

Hearing Objections to Mining Projects: an Enigma Wrapped in Obscurity?

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Abstract

In 2016, a Member of the Land Court described the hearing of objections to mining projects as "an enigma wrapped in obscurity led by uncertainty". This paper places the Member's assessment in an historical context with a view to charting a less mysterious and more certain future for such hearings.

The Land Court has been the forum for hearing objections to mining projects in Queensland since 2007. Its hearing process is the most recent iteration of procedure which has its roots in Australia's early colonial history. Understanding the history of processes used to determine access to land for mining purposes serves to dispel the mystery surrounding the jurisdiction and provides a foundation for reform.

The mining objection hearing has evolved, the issues considered have become more complex and the science about those issues is more sophisticated, if not more certain. Successive legislators have articulated aspirations for the process. Miners, objectors and interest groups have critiqued it. And, on occasions, the presiding judicial officer conducting the hearing has commented on it.

This paper explores the public record of these respective contributions. It also identifies potential reforms which respond to the enduring themes that emerge from the public commentary about hearing objections to mining projects in Queensland.

Introduction

39 days into the hearing of more than 60 objections to an application for a mining lease to extend an existing coal mine on the Darling Downs, a Member of the Land Court of Queensland described the process for hearing objections to mining leases and associated authorities as ‘...an enigma wrapped in obscurity led by uncertainty ...which leaves a sour taste in my mouth...’.¹

Given the application was hotly contested it is unsurprising this comment was picked up by the media. Soon after reading this, I was appointed President of the Land Court and my personal interest in the Member’s comment became a professional responsibility.

What led this Member to such despair? When he made this cry from the bench, he had been engaged in his difficult task for many weeks without a clear procedural foundation for the hearing.

In May 2015, Justice Philip McMurdo, as he then was, published a judgment² which plunged the Land Court into a procedural vacuum when conducting objections hearings. In *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors*, McMurdo J heard an application for judicial review of an order made by a Member of the Land Court that BHP disclose documents. The Member relied on a Land Court Rule which applies the relevant provisions of the *Uniform Civil Procedure Rules 1999* (Ch 7) to a proceeding in the Land Court. The case turned on the interpretation of the word *proceeding*.

McMurdo J examined the nature of the hearing and the function of the Court. An objections hearing commences by referral by the relevant government department, not application by the mining proponent or an objector. The Court makes a recommendation to the decision maker, who is not bound by it. In light of those features, he decided an objections hearing fulfils an administrative function and is not a *proceeding* in the sense used in the *Land Court Act 2000* and *Land Court Rules 2000*. Any power conferred by the Act and Rules in relation to a *proceeding*, therefore, did not apply to an objections hearing. The rationale applied in *BHP v Isdale* stripped the Court bare of its procedural clothing.

The decision was not appealed. It remains the law in Queensland.

¹ Transcript of Proceedings, *New Acland Coal v Ashman & Ors*, (Land Court of Queensland, Member PA Smith, 2 June 2016) 39-13.

² *BHP Billiton Mitsui Coal Pty Ltd v Isdale & Ors* [2015] QSC 107.

The difficulty with the rationale applied in that case is that nearly all the provisions relating to procedure in the *Land Court Act* and *Rules* use the term *proceeding*. Critically, this includes rule 4, which applies the uniform rules wherever the *Land Court Rules* do not provide for a matter of procedure.

I certainly empathise with a Judicial Officer faced with a vigorously contested and complex objections hearing without access to basic case management tools and hearing procedures. The Member quoted had to control a hearing with a very well-resourced and well represented mining company facing off 60 objectors; although, not all objectors were active parties and some were also very well represented. The company wanted an expedited hearing for understandable commercial reasons. Not all parties thought the others were playing fair. They all looked to the Member to treat them justly while bringing them to order.

The Member faced the difficulty of responding to the parties' reasonable (and sometimes unreasonable) demands using little more than the authority of his office. It is right that I note in this paper that, at the end of the hearings in 2016, the Member was commended by the parties and their representatives for both his fairness and his fortitude.

But should the Member have found himself in this position? Should the outcome in *BHP v Isdale* been such a surprise to the Court? The answer to that question must be no.

