

Land Court and Other Legislation Amendment Bill 2007

Explanatory Notes

Objectives of the Bill

The purpose of the Bill is to improve the system for administration of justice by conferring upon the Land Court most of the jurisdiction of the Land and Resources Tribunal (“the Tribunal”).

The Bill provides for the current members of the Tribunal and the Mining Referee to be offered alternative positions in the court system, consistently with the principles of judicial independence.

The Tribunal’s jurisdiction with respect to the Alternative State Provisions (“ASP’s”) is preserved. Under the *Native Title Act 1993* (Cth) States and Territories can set up alternative regimes to resolve native title matters. In 2000, the Queensland Government set up a system to deal with mining and exploration applications over areas where native title might exist and these were processed in the Tribunal. However, from 31 March 2003 applications for mineral tenements on land, where native title may exist, are processed under the *Native Title Act 1993* (Cth) future act provisions. The jurisdiction of the LRT is preserved only to the extent that it is required to protect the rights and interests that arose before 31 March 2003 thus ensuring those applications will be processed under the pre-existing ASPs.

The Bill allows for acting appointments to be made to allow this jurisdiction to be exercised. The Bill contains a repeal clause which retains the *Land Resources Tribunal Act 1999* (“the LRT Act”) until 31 December 2011.

The Bill makes amendments to achieve reforms in other areas of the court, namely allowing retired Magistrates to act as Magistrates and introducing a framework for a new system for costs assessment.

Reasons for the Bill

The Tribunal was established in 1999 by the LRT Act, but has not had sufficient workload to justify its resources. The Tribunal shares premises

with the Land Court and the work of these bodies is similar in nature. The Bill ensures that access to our courts (and through them, to justice) is improved for all Queenslanders by re-allocating the resources of the Tribunal into other parts of the justice system.

Achievement of the Objectives

It is proposed to merge the jurisdiction of the Tribunal into the Land Court. The jurisdiction of the Tribunal under many Acts will be exercised by the Land Court. Those Acts are amended by the Bill. The Tribunal's Cultural Heritage and Indigenous Land Use Agreements jurisdiction under the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* will be exercised by the Land Court in a new Cultural Heritage and Indigenous Land Use Agreement Division ("the Cultural Heritage Division"), established in the *Land Court Act 2000* ("LCA"). The Bill provides for the appointment of indigenous assessors to perform functions in the Land Court in its new Cultural Heritage Division.

The Bill provides for offers of appointment to different positions to be made to the existing members of the Tribunal and to the Mining Referee.

The Bill preserves the Tribunal's jurisdiction under the Alternative State Provisions and provides for the way that this jurisdiction can be exercised.

Estimated Cost for Government Implementation

The implementation is not expected to have additional costs to Government, other than as provided in new section 86 of the LCA.

Consistency with Fundamental Legislative Principles

The Bill affects the rights of parties to existing matters in the Tribunal. Their disputes will cease to be dealt with by the Tribunal and will then be dealt with by the Land Court. In order to cure any procedural deficit, under new s.91 of the LCA, the Land Court will have a wide power to make directions about how the proceeding is to be dealt with by the Land Court instead of the Tribunal and provides for indemnity certificates to be granted in appropriate cases for the purposes of the *Appeal Costs Fund Act 1973*.

In relation to the Tribunal, the Bill provides for the President (who enjoys the salary and allowances of a Supreme Court judge) and the deputy President (who enjoys the salary and allowances of a District Court judge) to be appointed to the District Court and to the Land Court, respectively.

In relation to the President, provision is made for the difference in salary until the President is eligible to retire on an annual pension under s.4 of the *Judges (Pensions and Long Leave) Act 1957*. At that time the President will be able to retire with a pension assessed as if he were a Supreme Court Judge. The Bill excludes any right to compensation for the changes, though it provides for an amount of compensation to be paid to the President, calculated under the Bill.

The current Mining Referee of the Tribunal is to be offered appointment as a Judicial Registrar of the Land Court. There will be no loss of conditions or tenure. The Mining Referee's long expertise in resource matters will be of great value to the Land Court.

These arrangements have been drawn to preserve the principles of judicial independence. All the proposed arrangements are contained in the Bill and are open to scrutiny.

Consultation

The proposal has been discussed with the members of the Tribunal, the President of the Land Court, the Chief Judge of the District Court, Agforce, National Farmers Federation and the Queensland Resources Council, officers from the Department of Natural Resources and Water, the Department of Mines and Energy, Queensland Treasury, Department of the Premier and Cabinet, and Environmental Protection Agency.

There has been consultation with the Commonwealth Attorney-General.

