

**QELA ANNUAL CONFERENCE 2000**

**THE LAND AND RESOURCES TRIBUNAL**

***THE NEW DINOSAUR ON THE BLOCK***

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**1. WHAT ... IS THE LAND AND RESOURCES TRIBUNAL?**

The Land and Resources Tribunal (*LRT*) was established by an Act of Parliament passed in March 1999.<sup>1</sup> The LRT has been and continues to be established in phases. An Acting Registrar and some registry staff were appointed in October last year. The President was appointed in December last year. Two Deputy Presidents were appointed in March this year, making a full compliment of presiding members. However, there are still a number of appointments yet to be made.

The LRT is an independent body with the powers of the Supreme Court and the presiding members are appointed at Supreme and District Court judicial level. The LRT is an independent body exercising both judicial and quasi-judicial powers. In some cases the LRT will make a recommendation to a Minister<sup>2</sup> and in others it will decide the matter<sup>3</sup>. The *LRT Act* emphasises the independence of the LRT by specifically providing that the LRT is not subject to the direction of the Minister.<sup>4</sup>

In the same way the LRT has been established progressively, the LRT's jurisdiction is also being established in phases. The LRT Act and other legislation confer that jurisdiction.<sup>5</sup>

Broadly speaking, there are four types of jurisdiction: cultural heritage, native title, mining tenure and environment.

***The author acknowledges the contribution of the President of the Land and Resources Tribunal, Gregory Koppenol, to this paper.***

<sup>1</sup> *Land and Resources Act 1999* (Qld) (LRT Act), s.4

<sup>2</sup> eg Whether to grant a tenure or an environmental authority.

<sup>3</sup> eg Whether, given the native title interests claimed or established, the mining project should proceed and, if so, on what conditions and what compensation is payable.

<sup>4</sup> *LRT Act* s.5

<sup>5</sup> *ibid.* s.51(1).

## 1.1 *Cultural Heritage*

The LRT Act confers exclusive jurisdiction on the LRT to grant an injunction to stop acts which would contravene legislation<sup>6</sup> that is designed to protect, preserve or allow access to items, places or areas of indigenous cultural significance.<sup>7</sup>

## 1.2 *Native Title*

There are a number of aspects to the native title jurisdiction that has either been conferred or that the government intends to confer on the LRT.

At the outset, it is important to distinguish the LRT's jurisdiction from that of the National Native Title Tribunal (*NNTT*) and the Federal Court under the *Native Title Act 1993 (Cth) (NTA)*. The LRT has no role in either registering native title claims or making native title determinations. The *NNTT* will still assess whether native title claims pass the registration test under the *NTA* and conduct mediations of those claims. The Federal Court will still determine whether or not native title has been extinguished and, if it has not, its nature and extent.

There are a large number of unproclaimed provisions of the *Mineral Resources Act 1989 (MRA)*<sup>8</sup>. They form the major part of the Queensland government's proposed alternative scheme to the *NTA* right to negotiate procedure for mining projects. Under the proposed Queensland scheme, the LRT has exclusive jurisdiction to:

- hear objections from native title claimants or bodies corporate to the grant of a mining tenure;
- interpret and enforce agreements about native title and mining negotiated under that scheme; and
- determine compensation payable to native titleholders for the impairment of native title rights by the mining activity.

Only claimants who have passed the *NTA* registration test will be entitled to participate in the Queensland scheme (as is the case with the *NTA* right to negotiate procedure).

The LRT is also the independent body required under the *Native Title Act 1993 (Cth) (NTA)*, to hear objections by native title claimants or bodies corporate to the doing of certain acts, including:<sup>9</sup>

- renewals of non-exclusive agricultural or pastoral leases, where the term exceeds the original term or is perpetual;<sup>10</sup>
- the compulsory acquisition of land (and native title interests) for infrastructure to be developed by third parties; and

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<sup>6</sup> such as s.56 of the *Cultural Records (Landscapes Queensland and Queensland Estate) Act 1987* (Qld).

<sup>7</sup> *LRT Act* s.53.

<sup>8</sup> *MRA Parts 13 -18*

<sup>9</sup> *ibid.* s.51A.

