

Property Law Forum

Tuesday 13 March, 2018
Mercure Brisbane, North Quay

Procedural changes in the Land Court
Member Bill Isdale, Land Court of Queensland

Background

- [1] In order to appreciate the significance of recent procedural changes in the Land Court it is helpful if I say a few words about the Court. Not everyone can be assumed to know much, if anything about the Land Court. It has a rather low public profile, perhaps principally because it does not deal with criminal cases which tend to attract a lot of attention.
- [2] That is not to say that the cases which come to the Land Court are not important. Everyone's legal dispute is important to them and some are huge. When land is resumed from its owner for public purposes a dispute regarding how much compensation must be paid comes to the Land Court. Millions of dollars are frequently in issue. When, for instance, a new mine is being proposed, the Court may hear objections and make a recommendation. Most of the matters that come before it are for decision; mining recommendations are an examples of an administrative aspect of the Courts jurisdiction, most of which is judicial, like other Courts.
- [3] The Land Court can order that someone be imprisoned, if that is necessary to deal with a contempt of the Court.
- [4] The Courts' low public profile should not be misunderstood. In fact, it is in my view an indicator that a Court is doing its job well when it is not controversial.
- [5] The Courts' decisions are all available to everyone as they can be found on the Courts' website where decisions of the other Courts of Queensland are published.
- [6] The Land Court is the second oldest Court in Queensland, after the Supreme Court and the 4 Members of the Court are led by the President. The President is remunerated at the same level as a Justice of the Supreme Court and Members at the same level as a Judge of the District Court.

- [7] There is no monetary limit to the value of claims which the Court can decide, in this it is like the Supreme Court. The Land Court also has an equitable jurisdiction, like the Supreme Court.
- [8] The Court is organised into two divisions, General and Cultural Heritage. In the General Division are such matters as compensation claims for land resumption and appeals from the Valuer-General's valuations of land. Members may sit in either division.
- [9] A case which I dealt with in the Cultural Heritage division will illustrate some of what the Court does.
- [10] There is a new road being built up the range to Toowoomba. There was an urgent application made to the Court by an applicant concerned that aboriginal cultural heritage might be about to be destroyed by the road works. The application was heard urgently and into the evening. The Court immediately issued an interim injunction to stop any threat to the areas in question.
- [11] There was no news report. Within a week the Court sent the dispute to mediation. It was resolved without any fuss and hardly anyone knows that is happened. The project continues and the cultural heritage will be protected. The Court has been successful without being controversial.

The Courts' workload

- [12] To appreciate the importance of the changes, it is also helpful to know the amount of work which the Court is presented with.
- [13] For comparison purposes, and the Land Court does a lot of comparing, particularly when the value of land is in issue, it is useful to look back just a short time, to the 2014-2015 financial year.
- [14] The workload then was-

Types of Cases	Filed	Finalised	Active as at 30 June 2015
Land Valuation Act appeals	373	398	141

Valuation of Land Act appeals	Nil	2	Nil
Mineral Resources Act objections and compensation referrals	167	193	128
Environmental Protection Act Objections and appeals	26	21	24
Acquisition of Land Act claims	9	32	23
Local Government Regulation appeals	15	14	11
Land Act appeals	Nil	4	Nil
Petroleum and Gas (Production and Safety) Act appeals	Nil	1	1
Water Act appeals	1	1	Nil
Other matters	1	Nil	1
Total	593	666	329

[15] Moving to the 2016-2017 financial year, the figures look a little different. In summary, they are-

Case field	Filed
Land Valuation	994
Resource Disputes	130
Land Acquisition	14
Cultural Heritage	4
Rating Categorisation	6
Others	2
Total	1,150

[16] Total cases finalised 1,210. Clearance rate 105%.

- [17] At the end of the financial year there were 308 active files. Of these, 292 (95%) are less than 2 years old and 16 (5%) are more than 2 years old.
- [18] Of these cases, 140 (45%), are valuation disputes, 136 (44%) are resources disputes, 18 (6%) acquisition of land matters and 14 (5%) others.
- [19] By the time of the Annual Report, there were no judgments outstanding beyond the 3 month standard which the Court sets for itself for delivery of a judgment after a hearing has been concluded.
- [20] While those figures are impressive and you may be wondering how it is that so much could be achieved by so few; there is more. The Courts' operating expenses for the Registry were a thrifty \$1,539,401.
- [21] The key to the Courts' performance in resolving disputes is its use of Alternative Dispute Resolution. Last financial year Court Alternative Dispute Resolution finalised 798 cases, 789 of them valuation disputes.
- [22] All judicial officers of the Court participate in these processes, which may be by way of a Preliminary Conference which might take an hour to a mediation which might take more than a day. Retired Court Member Professor Bob Scott and retired court President Mr John Trickett also conduct mediations privately, resolving many difficult cases with their case experience and enviable skill.
- [23] By far the most outstanding achievement in resolving disputes by Alternative Dispute Resolution has been demonstrated in every year since his appointment in 2015 by Judicial Registrar Graham Smith. Graham forms a team with Deputy Registrar Chris De Marco that just works, and works.
- [24] The success of resolving disputes quickly and inexpensively has been incorporated in to the Land Courts' procedural changes to which I will now turn.
- [25] These are not ad hoc but are a planned part of the Strategic Plan, which is set out below.

