

LAND COURT BILL 1999

EXPLANATORY NOTES

Objectives of Legislation

The Bill is designed to provide a short, separate piece of legislation to govern the constitution, composition, jurisdiction and powers of the Land Court. The Land Appeal Court is also constituted (and continued) under the Bill with power to hear appeals from the Land Court. Further appeals, on questions of law only, can be taken to the Court of Appeal.

The Bill will provide the legislative foundation for extensive new Rules and procedures to modernise and streamline the Court's operation.

With modern techniques of case-management (including Alternative Dispute Resolution) to be adopted in the subsequent Court Rules, there is likely to be an overall cost saving—both in the Courts operational costs and to the wider community.

Reasons for Bill

1. The Land Court is presently established under provisions of the *Land Act 1962* (Part 2, Divisions 5, 6 and 7). These provisions were not incorporated into the *Land Act 1994* because of the uncertainty which then existed as to the precise future of the Court. The provisions are essentially all that remains of the *Land Act 1962*—obviously only an interim measure pending complete repeal.

2. Inclusion of the Court in *Land Acts* of the past (1897, 1910, 1962 etc) is probably more of a historical reasoning. The Court jurisdiction then was largely to do with rentals, freeholding and other miscellaneous matters of Crown land administration. These matters are now of much less relative significance in the current Court's jurisdiction and workload. A myriad of other legislation now confers jurisdiction on the Court.

3. There is strong justification for the separate Act model rather than include in the *Land Act 1994*. A stand-alone Act can be assigned to the most appropriate Minister under administrative arrangements.

4. The Land Court Bill makes little substantive change to the present law. A main purpose is to provide the legislative base for extensive new procedural Rules to govern the Court's operation. Proposals for these new procedures were the subject of a report on the *Powers Rules and Procedures of the Land Court*.

5. The Bill preserves the existing Land Court and rights of its Members as well as retaining the references under Aboriginal Land Legislation. The provisions relating to the operation of a Queensland Native Title Tribunal (which were incorporated in the *Land Act 1962*) are not carried over here. The Land and Resources Tribunal established under the *Land and Resources Tribunal Act 1999* now covers this aspect. Procedure of the Court is continued to be governed by equity and good conscience with the strict rules of evidence not applying. New features include the following:

- **Uniform time limits (42 days) for lodgement of appeals under the various Acts conferring jurisdiction.**

There presently exists variations in the time limits governing appeals in the range of Acts conferring jurisdiction. These appear to be more of historical origin than of present need. To avoid user confusion and promote uniformity, a single time limit is to apply. (Treasury have requested a 30 day limit remain with any appeals to the Court from Acts they administer).

- **A right of appeal to the Land Appeal Court from all decisions of the Land Court.**

Some legislation conferring appeal rights prevents any appeal to a higher level than the Land Court (e.g. the *Water Resources Act*). Aggrieved persons who have wanted to further appeal have been using alternative and inappropriate mechanisms such as Judicial Review as a means of taking their case beyond the Land Court decision. The proposal now is for all cases which are entitled to go to the Land Court to also have the right to appeal through that appeal path rather than alternatives.

- **A hearing by the Land Appeal Court to be essentially a re-hearing of the evidence already presented in the Land Court with very limited scope for additional evidence.**

Rather than have the Land Appeal Court hearing as a fresh hearing (as was the case prior to 1994) or allow additional evidence with the consent of both sides, strict limitations are now to apply to any appeal. The Land Appeal Court will have the discretion to allow new evidence only if its admission is necessary to avoid grave injustice and there is adequate reason as to why the evidence was not previously given. Such conditions will ensure that the initial Land Court hearing is not merely a “trial run” and will preserve valuable judicial time at the Land Appeal Court level.

