The Land Court of Qld – The Challenge of an Administrative Function

Fleur Kingham

President, Land Court of Queensland

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Introduction

The Land Court of Queensland is a Judicial Tribunal with both institutional and individual independence. Our terms of selection, remuneration, and protection against removal are the same as Judges, but we are appointed for fixed terms of 15 years. The Court is well resourced. The Members are all lawyers with relevant specialist expertise – usually valuation, planning and environment or resources law. We have no non-legal members, although there have been such in the past.

The Court has the powers of the Supreme Court of Queensland for its jurisdiction which include land valuation appeals; compensation claims relating to a range of uses of land, including compulsory acquisition and mining or other resource projects; reviews of a myriad of government decisions relating to such matters; and the resolution of disputes between miners and landowners about the terms of access to land and the miners' conduct on the land. Environmental issues often arise across the full range of those cases.

However, the most complex environmental issues arise in the Court's mining and resources jurisdiction. In that context the Court hears objections to applications for mining leases and environmental authorities and makes recommendations to the ultimate decision maker: the Minister for Natural Resources and Mines (DNRM), for the mining lease; and the CEO of the Department of Environment and Heritage Protection (DEHP), for the environmental authority.

That is an administrative, not a judicial function. In practice, it is a merits hearing, having regard to statutory criteria that must be applied in granting the authorities. Although the hearing is prospective, as the final decision has not yet been made by government, the distinction has greater substance in theory than practice.

The mining lease application is only referred if it otherwise qualifies for grant, subject to the objections. The environmental authority is referred in draft form, so the DEHP has already completed its assessment when the matter comes to the Court. As far as I have been able to ascertain, the decision-makers have acted consistently with all recommendations of the Land Court about such matters.

I am currently researching the historical record for the institutions which preceded the Land Court: the Land and Resources Tribunal and the Mining Warden. To date, I have found only one example of a Minister not following a recommendation. In the early 1970s, the Mining Warden recommended the grant of a mining lease to mine mineral sands in a coastal environment with significant environmental values. Following the hearing there was a vigorous public debate. The lease was not granted due to the intense public opposition to the mine.

Our most recent controversy relates to the decision of the Land Court to recommend the grant of a mining lease to Adani: the Carmichael mine. You might be aware of the ongoing public campaign at both State and Federal level to stop that project proceeding.

Returning to the questions of process, the Court must afford natural justice in hearing objections. It must independently assess the evidence in making its recommendation. Sometimes there can be hundreds of objectors. Until fairly recently, the Court relied on the *Uniform Civil Procedure Rules 1999* (Qld) in conducting the hearings.

In 2015, a Supreme Court Justice decided those rules could not be applied to objections hearings. This created some difficulties for the Court. In the preceding eight years or so, the Court's process had become increasingly formal. The Members who conducted these types of hearings proceeded as if they involved civil claims, using an adversarial process with little

case management or ADR; an approach at odds with the Court's function and which confused objectors who were not legally represented.

Perhaps because objections hearings have always been conceived of as merits hearings, the Members of the Court are not assisted, as other administrative bodies are, by counsel assisting or by independent access to experts. The DNRM is not a part of the hearing. Although the DEHP is a statutory party, it plays a passive role in the process.

When I was appointed to the Court as President in August 2016, the Court's procedural problems had not been resolved. I commenced a review of our procedure. I started by engaging an independent person to consult widely with relevant individuals and agencies and provide a report summarising the feedback gathered about the Court's. I have now established a Working Group within the Court to develop new procedures and a Resources User Group to provide a forum for ongoing consultation.

Against that background, I want to focus on new or proposed procedures for the Court which might respond to two of the challenges posed by Rock Pring and Kitty Pring in their paper delivered in Oslo on 21 June 2016 – *'The Challenges Facing Environmental Judges in the Next Decade'*. These two challenges are: access to environmental justice and ADR.

The primary focus of access to environmental justice is standing. That is not an issue for objections hearings. Any can object and that gives them standing for the objections hearing. However, access to environmental justice raises other issues, particularly for litigants in person seeking to navigate court processes. The areas of reform I will discuss today relate to the use of ADR techniques and procedures for expert evidence. Both areas of reform are relevant to improving the experience and effectiveness of access to environmental justice by poorly resourced litigants, whether they are representing the public interest or their own interests (such as landowners concerned about the impact on their particular environment).

ADR

There has been limited use of court supervised ADR for objections hearings in recent years, although that was not always the case. The immediate forerunner to the Land Court in this

jurisdiction was the Land and Resources Tribunal (LRT). I served as a Deputy President of the LRT for 6 years. Members routinely mediated mining objections and this procedure was quite effective. It is not clear to me why there was less use of Members for mediation of these matters in the Land Court and how the process became more formal and adversarial.

Our consultations revealed some distrust of ADR by landowners. Often the miner pays the mediator's costs. Some landowners associate the mediator with the miner, even if the mediator is an independent ADR practitioner.

There is also a view amongst both objectors and mine applicants that ADR is not helpful because, for some critical issues, there can be no resolution. For example whether a mine should proceed given the uncertainty surrounding impacts on groundwater or the contribution of mining fossil fuels to climate change.