<sup>10</sup> *NTA* s.24ID.

the creation or variation of a right to mine granted for the sole purpose of constructing an infrastructure facility associated with mining.<sup>11</sup>

### 1.3 *Mining Tenure*

Functions previously undertaken by the Warden's Court under the *MRA*<sup>12</sup> will be conferred on the LRT. These include jurisdiction to:

- hear applications for mining tenements and to recommend to the Minister whether a grant should be made; and
- determine compensation payable to landholders.

This jurisdiction does not depend on the proposed Queensland scheme.

### 1.4 *Environment*

The EPA now has responsibility for regulating the environmental aspects of mining projects. Draft amendments to the *Environmental Protection Act 1994 (EP Act)* develop a new environmental approval process for mining projects.<sup>13</sup> Those amendments nominate the LRT as the body to hear objections regarding proposed conditions for environmental authorities related to mining activities. The draft bill to amend the EP Act is currently undergoing stakeholder and public consultation.

## 2. WHY ... A NEW TRIBUNAL?

The LRT was created in the context of Queensland's proposed scheme. To a certain extent, the structure, powers and processes of the LRT reflect the State's objectives for that process. The LRT has a statutory brief to act as quickly, and with as little formality and technicality as is consistent with the fair and proper consideration of the issues before it.<sup>14</sup> It is not bound by the rules of evidence, must observe natural justice and may decide the procedures to be followed before it.<sup>15</sup> This includes the ability to close proceedings to allow culturally sensitive issues to be dealt with.<sup>16</sup>

Whilst the LRT has been created in the context of Queensland's proposed scheme, it is clear that its jurisdiction is much broader than this. Cultural heritage, general tenure jurisdiction and environmental jurisdiction are not dependent upon the fate of the proposed scheme.

The LRT can and is intended to provide a single forum with streamlined and practical processes to deal with all issues in dispute in relation to proposed resource development and other land management issues. If you like, the LRT is the review body in an alternative IDAS process for resource development.

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<sup>11</sup> *NTA* s.24MD(6)(B)

<sup>12</sup> *ibid.* s.87, Schedule 3 (amendments to *MRA*).

<sup>13</sup> Fleur Kingham, Mining EPP, QELA Seminar, 6 March 2000

<sup>14</sup> *LRT Act* s.49(1)(b)

<sup>15</sup> *LRT Act* s.49

<sup>16</sup> *LRT Act* s.48

### 3. WHO ... ARE THEY?

The members of the LRT consist of presiding and non-presiding members.<sup>17</sup> The presiding members are the President and two or more Deputy Presidents.<sup>18</sup> The President is appointed at a level equivalent to a Supreme Court Judge.<sup>19</sup> Deputy Presidents are appointed at a level equivalent to District Court Judges.<sup>20</sup> Presiding members must be lawyers who have particular knowledge or experience in indigenous issues, and mining or land issues.<sup>21</sup> They are appointed until age 70.<sup>22</sup>

The non-presiding members consist of various categories. Members of the Land Court and the Land Tribunal are *ex officio* members. Their experience and expertise in indigenous issues and valuation and compensation matters will be drawn upon by the LRT when panels are constituted.

The other non-presiding members are appointed non-presiding members and referee non-presiding members.<sup>23</sup> Referee non-presiding members are appointed at a level equivalent to Magistrates. They must have extensive prescribed qualifications and experience and are appointed for not more than five years.<sup>24</sup> Only the referee members are appointed on a full-time basis.<sup>25</sup> There are three categories of referee non-presiding members – mining, mediation and indigenous issues. The mining and mediation referees must be lawyers with experience in those particular fields.<sup>26</sup> The indigenous issues referee must have experience in fields such as cultural heritage and indigenous issues, academia or management.<sup>27</sup>

The mining referee replaces the previous position of mining warden. The mediation referee will oversee the LRT's extensive mediation role. The indigenous issues referee will advise the presiding members about cultural heritage and indigenous issues.

### 4. HOW ... WILL IT OPERATE?

#### (a) Natural Justice

The LRT's brief is to observe natural justice and act as quickly and with as little formality and technicality as is consistent with a fair and proper consideration of the issues before it.<sup>28</sup> In particular, the LRT is not bound by the rules of evidence, may

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<sup>17</sup> *ibid.* s.6

<sup>18</sup> *ibid.* s.7(1).

