Speech by

Hon. V. LESTER

MEMBER FOR KEPPEL

Hansard 29 February 2000

LAND COURT BILL

Hon. V. P. LESTER (Keppel—NPA) (3.10 p.m.): We have to be ready.

An honourable members interjected.

Mr LESTER: Yes, I have been around a while. Some think that is a good idea, some do not. The Land Court was established in Queensland more than a century ago by the Land Act 1887. The Land Court is presently established under the Land Act 1962. The Land Act 1994 repealed the Land Act 1962 but continued the provision in the 1962 Act relating to the Land Court and its immediate appeal court, the Land Appeal Court. These provisions were not incorporated into the Land Act 1994 because of uncertainty that then existed as to the precise future of the Land Court. Their retention in the Land Act 1962 was designed as an interim measure until the future of the Land Court was decided. The future of the Land Court was canvassed in a number of reviews dating back to the early 1990s. At one stage, proposals were made for the integration of the Land Court with other bodies, such as the Planning and Environment Court, but did not come to fruition. The Land Court has continued to be established under the 1962 Act.

The Land Court Bill 1999 establishes the Land Court and the Land Appeal Court under separate legislation. The Bill makes little substantive change to the present law in that it has retained many of the substantive provisions relating to the Land Court, the Land Appeal Court and the Land Act 1962 as amended. The Bill also introduces a number of changes in the operation and procedure of the Land Court, some of which reflect similar changes made in other Queensland and interstate courts.

The Land Court and the Land Appeal Court provide a mechanism for the resolution of interrelated matters. The Land Court has jurisdiction over more than 30 State Acts to hear and determine matters relating to appeals and referrals under those Acts. The majority of matters heard by the Land Court are appeals against the determination of the chief executive of the Department of Natural Resources in matters relating to the Valuations Act 1994, the Land Act 1944, the Land Act 1994, the Water Resources Act 1989 and dispute claims for compensation following the resumption of land under the Acquisition of Land Act 1967.

The Land Court is a comparatively informal court. Its procedure is governed by equity, good conscience and the substantive merits of the case before it. It is not bound by strict rules of evidence. The report of a review of land policy and administration in Queensland—the Wolfe report—released in 1990 made the observation that land-holders, particularly those involved in rural industry, are comfortable appearing before the Land Court and impose great confidence in that process.

The Land Court further allows persons to appear before it in person, or to be represented by a lawyer or agent. At present, the vast majority of appeals in valuation matters are conducted by self-represented persons, whereas almost all claimants for compensation under the acquisition of Land Act 1967 are represented by a lawyer. The Land Court comprises up to six members, including a president. The president must be a barrister or a solicitor of at least five years' standing. In contrast, there are no qualifying requirements for members. Members are appointed for renewable terms of five years.

The current legislation makes provision for a rehearing of Land Court matters on application where a party is aggrieved by the Land Court's decision. In most matters, appeals from a decision of the Land Court lie in the Land Appeal Court, which is constituted by a judge of the Supreme Court and

two members of the Land Court, excluding the member who pronounced the decision. Appeals from the Land Appeal Court on the grounds of error or mistake of law or lack of jurisdiction can be made to the Court of Appeal. Funding for the Land Court is allocated through the Department of Natural Resources, although the court operates independently of the department.

Since the early 1990s, a number of reviews have discussed the future of the Land Court. In August 1993, the Electoral and Administrative Review Commission—EARC— released the report on the review of appeals from administrative decisions. As part of a greater review of the system of appeals from administrative decisions in Queensland, EARC reviewed the jurisdiction and work of the Land Court, the Land Appeal Court and the Planning and Environment Court. As a consequence of that review, the commission recommended the disbandment of the Land Court and the consolidation of all development, environment and land matters into one body called the development, environment and land tribunal. In November 1993, a discussion paper released by the Minister for Housing, Local Government and Planning described the proposals for new development and planning legislation in Queensland. One of the reforms proposed was the amalgamation of the Planning and Environment Court, the Land Court, and building tribunal into a consolidated land planning and environment court comprising both judges and non-judicial assessors.