- **Appeal from the Land Appeal Court to the Court of Appeal would be by leave only. This is similar to the appeal provisions in the *Integrated Planning Act 1997*.**

As any case sought to be taken to the Court of Appeal will already have been through two levels of hearing, it is considered appropriate that further appeal should be on issues of law (as is the case now) and only with leave. Citizens’ rights will still be preserved but the Court of Appeal will ensure that only appropriate cases proceed to it for full appeal hearing.

- **Creation of a new Judicial Registrar position to deal with the new case-management and alternative dispute resolution issues. (This is consistent with new enhanced powers of Registrars in the new Uniform Court Rules prepared by the Justice Department and the Judiciary).**

The Judicial Registrar position is canvassed in paragraph 6.

6. While the ‘Judicial Registrar’ position is effectively a new one, the functions of the position should relieve some of the work load presently placed on the five full-time Members. Two of the Members are temporary only. The need for additional permanent Members can be assessed once the new procedural processes (especially case-management and mediation), largely to be the responsibility of the Judicial Registrar, have been implemented.

7. While the term “Land Court” has historically been used to describe the body being constituted, it does not strictly meet all the recognised criteria necessary to qualify for “court” status. While its decisions are “determinations” rather than “recommendations”, its members are not appointed to permanent tenure. The existing practice of making “permanent” appointments for 15 year (renewable) terms is to remain.

While the term “Land Court” is to remain, its precise legal status as a “specialised judicial tribunal” is to be stated in the Bill.

8. The Justice Department, in close consultation with the Judiciary, has recently finalised Uniform Procedural Rules for the Supreme, District and Magistrates Courts. New Rules for the Land Court to follow this Bill will be consistent with such Uniform Rules as far as possible. Some areas can be adopted (by reference) with little or no change (eg Alternative Dispute Resolution, Disclosure/Discovery rules, Service of Documents etc). However, due to the specialist nature of the Land Court, additional provisions will be necessary in the Land Court Rules. These have been canvassed in the *Report on the Review of the Land Court* previously referred to.

ADMINISTRATION COST

While no precise costings of the proposals—to be largely implemented in the Rules—has been attempted, it would seem there is potential for savings for a number of reasons.

- A streamlined system of court-supervised case management and a range of pre-hearing steps (including mediation) should encourage settlement and shorten the hearing time of those cases that do proceed to trial.
- The Judicial Registrar—on a considerably lesser salary package—can assume various functions presently performed by court members.
- Telephone Conferences/Directions Hearings should shorten the number and length of court circuits.
- More controlled Land Appeal Court hearings should shorten time taken for those hearings.

Projected savings should be not only for the Court, but also for the parties—whether they be government departments, statutory authorities or other private litigants.

FUNDAMENTAL LEGISLATIVE PRINCIPLES

The Bill is consistent with fundamental legislative principles contained in section 4 of the *Legislative Standards Act 1992*.

CONSULTATION

- ***Client Groups***

Representatives from key client groups (valuers, legal, departmental) were consulted in preparation of the Report referred to above.

- ***Court President and Members***

The Court President as well as other Court Members (including the two temporary Members) have had detailed input.

- ***Steering Committee***

A Steering Committee was appointed to oversee the implementation of the Report on the Land Court Powers etc of which this proposed Bill was one recommendation. This Committee, consisting of the Court President, a senior partner of a leading Queensland law firm and a senior Departmental representative, has been assisted in its task by a private consultant experienced in Court administration.

- ***Government Departments***

The 10 Government departments administering legislation conferring jurisdiction on the Court have been consulted for comment on any impact the proposal may have on their legislation.

In addition, Justice Department has been consulted for comment on whether the proposal is consistent with current practices in or proposals for the wider Court system.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Bill.

Clause 2 provides for the commencement of the Act on a date to be fixed by Proclamation.

Clause 3 refers to dictionary in a Schedule to the Bill which defines certain of the key terms used throughout the Bill.