<sup>19</sup> *ibid.* s.10(1)

<sup>20</sup> *ibid.* s.10(2)

<sup>21</sup> *ibid.* s.8(1)(b)

<sup>22</sup> *ibid.* s.9

<sup>23</sup> *ibid.* s.15(1)

<sup>24</sup> *ibid.* s.22(2)

<sup>25</sup> *ibid.* s.16(2)(b)

<sup>26</sup> *ibid.* ss.18(1) and (2)

<sup>27</sup> *ibid.* s.18(3)

<sup>28</sup> *ibid.* s.49(1)

inform itself of anything in the way it considers appropriate, and may decide the procedures to be followed for its proceedings.<sup>29</sup>

Hearings are public. An order to limit the extent to which a hearing is open to the public may be made either in the interests of justice or to allow culturally sensitive issues to be appropriately dealt with.<sup>30</sup> The LRT anticipates that as well as submissions by indigenous parties, it will receive requests from mining applicants to limit public access to commercially sensitive material.

**(b) Minimum appropriate formality**

Whilst the LRT has the powers of the Supreme Court, it is clear that it is intended that it operate in a less formal manner. The current presiding members favour a simple and clear procedure that is accessible regardless of whether a party is legally represented.

Our rules will shortly be approved. They are only 4-1/2 pages long. The practice and procedure of the Supreme Court will apply where the LRT rules do not deal with an issue.<sup>31</sup> However, it is not our intention to rely on the Uniform Civil Procedure Rules (*UCPR*) as a matter of course. We propose to adopt an active case management approach along the lines of the Federal Court. The parties will appear before the LRT at an early stage and clear directions will be given about the steps leading to the hearing of the matter.

Our forms will also shortly be published. They are intended to be simple and easy to fill out, whilst capturing the information required by the LRT. The Registry is in the process of establishing an electronic document management system that will allow electronic lodgment of material. The forms will be published on our website and printed forms will also be available at Registry locations throughout the State.

In many cases, matters before the LRT will be commenced by force of statute. In this case, it may not be necessary for the parties to formally apply to the LRT. For example, the Mining Registrars will refer to the LRT applications for mining tenements and any objections received in relation to them. A separate process will not be required to confer jurisdiction on the LRT. It is likely that the same procedure will be adopted for objections to proposed environmental authorities, although it is not clear what, if any, role the Mining Registrars will have in that process. Referral may come from the EPA, rather than from the Mining Registrar.

Parties need not be legally represented before the LRT and may appear in person or be represented by an agent.<sup>32</sup> LRT members and lawyers appearing before the LRT will not wear legal wigs or gowns.

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<sup>29</sup> *ibid.* s.49(2).

<sup>30</sup> *ibid.* s.48.

<sup>31</sup> *ibid.* s.65(5).

<sup>32</sup> *ibid.* s.47.

**(c) Expeditious**

As well as the statutory requirement that the LRT operate as quickly as is consistent with the fair and proper consideration of issues before it,<sup>33</sup> some statutory timeframes are also imposed on the LRT. For example, Queensland's proposed scheme imposes timeframes within which the LRT must endeavour to make its determination.

Active case management will be adopted to ensure that proceedings do not languish and to direct the parties towards refinement and where feasible, resolution of issues in the proceedings. The rules will require the parties to confer before directions hearings and hearing of interim applications with a view to reaching agreement on the orders the LRT should make.

**(d) Costs**

Like the Planning and Environment Court, each party to a proceeding before the LRT must bear their own costs unless the LRT considers that special circumstances make an award of costs appropriate. If costs are awarded, the LRT must award an amount of costs it considers reasonable.<sup>34</sup>

**(e) Recognition of needs of users of the LRT**

The Registry is establishing procedures to allow for electronic lodgment of material. Appropriate technology will also be implemented to allow directions hearings and, in some cases, applications to be heard using teleconferencing or video conferencing. It is also hoped that some Registry services will be delivered to remote locations using computer based video conferencing.

**(f) Mediation**

Under the *MRA*, parties are entitled to request mediation before a matter comes to the LRT. The LRT also has the power to direct parties to mediate once it is seized of a matter. The Registry is currently establishing a mediation service, which will be strongly promoted to users of the LRT. The view of the current presiding members is that mediation should be encouraged at the earliest possible stage.

