

LAND AND RESOURCES TRIBUNAL BILL 1998

EXPLANATORY NOTES

Title of the Bill

Land and Resources Tribunal Bill 1998

Policy Objectives of the Bill

The policy objectives of the Bill are:

- To implement stage three of the Premier’s Native Title Strategy by providing for the establishment of the Land and Resources Tribunal (the tribunal) to deal with “future acts” which might affect native title with respect to mining.
- To provide, through the tribunal, an “independent person or body” required under sections 43 and 43A of the *Native Title Act 1993* (Cwlth) (NTA) and for the inclusion of a member of the National Native Title Tribunal (NNTT) to participate in the determination as required under section 43.
- To provide, through the tribunal, the “independent person or body” required under section 24MD(6B) of the NTA in respect to the compulsory acquisition of native title rights and interests.
- To transfer the functions of the Mining Wardens Court, established under the *Mineral Resources Act 1989* to the tribunal in order to create a single forum for all energy resource-based projects, whether native title is in issue or not.
- To provide mediation where required under the recent amendments to the *Mineral Resources Act 1989*.
- To provide, in doing all of the above, that the rights and interests of native title holders, the indigenous community and

Queensland's general community are given full and proper respect.

Achieving the Policy Objectives of the Legislation

The proposed legislation achieves these policy objectives by:

- Establishing the Land and Resources Tribunal, and the offices of the president, the deputy presidents, the indigenous issues referee, the mediation referee and the mining referee to discharge the determinative and mediation functions of the tribunal.
- In addition to the appointment of non-presiding members to the tribunal making members of the Land Court and Land Tribunals ex-officio members of the tribunal. This will give the tribunal access to the significant body of experience of the members of these bodies in carrying out its functions.
- Giving the tribunal jurisdiction with respect to matters that could previously have been heard by the Mining Warden in the Wardens Court and also providing jurisdiction to the tribunal in relation to hearings under the Alternative State Provisions and any ongoing issues relating to agreements created under them.
- Giving the tribunal jurisdiction with respect to actions brought by indigenous people in protection of their cultural heritage.
- Directing what type of proceedings are to be heard by the tribunal constituted as either a single member or a panel of members (which panel must include at least one of the presiding members). This balances the need for both a quick and cost effective manner of hearing proceedings where the subject matter of the proceedings is not of a complex nature, and the need for matters involving native title or complex issues to have access to a forum with appropriate knowledge and expertise in the issues of the proceedings.
- Transferring the right of appeal from a single member of the Land Court on all new matters of compensation to a panel of the tribunal and creating rights of appeal from proceedings of the tribunal.

- Amending the *Mineral Resources Act 1989* and the *Fossicking Act 1994*, to change references to the Mining Warden or the Wardens Court to that of the tribunal and to transfer its penal jurisdiction to the general Courts.
- Giving the tribunal power to make orders for the appropriate and confidential reception, custody and handling of culturally sensitive evidence.
- Making consequential amendments to the *Mineral Resources Act 1989*, the *Fossicking Act 1994*, the *Acts Interpretation Act 1954*, the *Native Title (Queensland) Act 1993* and the *Judges (Salaries and Allowances) Act 1967*.
- Deeming references to the Mining Warden or the Wardens Court in a number of other Acts to be a reference to the Mining Referee and the tribunal respectively.

Administrative Cost

The administrative cost to Government, as a result of the Bill, will be those costs associated with the tribunal undertaking its activities with respect to native title issues and non native title issues in accordance with the new procedures provided by the amendments and the Alternative State Provisions. These short term costs will be offset in the medium to long term by the revenues which will flow to the State from the resulting resource development and associated employment opportunities.

Fundamental Legislative Principles

The Bill is consistent with the fundamental legislative principles contained in section 4 of the *Legislative Standards Act 1992*. Section 4 requires that legislation has sufficient regard to:

- (a) rights and liberties of individuals; and
- (b) the institution of Parliament.

Under section 4(3)(a) of the *Legislative Standards Act 1992*, one of the fundamental legislative principles is whether legislation makes rights and liberties, or obligation, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review. The Bill ensures that the powers of the tribunal are sufficiently defined and subject to appropriate review.

The Bill provides for the delegation of administrative power only in appropriate cases and to appropriate persons, in compliance with section 4(3)(c). The Bill provides that a warrant issued by a Presiding Member is in compliance with the requirements of section 4(3)(e).

