

Update on the Jurisdiction of the Land and Resources Tribunal

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16 October 2000

1. Introduction

In a paper published in the last edition of the QEPR, I addressed the jurisdiction of the Land and Resources Tribunal.¹ Since the paper was presented² amendments have been made to the *Land and Resources Tribunal Act 1999 (LRT Act)*, the *Mineral Resources Act 1989 (MRA)*, and the *Native Title (Queensland) Act 1993*. Further, the *Water Act 2000* has been passed and the *Environmental Protection and Other Legislation Amendment Bill 2000 (EPOLA Bill)* has been introduced to Parliament. Each of these developments has implications for the jurisdiction of the Tribunal. Because the Tribunal's jurisdiction is evolving and has been expanded considerably by recent developments, this article will provide an overview of the Tribunal's entire current jurisdiction, noting those areas added to or changed by the recent amendments. It will also briefly outline the jurisdiction the *EPOLA Bill* proposes be conferred on the Tribunal.

2. Cultural Heritage

There have been no changes to the Tribunal's cultural heritage jurisdiction. The Tribunal retains its exclusive jurisdiction to grant an injunction to stop acts that would contravene legislation³ that is designed to protect, preserve or allow access to items, places or areas of indigenous cultural significance. The review of Queensland's cultural heritage legislation is still in progress and may result in changes to the Tribunal's jurisdiction in the future⁴.

3. Native Title

In August the Federal Senate debated the determinations made by the Federal Attorney General in relation to Queensland's "alternative state provisions"⁵. This article will not consider the determinations presented to the Senate, their fate or the details of the Senate debate. Suffice it to say that the Senate disallowed some but not all of the determinations⁶. As a result, further amendments were made to the *LRT Act*, the *MRA* and the *Native Title (Queensland) Act 1993* (amongst others) by the *Native Title Resolution Act 2000 (NT Resolution Act)*.

The effect of the amendments is that the Tribunal now has the following jurisdiction with respect to matters involving native title issues:

¹ F. Kingham, "The Land and Resources Tribunal, the New Dinosaur on the Block", QEPR vol. 6 no. 29.

² To the Queensland Environmental Law Association annual conference in May 2000.

³ Such as s. 56 of the *Cultural Records (Landscapes Queensland and Queensland Estate) Act 1987*.

⁴ The Queensland Government released a discussion paper in December 1999.

⁵ Made pursuant to the *Native Title Act (Cth) (NTA (Cth))* ss. 26A, 26B, 43 & 43A.

⁶ Only those determinations pursuant to ss. 26A and 43 survived the disallowance motion moved by Senator Woodley.

3.1 Determination of negotiation and objection processes for registered native title parties in relation to mining tenements

The Tribunal has jurisdiction to determine negotiation and objection processes for registered native title claimants and holders⁷ in relation to the grant or, in some cases, renewal of mining tenements, other than low impact tenements⁸. This includes mining claims⁹, high impact exploration permits¹⁰, high impact mineral development licences¹¹ and mining leases¹². It also has jurisdiction with respect to the variation of the conditions of low impact exploration permits¹³ and low impact mineral development licences¹⁴, if the variation of conditions would allow activities on non-exclusive land¹⁵ other than low impact activities.

The Tribunal's "native title issues decision" may be that the tenement is granted, that it is granted subject to conditions (either included in the mining tenement or by way of "contract conditions") or that the tenement should not be granted¹⁶. The Minister can only overrule the Tribunal's decision in limited circumstances¹⁷.

3.2 Access agreements for low impact activities

Low impact tenements have different procedural requirements. There is no objection available to registered native title claimants or holders to the grant of these tenements. However, an applicant must notify native title parties¹⁸. Further, prior to entering non-exclusive land, the holder of a low impact prospecting permit, exploration permit or mineral development licence must consult with and seek to reach an access agreement with the registered native title parties¹⁹. If the parties are unable to reach an access agreement, they can request the Mining Registrar to mediate the matter. If no agreement is reached one month after the request for mediation, the Mining Registrar must refer the matter to the Tribunal to make a decision about the terms of the access agreement, including compensation²⁰. This jurisdiction was conferred on the Tribunal by amendments to the *MRA* made by the *NT Resolution Act*.

3.3 Mediation

The Tribunal has significant mediation jurisdiction in relation to native title matters.

⁷ *MRA 1989* s. 655.

⁸ Low impact prospecting permits *MRA* s. 430, low impact exploration permits *MRA* s. 481 and low impact mineral development licences *MRA* s. 537

⁹ *ibid* ss. 463 & 465.

¹⁰ *ibid* ss. 483, 523 & 525.

¹¹ *ibid* ss. 539, 579, 580 & 586.

¹² *ibid* s. 669.

¹³ *ibid* s. 532.

¹⁴ *ibid* s. 591.

¹⁵ *ibid* s. 422.

¹⁶ *ibid* s. 675.