Five years earlier, in its judgment in *Dunn v Burtenshaw*,³ the Land Appeal Court decided there was no appeal from a recommendation by the Land Court following an objections hearing. The Land Appeal Court applied the same reasoning applied by McMurdo J in *BHP v Isdale*. The right of appeal to the Land Appeal Court is conferred on a party to a *proceeding*.⁴ The Land Appeal Court concluded an objections hearing culminating in a recommendation: '...is not a proceeding but rather an administrative step consequent upon a statutorily prescribed enquiry...'⁵

Unfortunately, despite the links between the membership of the Land Court and the Land Appeal Court, the significance of this judgment appears not to have been appreciated or responded to. The Court missed a valuable opportunity to remedy its procedural deficiencies before they were further tested.

³ (2010) 31 QLCR 156.

⁴ *Land Court Act 2000* s 64.

⁵ *Dunn v Burtenshaw* (2010) 31 QLCR 156 [47].

The Court is now well seized of the issue and was so, prior to my appointment. Interim measures have improved the situation, but the procedure for objections hearings is still limited and unsatisfactory.

In this paper, I will place the modern-day objections hearing in its historical context and consider criticism of the function, the forum and the process used to consider objections to mining projects. Against that background, I will discuss the reform process I have instigated to reveal the enigma and clarify the obscurity of an objections hearing in the Land Court.

The historical context of an objections hearing

When I first started working in resources law, I would have said that mining in Australia commenced with the gold rush of the 1850s. That was a very limited view. The history of mining has deep veins that transcend continents and ages. Ancient civilizations traded in resources won from the earth.

For example, it is recorded that ‘...the Phoenician civilisation prided themselves on their travels in their then known world in a quest for minerals, particularly the mining of tin in England.’⁶

You might wonder why I raise the Phoenicians. Until recently, I had not contemplated any link between that seafaring mining and trading empire and this continent. To my surprise, though, there are some who think they are an integral part of our history. On a website called *Australia for Everyone* it is published, without attribution and with a disclaimer as to accuracy, that the Phoenicians were the first Europeans in Australia and, more startling, that they were the culture-heroes of the Aboriginal dreamtime.⁷

Despite the Phoenician interest in tin, and the presence of tin on this continent, I am on much safer ground in crediting Aborigines with the status of being our first miners. It is accepted that for more than 40,000 years before the arrival of the First Fleet in Sydney Harbour, Australian Aborigines mined the land for ochre and stone.⁸

⁶ Barry Ryan, ‘The Law Surrounding “Miners Rights” Origin of the Mining Law of Queensland’ (read at a meeting of the Royal Historical Society of Queensland, Queensland, 27 June 1974) 104.

⁷ *Who Did Discover Australia?: The Phoenicians* (6 May 2017) The Discovery and Exploration of Australia <<http://www.australiaforeveryone.com.au/discovery/phoen.htm>>.

⁸ NSW Department of Primary Industries, ‘Mining by Aborigines – Australia's first miners’ (February, 2007) Primefacts 572

<http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiDnN-W29_TAhXDG5QKHfiBAIAQFggmMAA&url=http%3A%2F%2Fwww.dpi.nsw.gov.au%2F__data%2Fassets%2Fpdf_file%2F0008%2F109817%2Fmining-by-

A notable Queensland example is a 78ha open cut stone axe quarry at Lake Moondarra, north of Mt Isa. That site is at least 1000 years old. The Kalkadoon people quarried the basalt outcrops, manufactured hard, dense black axes and axe-blanks and traded them through extensive inland trade networks covering much of the western Lake Eyre basin.⁹ This was a communal endeavour by the traditional owners, involving both men and women in mining and manufacture.

While that is our indigenous history, our legal system is largely untouched by indigenous law and I must fast forward in time to the Roman Empire to understand the development of the modern objections hearing. The Romans recognised the domain of the State and the ownership of mineral in the soil by the State. Upon its conquest by the Romans, Britain inherited this conception of State domain. Under English law the Crown lay claim by Royal prerogative to Royal Mines, which are mines of gold and silver. Otherwise, under the feudal system, all other minerals belonged to the owner of the soil, whether the owner is the Crown or a freeman. That conception underlies the remnants of private ownership of minerals under some land tenures issued early in Queensland's history.

When the English Empire claimed territory in Australia in the late 18th Century, it had already evolved rules about the reception of English law into its colonies. Using the language of the time, if a colony was either uninhabited or inhabited by a primitive people whose laws and customs were considered inapplicable to a civilised race, the general rule was that the settlers took with them, as their *birthright*, the laws of England.¹⁰

That applied in the free colonies, such as South Australia, but was less certain in New South Wales and Van Diemen's Land, which were penal colonies. English criminal law was imported to penal colonies under Letters Patent issued in 1787. In practise, other English laws were also applied in those colonies as well, however their status was in doubt until 1828 when the British Parliament passed 'an Act to Provide for the Administration of Justice in New South Wales and Van Diemen's Land'.¹¹ It applied the laws in force in England in 1828 to the penal colonies.¹²

aborigines.pdf&usg=AFQjCNemoqN8_v5ogJWbExjuuWLRwGsnug&sig2=KuX9Skoo8Y_aQWCTRFUWUQ>.