In May 1995, the Parliamentary Electoral and Administrative Review Committee—PEARC—completed a report in response to the reforms of administrative law advocated by Fitzgerald and recommended by the Electoral and Administrative Review Commission. The committee noted that at one stage the Goss Government proposed to create a land, planning and environment division of the District Court. It further noted that, in relation to procedures, the proposed court would share many of the features of EARC's proposed development, environment and land tribunal. In May 1995, the Goss Government released an exposure draft of new planning and development legislation, the Planning, Environment, Development and Assessment Bill, for public comment. In the exposure draft it was noted that the proposal to amalgamate the Planning and Environment Court, the Land Court and building tribunal into a land, planning and environment court was to be implemented under separate legislation.

The Planning, Environment Development and Assessment Bill was never enacted, however, due to a change in the State Government. The incoming Borbidge coalition Government subsequently enacted the Integrated Planning Act 1997 in place of the Planning, Environment Development and Assessment Bill. The Integrated Planning Act 1997 continued the Planning and Environment Court. The Planning and Environment Court has jurisdiction to hear and determine matters, including planning, development and environmental protection matters. This new legislation did not affect the operations of the Land Court, which continued as before under the provision of the Land Act 1962.

A Report on a Review of the Powers, Procedures and Rules of the Land Court was released in October 1996. The summary of recommendations from the 1996 report is contained in appendix B to the bulletin. The primary focus of the review was to suggest ways in which court-supervised case management could be facilitated while retaining flexible procedures.

One of the issues dealt with in the 1996 report concerned whether the Land Court and the Land Appeal Court could be established under separate legislation. The 1996 report supported the concept that the legislation relating to the Land Court should be contained in separate legislation rather than the Land Act 1994. In this context it was noted that New South Wales and South Australia have established specialist courts dealing with a range of planning, environmental, developmental and land-related matters under their own legislation.

The 1996 report also proposed a scheme of new rules and procedures, similar to case management processes in the District Court or the Supreme Court, which could be adopted in the Land Court to improve the pre-hearing process. It identified a need for precise definitions of issues at an early stage followed by a compulsory preliminary conference or the like in order to avoid a "trial by ambush".

The present system of appeals from decisions of the Land Court was also canvassed in the 1996 report. It suggested that the current procedure of the Land Appeal Court hearing an appeal from the Land Court as a fresh hearing with limits on the admission of new evidence should be changed. As an alternative, the 1996 report proposed that appeals to the Land Appeal Court ought to be by way of re-hearing on the lower court record only. It would thereby exclude the admission of any new evidence. A party wishing to introduce new evidence could opt to have the matter reheard in the Land Court by the original member rather than appeal to the Land Appeal Court. This option also would not preclude the party from exercising their normal rights of appeal.

The 1996 report also noted instances where the judicial review process had been used to deal either with matters within the traditional jurisdiction of the Land Court or arising under an Act which did not confer a right of appeal from the Land Court to the Land Appeal Court. To overcome this problem, the 1996 report proposed that an appeal to the Land Appeal Court be available from all matters within the Land Court jurisdiction.

One of the recommendations made in the 1996 report was that the present entitlement of a party to appeal as of right to the Court of Appeal on a point of law from a Land Appeal Court decision should be removed. Instead, such an appeal should be by the leave of the Court of Appeal only. A further recommendation in the 1996 report was the appointment of a semi-judicial officer to conduct many of the preliminary procedures proposed in the review. The 1996 report suggested that it was neither cost effective nor appropriate for a member of the court to be involved in these stages.

According to the Explanatory Notes, the Land Court Bill 1999 is designed to provide a short, separate piece of legislation to govern the constitution, composition, jurisdiction and powers of the Land Court. It also constitutes and continues the Land Appeal Court with the power to hear appeals from the Land Court. Further provision is made for appeals on questions of law only to be taken to the Court of Appeal. The Bill is also designed to provide the legislative foundation for extensive new rules and procedures to modernise and streamline the court's operation.

