

**INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE
TRIBUNALS IN NSW**

Organisation: Local Land Boards of New South Wales

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LOCAL LAND BOARDS

NEW SOUTH WALES

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Law and Justice Committee
Parliament House
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Submission to Inquiry into Opportunities to Consolidate Tribunals in NSW

I am the Senior Chairperson of Local Land Boards of New South Wales and respectfully make this submission in that capacity.

What are Local Land Boards?

Local Land Boards ('Boards') are community based quasi judicial tribunals serving the metropolitan, regional and rural communities to resolve conflict and disputes within jurisdictions granted by a number of Acts. They are the oldest continuously operating tribunals in New South Wales.

Establishment

Boards were first established under the *Crown Lands Act 1884* and now serve 110 Land Districts in the Central and Eastern Divisions of land under the *Crown Lands Act 1989* and Western Division of land under the *Western Lands Act 1901*. There is a Local Land Board for each land district.

A Senior Chairperson of Boards is appointed by the Governor pursuant to section 22 of the *Crown Lands Act 1989*. The current appointment was made on 7 August 2006 for a term of 5 years, renewed for a further 2 years, expiring on 6 August 2013. The current Chairperson is eligible for reappointment at the expiration of the current term.

Relevant legislative provisions

The Boards have jurisdiction to hear and determine a wide range of applications, inquiries, and review of administrative decisions under the *Crown Lands Act* and *Western Lands Act* and other Acts.

Other legislation granting jurisdiction

Commons Management Act 1989

- Appeal against refusal to be enrolled on the Commoners roll (s.11)
- Inquiry into the affairs of a Common Trust (s.51)

Dividing Fences Act 1991

- Application for fencing orders (s.12)
- Ancillary orders under the *Act*

Hay Irrigation Act 1902

- Determination of value of leasehold improvements (s.19)
- Appeal against Minister's decision as to purchase price for land

Roads Act 1993

- Inquiry and report into opening or closing roads (s.260)

Rural Lands Protection Act 1998

- Appeal against basis for assessment of rates (s. 72)
- Appeal against rates (s.73)
- Appeal against issue or suspension of permits (s.109)
- Appeal against orders for eradication of feral animals or pests (s.175)
- Appeal against order for keeping feral animals or pests (s.176)
- Appeal about right of way conditions (s.99)

Water Act 1912

Public inquiries and reports into:

- Granting an application to carry out works (s. 20A)
- Granting a licence (s. 12)
- Granting an application for a bore licence (s. 114)
- Assessment of charges (ss. 108 and 110)
- Assessment of compensation (s. 26B)
- Determination of apportionment of contribution to expense where no licence is in place (s. 21B) and ancillary matters

Wentworth Irrigation Act 1990

- Appeal against Minister's decision as to purchase of land (s. 22C)

Source of matters before Boards

The source of the applications before the Boards is by direct application by members of the public to the Registrars of Boards, through referral by the relevant Minister to a Board and matters referred to a Board by Local Court magistrates where they have been unable to resolve the dispute and the expertise of the Boards is needed to make orders for fencing work under the *Dividing Fences Act*.

Venue of Hearings

The venues of hearings are in Court Houses throughout country, regional and metropolitan areas of NSW. During hearings the Boards usually visit the site of disputes for a view of the subject matter of the dispute.

The venue of the hearings changes daily.

A Chairperson is required under the *Act* to sit on each and every Board hearing. The Senior Chairperson presides at most hearings.

The Chairperson travels to different venues throughout New South Wales each hearing day. Hearings are organized on a circuit basis, usually according to land districts, to reduce the length in travel time that is inherent in hearing matters in the locality of the disputes.