In relation to the provisions in relation to costs assessment there has been consultation with the Chief Justice, the Queensland Law Society, and the Rules Committee, established under the *Supreme Court of Queensland Act 1991*, s.118C. The Chief Magistrate proposed the amendment to the *Magistrates Act 1991* to allow retired Magistrates to act as Magistrates.

Notes On Provisions

Part 1 Preliminary

Clause 1 states the short title of the Act.

Clause 2 states that commencement of certain provisions (those other provisions containing the arrangements for the President, Deputy President and Mining Referee) are on assent. Other provisions commence by proclamation.

Part 2 Amendment of Land and Resources Tribunal Act 1999

Clause 3 states that this part amends the LRT Act.

Clause 4 omits sections 10 to 12 (Salaries and Allowances, pension and leave of absence arrangements, and conditions of appointment for presiding members)

Clause 5 inserts new Part 2, division 2, which inserts new section 14A (Land Court member filling vacancy of presiding member) which allows a Land Court member to fill the vacancy of a presiding member.

Clause 6 inserts new section 19A (Land Court officer filling vacancy of referee non-presiding member) which allows the Judicial Registrar or other officers of the Land Court to fill the vacancy of any referee non-presiding member.

Clause 7 amends s29 (Registrar of Tribunal) to omit reference to the direction of the President. This is because, due to the small workload of the Tribunal under the ASP's, a President will only be appointed on an acting basis.

Clause 8 omits s38 (Arrangement of Business) providing for the arrangement of business of the Tribunal. This is because it is envisaged that the workload under the ASP's will be small and this provision will be unnecessary.

Clause 9 amends s39 (General requirements for constituting for proceedings) to simplify the arrangements for constituting a panel.

Clause 10 amends s43 (Reconstituting Tribunal- single member) to simplify the arrangements for reconstituting a panel.

Clause 11 omits sections 51A to 53A (General provisions regarding jurisdiction). These sections of the LRT Act confer the jurisdiction under the Native Title Act 1993 (Cth), the jurisdiction of the Tribunal for

registered indigenous land use agreements, the exclusive jurisdiction for negotiated agreements, the exclusive jurisdiction for certain cultural heritage matters and the exclusive jurisdiction for contract conditions. Under the Bill, this jurisdiction is conferred on the Land Court.

Clause 12 amends section 54 (Tribunal a court of record) by omitting reference to the President and replacing this with a reference to the Registrar, as it is likely given the small workload of the Tribunal under the ASP's that the President will only be appointed on an acting basis, but there will be a permanent appointment of a Registrar.

Clause 13 omits section 78 (Annual Report), which refers to the requirement for the Tribunal to prepare an Annual Report on the operations of the Tribunal. A new Section 77A of the LCA requires the Land Court to prepare an Annual Report which includes the operations of the Tribunal. A transitional section is inserted for the Tribunal's report for the financial year ending 30 June 2007.

Clause 14 omits section 80 (Preservation of rights of non-presiding member).

Clause 15 inserts new section 82A (Expiry of Act) which states the LRT Act expires on 31 December 2011.

Clause 16 replaces Part 6 and inserts new Part 6 headed "Transitional provisions for Land Court and Other Legislation Amendment Act 2007".

This inserts new s.87. This pivotal provision confirms that the purpose of the Bill is to transfer the Tribunal's jurisdiction to the Land Court. It describes the Tribunal's ongoing jurisdiction under the ASP's. The section ensures that the Governor-in-Council is not obliged to appoint presiding or non-presiding members of the tribunal but may act as convenient to appoint persons to act in those positions. This is to support the jurisdiction under the ASP's. The section continues to provide that persons may hold dual appointments in the Land Court and Tribunal registries.

New section 88 deals with transitional arrangements for the Tribunal's annual report for the financial year ending 30 June 2007.

New section 89 provides arrangements for the President of the Tribunal. These arrangements are consistent with the principles of judicial independence. The section provides that the Minister must offer to the person that if the person resigns that the Minister will recommend to the Governor in Council that the person be appointed as a District Court Judge and that the person will receive the entitlements mentioned in the LCA, s.86 (a new section). The provision ensures that if the person accepts the

offer within 30 days, the Minister must recommend to the Governor in Council that the person should be appointed a District Court Judge. The appointment of the President to the District Court would mean that the President would join this distinguished group of judges, who serve honourably through this State, deciding important matters arising within its civil, criminal, planning and appellate jurisdictions. Any issues of financial loss are dealt with by s.86 of the LCA.