PART 2—LAND COURT

Division 1—Establishment and Jurisdiction of the Land Court

Clause 4 provides for the establishment of the Land Court. Later provisions refer to any necessary transitional arrangements for the previous Land Court. Although the name “Land Court” is retained, its status is stated to be a “specialised judicial tribunal.”

Clause 5 provides that the Court has such jurisdiction as is given by any conferring Act. Such jurisdiction is exclusive to the Land Court. Put another way, a party cannot bring such action in, say, the Supreme Court.

Clause 6 abolishes the prior distinction between Court and Chambers; it also states that Court business is deemed to be conducted in Court.

Division 2—General powers

Clause 7 provides that the Court is not to be bound by the strict rules of evidence as to how it informs itself; however, it must act according to equity and good conscience but without regard to legal technicalities.

Clause 8 provides power for the Court to summon a person to attend Court and to produce relevant documents. Penalties apply for refusal to comply. However, there is protection against self-incrimination for a person summoned.

Clause 9 contempt of court powers applying in the Supreme Court are adopted here.

Clause 10 the Court is given power to make authorised orders on terms it considers applicable to the case before it.

Clause 11 provides the Court with power to accept evidence by a variety of means but imposes a duty to record such evidence.

Clause 12 provides a power to re-hear matters as opposed to appealing to a higher Court. The circumstances where such power is likely to be used would be relatively rare. It could occur where there was a valid reason (not merely tactical) for not submitting evidence at the initial hearing but where the absence of such had an important bearing on the decision.

Division 3—Composition and appointments

Clause 13 provides for the composition of the Court—the president and the members.

Clause 14 provides that Court shall be normally constituted by a single member sitting alone.

Clause 15 provides that the Court may sit in more than one place at the one time.

Clause 16 provides for the Governor in a Council to appoint the president and members. The president, but not the members, must be a barrister or a solicitor of at least 5 years standing. Permanent members are to be appointed for a fifteen year (renewable) terms. The president is to be appointed for the balance of his term as a member.

Clause 17 provides for any Aboriginal and Torres Strait Land Tribunals members to be appointed as members of the Land Court.

Clause 18 provides for the appointment of a current member to act as president.

Clause 19 provides for appointment of acting members either to fill a vacancy or if the business of the Court so requires.

Clause 20 prohibits a member from having involvement in the practice of a business or profession likely to be in conflict with his duty as a Court member. For example, a member should not practice as a valuer or retain an interest in a private valuation firm of which he was formerly a partner. Further, a Court member must resign as a Court member if chosen as a member of the Queensland Parliament.

Division 4—Rules and directions

Clause 21 provides for the making of rules governing the procedures of the Land Court. Such rules are to be formally approved by the Governor-in-Council after the concurrence of the Chief Justice and the Land Court president.

Clause 22 provides for the issue of directions about procedure where a matter is not covered by the rules. Such directions can be of a general nature or relate to a particular case.

Division 5—Sittings, parties, adjournments and loss of presiding member

Clause 23 provides that the Court may sit in any place (in Queensland).

Clause 24 provides that a party having a case before the Court may appeal personally (without legal or other representation) or he may be represented by a lawyer or agent (for example, a valuer).

Clause 25 makes provision for adjournment of proceedings either to a future specific time and/or place or to a time and/or place to be fixed in the future.

Clause 26 provides for a “stay” or freeze on the decision, on order of the Court, until a decision on the re-hearing application (and eventual re-hearing, if any) is made. Similar provision for “stay” is made for appeals to the Land Appeal Court (see clause 69).

Clause 27 provides for the situation where a presiding member dies or becomes incapacitated before the completion of the hearing or delivering the decision.

The Court president on his own initiative or on the application of a party to the case has three options open:

- a rehearing
- adjournment, until the incapacitated member is able to continue
- with the consent of the parties, make any other appropriate order

In the case of a re-hearing, power is given to the member re-hearing the case to make an order as to costs in relation to the initial hearing.

