The Land Court: Looking Forward

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QELA Seminar: An evening with the President

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[1] Thank you for the invitation to speak to you tonight. I have had a long association with QELA. I believe I attended QELA's first conference. I have been a member or associated with QELA ever since. I am delighted and honoured to be the first speaker for your seminar series this year.

[2] This presentation is intended to give you an overview of the reform process now underway at the Land Court.

[3] When I was appointed President I set out to get an understanding of issues that may need to be addressed in improving the Court's processes and performance.

[4] The first issue I encountered was timeliness. This was a matter that was raised frequently with me by members of the profession. It seemed that there was an issue with timeliness for delivery of judgment after hearing, but also in the time taken getting a matter listed for hearing.

[5] The next issue raised with me related to clarity of the issues in a no pleadings jurisdiction. The Court has sought to deal with this in the past by making directions to require a pleadings-like documents (statements of facts, matters and contentions). In a jurisdiction which relies heavily on expert evidence some lawyers have questioned the value of that approach.

[6] Obviously, it is a high priority for me to ensure we make the best use of experts who appear before the Court. The *Land Court Rules 2000* adopt a similar approach to expert evidence as the Planning and Environment Court of Queensland. However, I encountered some inconsistency in the approach taken to obtaining reports and joint conferences between different types of cases.

[7] But without doubt one of the most pressing issues arose in the context of our mining jurisdiction. This arose because of the mix of functions the Land Court has in relation to resources issues. The most contentious area of our jurisdiction is hearing objections to applications for mining projects and associated environmental authorities. The Court's function is administrative and that means that the provisions in the *Land Court Act* and *Land Court Rules* that set most of our procedures did not apply to an objections hearing. That became evident as a result of a decision of the Queensland Supreme Court on judicial review of a decision of a Member of the Land Court.

[8] We now have a temporary fix. Some, but not all, of our procedural sections now apply to objections hearings. The Court is in the process of developing amendments to the Act and Rules and also a Practice Direction to deal with these hearings.

[9] The Court does have judicial functions in the resources jurisdiction. For example, the Court determines compensation that must be paid by the miner to the landowner for the impact of their activities on the land. There is also some decision making power regarding access to land and conduct and compensation agreements in other jurisdictions, like coal seam gas and petroleum activities.

[10] There is an issue about disclosure of information in our mining jurisdiction when our function is to make recommendations about mining leases. In *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors*[1] Justice Phillip McMurdo, as he then was, considered the question of the Court's function and power. He determined that when recommending to the Minister, whether a mining lease should be granted, the Court is not fulfilling a judicial function, but exercising an administrative power. The procedures that had, to that point, been assumed to apply to such mining matters, by reference to the *Uniform Civil Procedure Rules 1999*, do not apply. That created a difficulty for the Court. There is now a transitional regulation that came into force recently. It will expire in July. It gives a very short period of protection to the Court. Although it has the effect of reinstating most procedural powers, based on concerns raised by stakeholders during consultation, the Court has not been given the power to require disclosure. That is an ongoing issue.

[11] Another issue is the exposure of parties to costs orders. The Court does have the power to award costs in mining matters.

[12] Another issue I am addressing is the idiosyncratic approach to cases before the Court. My observation before I started with the Court was reinforced once I joined the Court. There is a different experience in the Land Court depending upon the Member presiding. The Court uses a docket system. By and large, the Member, with the assistance of their Deputy Registrar, determined what information went out to parties, how the case was managed and what the expectations of parties were. I have set about trying to deal with those idiosyncrasies and adopt a common approach. Of course, ultimately, a Member hearing a matter will control the way

[1] [2015] QSC 107.

in which the hearing is conducted, in accordance with the powers conferred on that Member. But how a matter gets to hearing and what parties might expect the Court to direct them to do or expect them to do, needs more clarity. That is something I am working on.

[13] The final issue raised with me during consultation was: the Land Court's approach to ADR. It seems to have been a little bit inconsistent across different jurisdictions.

[14] The Judicial Registrar has a very un impressive success rate in Preliminary Conferences in dealing with land valuation appeals involving land worth $5 million or less. Beyond that, the Court's strategy in relation to ADR was unclear.