The current working arrangements are:-

- For the first full week of each month the Board sits at two different venues each day in the Metropolitan, Windsor, Penrith or Picton land districts. The Board hear 8 fully contested hearings during that week. The hearings are conducted in Court Houses nearest the site of the dispute. If in the Board's opinion, it would assist to view the site of the dispute, then the Board takes a view and continues the hearing on site. The nature of disputes in these land districts are normally disputes under the *Dividing Fences Act 1991* and appeals against determinations of rent for Crown lands.
- For every other week of each month the Board is on circuit throughout country and regional New South Wales. Usually each day is a different venue, the circuit organized within regions. The Chairperson travels by vehicle to Court Houses nearest the venue of the disputes if within 3 hours of Sydney. If more than 3 hours from Sydney the Chairperson flies to a regional centre and then drives to the location of the hearing (Court House). When the hearing requires members of the Local Land Board to sit with the Chairperson, they are empanelled from members living nearest the hearing. Those members are appointed by the Minister for Primary Industries.
- The hearings in country and regional areas consist of domestic and rural fencing disputes, inquiries into opening, closure and use of Crown roads, appeals against determinations of rent of Crown lands and other public inquiries referred by the Minister, inquiries into the grant of licenses for

water storage and pumping, appeals under the *Rural Lands Protection Act 1998* as to rates and orders and referrals for inquiries under the *Western Lands Act*.

- The length of hearings and inquiries can range from a half to four days in country and regional areas.
- The *Crown Lands Act* requires the Boards:-
 - to conduct its hearings under the provisions and practices of the Local Court but the rules of evidence do not apply.
 - Evidence is given under oath.
 - All decisions must be supported by written reasons. Full written reasons and the decision are provided to the parties.
- Over the last 3 years the Boards has conducted in excess of an annual average of 175 full hearings plus ancillary applications for adjournment or directions each year throughout New South Wales. Of these approximately 30 are referrals from Local Court Magistrates who have elected to transfer dividing fence disputes to the Boards as the appropriate experienced tribunal to hear and determine such disputes.

Function of Senior Chairperson

The Senior Chairperson is responsible for assigning the functions of chairing the Boards sittings, together with the conduct of hearings, determinations, inquiries, references and appeals under the Acts giving jurisdiction to the Boards and providing recommendations for review of function of the Boards.

A Chairperson may sit alone in some prescribed matters arising out of the administration of the *Crown Lands Act* or any other prescribed matter e.g. matters under the *Dividing Fences Act* in the metropolitan or residential areas; inquiries under the *Roads Act* and *Water Act*.

Otherwise, the Chairperson sits with two lay Board members, with a quorum required of the Chairperson plus one member. The Chairperson exercises interlocutory matters alone.

A Board is a tribunal of fact and law, exercising duties which are substantially judicial in nature; *Ex parte Browne* (1888) 9 L.R. (N.S.W.) 102; *Re Bryans* (1896) 6 L.C.C. 181; *Ex parte Bennett* (1989) 19 L.R. N.S.W 139; *Re McDonald* (No. 1) 17 L.V.R. 63; *Tandou Limited v Western Lands Commissioner* [1996] NSWLEC 166; *Grant Mills & Ors v Water Administration Ministerial Corporation* [1998]NSWLEC 307.

Accountability structure

Written reasons must be provided for every decision made by either the Chairperson sitting alone or on behalf of a Board: *Crown Lands Act* Schedule 2.

There is consequently a heavy onus on the Senior Chairperson to ensure that a Board's decisions and all written reasons for its decisions are soundly based at law.

In the decision in *James Bryden as Executor of the estate of John Anthony (deceased) v Minister for Lands & Ors* [2011] NSWSC 945 (2 September 2011) [par 44] Pembroke J made favorable comments on the conduct of an inquiry carried out by a Board in a very contentious Crown road matter.

“The Board had clearly worked hard to arrive at the recommendations that were set out in its report. Not only had it conducted a hearing and analysed the evidence and the issues, but it compiled its report with commendable thoroughness.”

In a recent appeal against a decision of the Minister administering the *Crown Lands Act* for a determination of rent of Crown land, the Board’s decision was reviewed by the Supreme Court. The Court supported the Board’s decision. The matter was subsequently further appealed to the Court of Appeal. The Court of Appeal again supported the Board’s decision; *Farriss v Minister Administering the Crown Lands Act 1989* [2011] NSWCA 275.

The decision of a Board, in some of its jurisdictions, is subject to appeal to the Land and Environment Court. The Board may in some circumstance refer matters to the Land and Environment Court of its own volition.

The responsible Minister may in limited circumstances refer a decision of a Board to the Land and Environment Court or refer the matter back to the Board for re-hearing.