New section 90 provides arrangements for the Deputy President of the Tribunal. These arrangements are consistent with the principles of judicial independence. The section provides that the Minister must offer to the person that if the person resigns that the Minister will recommend to the Governor in Council that the person be appointed as a member of the Land Court and that the person will receive the entitlements mentioned in the LCA, s.87 (a new section). The provision ensures that if the person accepts the offer within 30 days, the Minister must recommend to the Governor in Council that the person should be appointed a member of the Land Court. The Deputy President is already a part-time member of the Land Court. The Deputy President will enjoy essentially the same conditions as under his present appointment and continue to work at similar tasks.

New section 91 provides arrangements for the Mining Referee of the Tribunal. These arrangements are consistent with the principles of judicial independence. The section provides that the Minister must offer to the person that if the person resigns that the Minister will recommend to the Governor in Council that the person be appointed as a judicial registrar of the Land Court and that the person will receive the entitlements mentioned in the LCA, s.88 (a new section) – which guarantees current salaries and allowances. The provision ensures that if the person accepts the offer within 30 days, the Minister must recommend to the Governor in Council that the person should be appointed a judicial registrar of the Land Court. The Land Court does not have an equivalent position of Mining Referee, however, the judicial registrar is able to exercise decision-making authority, conferred by rule of court. It is intended that by rule of court, the decision-making authority that the Mining Referee currently exercises will be conferred upon a judicial registrar.

New section 92 provides for the effect of the repeal of sections 10-12 on a person still holding appointment under section 7 as President or Deputy President. This section would come into effect only after the offers of appointment had been made under sections 89 and 90, and the time had lapsed for acceptance.

Clause 17 omits entries from schedule 1 (requirements for constituting Tribunal), consequent upon the jurisdiction in those matters having been conferred upon the Land Court in Part 3 of the Bill.

Clause 18 omits schedule 2 in relation to negotiated agreements, because this jurisdiction is conferred upon the Land Court in Part 3 of the Bill.

Part 3 Amendment of Land Court Act 2000

Clause 19 provides that Part 3 amends the *Land Court Act 2000* (“LCA”)

Clause 20 amends s.5 (Jurisdiction of Land Court) which explains the jurisdiction of the Land Court. The reference to “any Act” in s.5 (1) and (2) is replaced with a reference to “an Act”. A new subsection is inserted to provide that the subsection does not limit parts 3 and 4 and a further subsection is inserted to ensure that the jurisdiction of the Land Court is not ousted merely because a proceeding is about claims or interests of an equitable nature or involves making a decision about title to land. This provision exists in the LRT Act, section 51(2). It has been added into the LCA, because it is essential to ensure that the Land Court has full jurisdiction to deal with matters under the jurisdiction acquired by this Bill, including the Cultural Heritage Division.

Clause 21 inserts new part 2, division 1A after section 6 of the LCA to establish the Cultural Heritage Division. New section 6A is inserted dividing the Land Court into the general division and the Cultural Heritage Division. This section clarifies that any member can sit in either division, as nominated by the President, but members may be nominated for both. New section 6B is inserted which states the purpose of the Cultural Heritage Division.

Clause 22 amends s.16 to add as criterion for appointment as a member of the Land Court extensive experience in land related matters, mining or petroleum issues, or indigenous issues. The inclusion of these additional areas of knowledge will mean members will be able to be appointed to the Land Court who possess these additional areas of expertise.

Clause 23 inserts new pt 2, divisions 6A to 6C after s.32.

New Division 6A provides for Indigenous Assessors.

New s.32A provides for the appointment of indigenous assessors by Governor in Council. It sets out the conditions for eligibility for appointment and provides that an indigenous assessor who is allocated to a proceeding in the Cultural Heritage Division is an officer of the Land Court for that proceeding.

New section 32B provides that the Governor in Council may decide the remuneration, allowances and conditions of an indigenous assessor and provides how an indigenous assessor may resign. It further provides that an indigenous assessor is appointed under the LCA and not under the *Public Service Act 1996*.

New section 32C allows the President of the Land Court to allocate an indigenous assessor to a proceeding in the Cultural Heritage Division if satisfied that this will help achieve the prompt and efficient conduct of the proceeding.

Section 32D defines the role of an indigenous assessor. Importantly, the role is clearly defined as providing advice to the court about matters relevant to the proceeding within the indigenous assessor's knowledge or experience. It is clear that this advice must be disclosed to the parties and they must have an opportunity to make submissions about the advice.

New Division 6B deals with the Jurisdiction of the Land Court in its Cultural Heritage Division.

New section 32E confers jurisdiction under the *Native Title Act 1993* (Cth). This jurisdiction was exercised by the LRT, pursuant to the LRT Act, s.51A - which is repealed by this Bill.