⁹ Geraldine Mate, *Exploitation: Mining* (18 October 2010) Queensland Historical Atlas <<http://www.qhatlas.com.au/content/mining>>.

¹⁰ Alex C Castles, *The Reception of English Law into Australia*, (1963) *The Adelaide Law Review*, 1, <<http://www.austlii.edu.au/au/journals/AdelLawRw/1963/1.pdf>>.

¹¹ *Australian Courts Act 1828* 9 Geo 4 c 83.

¹² *Ibid* s 24.

With that, the foundation for mining law in Queensland was settled. English law applied in the colony of New South Wales before separation of Queensland in June 1859. In truth, though, there was little English law that guided the new colonies and, even before separation, the government of NSW exercised its legislative power to regulate mining.

The *Goldfields Act 1856* (NSW) was enacted to regulate activities on the gold fields following the gold rushes which started in 1851, first in NSW and then in Victoria. Gold mining transformed the immigrant population of Australia from one comprised predominantly of British and Irish convicts to a multicultural melange of gold fever sufferers. The population of Australia trebled in a decade.

As the gold rushes died down in southern states, gold fever spread to Queensland. James Nash discovered gold in Gympie in 1867 and within two years thousands of people had moved into the area. With the opening of the Gympie Goldfield came the first institution charged with regulating mining in Queensland.

That was the Gympie Local Mining Court. It was established under the NSW *Goldfields Act 1856* (NSW), which then still applied. Viewed through a modern lens, the Local Mining Court was a most unusual tribunal.

It had a combination of legislative and adjudicative functions. It made regulations for the district and settled disputes between miners. Apart from a Chairman appointed by the government, the Members of the Court were elected from and by holders of mining rights. This model was devised in Victoria following a Royal Commission into the events leading up to the Eureka Stockade in 1854.

But the Gympie Local Mining Court was not the only show in town. There were also Commissioners appointed under the *Mineral Lands Act 1872*.¹³ The first recorded mining hearing in Queensland occurred in Gympie and was presided over by Henry Edward King, described as the Gold Commissioner. He had the responsibility of holding an open court to hear objections and protests to applications for mining tenures. He could provisionally accept or reject any application, but if he accepted the application, no title accrued until confirmed by the Secretary for Lands.¹⁴

¹³ Supreme Court Library Queensland, *Gympie* (2016) Sir Harry Gibbs Legal Heritage Centre <<http://legalheritage.sclqld.org.au/collections-and-research/history-of-the-regional-courthouses/gympie>>.

¹⁴ Queensland, *Votes and Proceedings* (1874) Legislative Assembly 693.

In 1874, Queensland's flirtation with participatory democracy was abandoned. The Gympie Local Mining Court was abolished and a new system of Wardens' Courts was introduced by the *Goldfields Management Act*.¹⁵ By then there was more than one goldfield in operation. The Governor could proclaim a Wardens' Court for any goldfield. A Wardens' Court was a court of record. It had jurisdiction to hear and determine all disputes relating to mining. It was presided over by a Warden or Warden and assessors drawn from the local community.

As early as 1881, the Warden's function was considered by the Supreme Court of Queensland.¹⁶ It concluded the duties of a Mining Warden in receiving, recording and reporting on applications for mining leases were purely ministerial.

In 1897, during a Queensland Royal Commission into the regulation of mining, Wardens came in for some criticism. One submission suggested Wardens 'would certainly be swayed by local feeling, and others might be guided by vindictive motives'.¹⁷

It was also suggested at the time that Wardens:¹⁸

...who moved in the upper circles of local society, became too closely identified with the interests of the employers; some of them may perhaps have been over-ready to consider exemption applications by their friends.