Division 6—Judicial Registrars

Clause 28 provides for the Governor-in-Council to appoint judicial registrars. While this is a new position for the Land Court, it follows the proposal to introduce equivalent positions in the Supreme and District Court systems. The appointee must be eligible for appointment as a barrister or solicitor of the Supreme Court. Restrictions on removal are listed—only on the basis of proven incapacity or misbehaviour.

Clause 29 provides for the judicial registrar to deal with matters that will be listed in the Rules of Court. One limitation on his powers is that he cannot exercise the contempt powers of the Court.

Clause 30 provides for the independence of judicial registrars—they are not subject to control other than the direction and control as provided for under this Act.

Clause 31 provides for the situation where a party is dissatisfied with a judicial registrar’s decision. Only with leave of a member—not as of right—the matter may be re-heard. Conditions may be placed on any re-hearing that is granted.

Clause 32 provides that the judicial registrar may exercise any powers granted to the registrar under any Act. A member of the Court may also exercise any of the powers of a judicial registrar.

Division 7—General matters

Clause 33 the Court is given power to make declarations about actions taken or proposed under Acts conferring jurisdiction on the Court.

The Court can also make a declaration as to the interpretation of any legislation relating to matters dealt with by the Court.

Clause 34 the general rule is that parties to a proceeding bear their own costs.

However, the Court may make an order as to costs it considers appropriate. For example, a successful party may be granted an order that the other side pay all or part of their (the successful party's) costs.

Clause 35 the legal protection provided to judicial figures, lawyers (or agents) and witnesses in the wider Court system is granted to the corresponding persons in the Land Court system.

Clause 36 provides for the holding of preliminary conferences to identify issues in an attempt to negotiate a settlement. A party's representation at the conference must have authority to settle the matter on any issue raised. A presiding member or judicial registrar may dispose of any matter in the manner agreed. Alternatively, if agreement is not reached but the parties agree to its finalisation, the Court may still dispose of the matter. If the matter proceeds further, two restrictions apply unless the parties' consent. First, the presiding member or judicial registrar at the preliminary conference cannot hear the matter at the future stage. Second, any evidence given (or admission made) at the preliminary conference cannot be addressed at further proceedings.

Division 8—Alternative Dispute Resolution

Clause 37 adopts the Alternative Dispute Resolution provisions of the Supreme Court Act. These essentially relate to mediation and case appraisal.

This clause also provides for a member (or judicial registrar) to be appointed a mediator on case appraiser. Thus, it is not necessary for an external mediator—for whom the parties would pay—to be appointed.

Division 9—Conditions of members

Clause 38 provides for the remuneration of the president and members to be decided (as is the case with Judges) by the Judges' Salaries and Allowances Tribunal.

Clause 39 provides similar conditions for long (service) leave as apply to judges.

Clause 40 provides for similar conditions for pensions as apply to judges. Separate provisions apply to members who are members of the State Service Superannuation Fund at the time of the member's appointment if they elect to remain with that fund.

Clause 41 provides for the periods to be taken into consideration in calculation of a member's length of service.

Clause 42 provides that a member must retire on reaching 70 years of age. However, the member who starts a hearing before 70 years of age, may continue with the hearing until it ends.

Clause 43 provides that a member can only be removed from office by the vote of Parliament for incapacity or misbehaviour. The latter terms are not separately defined in the Act. Reliance is placed on their established meaning.

If Parliament is not sitting, a member may be suspended by the Governor-in-Council. Provision is then made for consequent action once Parliament resumes. Grounds for suspension must be presented to Parliament where the suspension can be confirmed or lifted.

Clause 44 provides that certain of the conditions applicable to members under Division 9 do not apply to those appointed only by virtue of their membership of the land tribunal.

Division 10—Conditions of Judicial Registrars

Clause 45 provides for the conditions of appointment of judicial registrars. The position's independence is preserved with appointment being under this Act rather than the Public Service Act.