New section 32F confers jurisdiction for registered indigenous land use agreements. This jurisdiction was exercised by the LRT, pursuant to the LRT Act, s.51B - which is repealed by this Bill.

New section 32G confers jurisdiction for negotiated agreements. This jurisdiction was exercised by the LRT, pursuant to the LRT Act, s.52 - which is repealed by this Bill.

New section 32H confers jurisdiction for particular cultural heritage matters. This jurisdiction was exercised by the LRT, pursuant to the LRT Act, s.53 - which is repealed by this Bill.

New section 32I confers jurisdiction for contract conditions. This jurisdiction was exercised by the LRT, pursuant to the LRT Act, s.53A - which is repealed by this Bill.

New Division 6C is inserted dealing with additional power of the Land Court when exercising particular jurisdiction.

New section 32J confers upon the Land Court various powers of the Supreme Court in relation to the jurisdiction, which the Land Court acquires under this Bill. The powers include powers to grant any relief or remedy or give effect to every ground of defence or matter of set-off whether equitable or legal. These powers are being conferred because when the LRT exercised this jurisdiction, the LRT also exercised those powers under the LRT Act, s.65. These powers are additional to those of the Land Court.

Clause 24 inserts a new subsection (2) into section 39 of the *Land Court Act 2000*. The amendment maintains the current position by providing that the Governor in Council is the prescribed authority for section 15 of the *Judges (Pensions and Long Leave) Act 1957* in relation to leave of absence of members of the Land Court. This amendment is consequential on an amendment to the *Judges (Pensions and Long Leave) Act 1957* contained in the Justice and Other Legislation Amendment Bill 2007.

Clause 25 inserts new section 77A dealing with the Annual Report. This establishes a new reporting obligation for the Land Court to provide an annual report, beginning with the financial year ending 30 June 2008. The report must include a report on the operations of the LRT, until the LRT Act is repealed (see clause 15 of the Bill). This new requirement will bring new transparency to the operations of the Land Court.

Clause 26 inserts new Division heading – “Division 1 Savings and transitional provisions for Act No. 1 of 2000.”

Clause 27 inserts new part Part 6, division 2 dealing with transitional provisions for the *Land Court and Other Legislation Amendment Act 2007*.

New section 86 provides the entitlements for a person who holds appointment as the LRT President and who resigns that office and is appointed as a District Court Judge. The section provides that from the new appointment, the person is eligible to be paid as a District Court judge. It provides for the single payment (on appointment) of an amount equal to the difference between the salary, allowances and rates of allowances payable to a Supreme Court judge and those payable for a District judge for the period between the day of appointment and the day the person becomes eligible to receive a pension under the *Judges (Pensions and Long Leave) Act 1957* (“*Judges Pensions Act*”), s.4. Otherwise the section provides that the State has no other liability to compensate the person because of any

reduced salary after the person becomes eligible to receive a pension. The section preserves any other entitlements accrued by the person while the President of the LRT, but in relation to accrued leave of absence under the *Judges Pensions Act*, the leave is to be paid at the salary applicable to a District Court Judge. This is because the section already provides for a single payment for the difference in salary, otherwise there would be a risk of a double payment. Finally, the section specifically provides for the benefit of the person (and any spouse or child) that the *Judges Pensions Act* applies as if the person had been appointed a Supreme Court Judge when appointed president of the LRT until the person's retirement or death and had been paid a Supreme Court Judge's salary at the time of retirement or death. It is considered that the arrangements provided in this section are fair and reasonable.

New section 87 provides the entitlements for a person who holds appointment as the LRT Deputy President, and who resigns that office, and is appointed as a member of the Land Court. From the new appointment the person's salary and allowances are those payable to a Land Court member. There is no provision for compensation as the terms are commensurate with those of a District Court Judge. The person retains all accrued but not yet received entitlements. The section specifically provides for the benefit of the person (and any spouse or child) that service for the purposes of the *Judges Pensions Act* is taken as if the person had been a District Court Judge from their appointment as a Deputy President.

New section 88 provides for the entitlements for a person who holds appointment as a Mining Referee of the LRT, who resigns the persons' office as Mining Referee and at the same time the resignation takes effect, is appointed Judicial Registrar of the Land Court. The section applies from the time of the new appointment until 16 July 2008, which is when the Mining Referee's current appointment expires, and entitles the person to the same salaries, allowances and conditions as under the instrument of appointment as a Mining Referee. The person retains any benefits accrued but not received as Mining Referee. The section specifically provides that the person's entitlements must not be reduced under this section.