The Acting Registrar will shortly be inviting expressions of interest from mediators and others interested in becoming accredited LRT mediators. The requirements for accreditation are currently being developed. Some formal mediation training will be required. However, LRT accredited mediators will also be required to go through top-up training that deals with LRT procedures, cultural awareness and mining issues.

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<sup>33</sup> *ibid.* s.49(1)(b).

<sup>34</sup> *ibid.* s.50.

## **5. WHERE ... WILL IT HEAR CASES?**

Whilst the LRT is based in Brisbane, it will have regional support throughout the State. It will have the capacity to hear matters in regional centres and, where appropriate, in remote locations. The LRT, and the Mining Referee in particular, will regularly sit in regional centres.

In some cases, directions hearings and interim steps may be dealt with in Brisbane (with or without recourse to video or teleconferencing facilities) whilst the hearing itself will be heard in a regional centre or remote location. When the LRT is sitting in a regional centre, it will also call over matters in that region to assess their progress.

The LRT may also choose to hear some evidence in Brisbane and other evidence in remote locations. The current presiding members anticipate there will be a need from time to time to view sites of cultural significance or areas in which activities are proposed to take place. Requests for a view or for a hearing at a remote location will be addressed at an early stage in the directions hearing.

## **6. WHEN ... WILL IT COMMENCE?**

Some of the LRT's jurisdiction has already commenced. The exclusive jurisdiction for hearing cultural heritage injunctions has commenced, as has the jurisdiction to act as the independent body to hear objections to certain lease renewals, compulsory acquisition for third parties and mining tenements for infrastructure purposes. There are three broad areas of jurisdiction which are yet to commence.

The first is the non-native title mining jurisdiction. This is the substitution of the LRT for the Mining Warden's Court. It is anticipated that this jurisdiction will shortly commence. When it does, all tenure processes, including land-holder compensation, will be transferred from the Mining Warden's Court to the LRT.

The second is Queensland's proposed alternative to the NTA right to negotiate procedure. Whilst the State legislation has been passed, the Commonwealth Attorney-General has not yet declared it to be in compliance with the *NTA*. Assuming the Commonwealth Attorney-General does so declare it, the declaration can be disallowed in either house of the federal Parliament. There has been a lot of discussion recently about moves to disallow the Queensland scheme in the federal Senate. Timing for resolution of the Queensland scheme is still uncertain and depends on when the Attorney-General makes his decision and the sitting times for both houses of Parliament.

The third broad area of jurisdiction is environmental regulation of mining activities. Draft legislation has been circulated to stakeholders. At this stage, no bill has been placed before the Parliament. It is unlikely that environmental jurisdiction will commence within the next few months.

## **7. WHAT IF ... THE STATE'S RIGHT TO NEGOTIATE REGIME IS DISALLOWED BY THE SENATE?**

Whilst the LRT has been established in the context of Queensland's alternative scheme, the jurisdiction of the LRT extends well beyond that proposed process. If the Senate does disallow the Queensland scheme, the LRT will still be able to exercise its jurisdiction in the remaining areas.

Stakeholders and government agencies have estimated that there is something in the order of 2,000 mining tenement applications with the Department of Mines and Energy. All of these tenements must go through a tenure process regardless of whether Queensland's scheme is approved. A large proportion of those applications will also require LRT involvement, either in recommending whether or not the tenement should be granted or in dealing with landholder compensation issues.

There is a significant amount of work involved in that jurisdiction. During a period of apparently low exploration and mining activity, the Mining Warden and 2 Acting Mining Wardens appear to have been kept busy. Add to this cultural heritage jurisdiction, the jurisdiction as the independent body under the NTA and the proposed environmental jurisdiction, and the current presiding members are likely to be fully occupied.

## **8. CHALLENGES AHEAD**

Assuming the full jurisdiction of the LRT commences, there are two particular challenges ahead for the LRT that I would like to raise in this forum: facilitating an integrated approach to resource development and assessing compensation for native title claimants.

### ***8.1 Facilitating an integrated approach to resource development***

I assume the legislation will be drafted so that administrative decision making processes under the various pieces of legislation are synchronized or, at the very least, do not conflict with each other. This is a difficult task for the policy makers and drafters.