Details of the appointment, including salary, not provided for in this Act must be published in the Government Gazette. Unlike members, the appointment is not related to the *Judges (Salaries and Allowances) Act 1967*.

Clause 46 provides a maximum retiring age for the judicial registrar at 70 years. This is consistent with that for members.

Clause 47 provides for the preservation of accrued rights for a person appointed as a judicial registrar who was formerly a public servant. Service as a judicial registrar is deemed to be a continuation of public service in so far as such rights are concerned.

Division 11—Other Land Court Officials and registry

Clause 48 provides for the appointment of certain court officials. They are to be employed under the *Public Service Act* although the registrar must be appointed by the Governor-in-Council.

Clause 49 provides for the registrar and deputies to exercise functions granted under this or another Act. They are given powers to do anything necessary to perform those functions. Unlike members or judicial registrars, they cannot exercise judicial or quasi-judicial powers.

Clause 50 provides for the registrar to delegate his functions to a deputy.

Clause 51 provides for a single registry located in Brisbane. It is under the control of the registrar who may give directions to registry officers.

Clause 52 provides a duty on the registrar to keep minutes of court proceedings and records of its decisions.

It also provides that any person, not limited to a party to proceeding before the court, may examine and take copies of any notes of evidence or any documents produced in evidence to the court.

PART 3—LAND APPEAL COURT

Division 1—Establishment and jurisdiction

Clause 53 provides for the establishment of the Land Appeal Court. Transitional provisions cover the provisions of the Land Appeal Court. Formalities of it being a court of record and having a court seal are also included.

Clause 54 jurisdiction to hear matters is that conferred on the Court by any Act.

Division 2—General powers

Clause 55 similar general rules apply to the Land Appeal Court as to the Land Court. The strict rules of evidence do not apply; and regard is to be had to the substantial merits of the case without regard to legal technicalities.

The limits of these rules have been established by various Court decisions on corresponding provisions in the repealed provisions.

Clause 56 provides the general rule that an appeal to the Land Appeal Court is to be decided on the evidence already presented to the Land Court in the case appealed against. The appeal case is not a re-hearing as was the case prior to 1994.

However, new evidence can be admitted in a fairly limited range of cases. The Court is given a discretion to admit such evidence if the nominated conditions are met. These conditions are stricter than those applying under the previous provisions.

Clause 57 as an alternative to finally deciding the matter itself, the Land Appeal Court may return the case back to the Land Court for certain reasons. These include an error or mistake of law or for the matter to be re-decided with or without further evidence.

Division 3—Constitution for appeals

Clause 58 provides for how the Land Appeal Court is to be constituted, namely by a Supreme Court judge and two members other than the member who gave the original decision appealed against.

Clause 59 covers the case of appeals from the land tribunal as opposed to the Land Court. Provision is made for at least one member of the land tribunal (other than the initial decision-maker) to sit on the appeal court.

Clause 60 provides for the composition of the Land Appeal Court where there is a question of law referred to that court for determination from a land tribunal. The power to so refer is conferred by the *Aboriginal Land Act 1991*.

Clause 61 provides for the Court president to hear the final decision on composition of the Land Appeal Court for all appeals to that Court, whether they be from the Land Court or the Land Tribunal.

Clause 62 provides for the Chief Justice to nominate the Supreme Court Judge who is to sit on the Land Appeal Court in Brisbane. The Supreme Court Judge appointed to the three districts in Queensland—central, northern and far northern—sit on the Land Appeal Court whenever it sits in their districts.

Clause 63 provides that the Court, as with the Land Court, may be constituted in more than one place at the one time.

Division 4—Appeals, sittings, parties, adjournments, proceedings and loss of presiding members

Clause 64 provides a right for a party to proceedings to appeal the whole of the decision of the Land Court or specific parts of it.

Clause 65 provides for appeals to be made within 42 days of the Land Court decision. Notice of appeal must be served on all the parties and the Land Appeal Court registrar.