With respect to the rights and liberties of the individual under section 4(3)(g), the Bill ensures that a person appointed as a Mining Warden has their salary and conditions preserved, after the commencement of this Act, and is not adversely affected.

Lastly, section 4(3)(j) of the *Legislative Standards Act 1992* provides that one of the fundamental legislative principles is whether legislation has sufficient regard to Aboriginal tradition and Island custom.

The Bill addresses this principle in four ways. First, all proceedings involving issues of native title will be heard before a presiding member, with particular knowledge or experience of indigenous issues, assisted by a panel. Secondly, the Bill provides that a member of the NNTT will participate in the determination of objections made by native title notification parties. Thirdly, the office of an indigenous issues referee is created, which requires appropriate qualifications and experience, so that the tribunal has a member of the tribunal with particular expertise in handling issues central to indigenous culture, society and traditions. Fourthly, the tribunal has power to make orders for the appropriate and confidential reception, custody and handling of culturally sensitive evidence.

With respect to whether the legislation has sufficient regard to the institution of Parliament under section 4(4) of the *Legislative Standards Act 1992*, the Bill is consistent with fundamental legislative principles as the Bill does not allow for the delegation of legislative power, does not authorise the amendment of any Act other than by an Act and does not restrict, in any way, the scrutiny of any delegated legislative power by the Legislative Assembly.

Consultation

Consultation has occurred with officers of the Commonwealth Attorney-General's Department and the following State Departments and Offices:

- the Department of the Premier and Cabinet;
- the Office of Parliamentary Counsel;
- the Office of the Public Service;
- the Department of State Development;
- the Department of Justice;
- the Department of Mines and Energy;
- the Department of Aboriginal and Torres Strait Islander Policy;
and
- the Department of Natural Resources.

Consultation has also occurred with representatives from indigenous, pastoral, agricultural and mining interests through the Premier's Native Title Task Force.

NOTES ON CLAUSES**PART 1—PRELIMINARY**

Clause 1 sets out the short title of the proposed Act.

Clause 2 provides that the Act will commence on a date to be fixed by proclamation.

Clause 3 identifies that Schedule 4 of the Bill contains a dictionary of words used in the Act.

PART 2—ESTABLISHMENT AND MEMBERSHIP OF THE TRIBUNAL

Division 1—Establishment

Clause 4 establishes the body to be known as the Land and Resources Tribunal.

Clause 5 provides that the tribunal in exercising its jurisdiction is not subject to the Minister's direction.

Clause 6 states that members, of the tribunal are either presiding members or non-presiding members.

Division 2—Presiding members

Clause 7 sets out that the presiding members appointed by Governor in Council are the president and deputy presidents.

Clause 8 sets out the eligibility for appointment as a presiding member. The provision ensures that all the presiding members must be eligible for appointment as a Supreme Court Judge, must have particular knowledge or experience of indigenous issues and ensures that at least one presiding member should have particular knowledge or experience of mining and petroleum issues.

Clause 9 provides that a presiding member must retire at 70 years of age but may continue beyond 70 years of age in order to finish a proceeding.

Clause 10 provides that the salary and allowances payable to the president and deputy presidents are those payable to a Supreme Court judge and District Court judge respectively.

Clause 11 provides that the *Judges (Pensions and Long Leave) Act 1957* applies to the presiding members as if they were judges under that Act.

Clause 12 states that presiding members are not appointed under the *Public Service Act 1996* and are not subject to industrial awards, agreements or decisions.

Clause 13 provides that the reasons and method of termination of a presiding member are the same which apply to a judge.

Clause 14 sets out those circumstances and eligibility for appointment as an acting presiding member.

Division 3—Non-presiding members

Clause 15 describes the different categories of non-presiding members of the tribunal.

Clause 16 provides for the appointment of appointed non-presiding members.

Clause 17 sets out the qualifications required for appointment as an appointed non-presiding member.

Clause 18 describes the qualifications for appointment as a mining referee, mediation referee and indigenous issues referee.

Clause 19 sets out those circumstances and eligibility for appointment as an acting non-presiding member.

Clause 20 provides that a Land Court or Land Tribunal non-presiding member stops holding office in the tribunal if the person stops holding office as a member of the Land Court or Land Tribunal respectively. The clause provides for the continuation of membership of the tribunal, where it has stopped, to enable the member to finish a proceeding.