Despite such views, Wardens survived when the *Mining Act 1898* consolidated a number of Acts associated with mining. Commissioners appointed under the *Mineral Lands Act 1872* became Wardens under the *Mining Act*.¹⁹ Each goldfield and mineral field was assigned to a particular Wardens' Court. The Warden had the judicial duty of determining disputes arising in relation to mining in the district. The Warden also performed ministerial duties, exercising the functions prescribed by the mining acts and regulations, and acting as the administrative officer of the Department of Mines for that district.²⁰

That continued under the *Mining Act 1968-1976*. The Regulations to that Act provided for the Warden was to hear applications for mining leases along with any objections and recommend to the Minister whether they should be granted or rejected.²¹ The Minister was

¹⁵ (1892) 38 Vic. No. 11.

¹⁶ In the case *Re Mills, ex parte Mills* (1881) 1 QLJ 1.

¹⁷ J Marsland, Submission to Commonwealth, *Royal Commission on Mining* (1897) 477.

¹⁸ J Stoodley, *The Queensland Goldminer in the late 19th century* (M A Thesis, Queensland University, 1964) (x).

¹⁹ *Mining Act 1898* s 105(2).

²⁰ Queensland Department of Mines, *Queensland Mining Guide* (1932 Edition) 85-86.

²¹ *Mining Act 1968-1976* Regs 40-41.

not bound to accept the Warden's recommendation. Ultimately, the decision was made by the Governor-in-Council upon the recommendation of the Minister.²²

By the 1970s, though, the relationship of the Mining Warden to the Mines Department came under fire. In an editorial during the debate about sandmining of the Cooloola sand mass, this editorial was published in the *Courier Mail*:²³

Perhaps they (the Cooloola leases) should be granted. Mining and conservation must learn to coexist. But that is not the point... it is absurd that questions which can concern conservation and environment, recreation and tourism, should be dealt with by the Mines Department, which is responsible for promoting mining. A Mining Warden should not be the arbitrator.

Views such as this explain the increasing separation of the Wardens' Court from the Minister and Department responsible for mining. Over time Wardens were no longer officers of the Mines Department, but Stipendiary Magistrates. This did not completely quell criticism as they remained public servants until that link was severed by the *Stipendiary Magistrates Act 1991*.

The Wardens' Court was created as a single institution by the *Mineral Resources Act 1989*. In 1999, the office of Mining Warden and the Wardens' Court was abolished by the *Land and Resources Tribunal Act 1999*. In 2007, the Land and Resources Tribunal, which had assumed the non-coronial functions of the Warden, was abolished and its jurisdiction conferred on the Land Court. Through those rapid transitions, although there were many reforms to the institutions and their composition, the function in hearing objections to mining lease applications remained unchanged.

Criticisms of the Court's function

It can be, and indeed has been, argued that a hearing of an objection which does not result in a binding determination is a 'solemn farce with no significance whatever'.²⁴ This is a recurrent theme in criticisms of the objections hearing process.

The political nature of the ultimate decision was most starkly illustrated during the sand mining battles in the 1970s in Queensland.

²² *Mining Act 1968-1976* s 21(4).

²³ Editorial, 'The State Government Should Review its Conservation and Mining Laws', *The Courier Mail* (Queensland), 10 December 1973.

²⁴ *Stow v Mineral Holdings (Australia) Pty Ltd* [1979] HCA 30 [42] per Aicken J.

In January 1970, Cudgen RZ Limited and Queensland Titanium Mines Pty Ltd lodged lease applications over an area of 16,600 acres in the Cooloola area. 200 objections were received. After a nine day hearing, the Gympie Mining Warden recommended the Mines Minister grant all leases applied for.

The real battle took place outside the Wardens' Court and in the public arena. 'Politics, public opinion, public relations and pressure were the deciding factors'.²⁵

An interesting aspect of that public campaign was the role played by Australia's Chief Justice of the day, Sir Garfield Barwick, who wrote a letter to the Queensland Premier, published in newspapers all over Australia, in which he said mining the Cooloola sand mass, instead of preserving it as a National Park, would be an 'immeasurable loss to the people of this and future generations'.²⁶ He was speaking in his capacity as Chairman of the Australian Conservation Foundation but was, nonetheless, criticised for weighing into the debate.

The political campaign was so effective that even the mining companies' threat of legal action did not sway the Cabinet. On 28 August 1970, the companies sent a letter to the Premier threatening legal action if the leases were refused. After taking advice, Cabinet formally decided against the grant of the leases on 9 November 1970.²⁷

The importance of the Cooloola issue was that it was the first really major land-use clash in Queensland to catch the public eye. It was also notable for the fact that for the first time in a major issue, the Governor-in-Council did not accept the Mining Warden's recommendation.²⁸

The next sand mining battle involved Fraser Island. This ended more favourably for the miners, at least as far as the Queensland mining leases was concerned. It also proceeded with the sort of expedition miners might dream about today, but which conservationists attacked as 'undue haste'.²⁹ The applications by Dillingham Mining Company and Murphy Ores Incorporated and the 1,300 objections to them were heard by the Maryborough Mining Warden over almost four weeks in May 1971. Less than a month after the hearing ended, on June 24 1971, State Cabinet announced that it had approved the leases.³⁰

²⁵ John Gagliardi, *The Mining Warden: an appraisal of his role in the hearing of mining lease applications in Queensland* (Master of Public Administration Thesis, University of Queensland, 1974) 59.