New section 89 provides for the entitlements for a person who held appointment under the LRT Act section 7, as Deputy President of the LRT before the commencement of this section, and who resigned from the persons' office as Deputy President and took up an appointment as a District Court judge. In relation to that person, the section clarifies that for the purposes of the *Judges Pensions Act*, the Act applies as if the person

had been a District Court judge for the entire period from their appointment as a Deputy President of the LRT.

New section 90 provides for the assumption by the Land Court of the role of Warden, and Wardens' Court under particular acts.

New section 91 provides that the Land Court is to assume jurisdiction for proceedings already before the LRT. The Land Court has jurisdiction to finish such proceedings and the President may give any necessary directions about how the proceeding is to be dealt with by the Land Court instead of the LRT. The section allows the Land Court to grant an indemnity certificate for the purposes of the *Appeal Cost Funds Act 1973*.

Clause 28 amends Schedule 2 (Dictionary) to insert new definitions required for this Bill.

Part 4 Amendment of Mineral Resources Act 1989

Clause 29 provides that this part amends the *Mineral Resources Act 1989*.

Clause 30 amends section 86 (Appeal against Tribunals' determination upon compensation) and omits reference to Tribunal and Tribunal (appeal) and inserts Land Court and Land Appeal Court.

Clause 31 inserts new section 86A dealing with security for costs for an appeal lodged under section 86. The amendment provides an orderly administrative process for the Land Court including appropriate notification and time periods in which the court must act, as well as clearly setting out the consequences for non compliance by applicants.

Clause 32 Amends s282 (Appeal against Tribunal's determination upon compensation) by omitting reference to the Tribunal and the Tribunal (appeal) and inserting references to the Land Court and the Land Appeal Court and by omitting s.282 (2) (c).

Clause 33 inserts new section 282A dealing with security for costs of appeal under section 282. New section 282A requires the registrar of the Tribunal to determine the level of security for costs when an appeal application is lodged. Commonly appeals may be lodged on the last day of the appeal lodgement time. The consequence is that the registrar does not have adequate time to make a considered decision as to an appropriate level

of security. The amendment provides a more orderly administrative process for the Tribunal including appropriate notification and time periods in which the court must act, as well as clearly setting out the consequences for non compliance by applicants.

Clause 34 deals with renumbering and relocation of part 19, division 6, first occurring, heading (Transitional provisions for Mineral Resources and Other Legislation Amendment Act 2005). The section relocates and renumbers part 19, division 6 as part 19, division 7.

Clause 35 amends s739, first occurring (Application of particular provisions) and relocates and renumbers section 739 in part 19, division 7 as section 764.

Clause 36 inserts a new Part 19, Division 8 dealing with transitional provisions for Land Court and Other Legislation Amendment Act 2007. New section 765 states that particular references to the Land Court are to be taken to be references to Tribunal where native title provisions and other circumstances apply. This section is necessary to allow the Tribunal to exercise effectively its continuing jurisdiction under the ASP's. New section 766 provides that the reference in s.764(7) to the Tribunal, is for a Land Court recommendation (made after s.766 commences), taken to be a reference to the Land Court.

Part 5 Amendment of Supreme Court of Queensland Act 1991

Clause 37 provides that this part amends the *Supreme Court of Queensland Act 1991*.

Clause 38 inserts a new Part 7, division 5A providing for costs assessors. The new part contains a provision 93LA conferring upon a costs assessor the protection and immunity conferred on a judge performing the functions of a costs assessor. The provision continues to provide protection and immunity upon the parties and witnesses, as if they were before the Supreme Court in a proceeding and confers protection upon documents as if they were produced before the Supreme Court. New section 93LB imposes an obligation of confidence upon a costs assessor in relation to confidential information.

New section 93LC preserves privilege despite disclosure to a costs assessor.

Clause 39 amends schedule 1, item 18(d) of the Act by inserting a new subject matter for rules of assessment of costs, specifically including a rule-making power for the appointment and removal of persons other than registrars to assess costs under the *Uniform Civil Procedure Rules 1999*.

Clause 40 amends the schedule 2 (Dictionary) by inserting definitions of “costs assessment” and “costs assessors”.

Part 6 Amendment of other Acts

Clause 41 provides that the schedule amends the Acts mentioned in it.

Primarily, the schedule amends other Acts to change references to the Tribunal to references to the Land Court. These references are changed so as to confer jurisdiction upon the Land Court.

In addition, the schedule amends the *Legal Profession Act 2007*, to repeal sections 350 to 352. This is because of the changes made by this Bill to the *Supreme Court of Queensland Act 1991*.

Also, the schedule amends the *Magistrates Act 1991*, section 6(1) to allow retired Magistrates to be appointed to act as Magistrates.