland.

From the perspective of an outsider looking in, I have little doubt that a general bystander could be confused as to the role that the Land Court plays in planning and environment law compared to that of the Planning and Environment Court. In preparing this paper, I am acting on the presumption that all conference delegates are quite familiar with the role that the Planning and Environment Court plays in Queensland's planning and environmental law.

I have looked closely at the conference topics and note that quite a number of them relate directly to the Land Court's jurisdiction, these being:

- Energy, mining and resources
- Federal and State environmental issues, including vegetation clearing, offsets and coastal management
- Built and natural heritage
- Infrastructure
- Planning issues, particularly as they relate to significant compulsory acquisition cases

I will attempt to give some overview as to the jurisdiction that the Land Court has within each of these fields.

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 Queensland energy, mining and resources law. The jurisdiction relates to issues of questions as to 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. 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, I would refer to you to the very 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.

Although there is no doubt that the recommendations made by the Land Court with respect to major mining projects are an important aspect of the Land Court's jurisdiction, it is important to understand that such matters relate, numerically at least, to a relatively small percentage of the overall jurisdiction of the Land Court. For instance, in the 12 months to 1 May 2014, 19 matters out of 723 matters lodged with the Court (or, in other words 2.6%) related to objections to the grants of mining tenures (and of course this number includes mining claims for which the Land Court has a role of instruction to the Minister and not recommendation).

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 very 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.

Federal and State environmental issues including vegetation clearing, offsets and coastal management

Even if the *Xstrata* and *Hancock* decisions referred to above are given little more than a cursory glance, it will immediately become evident that an important aspect of the Land Court's jurisdiction closely tied to that of considering objections to mining leases is a consideration of objections to the grant of environmental authorities relating to mining tenements. As *Xstrata* and *Hancock* show, the environmental issues that the court has to take into account are as far reaching as one can imagine. Again, as in the case of mining leases, the court makes a recommendation to the Honourable the Minister regarding environmental objections, although the *Environmental Protection Act 1994* (EPA) which is the relevant legislation is worded somewhat differently in that it refers to the Land Court decision in making a recommendation. Just as was the case with objections to mining leases, objections to environmental authorities make up approximately 2.5% of the Land Court's jurisdiction. The hearing of objections under the MRA and the EPA are by far the two main aspects of jurisdiction of the Land Court that involve anything that can be considered as other than a final determination by the court. Ninety-five percent of the Land Court's caseload is fully determinative in nature, with no monetary limit.

It would be a mistake to think that the jurisdiction of the Land Court in environmental matters relates only to the hearing of objections under the MRA or the EPA. The Land Court also has important jurisdiction relating to the granting of water licences under the *Water Act* 2000, and is also regularly called upon to take into account environmental features of land when determining valuations under the *Land Valuation Act 2010* (LVA). Further, environmental concerns are often interwoven into cases relating to the protection of indigenous cultural heritage under the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*.

Environmental considerations may also be relevant when the court hears cases relating to the determination of compensation under the *Acquisition of Land Act 1967* (ALA).

Built and natural heritage

As already indicated, the Land Court has important jurisdiction in dealing with indigenous cultural heritage. However, issues relating to heritage protection orders relating to the built environment post European settlement are also considered by the Land Court, particularly in determining questions of value of land under the LVA.

An interesting decision which relates to the impact of a heritage listed tree on the unimproved value of a property was the case of *Morris v Valuer-General* [2011] QLC 78.

Infrastructure

Issues relating to infrastructure law may come before the Land Court in a number of ways. There are often issues relating to infrastructure linked to major mining projects. Additionally, whenever the State Government requires the resumption of land for infrastructure purposes, it is the Land Court of Queensland which is tasked with the job of determining the proper compensation that should be paid to the dispossessed landholder. See for instance the decision of the Land Appeal Court of Queensland in the case of *Brisbane City Council v Bortoli* [2012] QLAC 8 which related to

compensation payable following the resumption of land for the North-South Bypass Tunnel Project in Brisbane. Further, the Land Court currently has before it a number of cases arising out of the resumption of land for the Northern Water Pipeline Interconnector Corridor which travels between Brisbane and the Sunshine Coast.

An infrastructure case which arose out of indigenous cultural heritage proceedings under the *Aboriginal Cultural Heritage Act 2003* and which may be of interest to some conference attendees was that of *State of Queensland v Wesley Aird & Ors* [2008] QLC 208 which related to the proposed construction of the Gold Coast University Hospital.

Planning issues, particularly as they relate to significant compulsory acquisition cases

An important aspect of the work of the Land Court over many decades has been the determining of compensation in ALA matters as referred to earlier. The point which might not however be completely recognised is the very important role that town planning evidence may play in the determination of those acquisition cases.

One of the important roles of the court in determining the compensation payable to a dispossessed owner in an ALA case is the highest and best use that the landowner could have put his land to but for the resumption of the land by the State. In order to ascertain the highest and best use of the acquired land, complex town planning evidence is often provided to the Land Court relating to hypothetical developments that could have been placed on the subject land at the date of acquisition.

It goes without saying that the determination of the highest and best use of the land may have a very significant impact on the overall amount of compensation that a dispossessed landholder is awarded by the Land Court.

I could give a myriad of examples of acquisition cases before the Land Court which have involved significant town planning evidence. A series of cases that may be of some interest relate to the *Mio Art* original Land Court decision and subsequent appeals. I am sure that anyone with a keen interest in this area of the law would be fascinated by the various *Mio Art* decisions; they being [2009] QLC 177; [2010] QLAC 7; [2011] QCA 234; and [2012] QLAC 5.

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 determining matters relating to planning and environment law in Queensland, and in particular how that role is distinct to that played by the Planning and Environment Court of Queensland.

If the distinction remains somewhat murky, what else can I say but, what would you expect when playing a “game of tomes” in Queensland’s planning and environment law?