²⁶ Letter from Sir Garfield Barwick to Queensland Premier, 21 August 1970.

²⁷ John Gagliardi, *The Mining Warden: an appraisal of his role in the hearing of mining lease applications in Queensland* (Master of Public Administration Thesis, University of Queensland, 1974) 76-77.

²⁸ Ibid 87.

²⁹ Ibid 101.

³⁰ Ibid.

The public opinion campaign was ineffective in Queensland, but, ultimately, mining was hindered by the Federal Government's decision under Prime Minister Malcolm Fraser to refuse export licences for the minerals extracted.

One of the most important cases involving the procedure of the Queensland Mining Warden involved that objections hearing. The High Court concluded Regulation 39, which then applied, required the applicant to satisfy the Warden that the lease was in the public interest, regardless of the grounds of objection.³¹ That remains a consideration under the current legislation.

The political nature of the approval process is a recurring theme in critiques of the Wardens' Court and its successors. The public record is replete with examples of this criticism. This one is representative of the perspective of the miner:³²

If the matter is going to be decided by a politician, we should be talking directly to that politician, and giving him political reasons why our leases should be granted. If it is to be decided by the Mining Warden, then we should prepare the sort of evidence he would need in making an objective assessment. At the moment, the situation is ludicrous. We build up a gigantic case to support our leases, retain learned counsel, develop technical evidence, only to have it put to a country S. M. who has no power to make a decision anyway.

At one stage, it seemed possible that the Wardens' Court would lose its role in hearing objections. In its Green Paper regarding reform of the *Mining Act 1968-1986*, the Queensland Government canvassed a proposal to divide the Warden's functions between the Mining Registrar, who would perform the administrative functions, and the Court system, which would perform the judicial functions including determining compensation.³³

That would have left consideration of objections in the hands of the Mining Registrar, not the Courts. That proposal was not adopted and the Wardens' Court function remained largely unchanged by the *Mineral Resources Act 1989*. Views such as these expressed by mining lawyer, Ian Alfredson, appear to have prevailed:³⁴

Even though the jurisdiction of the Magistrates Court may be limited, the Warden, as a Stipendiary Magistrate, is experienced in the sifting of evidence

³¹ *Sinclair v Mining Warden at Maryborough* (1975) 49 ALJR 166.

³² John Gagliardi, interview with Mr B Cox, Managing Director of Cudgen RZ Limited (a company involved in the Cooloola dispute) (personal interview, November 1972); John Gagliardi, *The Mining Warden: an appraisal of his role in the hearing of mining lease applications in Queensland* (Master of Public Administration Thesis, University of Queensland, 1974) 34.

³³ Queensland Government, Green Paper, *Mining Act 1968-1986* (Qld), *Mining regulations 1979* (Qld) 18-19.

³⁴ I D Alfredson, 'Policy Objectives of Mining Legislation and the Queensland Review', [1987] *AMPLA Yearbook* 54.

and the impartial weighing of its worth. A Mining Registrar as an officer of the Mines Department, without judicial experience, is unlikely to have similar ability to make the findings of fact which the new proposals would require. Moreover, it is important that there is general confidence in the balance which is to be struck between the mining industry, landholders and other interest groups. It is suggested that this confidence is likely to be enhanced if objectors are assured of the impartiality of a judicial officer rather than a Departmental administrator. If the Wardens' Court is to be abolished, its place in the hearing of objections and in other circumstances where public interest questions arise should be taken by another tribunal presided over by a judicial officer.

An alternative proposal, recently pressed by conservationists, is to make the Court the final arbiter on the application, as this report demonstrates:³⁵

Queensland's "hamstrung" Land Court should be given the power to make final decisions on mining projects to avoid wasting time and money, the State Government has been told. In a letter to the Queensland Government, the Environmental Defenders Office (EDO) has pointed out the Land Court currently performs an administrative rather than a judicial role, which has "tied the court's hands".