[15] So where did I start? I thought it would be helpful to use a process tried by other courts around the world and in Australia. It is called the International Framework for Court Excellence ("IFCE"). It identifies the core values of Courts, which are:

- Equality before the law
- Fairness
- Impartiality
- Independence of decision-making
- Competence
- Integrity
- Transparency
- Accessibility
- Timeliness
- Certainty.

It identifies how, as a Court, those core values are achieved. It was developed in response to pressure from government for greater accountability by Courts and Tribunals for their use of public resources. Sensibly, Courts took the lead in developing the IFCE. So, the IFCE provides a methodology to use to examine what we are doing and, in a rigorous way, to work through our processes.

[16] So, what has changed?

Timeliness

[17] One of the first things I did to address timeliness was to adopt a reserved judgments protocol based on the protocol in operation in most Courts and Tribunals in Australia. A judgment is expected to be provided three months after final submissions. Members are held accountable internally. I expect that I will report publically against that protocol. Of course, there will be some decisions that cannot realistically be provided within three months of final submissions. However, I will be monitoring that quite closely and looking at what I need to do, for example in listing of Members, to enable all of us to achieve that target.

Judgment guide

[18] Another thing I was concerned about was the professionalism of the production of the Court's judgments. There was a different look and feel to decisions written by different Members. I do not mean the substance of the decision or the style of writing. I mean the presentation, formatting and headnotes. We have now resolved these matters and adopted a common form of catchwords, which is consistent with that used in the other courts. I considered that very important to increase accessibility to Land Court judgments. One of the finest legacies of Carmel McDonald's period as President of the Court is her work to enhance accessibility

of the Court's judgments. She started the process of judgments being published on the Supreme Court Library's webpage. The Judgments Protocol will extent that important project she initiated.

Centralised case management

[19] Another early initiative was to introduce centralised case management. I said that previously there was a docket system and Members managed the cases on their docket themselves and different approaches emerged across those dockets. That happens in any court where there is a docket system. I have found that by calling over every matter that is before the Court I have got a very good feel for what is happening across our jurisdiction and for the trends. I will certainly find out quickly if our procedures are onerous, inappropriate or not working because it will be raised with me daily in court.

Early listing for hearing

[20] I have also increased early listings for hearing. Once any matter has clarity about the issues and expert material has been provided I will list it for hearing. For those matters that were current, I set about listing them early and also listing an ADR event prior to the hearing, leaving enough time to promote ongoing discussions if the matter did not resolve at mediation. My hope was that by listing matters some might resolve and that has certainly happened. Quite a few were resolved before Christmas and I am encouraged by those results.

Increased use of ADR

[21] My next impetus was to increase our use of mediation. Whether by Members or private mediations, I am happy to say that increased mediations are beginning to produce results. I should stress that there has always been a lot of private

mediation conducted at the request of parties at the Land Court. There are some very experienced mediators working in our jurisdictions who regularly achieve good results. When I talk about the mediations that I have been listing, I mean court supervised mediation. That is, mediation conducted by Members and the Judicial Registrar. I will shortly finalise a Practice Direction about that. I want to stress that I see it a supplement to, not a replacement of, private mediation.

[22] Another initiative I am working on is developing a court approved panel of specialist ADR practitioners. We are considering how could they be used and what qualifications we would be looking for. It seems to me the starting point would be that they are accredited ADR practitioners. But we will also be looking for people who possess specialist academic qualifications or have experience that is relevant to our jurisdictions. That idea has come from stakeholders, largely in the mining and petroleum jurisdictions. They are looking for people who understand impacts on graziers of mining activities. They are looking for people who understand the complexities involved in developing a mine and the impacts on groundwater and the like.

[23] The Practice Direction that I will issue shortly will not deal with that. I want to consult, firstly with the legal stakeholder group; but also more widely than that, to consider the role of members of such a panel. One suggestion that has been put to the Court is that the specialist mediators might be made available for mediating matters that have not yet come to the Land Court. So, that could prevent a matter coming to the Land Court. I can see some merit in that. Of course, the basis for the Court to do that now is unclear. But it is a suggestion that has been put by stakeholders. The Court is looking at that, as is Government.