Under clause 4(1), the Land Court is established as a specialist judicial tribunal. It has jurisdiction as given to it under the Act. Under clause 5, such jurisdiction is exclusive to the Land Court. The Land Court consists of the president and other members. The court is constituted by a single member sitting alone, unless the court is required under an Act conferring jurisdiction on the Land Court, to be constituted in another way.

Clause 16 provides for the appointment of the president and other members on the commission of the Governor in Council. The president, but not the members, must be a barrister or a solicitor of the Supreme Court of at least five years' standing.

Clause 17 provides for the ex officio appointment of members of the Aboriginal and Torres Strait Land Tribunals as members of the Land Court. The Scrutiny of Legislation Committee has noted in its report on the Land Bill 1999 that the Bill does not provide any express guidance on the nature of the expertise required to be possessed by persons appointed as Land Court members other than the president. The committee contrasted the recently enacted Land and Resources Tribunal Act 1999 as an example of legislation which specifies eligibility requirements of knowledge or experience for appointment as an appointed non-presiding member and a referee non-presiding member. I understand that the Minister is making some moves in that area. That is very good.

Clause 20 imposes the requirements that a member must not practise in, or have a direct or indirect interest in the practice of, a business or profession if the practice or interest is likely to conflict with his or her duty as a court member. For example, a member should not practise as a valuer or retain an interest in a private valuation firm of which he or she was formerly a partner. This requirement, however, does not apply to an acting member or a member appointed on a part-time basis by virtue of being a member of a land tribunal.

Further, a court member must resign his or her position with the court if elected as a member of the Legislative Assembly of Queensland. A member must retire at 70 years of age. However, a member who starts a hearing before reaching 70 may continue with the hearing until such time as it ends. A member can be removed from office by vote of the Parliament only for incapacity or misbehaviour. If the Parliament is not sitting, the Governor in Council may suspend the member. The grounds for suspicion must be laid before the Parliament within seven sitting days after the suspension. Parliament may then confirm or lift the suspension.

As to some of its powers, the Bill expressly confers numerous powers on the Land Court in the exercise of its jurisdiction. These powers include the power to adjourn proceedings; to issue a subpoena to a person to attend court and to produce relevant documents; to punish a person for contempt of the Land Court; to make any order, give leave or do anything else it is authorised to do on the terms the court considers appropriate; to rehear a matter on the application of an aggrieved party; to stay proceedings; and to make declarations.

Clause 9(1) details the list of acts that constitute contempt of the Land Court. A member of the Land Court has the same power to punish a person for contempt of the Land Court as a Supreme Court judge for contempt of the Supreme Court. At common law, superior courts possess jurisdiction to punish contempts of court wherever they occur, whereas the jurisdiction of inferior courts is limited to punishing contempts committed in the face of the court. In its report on the Land Court Bill 1999, the Scrutiny of Legislation Committee noted that the powers to punish for contempt conferred on the Land Court under clause 9 extend well beyond the powers conferred by common law. The committee queried the appropriateness of conferring on Land Court members the same powers to punish for contempt exercisable by a Supreme Court judge. The committee noted also that, although the Land Appeal Court has equivalent powers to punish for contempt under clause 72, with one exception a Supreme Court judge would always be sitting on the court.

The authority of the Land Court to rehear a matter is carried over from clause 12 of the Land Act 1962. The provision provides an alternative to appealing the decision to a higher court. If practicable, the same member who made the declaration must rehear the matter. According to the

Explanatory Notes, the circumstances in which the power to rehear a matter is likely to be used would be relatively rare. For instance, it could occur when there was a valid reason for not submitting evidence in the initial hearing but where the absence of that evidence had an important bearing on the decision. The present experience of the Land Court is that applications to have a matter reheard by the Land Court are rarely made. When a party has made an application to have a matter reheard, the Land Court can stay the decision made up until the time the application is refused or the matter is reheard. Clause 33 gives the court the power to make declarations about actions taken or proposed to be taken under Acts giving jurisdiction to the court and the interpretation of an Act for the purpose of proceedings in which the court has exclusive jurisdiction.