"The Land Court has been hamstrung in its powers to resolve appeals because it can only make recommendations," EDO solicitor Sean Ryan said. "A lot of time and money is spent by all parties in the Land Court process on mining matters but it still only results in an uncertain recommendation."

Nevertheless, there are also supporters of this hybrid role, a recommendatory function performed in an adjudicative forum. For example, one legal commentator has said of the Western Australian process:³⁶

Often the Mining Warden's jurisdiction is the only open forum by which competing interests can be heard. The subsequent report and recommendation to the Minister demonstrates publicly that competing interests have been heard and taken into account.

Given my role, it is not appropriate for me to express a view on these various perspectives or to identify the role I would favour for the Land Court in mining approvals. That is a matter for others to comment about and for government to consider.

Reforming the objections hearing

However, it is my responsibility, as President of the Court tasked with this unusual jurisdiction, to do what I can to ensure the Court's process has integrity and is appropriate to the function.

³⁵ Stephanie Smail, *Queensland Government told 'hamstrung' Land Court should have more power over mining projects* (28 June 2016) ABC News <<http://www.abc.net.au/news/2016-06-28/hamstrung-land-court-should-have-more-power-over-mining-projects/7549870>>.

³⁶ Mark Gerus, 'In Defence of the Mining Warden and the Wardens' Court' (August 2014) 33(2) *Australian Resources and Energy Law Journal* 189.

Let me take you back to the Lands Commissioners for some guidance about process. Their proceedings were informal and were not recorded. Until 1866 they were required to be conducted on the spot, and generally they were. Detailed descriptions of how they performed their functions are hard to come by. But here is one from a Commissioner called upon to resolve a dispute about encroachments in 1852 at Myers Creek, near Bendigo.³⁷ He feared it was the *height of insanity* to go amongst the diggers without five or six troopers, but having none, he trusted to the general feeling amongst diggers of wishing to see justice done. He proceeded to Peg Leg Gully:³⁸

Following the ...(complainant was)...a large crowd of men, numbering a thousand or more, immediately gathered together, but what was their object of so gathering? was (sic) it to pitch me neck and crop into a hole, if I did not give it in favour of the party who mustered strongest, and were determined that they should have it right or wrong? Was it to give evidence if required? Was it to endeavour to annoy me so as to *get a rise* out of me? or (sic) was it from curiosity to see whether I was inclined to favour one party, because they were what are termed a *swell* party, more than another who were not?

He then turned to his procedure:³⁹

Both parties would commence, perhaps, declaring it was theirs, but, I quietly informed them, that if they wanted me to decide impartially, they must speak one at a time; this was instantly complied with, and hearing both parties, and witnesses *pro et con*, and deciding to the best of my judgment, either by a division, or drawing lots, the case was satisfactorily settled, for it was not difficult to tell by a sort of popular feeling generally, if one really was in the wrong.

So what can we learn from that procedure?

How brave was the Commissioner? Was he going to be pitched neck and crop into a hole in the absence of five or six troopers to protect him?

Here, surely, is natural justice in action. He heard from both parties and witness *pro et con*.

He displayed deft skills as a Judicial Officer: 'I quietly informed them that if they wanted me to decide impartially they must speak one at a time'.

He commanded respect for the office: 'They instantly complied'.

He was certain about the outcome. Although there was curiosity about whether he would be swayed by those who mustered strongest or whether he was inclined to a swell party, in the

³⁷ John P Hamilton, 'Adjudication on the Gold Fields in New South Wales and Victoria in the 19th Century' (The Federation Press, 2015) 95.

³⁸ Ibid.

³⁹ Ibid.

end: 'It was not difficult to tell by a sort of popular feeling generally, if one really was in the wrong'.⁴⁰

So what we have here is brave, swift, local and popular justice.

I am afraid that the demands of modern Courts are greater than this. Shortly after I was appointed, I commenced a reform process using the International Framework for Court Excellence. The core values for a court used by that framework will guide the Court in reforming our procedure: equality before the law; fairness; impartiality; independence of decision making; competence; integrity; transparency; accessibility; timeliness; certainty.⁴¹

Consulting about the problems

My first step was to engage an independent person to consult with our stakeholders about the process. A wide range of issues were raised, many of which concern government policy and legislation and are beyond the Land Court's scope. These have been referred to government. However, I am pleased to say that government is considering the issues raised by stakeholders. For example, one issue raised related to the role of the Department of Environment and Heritage Protection as a statutory party to an objections hearing about an environmental authority for a mine. The Department approached the Court recently to clarify the Court's expectations.