VISION

The Land Court will be an exemplary forum for specialist dispute resolution, providing exceptional public value through accessible, flexible, just, fair, and innovative services and procedures.

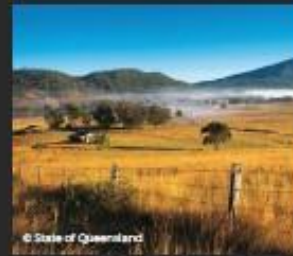
MISSION

The Court hears and determines matters relating to land and other natural resources. The Court:

- Hears appeals against land valuations
- Determines claims for compensation for the resumption of land
- Hears objections to the grant of mining tenures and environmental authorities for resource projects
- Determines compensation for mining activities and compensation and land access for other natural resources activities
- Hears appeals against local government rating categories
- Determines disputes regarding Indigenous land use agreements and cultural heritage issues

GUIDING VALUES

- Equality (Before the Law)
- Fairness
- Impartiality
- Independence of Decision Making
- Competence
- Integrity
- Transparency
- Accessibility
- Timeliness
- Certainty



LAND COURT OF QUEENSLAND

STRATEGIC PLAN

STRATEGIC OBJECTIVES

- Align and develop systems to deliver better public value.
- Develop consistent and effective leadership.
- Build our capability and performance.
- Strengthen our internal and external relationships and alliances.

MINING OBJECTION HEARINGS

The Court will implement a reformed procedure for hearing objections to mining leases and associated environmental authorities. The procedure has been developed following extensive consultation with the objective of furthering the guiding values for the Court.

SPECIALIST ADR (ALTERNATIVE DISPUTE RESOLUTION) PANEL

The Court will establish and train a panel of ADR practitioners with particular qualifications or experience of relevance to the specialist jurisdiction of the Court. The Court will appoint practitioners from the ADR Panel to assist in resolving matters before the Court. Parties can also access practitioners from the ADR Panel by agreement for pre-filing ADR. The Court will pilot a low cost fixed fee ADR service for mediating small mining disputes in regional areas.

DATA INTEGRITY

The data maintained in the case management system is often not reflective of either what is on the file or what has occurred in the matter. An audit of file data and improved procedures will address this for future records. The Court will devise and implement a process for addressing past inaccuracies in data to ensure performance reporting is robust.

CASE MANAGEMENT SYSTEM TEMPLATE REVIEW AND REDESIGN

The current templates on the Caseworks case management system are outdated and inconsistent. A Land Court registry business content expert will work offline to review all templates and update as necessary. An information technology professional will redesign and install the updated version of templates.

OTHER REGISTRY REFORMS

The Court will review and restructure the Registry to build its capability and performance. The Court will also modernise, document and implement consistent registry practices and procedures.

PROCEDURAL ASSISTANCE

The Court will offer a procedural assistance service for self-represented parties. This will be a service that observes the distinction between procedural assistance and advice and connects self-represented parties with suitable support services.



LAND COURT OF QUEENSLAND

STRATEGIC PLAN

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- [26] A group of mediators drawn from Court staff and the private sector has just completed their training and is moving towards accreditation. There are some very widely experienced and impressively qualified people in the group.
- [27] New Practice Directions have been issued to regulate such things as Direct Access Briefing where a barrister accepts a direct brief in the Court rather than being instructed by a solicitor.
- [28] The list of cases is managed by the President who will decide when the time is right to allocate a case to a Member for hearing.
- [29] Litigants may expect to have mediation offered to them or to be directed into mediation to resolve, or at least to find the minimum scope of their dispute that might have to be resolved by a court hearing. In many cases some, at least, matters can be agreed, even if it is only on the basis that, for instance, if the Court finds such and such then, say, the value would be that. Even a partial agreement can reduce the time and cost spent in litigation and allow the parties to have a reduced uncertainty in respect of the outcome.
- [30] There is a relatively new procedure in regard to representation by agents. This is to be found in a Practice Direction, namely 5 of 2017, which is brief enough to set out here.
- [31] It is in the following form-