As to some of the rules, one of the major reforms proposed in the Report on the Powers, Rules and Procedures of the Land Court was that there should be new procedural rules to govern the operation of the Land Court and Land Appeal Court. Under clause 21 of the Bill, the Governor in Council, with the concurrence of the Chief Justice and the Land Court president, is authorised to make new procedural rules concerning the operation of the Land Court. The rules are expressed to be subordinate legislation. Notably, clause 21(4) provides that the rules may be uniform rules that apply to other courts. Uniform Civil Procedure Rules for the Supreme, District and Magistrates Courts came into operation on 1 July 1999. According to the Explanatory Notes, the new Land Court Rules to follow this Bill will be consistent with such uniform rules as far as possible. Some areas such as alternative dispute resolutions, disclosure and service of documents can be adopted by reference with little or no change. However, due to the specialist nature of the Land Court, it is anticipated that additional provisions will be necessary in the Land Court Rules. Where a matter about Land Court procedure is not covered by the rules, clause 22 authorises the issue of directions of a general nature or relating to a particular case.

In relation to judicial registrars, another major reform proposed in the Report on the Powers, Rules and Procedures of the Land Court in 1996 was the introduction of the position of a semi-judicial officer in the Land Court to supplement the position of the president and other members. The Bill creates the new position of judicial registrar of the Land Court. A similar position of judicial registrar in the trial division of the Supreme and District Courts is provided for under the Uniform Civil Procedures Rules 1999. Under clause 29(1), the judicial registrar's function is to hear and decide prescribed matters listed in the Land Court Rules. It is envisaged that these matters will include new procedural processes, such as case management, alternative dispute resolution and mediation. Further, it is anticipated that the position should relieve some of the workload presently placed on our full-time members.

In its Report on the Land Court Bill 1999, the Scrutiny of Legislation Committee noted that the Bill does not expressly indicate the intended nature of the judicial registrar's role. The committee has recommended that the Minister consider amending the Bill to specify in more detail the tasks that it is intended the judicial registrar may be authorised by rules to perform. We will await the Minister's comments on that. Under clauses 29(2) and (3), in determining a matter, the judicial registrar can exercise all of the jurisdiction and powers of the Land Court but does not have the power to punish a person for contempt. Clause 32 enables a judicial registrar to exercise a judicial or quasi-judicial power granted to the registrar under any Act. A member of the court may also exercise any of the powers of a judicial registrar. In order to be appointed as a judicial registrar, a person must be eligible for admission as a barrister or solicitor in the Supreme Court. Similar to members, the retirement age for judicial registrars is 70 years of age.

A number of provisions provide for the independence of the position of judicial registrar. A judicial registrar is appointed by the Governor in Council and may be removed by the Governor in Council only for proven incapacity or misbehaviour. Furthermore, the appointment of a judicial registrar is under the proposed Act rather than the Public Service Act 1996. When exercising a judicial or quasi-judicial power, a judicial registrar is not subject to direction or control other than as provided under the proposed Act. A party to a proceedings who is dissatisfied with the judicial registrar's decision in the matter may, with the leave of the Land Court as constituted by a member, have the matter reheard by a member of the Land Court. Conditions may be placed on the rehearing.

As to other Land Court officials, provision is also made under the Bill for the appointment of a registrar, deputy registrar and other officers of the Land Court. In contrast to the judicial registrar, these officials are to be employed under the Public Service Act. It should also be noted that, unlike members or judicial registrars, the registrar and deputy registrar must not exercise a judicial or quasi-judicial power. The registrar, deputy registrar and other officers of the Land Court are also expressed to hold their equivalent positions in the Land Appeal Court.