Nevertheless, I have recently issued a new Practice Direction for mediation of all matters, including objections hearings. It allows for mediation by Members as well as a Judicial Registrar – this should overcome the perception the mediator is aligned with the miner. The Court will also establish a panel of specialist ADR practitioners to complement Court conducted ADR and, of course, private mediation will continue to be encouraged. My focus today, though, is on court conducted ADR.

Firstly, I want to talk about a discriminating approach to referral to ADR. I am open to referring only some issues or some parties to mediation. In my view, not all parties need to participate and not all issues need to be discussed. Partial resolution may well benefit some parties.

Often, landholders who object will have discrete concerns to a public interest objector and their concerns might be able to be accommodated by changes to mine plans or conditions. I see no reason why such issues cannot be mediated, even if not all objectors wish to participate. Resolution of a discrete issue for a landholder could not affect another person's objection. Partial resolution need not necessarily dispose of the landholder's objection entirely. A landowner might maintain their objection while arguing that, if the Member does

recommend the lease is granted, that the grant is subject to conditions agreed with the miner to deal with the issue mediated.

I have also started using ADR by Members as a less formal opportunity for case management – identifying the issues, developing the most appropriate, time effective and cost effective approach for the objections hearing. While this can be done in directions hearings, particularly where there are litigants in person, case management might be better discussed in a without prejudice forum that ends in an agreement about the process for the hearing. I see this sort of case conferencing as an opportunity to understand the true nature of the objection, to educate the parties about the Court's expectations and to better prepare the parties to effectively participate in the hearing.

To the same end, ADR can provide a forum for exploring expert evidence. Currently experts are involved in without prejudice discussions and assist the parties to resolve alternative proposals or conditions. This has particular value for objectors who are litigants in person and who might find it difficult to probe expert opinion in an adversarial setting. A mediator can make creative use of experts in progressing discussions, and can also explore any misapprehensions between the experts that might be a barrier to agreement.

However, there are ongoing issues with expert evidence that I think need to be addressed and I will turn now to some procedures to improve expert evidence in our objections hearings.

Expert Evidence

These procedural reforms have been implemented or are under consideration in order to improve the accessibility and utility of expert opinions.

- **Opposing experts:**

There is scope for reform of the Court's procedure for dealing with conflicting expert opinion. The Court uses the same process as the Queensland Planning & Environment Court. Experts

confer to identify areas of agreement and disagreement and produce a joint report, before they commit themselves to an individual opinion. That has a lot to commend it.

However, this procedure hasn't eliminated the difficulties often encountered because experts have been individually briefed with different information and competing instructions about the facts they are asked to assume in forming their opinions. Too often the experts still pass like ships in the night, even in their joint reports.

I have introduced concurrent evidence in the Land Court. At hearing, that assists to clarify the real issues between them. However, that is a little late in the process to substantially improve the quality of the expert reports. Some differences of opinion stem from the initial briefing, which colours the process and leads the expert down a path of reasoning without proper appreciation or consideration of the issue raised by another party (and without access to relevant information they may have).

I am looking at ways experts can be better briefed – most likely with one set of instructions, contributed to by all parties, which identifies the particular issue(s) the experts are asked to address and the competing factual and other assertions they are asked to assume.

In our mining jurisdiction, especially with litigants in person, this might most easily be achieved by a briefing meeting which the parties attend and which is conducted by the Member managing the case. That would keep it on the record. It would increase transparency and hopefully reduce the potential for misapprehension of another party's case. At the briefing conference, the experts would not be expected to express an opinion, but could ask questions and request information that would assist them in their discussions.

Following this, not necessarily on the same day, there would be a conference of experts culminating in a joint report provided to the Court and all parties. I favour those conferences being chaired by the Member who conducted the briefing meeting. As the conference would not include any of the parties, the case managing Member would not conduct the objections hearing, although they may mediate the matter.

Single expert

Another process I am considering introducing is a form of arb/med. I think this will be most useful for discrete issue(s) early in the process where:

- the objector doesn't intend, or doesn't have the means, to call their own expert on the issue(s) so the sole expert evidence will be called by the miner; and
- the evidence relates to an objection that might be able to be dealt with by conditions (such as amenity impacts).

In that case, the expert's evidence could be taken on the record with all parties able to ask questions, led by the Member conducting the objections hearing. That could be followed by a mediation dealing with that discrete issue or issues. I have used this process before in a disciplinary jurisdiction and it worked very well. The Member taking the evidence session does not conduct the mediation. The mediator observes the evidence session so they are fully informed. Because the evidence has already been tested, the parties are in a better position to consider their options and realistically assess their prospects.

Although I have indicated this would be useful where there is only one expert, I have used it with conflicting experts who gave evidence in a concurrent evidence session.

Conclusion

In summary, I consider these processes could:

- More fully utilise the specialist expertise of the Members in ADR and case management;
- Ensure objections hearings are managed in a case specific way that is more responsive to the particular issues and to the particular parties;
- Provide an early opportunity to resolve issues capable of resolution;
- Develop more flexible and accessible means of briefing and using experts in the process:
    - To increase transparency and reduce unconscious bias;

- To ensure experts are briefed with the same material and asked to address all relevant scenarios; and
- To promote resolution after early testing of the expert evidence.

My objectives in developing these new procedures are:

- To make objections hearings more accessible, efficient and effective;
- To increase the use of ADR and ADR techniques in objections hearings; and
- To promote the independence of expert opinion evidence and make the most efficient and effective use of it.