Clause 21 sets out the circumstances whereby an appointed or referee non-presiding member may be removed from office.

Clause 22 sets out the terms of appointment of an appointed non presiding member or referee non-presiding member and provides for the continuation of membership, where it has stopped, to enable the member to finish a proceeding.

Clause 23 states that an appointed non presiding member or referee non presiding member may resign by giving notice to the Minister.

Clause 24 provides for the terms and conditions of appointment of each non-presiding member.

Division 4—General provisions about members

Clause 25 outlines who may grant leave of absence to the president, a deputy president or a non-presiding member.

Clause 26 sets out the limitations placed upon a member of the tribunal holding a benefit of an interest in a mining tenure.

Clause 27 outlines the procedure to be followed if a member becomes aware that the member has a conflict of interest about a proceeding before the tribunal.

Clause 28 provides that a member of the tribunal may also be a member of the NNTT.

PART 3—REGISTRAR AND DEPUTY REGISTRARS***Division 1—Registrar***

Clause 29 provides for, and sets out, the powers and responsibilities of the registrar of the tribunal.

Clause 30 outlines that the registrar may keep appropriate records and information and the restrictions that may be placed on access to the records of the tribunal.

Clause 31 states that the registrar may engage consultants to perform services for the tribunal.

Clause 32 provides the registrar with the ability to delegate the registrar's powers.

Division 2—Deputy registrars

Clause 33 provides deputy registrars may either be a member of the staff of the tribunal or be a person appointed as a deputy registrar who holds another position.

Clause 34 outlines the basis for an appointment as a deputy registrar (additional office).

Clause 35 provides for the conditions of appointment of a deputy registrar (additional office).

Clause 36 notes that when exercising a function as a deputy registrar (additional office) the deputy registrar is subject to the direction of the registrar.

PART 4—ORGANISATION AND OPERATION OF TRIBUNAL

Division 1—Sitting of tribunal

Clause 37 provides that the president directs where and when the tribunal sits within the State.

Clause 38 provides that the president may give directions about the business of the tribunal.

Clause 39 provides that a proceeding must be dealt with by the tribunal either constituted as a panel of the tribunal or as a single member. The clause describes how a panel can either be a standard panel or an NNTT panel. The clause also sets out those considerations the president must take into account in determining the type and composition of the panel.

Clause 40 provides that Schedule 1 of the Act also sets out when and the type of panel to be composed by the president for a particular proceeding. The clause also requires the president to identify the members of the panel and where appropriate the NNTT member of the panel.

Clause 41 sets out how a decision is made by a panel to a proceeding and sets out the different roles for a presiding member and a non-presiding member.

Clause 42 sets out how a decision is to be made by an NNTT panel. This reflects the requirement of section 43(2)(h) of the NTA.

Clause 43 describes how a single member panel may be reconstituted where the member for any reason stops being a member so that the proceeding may finish.

Clause 44 describes how a panel may be reconstituted where a member for any reason stops being a member so that the proceeding may finish.

Clause 45 describes how an NNTT panel may be reconstituted where the NNTT member, who is not a member of the tribunal, for any reason stops being a member of the panel so that the proceeding may finish.

Division 2—Hearings

Clause 46 outlines the application of this division.

Clause 47 provides that a party may appear or be represented by someone else before the tribunal.

Clause 48 states that a tribunal hearing is open to the public except where the interests of justice or culturally sensitive issues require otherwise.

Clause 49 states the manner in which the tribunal must conduct a hearing. In particular the tribunal is not bound by legal forms or rules of evidence. The tribunal can also make directions about the way a proceeding is to be conducted.

Clause 50 provides the general rule that each party to the proceeding before the tribunal must bear its own costs of the proceeding unless the exception applies.

Division 3—Jurisdiction

Clause 51 contains the general provisions relating to the tribunal's jurisdiction.

Clause 52 describes the exclusive jurisdiction of the tribunal relating to the enforcement of, disputes arising under, and declarations about negotiated agreements described in Schedule 2.

Clause 53 confers exclusive jurisdiction to the tribunal with respect to certain cultural heritage matters.

Division 4—Other supporting provisions

Clause 54 provides that the tribunal is a court of record and outlines particular conditions for the tribunal's seal.

Clause 55 states the form of a decision of the tribunal.