As I noted earlier in dealing with preliminary conferences, the report on the review of the rules, procedures and powers of the Land Court suggested the incorporation of preliminary conferences into the case management procedures used in the Land Court. A similar suggestion was also made in the Wolfe report released in 1990. The advantage of a preliminary conference is that it allows the issues in a matter to be further defined and perhaps resolved at an earlier stage of proceedings with consequent savings in court resources at the time.

For the past two years, the Land Court has offered court supervised preliminary conferences to parties in proceedings before the court. The conferences are currently conducted by one of the members of the Land Court. Under the current legislation, the court does not have the power to direct the parties in a proceeding to participate in a preliminary conference. The conferences, therefore, are conducted with the agreement of the parties in a proceeding on the understanding that, if the parties do not achieve a resolution, then they retain their rights in respect of the court proceedings. In the 1997-98 financial year, a resolution rate of about one in three was achieved for matters in which preliminary conferences were held. The majority of matters that were settled were appeals under the Valuation of Land Act.

Under clause 36 of the Bill, the court may hold preliminary conferences in an attempt to negotiate a settlement between the parties in a dispute. A party can be represented by a lawyer or an agent at the conference, but the representative must have the authority to settle the matter on any issue raised. If a matter does not settle at a preliminary conference, the member or judicial registrar presiding at the conference may take a decision on the matter if the parties agree.

If the matter proceeds further, two restrictions apply unless the parties consent. Firstly, the member or a judicial registrar who presided over the preliminary conference cannot hear the matter at a future stage in court. Secondly, any evidence given or admission made at the preliminary conference cannot be raised at the further proceedings. Similar disqualifications exist in the South Australian legislation relating to the Land Resources and Development Court in South Australia. These types of provisions are generally felt to encourage frank discussions at the preliminary conferences.

In relation to alternative dispute resolution procedures, one of the key procedural changes in the power and procedures of the Land Court made by the Bill is the introduction of court connected alternative dispute resolution—ADR—processes, such as mediation and case appraisal. Mediation is a process whereby a third party from a position of apparent neutrality assists those who are in dispute towards an agreed outcome between them. The role of the mediator does not extend to deciding the outcome. Case appraisal in the present context is a process under which a case appraiser provisionally decides a dispute. Unless a party is dissatisfied with the case appraiser's decision, it elects to continue to have the dispute go to trial or otherwise be heard. The case appraiser's decision is binding on all parties.

In the last decade there has been a shift in emphasis in the wider court system towards the resolution of disputes by means other than litigation. The integration of ADR processes in Land Court procedures follows that precedent. Clause 37 of the Bill incorporates the ADR procedures and those contained in the Supreme Court of Queensland Act and the Uniform Civil Procedures Rules in 1999 into the procedures of the Land Court. The provisions mainly relate to mediation and case appraisal.

Clause 37(4) enables the president to approve a member or a judicial registrar as a mediator or case appraiser for the ADR provisions. This provision alleviates the necessity to appoint an external mediator at the cost of the parties but still allows the parties to nominate an external mediator at that time if that is their choice.

In relation to appeals, the Bill retains the current two-tiered appeal structure of the Land Court and the Court of Appeal in the appeal process with some minor procedural amendments. The Land Appeal Court, established under clause 53, is a court of record. Like the Land Court, strict rules of evidence do not apply in the Land Appeal Court. It must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities.

Under clause 54, the Bill confers a right of appeal to the Land Appeal Court from all decisions of the Land Court. Previously some of the Acts under which matters can be referred to the Land Court prohibited any such Land Court decision from being appealed. According to the Explanatory Notes, aggrieved persons who have wanted to further appeal matters arising under those Acts have used the process of judicial review as an alternative mechanism to further litigate the case. The conferral of a right to appeal in all cases is designed to overcome the problem.