PRACTICE DIRECTION NUMBER 5 of 2017

LAND COURT OF QUEENSLAND

REPRESENTATION BY AGENTS

1. The purpose of this Practice Direction is to facilitate representation by agents other than legal practitioners and to enhance the information available to their principals.
2. The procedures set out in this Practice Direction may be varied by direction of the Court.
3. By the time of their first appearance, an agent who is not a legal practitioner, appearing in that capacity, must file written authority of their engagement to act in the approved form signed by their principal. Any limitation of their authority must be recorded on the form.
4. The principal must confirm they have read the following information by signing the approved form:-

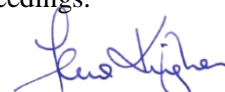
Parties appearing in the Land Court often engage the services of a lawyer to represent them. Lawyers offer clients professional skill and expertise. They are accountable to their professional bodies and to the Court. They are also covered by insurance for any potential liability claims made against them by their clients.

However, a party may choose to represent themselves or be represented by an agent.

Before deciding to be represented by an agent, you should give careful consideration to the suitability and skill of the agent. You should be aware that agents (unlike lawyers) are not required to have professional indemnity insurance cover when representing clients before the Land Court. If you hire an agent and they have no professional indemnity insurance, you may find it difficult to get compensation if serious errors are made by the agent.

In some proceedings in the Land Court, costs are awarded against the unsuccessful party. If the winning party has engaged an agent to represent them, then it is unlikely the agent's fees can be recovered from the unsuccessful party.

You may be asked by your agent to sign a waiver to remove your right to make a claim against the agent if you're unhappy with outcome of the proceedings. You should be aware that you are engaging an agent who may not have to accept any responsibility for the outcome of the proceedings.



Fleur Kingham
President
22/03/2017

[32] This has some resonance with the Code of Professional Conduct of the Australian Property Institute, the API. Rule 2 of that code deals with conflict of interest.

[33] It is unnecessary for present purposes to set out Rule 2, but useful to look at a news item published by the API fairly recently. I will set it out as it is very pithy and crystal clear-

“Expert v Advocate

Expert - a person who has relevant specialised knowledge based on that person’s training, study or experience.

Advocate - a person who puts forward a case on someone else’s behalf or a person who publicly supports or recommends a matter.

The purpose of this Member Reminder is to clarify issues with regards to the implications for Members in managing their professional responsibilities as adviser, advocate and expert. Members are reminded that they may not act as both an expert and an advocate.

This is particularly in response to the NSW Land Acquisition (Just Terms Compensation) Amendment Act 2016. Section 10A of the amended Act includes **“Minimum period of negotiation for acquisition by agreement before initiation of compulsory acquisition process...**

(2) The authority of the State is to make a genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice.”

In some cases, a Valuer may carry out an initial valuation or consultancy. If the Valuer then applies their expertise for the client eg liaising with the authority, reviewing options, or any other communication, this is likely to involve advocacy. When the property practitioner does this, they are acting for the benefit of the client and not the court. The code of conduct permits Valuers to act as advocates, but if they do, they are prevented from acting as experts in the same matter.

If a member has acted as an advocate, any request to act as an expert should be declined and it be recommended that the instructing party seek advice from an independent Valuer or firm. Note, this also precludes property practitioners working for the same firm as the advocate from acting as an expert.”

[34] The last sentence could not be more unambiguous.

[35] In the fast-paced-environment in which we must all practice our professions, the procedural changes which have been introduced in the Land Court are consistent with modern notions of professional practice such as the API rule to which I referred.

[36] In the event that the Court must resolve a dispute by way of a hearing, there are new guidelines published on its website for concurrent hearing of evidence. This offers an

opportunity to further save time and costs. Expert witnesses will need to be ready to rub elbows with their colleagues and to have their disagreements with the competing opinions coming from right next to them. This is a simultaneous test of technical skill and diplomatic adeptness.

[37] The Land Court now has a completely equipped court room for electronic trials so that great volumes of paper can be replaced by prompt access to material shown on display screens so that everyone can see it at once. This brings with it the requirement to provide material to the Court in suitable electronic formats.

[38] The Presidents' vision and reforms are in place already and being added to as experience is gained. The Court Members, the Judicial Registrar, the Registrar and Registry staff are equal partner in this reform and committed to continuous improvement.

**WA ISDALE
MEMBER OF THE LAND COURT**