Timeliness

Timeliness of the Court's process is a critical issue, not just in this jurisdiction. To improve the Court's performance, I have abandoned the docket system and centralised case management. Currently, I case manage every matter, progress them as efficiently as possible and list them for ADR and hearing as early as is practicable.

At the other end of the matter, to improve timeliness of decision-making by the Members, the Court has adopted a 3 month protocol for reserved judgments. This includes recommendations following an objections hearing. Members report against this protocol monthly and I manage listings with outstanding judgments in mind. Our protocol is published on the Court website and allows for an anonymous enquiry through the Registrar about any outstanding judgment.

⁴⁰ Ibid.

⁴¹ The International Consortium on Court Excellence, 'International Framework for Court Excellence', (National Centre for State Courts, 2nd ed, March 2013) 3.

Referral procedure and documents

A key concern for me is the process for referral of applications to the Court. It is not clear whether the material we are receiving is adequate or comprehensive. It seems likely that the Departments have information relevant to the statutory criteria the Court must consider that is not provided with the referral materials. This could place both the Court and the ultimate decision makers in a difficult position. The Court's recommendation could well be made without considering information later placed before the Minister (in the case of the mining lease) or the Chief Executive (in the case of the environmental authority). The decision-maker is then faced with either requesting the Court to re-open the hearing to consider the further material or make a decision on a recommendation which has not been made with full access to relevant material.

As well as ensuring the Court is provided with all relevant material, there are questions of access to those documents, for the parties and for the public generally. As the objections hearing is an administrative process, the usual rules of access to Court documents do not necessarily apply. It cannot be assumed that the referral materials are to be treated in the same way as documents filed in a Court proceeding.

Information privacy legislation and common law concepts of confidentiality may constrain access in a way that is not usual for documents provided to a Court. This is another implication of the administrative function for objections hearings that has not been adequately addressed.

I am currently working with officers of both the Department of Natural Resources and Mines and the Department of Environment and Heritage Protection to ensure both issues are properly addressed; that is, the provision of relevant material and the basis upon which they may or may not be accessed.

Clarity about procedure

A strong theme in the feedback from stakeholders was the lack of information about the Court's procedure. This issue has great significance for litigants in person. In this jurisdiction, small miners as well as objectors are frequently unrepresented. Once our procedures are settled, we will develop written and other materials that are easily understood. We will also train our Registry staff to provide procedural support (but not legal advice) to litigants in person.

However, this complaint is not made only by litigants in person. It is an old and enduring complaint by lawyers as well. That is hardly surprising given the Member quoted in this paper decried the obscurity of the process.

This quote from a lawyer in the 19870s would not look out of place in our recent consultation report:⁴²

When the Warden hears objections to mining lease applications, he is acting in his administrative capacity, and although these hearings give the appearance outwardly of a proper court, there is no set procedure for them laid down in the Mining Act. From a lawyers' point of view, the procedure is far too vague and uncertain. Written submissions should be insisted upon, and the Supreme Court pleadings system should be used. This would prevent the admission of hearsay evidence, which at present is far from uncommon.

Clarity about issues

Earlier crystallisation of the scope of the objections hearing will be an important aspect of the new procedure. In a no pleadings jurisdiction, the Court must do what it can to ensure that the hearing deals with the real issues in dispute and that these are identified early so that the hearing is not delayed or prolonged by changes in tack.

That said, the Court must ensure that it fulfils its statutory function, which requires it to consider statutory criteria, whether or not they are specifically raised by an objection. The new procedure must identify the Court's source of information about those criteria and the implications, if any, for the scope of the objections hearing.

Promoting resolution and using ADR tools for case management

There has been limited use of court supervised ADR for objections hearings in recent years, although that was not always the case. Mediation of mining objections was a routine feature of the Land and Resources Tribunal.

Our recent 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 for applications which involve issues that the parties will never agree on. One example is

⁴² John Gargliardi, interview with Mr R North, Tully and Wilson Solicitors (personal interview, 1 November 1973); John Gagliardi, *The Mining Warden: an appraisal of his role in the hearing of mining lease applications in Queensland* (Master of Public Administration Thesis, University of Queensland, 1974) 137.

whether a mine should proceed given the contribution of burning fossil fuels proposed to be mined to global carbon emissions and, therefore, climate change.