Notwithstanding that there is no appeal as of right under decisions made by the Boards under the *Dividing Fences Act*; the Board’s decisions under this Act and all other Acts in which it has jurisdiction may be reviewed by the Land and Environment Court or the Supreme Court on administrative law grounds.

Self represented parties before a Board do not realistically have a pathway to have decisions reviewed as appeals to the Supreme and the Land and Environment Courts are costly and complex together creating a barrier to accessible review.

Development of Boards, general powers and procedures

Under the *Crown Lands Act 1884* the Chairperson was a justice for the purposes of the Act: s.14 (2), as were those exercising authority in Police Courts. The Chairperson and the Justices of the Peace (Magistrates) in Police Courts had similar status and stipend.

The origins of the Boards paralleled the origins of police courts. This is shown by the development of land districts and police districts.

- Boards within land districts exercised review of administrative decisions, original jurisdiction for the control and order of the distribution of land and its use;
- Courts of Petty Sessions in police districts to administer law for the good order, safety and protection of the community.

Court houses were established throughout New South Wales. Those court houses were either under the control of Crown lands or the Attorney General. Now all Court houses are under the control of the Attorney General.

The procedure of the Boards is now defined by Schedule 2 of the *Crown Lands Act* 1989. Section 3 (b) of Schedule 2 of the Act, provides that the procedure of the Boards will be the same as that before a Local Court.

Historically, Boards and courts of petty sessions served local areas, as community based tribunals to deliver peace, welfare, and good government for the citizens of New South Wales.

Boards have a specialist jurisdiction dealing with complex land related subject matter.

A Chairperson has highly developed specialist expertise in laws relating to land and rural practices and depth of general legal knowledge.

Its lay members are neither qualified nor proficient in the law. They bring practical experience to bear on those matters over which they preside in conjunction with the Chairperson, although their local or personal knowledge must not be relied upon; *Re Knight* (1922) 1 L.V.R. 19, and a Board must come to its own decision on the evidence before it; *Woodbridge v Dennis* (1906) 16 L.C.C. 19 .

The Chairperson provides advice to lay members as to points of law that arise during hearings. The lay members hear the evidence with the Chairperson. The majority view prevails as the decision of a Board, but the lay members cannot comment on the Board's decision, but can in the case of an appeal transmit to the Land and Environment Court written reasons for their decision.

The jurisdiction under the *Dividing Fences Act*, *Crown Lands Act* and *Roads Act* is granted to the Board. Where practical assistance may help the Chairperson, lay members are empanelled to constitute a Board; otherwise the Boards will be constituted by the Chairperson sitting alone.

Under the *Dividing Fences Act* and the *Water Act*, the jurisdiction is shared with the Local Court. While the Boards exercises the same function in these jurisdictions as the Local Court, the advantage of a matter heard by a Boards is that it will, and does, conduct a view of the subject matter of the dispute or inquiry.

A Board is the preferred jurisdiction for dividing fence disputes, as judicially recognized by the Supreme Court; *Alwiah v Watts & anor* [2004] NSWSC 148 at 27 and 28.

Contemporary changes and improved efficiencies

With the Chairperson mostly sitting alone (since 2009), particularly in applications under the *Dividing Fences Act*, the Chairperson has greater responsibility in delivering decisions to often irate, querulous, highly emotive, and agitated parties appearing before the Boards. Those parties are frequently unrepresented and the Chairperson is required to exercise a high level of dispute resolution and conflict management skills to resolve disputes that have been simmering for years between neighbours or in communities.

Uniquely, the jurisdiction under the *Dividing Fences Act* deals with adjoining owners of land. The care skill and sensitivity needed to make orders under the Act is heightened by the fact that participants in the dispute need to continue to live beside each other

where each day they are confronted with and reminded of the cause or root of their dispute.

Boards also deal with complex water license issues and determination of rents for Crown lands.

Under the *Water Act*, inquiries are conducted into the granting of licenses for works and pumping of water. These are high value assets and the impact on other members of the community must be considered and examined. Such inquiries evoke strong and passionate community interest and feeling. Hearings are conducted in the communities affected, which permits the opinions of people wishing to be heard an opportunity to have those opinions considered.