Even if this is achieved, the LRT will face a significant challenge in running combined hearings of matters under multiple pieces of legislation. If, for example, the LRT has a mining lease application before it, it may well be required to consider the following issues:

- whether it should recommend the grant of the mining tenement;
- what tenure conditions should be imposed if the tenement is to be granted;
- what compensation should be paid to the landholder;
- what environmental conditions should apply to the activity;
- what impact the activity will have on native title rights and interests;



- whether, given that impact, the mining activity should proceed and, if so, on what conditions
- what compensation should be paid to claimants or holders of native title rights and interests.

This will involve a consideration of provisions of the *MRA*, the *EP Act* and the *NTA*. The LRT will be required to adjudicate on issues as diverse as:

- the technical feasibility of the project;
- the economic feasibility of the project;
- the nature and extent of native title rights and how they may be affected;
- the effect of the project on items or areas of cultural significance;
- the potential environmental impacts of the project and the measures proposed to prevent or minimise that impact;
- valuation of compensation for landholders, including native title owners.

The complexity of the LRT's task is compounded by distinctions between the roles that it will play in a combined hearing. For example, in making a "native title issues decision", the LRT is the decision-maker. That is, the LRT will decide whether, taking into account native title rights and interests, the mining lease should be granted.<sup>35</sup>

However, with respect to the grant of a mining lease or of an environmental authority, the role of the LRT is to recommend to the relevant Minister if the grant should be made and, if so, on what conditions.

Compensation decisions, on the other hand, are decisions of the LRT. The LRT will need to be transparent about the capacity in which it is acting with respect to the matters before it.

There is a further complication in recommending conditions for mining tenements and environmental authorities. Justice French delivered a paper at the National Environmental Law Association State Conference in Perth in November 1998 entitled "*Native Title and Environmental Law – The Coming Conjunction*". He discussed the precedents for Aboriginal involvement in environmental planning at the Local Authority level and in joint management regimes.

As the LRT will be acting in different roles and making recommendations to different Ministers, to a certain extent it will be required to separate, rather than integrate, the issues of native title and the environment. This will be extremely difficult given the clear interest of indigenous owners in environmental management.

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<sup>35</sup> There is limited power for the Minister to override a native title issues decision *MRA* ss.521, 577, 645 and 681. The Minister may override the native title issues decision only if it is in the interests of Queensland or in the national interest to do so and the Minister does so within two months after the LRT makes its decision.

## 8.2 *Assessing compensation for native title claimants*

A second particular challenge is assessing compensation for the impact of a mining activity on native title rights and interests. To date the judicial focus has been on whether native title has been extinguished rather than on compensation for impact on that title. There is little jurisprudence to establish the principles that should guide the LRT in making that assessment.

Further, the LRT may be required to assess compensation before the Federal Court has determined whether native title still exists and, if it does, its nature and extent. In this case, the LRT will make a "compensation trust" decision<sup>36</sup>. That is, compensation is assessed and paid into trust pending the outcome of the Federal Court's determination. In order to do this, the LRT may have to make assumptions about the existence, nature and extent of native title.

Unless the parties agree about these issues, it is likely that the LRT will have to hear evidence on them. This will need to be carefully handled, to ensure that proceedings before the LRT do not become a de facto native title hearing. Further, it is possible that the LRT and the Federal Court could reach different conclusions about these issues. Orders may have to be appropriately framed to allow parties to re-open decisions if necessary.

## **9. CONCLUSION**

The LRT is in its very early stages of operation and the full scope of its jurisdiction is not yet determined. It may be some time before it is settled. In the meantime, as it progressively commences its jurisdiction, the LRT, its Presiding Members, the parties who use the LRT, the lawyers who appear before the LRT and the other professionals who assist them, will all be on a steep learning curve.

The current Presiding Members have been consulting widely with user groups about the LRT's operations. We will continue to do so. Through the LRT, there is an opportunity to experiment with judicial and dispute resolution procedures in a way that is not available for established courts with long standing traditions and processes. Whilst the vision for the LRT is clear, the path to achieving that vision is not. On behalf of the other presiding members, I invite you all to take an active part in contributing to the evolution of this newest dinosaur on the block.

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<sup>36</sup> MRA s706