The Land Appeal Court is constituted by a Supreme Court judge and two members other than the members who made the decision appealed against. If an appeal is made from a land tribunal, at least one member of the land tribunal other than the initial decision maker must sit on the Appeal Court if practical. Clause 65 states that a party intending to appeal any Land Court decision must serve within 42 days of that decision a notice of appeal, stating the grounds of appeal, on the other parties and the registrar of the Land Court. Clause 56 confers on the Land Appeal Court the discretion to allow new evidence on an appeal if three conditions are met—

the admission is necessary to avoid grave injustice;

there is adequate reason as to why the evidence was not previously given; and

the application to have the evidence admitted is made prior to the hearing of the appeal.

Instead of finally deciding the matter itself, the Land Appeal Court can remit a matter to the Land Court or tribunal because of an error or mistake in law or for the matter to be redetermined with or without further evidence. The Land Appeal Court can stay an appeal decision for a period up until the time the appeal is decided in order to secure the effectiveness of the appeal. Clause 72 enables certain provisions applying to the Land Court to apply to the Land Appeal Court. These provisions relate to contempt, rules, directions, costs and subpoenas.

Clause 74 provides that an appeal from the Land Appeal Court to the Court of Appeal must be on an issue of law and requires the leave of the Court of Appeal or a judge of appeal. The requirement for a party to obtain leave to appeal is new and is designed to ensure that only issues of sufficient merit proceed to full appeal, given that any case taken to the Court of Appeal will already have been through two levels of hearing. This change is consistent with the appeal provisions in the Integrated Planning Act relating to appeals from the Planning and Environment Court to the Court of Appeal.

There are indeed no provisions in the Bill for the Land Appeal Court, of its own motion or at the request of a party to the appeal, to state a case on a point of law for the opinion of the Court of Appeal, as is currently the case under section 45A of the Land Act 1962. The Court of Appeal can remit a case to the Land Appeal Court to make a decision in accordance with the Court of Appeal decision; it may substitute its own decision; or it may make any order it considers appropriate.

In relation to representation, a party is entitled to appear in person or be represented by a lawyer or agent in an appeal before the Land Court. In this context, an example of an agent could be a valuer.

In relation to court records, the registrar is required to keep minutes of the proceedings and records of its decisions. Notably, any person—not limited to a party to a proceeding—may see and take copies of notes of evidence and of any documents produced in evidence to the court.

In relation to costs, under the current legislation the Land Court has a general discretion to award costs as it thinks fit in any matter in which it has jurisdiction. The Bill restates the general rule that each party to a proceeding in a court bears their own costs. The court, however, may also make an order as to costs as it considers appropriate. The court has the discretion then to order costs in cases where it considers the general rule should be displaced. A costs order may be made an order of the Supreme Court and enforced in the Supreme Court.

The Bill retains the references under the Aboriginal land legislation. As noted above, clause 17 provides for the appointment of members of the land tribunals established under the Aboriginal Land Act 1991 or the Torres Strait Islander Land Act 1991 or on an ex officio basis. There are no provisions relating to the Queensland Native Title Tribunal in the Bill as the Land and Resources Tribunal established under the Land and Resources Tribunal Act 1999 now covers that aspect.

The Bill contains consequential amendments to various Acts that refer disputes to the Land Court. A uniform time period of 42 days in which to lodge an appeal to the Land Court is provided, except in relation to the Land Tax Act, which retains the 30-day time limit. The change is to avoid user confusion and promote uniformity. Further, restrictions in the Water Resources Act 1989 (Qld), the State Housing (Freeholding of Land) Act 1957 (Qld) and the Soil Conservation Act 1986 (Qld) which had prevented any further appeal from a decision of the Land Court have been lifted.

Mention is made of what happens in other States. The Opposition at this point will indeed be supporting this Bill. I understand that the Minister has taken up the major amendment as recommended by the Scrutiny of Legislation Committee. We will see what happens in the Committee stage.

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