¹⁷ *ibid* s. 680 & Part 17, Division 4, Subdivision 6.

¹⁸ *ibid* ss. 431, 486 & 542.

¹⁹ *ibid* ss. 433, 488 & 544.

²⁰ *ibid* ss. 436A, 491A & 547A.

Under the *LRT Act*, the Tribunal has all the powers of the Supreme Court²¹. This includes the power to order parties to mediate a proceeding that is before the Tribunal. The Presiding Members of the Tribunal consider the use of alternative dispute resolution procedures, such as mediation, is consistent with the Tribunal's statutory obligation to "act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it"²².

The Tribunal also has jurisdiction to mediate negotiations between the applicant, the registered native title parties and the State with respect to all mining tenements, other than low impact prospecting permits, low impact exploration permits and low impact mineral development licences²³. The request for mediation can be made to the Tribunal at any time before a negotiated agreement is reached or the application for the tenement has been referred to the Tribunal²⁴.

The parties to certain Indigenous Land Use Agreements may also confer jurisdiction on the Tribunal to mediate matters that arise under those agreements²⁵. This is a new mediation jurisdiction conferred by amendments made to the *LRT Act* by the *NT Resolution Act*.

3.4 Indigenous Land Use Agreements (ILUAs)

The *NT Resolution Act* amended the *LRT Act* to confer jurisdiction on the Tribunal for certain types of ILUAs. The ILUAs must be registered and the State must be a party. Such ILUAs may confer jurisdiction on the Tribunal to mediate, make a recommendation or make a decision about a matter arising under the ILUA²⁶.

3.5 Negotiated agreements

There is no change to the Tribunal's jurisdiction for negotiated agreements. It has retained its exclusive jurisdiction with respect to negotiated agreements reached by the parties pursuant to the native title provisions of the *MRA*²⁷. The Tribunal's jurisdiction is to enforce, decide a matter arising or make a declaration about the interpretation of a negotiated agreement²⁸.

3.5 Compensation

The Tribunal has comprehensive jurisdiction to deal with compensation payable to native title parties in relation to a "relevant act"²⁹. This jurisdiction was not altered by the recent amendments, although it had not then commenced. It extends to mining

²¹ *Land and Resources Tribunal Act 1999* s. 65.

²² *ibid* s. 49(1)(b).

²³ Mediation of the access agreements can be requested from the Mining Registrar *MRA* ss. 436,491 & 547.

²⁴ *Mineral Resources Act 1989* s. 662.

²⁵ *Land and Resources Act 1999* s. 51B.

²⁶ *op cit*

²⁷ *MRA* ss. 651 & 659(1).

²⁸ *LRT Act* s. 52.

²⁹ *MRA* ss. 706 & 707.

tenements that the Tribunal otherwise has no jurisdiction under the native title provisions to mediate or decide.

Relevant acts include the grant or renewal of or subsidiary approvals to all mining tenements, both low and high impact. It also includes tenements that are not otherwise subject to the native title provisions of the *MRA*. These are mining tenements in an approved opal or gem mining area³⁰ or which relate to a place on the seaward side of the high-water mark of the sea and mining leases granted for the sole purpose of constructing infrastructure facilities. Relevant acts also include some renewals to which the native title provisions do not apply and for which compensation has not been agreed previously.

3.6 Native Title Act (Cth) “independent body” jurisdiction

The Tribunal is the independent body³¹ to hear objections by registered native title parties to the doing of certain acts³². These include the renewal of certain agricultural and pastoral leases³³, the compulsory acquisition of native title interests for third party infrastructure³⁴ and the grant of mining leases for the sole purpose of constructing infrastructure³⁵.

4. Mining

4.1 Existing MRA provisions

The Tribunal has now assumed the jurisdiction of the Mining Warden under the *MRA*³⁶. This jurisdiction includes hearing objections to and making recommendations on the grant of certain tenements, determining non-native title compensation, determination regarding caveats over mining tenements and reviewing or hearing appeals from certain decisions under the Act. Annexure A to this article is a table that sets out the non-native title jurisdiction of the Tribunal pursuant to the *MRA*. The Tribunal has transitional powers to finish any matters before the Mining Warden at the time this jurisdiction commenced³⁷.

4.2 Proposed amendments to the MRA

Amendments proposed to the *MRA* by the *EPOLA Bill*, if passed, will confer new jurisdiction on the Tribunal to review a compensation agreement or determination if there has been a material change of circumstances for the mining lease since the agreement or determination was made³⁸.

³⁰ Pursuant to s. 26(2)(d) of the *Native Title Act 1993 (Cth) (NTA (Cth))*.

³¹ Required under the *NTA (Cth)*.

³² *LRT Act* s. 51A.

³³ *NTA (Cth)* s. 24ID.

³⁴ *State Development and Public Works Organisation Act 1971*, s. 78B.

³⁵ *NTA (Cth)* s. 24MD(6)(b).