Under the *Crown Land Act* appeals against determination of rents for Crown land involves important consideration of circumstances, the impact of which may have State significant repercussions. The parties are normally represented by legal practitioners including Senior Counsel. These matters have complex issues and require extensive consideration of the law. The decisions have considerable impact on the parties and the State (*Farris v Minister Administering the Crown Land Act 1989*).

The increasing value of land in metropolitan and coastal areas coupled with heightened regulation of development has significantly increased the potential for fencing disputes. Where the parties are represented legal argument naturally features prominently. As referred to previously the Boards is required to provide written reasons for all its decisions. These now need to be carefully considered and closely written. The sole burden for the quality of these decisions falls entirely on the Chairperson.

The Chairperson is required to have an extensive knowledge of the *Evidence Act* in order to conduct the proceedings before the Boards with the same judicial authority as a Magistrate.

In order to perform the duties of Chairperson the incumbent must have:-

- A thorough knowledge of general law, the laws and rules of evidence and court room practice;
- A highly developed expertise in land law, particularly a comprehensive knowledge of the *Real Property Act*, *Conveyancing Act*, *Crown Lands Act* and all other Acts which assign jurisdiction to the Boards; and,
- dispute resolution skills, and an extensive understanding of administrative and procedural law,
- An ability to deal with upset, querulous and highly emotional self represented litigants;
- Knowledge of, understanding and empathy for the exigencies and character of rural life and experiences.
- A practical and theoretical appreciation of dispute resolution techniques and their application as a mechanism for resolving conflicts

Arguments in Support of Consolidating Boards with other NSW Tribunals

At the time of appointment as current Senior Chairperson, I was tasked with the responsibility of effecting the changes necessary to enable the Boards system to function on a coordinated, state wide basis while retaining the valuable service provided to citizens of New South Wales, particularly in regional and country areas to have land related conflicts heard and determined in the locality of the dispute. Some of those recommendations resulted in changes referred to in this submission.

In 2007 I made recommendations to the Department of Lands, then responsible for the *Crown Lands Act*, that the Boards become a division of the Administrative Decisions Tribunal ('ADT'). This recommendation was made to:-

- Increase the efficiencies to be obtained by having a centralized expert registry to support the work of the Boards.
- Provide access to the cost effective and readily accessible ADT internal appeal mechanism contained within the present ADT framework as no appeal as of right now exists other than referred to in the limited circumstances set out in this submission.
- Satisfy the paramount need for Boards to reinforce and enhance their independence as tribunals for the review of administrative decisions and in the exercise of their original judicial function.
- If the Boards become a division of the ADT, it would enhance the authority in the minds and perception of the self represented parties before the Boards, as they are recognized by legislation and superior courts.
- The Boards uniquely provide a service to all members of the country, regional and city communities. The Boards resolve disputes, conduct inquiries and make decisions in the community where the parties live and work. The ADT does similarly. It is imperative that this function be retained along with the other benefits of this proposal.
- Provide a structure with a similar policy of the availability of low cost dispute resolution facilities without complex rules or procedures for mostly self represented parties.
- Provide savings in the provision of registry services, administration and management, a single point of contact for users and potential users of the Boards dispute resolution function.

The President of the ADT, Judge O'Connor supported the 2007 recommendation that the Boards become a separate division of the ADT. It was proposed that the Boards would retain their current structure and jurisdiction, with the added benefit of the registry support and internal appeal mechanism of the ADT. The Head of the proposed division, being the Senior Chairperson, would fulfill the same role now undertaken as being responsible for arranging and conducting hearings.

In May 2011, I had further discussions with Judge O'Connor, confirmed his support for the Boards becoming a division of the ADT.

Recommendation

I respectfully recommend that:-

- Local Land Boards be retained in their current form with the same jurisdiction and powers as they now have, preserving their unique, important and accessible, specialist function, land and rural knowledge, serving rural, regional and metropolitan communities;
- administrative responsibility for the Boards be transferred to the Administrative Decisions Tribunal;
- the cost effective and readily accessible ADT internal appeal mechanism be available as a means of review of the Boards decisions; and,
- the Boards become a separate division of the ADT, perhaps called the “Lands Division”.

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