Expert evidence

[24] I would like to turn now to expert evidence, particularly concurrent evidence. For those of you who appear in federal jurisdictions, this is not a new process. It is used routinely in the Federal Court, also in jurisdictions like the Land and Environment Court (NSW). It is used in Queensland in QCAT. It is used in the Supreme Court by a number of judges, primarily in the commercial causes jurisdiction. I used to use it in the District Court, largely in personal injury matters. I have used it a couple of times in the Land Court. I have issued a Practice Direction which outlines the process. I am eager to hear feedback from QELA about that. It will be revised with the benefit of experience some time later this year.

[25] Be assured that you will have the opportunity to have input about whether expert evidence does proceed that way. I like concurrent evidence as a process. I am comfortable with it. It suits my purposes. I do it selfishly, because it assists me to very quickly get on top of the real issues in dispute between the experts. Other Members may not be comfortable with it and some may never do it. So do not assume that it will be used for every hearing. I think it is essential that all Members who want to use concurrent evidence are trained in the process. I am taking steps to ensure that happens as soon as practicable.

Reporting

[26] Turning to, reporting on court performance. The idea is to use reporting against court performance standards to hold the Court accountable and drive improvement. It uses the management theory that if you do not measure it you will not value it. We had some feedback through a consultation process, which I will talk about in a moment, that we should adopt the standard that is reported against

by Courts throughout Australia. That standard is no more than 10% of cases current after 12 months from filing and all cases determined within two years of filing. The idea of a time standard is to provide a measure to use proactively. So I will be monitoring it. If I see that we are not achieving that time standard I will be looking at what we can do to improve our practices. That said, timeliness does not depend only on our performance. The Member has quite a lot of power but is not supreme. Often, delays are associated with the conduct of parties. Steps to clarify and enforce expectations of parties are important in improving timeliness.

Member support

[27] We are also looking at the way in which we organise our registry, to look for efficiencies but also to better support our Members. Our Members at the moment do not have associates, for example. I do, but I am looking for the same support for all Members. I think that is essential given the nature and complexity of our jurisdiction.

Professional development

[28] Additionally, I have a focus on professional development of Members and staff. I have talked about training Members in concurrent evidence. They will shortly undertake judgment writing training. We are also offering ongoing training in ADR. I will encourage all Members to get, and maintain, accreditation. I am also encouraging them to use the entitlements they have to access the excellent judicial education programs that there are available to Judicial Officers in Australia through the NJCA, for example.

[29] As for staff, we are looking at the usual sort of training for staff with an extra element. Officers of the Court will be involved in doing intake for court supervised

mediation. I am in the process of having all of them trained as mediators and will support them being accredited if they wish to gain accreditation. That is not to say that they will be mediating. However, a good thorough understanding of the principles of ADR will enhance their capacity to prepare parties for mediation and to support Members in the mediation.

Mining objections hearings

[30] Turning then to mining objections hearing review, I can only touch on this. The Court will shortly publish a response to feedback that we received after consultation in November and December on the mining objections hearing process. I have already touched on some of the difficulties with our powers and administrative function. The Court will establish a special Land Court User Group that deals with this jurisdiction. That forum will assist the Court to develop better procedures for our mining hearings and to clarify our expectations of parties in those matters.

[31] That is enough of what has changed. What next? We will articulate what we are going to do. We will implement it. We will review it. Then we will revise it. That is the culture I hope to foster within the Land Court.

[32] Why? Because of all those values identified in the IFCE slide; the core values for the Court. Everything I have talked about is designed to help the Court achieve those core values. If it does not help to do so it should be abandoned.

[33] There was a lot in that overview but I hope that you get the sense that there is a lot of activity. There certainly is. But it is activity with purpose. I look forward to the point, maybe in a year or so, when I can look back and see what is working

and what is not. I look to associations such as QELA to help the Court to audit, revise and redevelop our processes on an ongoing basis.

[34] Thank you for your attention. I am happy to answer any questions you have.