I have recently issued a Practice Direction for mediation of all matters, including objections hearings. It allows for mediation by Members as well as the 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 and developing the most appropriate, time efficient and cost effective approach for the objections hearing. While this can be done in directions hearings, it might be more effective, particularly with litigants in person, to explore the issues in a without prejudice forum so as to develop the most appropriate process for the objections 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.

Improving access to and use of expert advice

A common theme in past criticisms of the Wardens' Court was a lack of expertise in the technical disciplines often engaged in objections hearings. Although the same can be said of the current Members of the Land Court, that did not arise in our recent consultation. However parties did raise the increasing complexity of the technical issues and the need for improving the Court's procedures in this regard.

The Court could improve the way that expert advice and evidence is accessed by the Court and the parties in a number of ways. Options include:

- a) Using assessors to sit with Members of the Court;
- b) Obtaining information and advice from officers of government with relevant expertise; and
- c) Reforming the Court's expert evidence procedures to enhance the role of the expert as an independent advisor and to enhance both the Court's and the parties' understanding of their advice.

Assessors: There is an historical precedent for using assessors dating back to the *Goldfields Management Act 1874*. The original model resembled a trial by judge and jury, with the assessors determining questions of fact.⁴³ The procedure was rarely used and was abandoned under the *Mining Act 1968*. However, assessors remain a feature of other specialist tribunals, such as the Queensland Civil and Administrative Tribunal when exercising its professional disciplinary jurisdiction. It may be worth revisiting the notion of assessors, drawn from the ranks of persons with relevant professional and other expertise.

⁴³ H J Armstrong, 'A treatise on the law of goldmining in Australia and New Zealand', second edition, (G Partridge and Co, Melbourne, 1901) 297.

Obtaining information: There is a wealth of information on the government's public record. This is not used in any systematic way in objections hearings. It could provide a starting point, set the context for an objections hearing and orient the Court and the parties before evidence is led. I am discussing with officers of relevant departments how this information might be presented neutrally to enhance the information base for the objections hearing. It is likely that the information base will also be improved by reforms to the referral process. It might also be useful to call government experts as witnesses during the hearing.

Reforming the Court's procedures for expert evidence: I am considering the following ideas for improving the accessibility and utility of expert evidence:

- d) The Court engaging with experts earlier in the management of the case;
- e) Being more creative in how the Court uses expert evidence to enhance the prospects of resolution;
- f) The Court taking an active role in transparently briefing the experts on the issues raised by the objections; and
- g) Using less formal processes (on and off the record) to obtain expert advice, including in conferences and concurrent evidence sessions.

There is scope to reform 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, most likely not 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.

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:

- a) 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
- b) 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.

In summary, I consider these processes could:

- a) more fully utilise the specialist expertise of the Members in ADR and case management;
- b) ensure objections hearings are managed in a case specific way that is more responsive to the particular issues and to the particular parties;
- c) provide an early opportunity to resolve issues capable of resolution;
- d) develop more flexible and accessible means of briefing and using experts in the process:
 - i. to increase transparency and reduce unconscious bias;
 - ii. to ensure experts are briefed with the same material and asked to address all relevant scenarios; and
 - iii. to promote resolution after early testing of the expert evidence.

These proposals raise many issues that the Court needs to consult about.

Consulting about the solutions

The Court is now actively consulting with a wide range of groups and individuals. I have been delighted by the genuine interest I have encountered in improving the way the Court deals with these often complex and difficult hearings.

We have an internal working party working on procedures which is meeting as regularly as the Court's other commitments allow. Our consultations with government agencies are under way. It is likely to take some time to clarify the information provided by the Departments and the role of the Departments will play in the process.

It is crucial that the Court has a means of consulting broadly with those affected by and interested in our objections hearings.

To that end, I have established a Legal Profession Reference Group and a Resources User Group. These two bodies will be the primary avenues for consultation, particularly on the detail of any proposed reforms. I expect to bring at least some proposals to each of these groups for consideration within the next couple of months.

Conclusion

The objections hearing has been a feature of Queensland mining law from separation of the colony. It has always been a controversial jurisdiction, first coming under scrutiny by a Royal Commission in 1897. There is enduring dissatisfaction with the function, which places the Court in an administrative role, sometimes during a highly politicised debate. The reformed procedures cannot change that. My objective for our procedural reforms is to improve and clarify our process and ensure the objections hearing is no longer an enigma wrapped in obscurity.

A little over 150 years after John Nash discovered gold in Gympie; and on about our 7th iteration of the institution charged with recommending on the grant of mining tenures, it is time for us to put some flesh on the bones of this unusual type of hearing.

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