³⁶ *LRT Act* Schedule 3 amendments to the *MRA* (NB: this schedule has been omitted from reprint no. 2 pursuant to the *Reprints Act 1992*, s. 40).

³⁷ *LRT Act* s. 83 This jurisdiction commenced on 18 September 2000.

³⁸ *EPOLA Bill* cl146.

4.3 Special agreement acts

The Tribunal has now assumed the jurisdiction of the Mining Warden under the special agreement acts³⁹. They are the *Alcan Queensland Pty. Limited Agreement Act 1965*, the *Aurukun Associates Agreement Act 1975*, the *Central Queensland Coal Associates Agreement Act 1968*, the *Queensland Nickel Agreement Act 1970* and the *Thiess Peabody Coal Pty. Ltd. Agreement Act 1962*.

5. Petroleum

The Tribunal has now assumed the jurisdiction of the Mining Warden under the *Petroleum Act 1923 (Petroleum Act)*⁴⁰. This jurisdiction relates largely to compensation but does include the grant of tenure in limited circumstances and some actions for recovery of debts, for damages and to resolve disputes about use of water resources⁴¹. The Tribunal has transitional powers to finish any matters before the Mining Warden at the time this jurisdiction commenced⁴². The *Petroleum Act* is being revised and this may result in further or different jurisdiction in the future. The *Water Act* will also affect the Tribunal's jurisdiction with respect to disputes about the use of water resources, once the relevant provisions commence⁴³.

6. Fossicking

The Tribunal has now assumed the jurisdiction of the Mining Warden under the Fossicking Act⁴⁴. This includes jurisdiction to hear appeals against decisions regarding licences or permits under that Act⁴⁵. The Tribunal has transitional powers to finish any matters before the Mining Warden at the time this jurisdiction commenced⁴⁶.

7. Environment

Substantial new jurisdiction in relation to the environmental aspects of mining activities will be conferred on the Tribunal if the *EPOLA Bill* is passed in its present form. In summary, the proposed jurisdiction is to mediate⁴⁷ and make recommendations about the environmental authorities proposed to be issued in relation to mining claims and mining leases⁴⁸ and to mediate disputes about and review certain administrative decisions⁴⁹.

³⁹ *LRT Act* s. 86 This jurisdiction commenced on 18 September 2000.

⁴⁰ *LRT Act* s. 86.

⁴¹ *Petroleum Act* ss. 18, 21, 26, 30, 36, 38, 42, 64, 95 & 99.

⁴² *LRT Act* s. 83 This jurisdiction commenced on 18 September 2000.

⁴³ The *Water Act* does not amend s. 95 of the *Petroleum Act*, which confers on the Tribunal jurisdiction to resolve disputes about the use of water resources. However, provisions in the *Water Act* will amend the *Petroleum Act* by deleting those provisions that gave holders of petroleum tenures access to water under that Act. As s. 95 refers to disputes about taking water under the *Petroleum Act*, once these rights are removed from the Act, it appears that s. 95 will be rendered obsolete. These provisions have not yet commenced.

⁴⁴ *LRT Act* s. 86.

⁴⁵ *Fossicking Act* s. 99.

⁴⁶ *LRT Act* s. 83 This jurisdiction commenced on 18 September 2000.

⁴⁷ *EPOLA Bill* cl 6 proposed *Environmental Protection Act 1994* ss. 34HK.

⁴⁸ *EPOLA Bill* cl 6 proposed *Environmental Protection Act 1994* ss. 34GM, 34HI, 34FS.

⁴⁹ *EPOLA Bill* cl 6 proposed *Environmental Protection Act 1994* ss. 34GM, 203B, 203D & Schedule 1 Part 1.

8. Water

The *Water Act 2000 (Water Act)* has introduced new approval processes for activities previously regulated under the *Water Resources Act 1989*, including applications for the construction and maintenance of referable dams. The *Water Act* confers limited jurisdiction upon the Tribunal for appeals against certain development decisions, at the discretion of the appellant. Provided the development application relates to an activity authorised under the *MRA* and the applicant has applied under the *MRA* for such authorisation, an appeal against the decision on the development application can be made to the Tribunal⁵⁰. Otherwise, the appeal is made to the Planning and Environment Court, pursuant to the *Integrated Planning Act 1997*.

9. Conclusion

The Tribunal's native title and mining jurisdiction has been extended as a result of recent amendments to the *MRA* and the *LRT Act* and the passage of the *Water Act*. The *EPOLA Bill* contains clauses that, if enacted, will extend further the Tribunal's jurisdiction under the *MRA* and introduce significant new jurisdiction under the *Environmental Protection Act 1994* in relation to the environmental aspects of mining. It is possible that the review of the cultural heritage legislation and the revision of the *Petroleum Act* will further add to or change the Tribunal's dynamic and evolving jurisdiction.

⁵⁰ *Water Act* s. 972.