The notice of appeal must state the grounds on which the appeal is made.

Clause 66 As with the Land Court, the Land Appeal Court may sit in any place in Queensland.

Clause 67 As in the Land Court, any party to the appeal may appear personally or be represented by a lawyer or agent (eg. a valuer).

Clause 68 This adjournment power corresponds to that of the Land Court provided for in clause 25.

Clause 69 an appeal against a decision of the Land Court does not, in itself, prevent that decision from coming into effect or being carried out. However, the Land Appeal Court may order such decision not be carried out ('stayed') pending the outcome of the appeal.

The reason for granting such a stay would be to ensure any varied decision on appeal could be effectively carried out eg. payment of a large compensation award to a financially vulnerable company may be stayed if there were serious doubt about recovery of excess should a much lower figure be awarded on appeal.

Any stay ordered cannot operate past the time of the Land Appeal Court decision.

Clause 70 If one member of the Land Appeal Court dies or becomes incapacitated before the Court's decision is delivered, the clause provides that the case may proceed with the other 2 only. However, this can only happen with the consent of all parties to the appeal.

Clause 71 provides that, where a decision is not unanimous, a decision of the majority of the Court is the decision of the Court.

Division 5—General matters

Clause 72 Rather than repeat certain provisions applying to the Land Court, this clause makes them apply, with any necessary adaptations, to the Land Appeal Court. These provisions relate to:

- subpoenas;
- contempt;
- rules of Court;
- directions; and
- costs.

Clause 73 provides for the Registrar and other officers of the Land Court are to hold similar positions in the Land Appeal Court.

PART 4—APPEALS TO COURT OF APPEAL

Clause 74 provides for appeal from the Land Appeal Court to the Court of Appeal. Such appeal is limited to questions of law or absence or excesses of jurisdiction in the Courts below. Appeal, even on these limited grounds, is now only ‘with leave’ from the Court of Appeal.

This “leave” requirement follows the recently introduced model for appeals from the Planning and Environment Court to the Court of Appeal. The leave requirement should ensure only issues of sufficient merit proceed to full appeal.

Clause 75 provides the procedural requirements for appealing to the Court of Appeal. Time limits and service provisions are included.

Clause 76 The Court of Appeal is given a number of options as to the course it takes. It may return the matter to the Land Appeal Court to make a decision in accord with the Court of Appeal decision on, for example, a legal issue; it may substitute its own decision; or it may make any order it considers proper in the circumstances of the case.

PART 5—MISCELLANEOUS

Clause 77 provides that the appointment and signature of office holders under this Act can be accepted in a court situation on their face without further formal proof.

Clause 78 provides for the making of regulations including those relating to fees and costs.

PART 6—SAVINGS AND TRANSITIONAL

Clause 79 provides for the continuance of the Land Court established under earlier legislation.

Clause 80 makes a similar provision for continuance of the Land Appeal Court.

Clause 81 provides for the continuation of the appointments of the existing President and members. Existing members (including the president) have their present appointments continue for the stipulated period.

Clause 82 provides for the continuation of all existing entitlements the members have, including long leave rights.

Clause 83 provides for the continuation of the appointments of the Registrar and other Court officers together with any accrued rights they presently have.

Clause 84 provides for Court orders made before the commencement of this Act, but still current, to continue to have legal effect. Such orders can be discharged or amended under this new Act.

Clause 85 provides that any matters commenced under prior legislation can be continued and completed under this Act.

PART 7—CONSEQUENTIAL AMENDMENTS

These provisions amend various Acts which refer disputed issues to the Land Court. The amendments cover two areas. First, a uniform time period (42 days) in which to lodge appeals is provided (except with the Land Tax Act where the limit of 30 days is retained).

Second, three Acts—the *Water Resources Act*, *State Housing Act* and *Soil Conservation Act*, previously prohibited any decisions of the Land Court being further appealed on matters referred to by such Acts. These restrictions are now lifted.