Clause 56 sets out the process for the transfer of a matter from the Supreme or District Court to the tribunal.

Clause 57 sets out the circumstances whereby it is an offence for a witness who has been notified to attend and who fails to attend.

Clause 58 sets out the circumstances whereby it is an offence for a witness who refuses to be sworn or to make an affirmation, to answer a lawful question, or produce a document.

Clause 59 provides members, representatives and witnesses with the same protection and in the case of members and representatives immunities, as if they were in a Supreme Court proceeding.

Clause 60 provides a general offence provision relating to the obstruction of, or improper influencing of, the conduct of a tribunal hearing as well as the contravention of an order of the tribunal limiting the extent to which a hearing is open to the public.

Clause 61 provides that a witness who is notified to appear has the right to be paid an allowance.

Clause 62 sets out those circumstances whereby a person is in contempt of the tribunal.

Clause 63 deals with punishment for contempt and the manner in which contempt proceedings are conducted.

Clause 64 removes the possibility of being punished twice for an act constituting both contempt and an offence under this Act.

Clause 65 sets out the general powers of the tribunal, particularly in relation to the type of orders that may be made and the power of the officers of the tribunal in giving effect to those orders.

Clause 66 is a general provision in respect of the enforcement of decisions and orders of the tribunal.

Clause 67 provides appeal rights for a decision of the tribunal but only on a question of law. An appeal from a single member (except for the president) is to the president with the leave of the president. An appeal from the president or a panel is to the Court of Appeal. This clause also deals with appeal time limits and the orders which may be made on appeal.

Clause 68 provides the rules in relation to a stay of the decision of the tribunal where the matter is appealed.

Clause 69 outlines how the tribunal constituted as a single member may refer a question of law to the Court of Appeal.

Clause 70 outlines how the tribunal constituted as a panel may refer a question of law to the Court of Appeal.

Division 5—Mediation

Clause 71 describes the application of the division.

Clause 72 sets out certain conditions of form to be met where an agreement has been negotiated.

Clause 73 provides that a mediator must not disclose, without reasonable excuse, any matter that comes to the mediator's attention during the mediation.

Clause 74 sets out those protections or immunities which attach during a mediation to the mediator, a participant and a document.

Clause 75 makes it clear that all mediation participants must agree before a mediation matter is admissible in a proceeding before the tribunal.

Clause 76 precludes a mediator from sitting on a hearing which the member has mediated.

Division 6—Other provisions

Clause 77 notes that the staff of the tribunal are employed under the *Public Service Act 1996* and that the tribunal is part of the department for the purposes of the *Financial Administration and Audit Act 1977*. It also provides for the qualifications of the registrar.

Clause 78 prescribes the requirements for the preparation and tabling of a copy of the annual report of the tribunal in the Legislative Assembly.

Clause 79 provides that another presiding member may be delegated the administrative powers of the president under this Act.

PART 5—MISCELLANEOUS

Clause 80 provides that where a public service officer is appointed on a full-time basis as a non-presiding member at the end of that persons term of office the person is entitled to return to the public service.

Clause 81 gives the Governor in Council the power to make regulations for this Act.

Clause 82 gives the Governor in Council the power to make rules for the practices and procedures of the tribunal.

PART 6—TRANSITIONAL PROVISIONS

Clause 83 states how to deal with matters commenced but not finished prior to the commencement of this Act.

Clause 84 provides that a person who is a mining warden on the commencement of this section becomes a mining referee.

Clause 85 provides a continuing role for the mining referee as the mining warden under those designated Acts in the clause.

PART 7—CONSEQUENTIAL AND OTHER AMENDMENTS

Clause 86 provides that schedule 3 amends the Acts mentioned within it.

SCHEDULE 1

Schedule 1 sets out the requirements for constituting the tribunal with respect to the various proceedings that may be brought before it under the *Mineral Resources Act 1989* and the *Fossicking Act 1994*. In particular the schedule prescribes when a NNTT panel is to be formed.

SCHEDULE 2

Schedule 2 prescribes what a negotiated agreement is by reference to the relevant provisions of the *Mineral Resources Act 1989* for the purposes of section 52 of this Act.

SCHEDULE 3

Schedule 3 sets out the amendments to the Acts mentioned in the schedule.

SCHEDULE 4

Schedule 4 contains the dictionary for this Act.