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Negotiated access to land in Queensland – is this the end of ADR?

By James Plumb, Partner and
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Australia Pacific LNG Pty Ltd v Golden & Ors [2013] QCA 366

The Queensland Court of Appeal has recently been asked to consider the legal effect of an election notice issued pursuant to the negotiated access and compensation regime under the Queensland petroleum legislation.

Pending any subsequent legislative amendments, if the original decision is upheld by the Court of Appeal, a party that is first in time to issue an election notice could be free to force any method of alternative dispute resolution (**ADR**) on another party and, potentially, to effectively oust the role of the Land Court to determine compensation terms that cannot be agreed. On the other hand, if the decision is overturned on appeal, there may be a decline in the use of ADR and a corresponding increase in instances of the Department being called upon to assist the parties to reach a negotiated resolution.

Background

Australia Pacific LNG Pty Ltd (**APLNG**) sought access to two properties west of Wandoan, for the purpose of drilling, constructing and operating a number of petroleum wells, associated infrastructure and flowlines on each property.

After many months of negotiations with the landholders, APLNG issued formal negotiation notices under the negotiated access and compensation regime of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (**P&G Act**). The parties were unable to reach agreement within the set negotiation period (20 business days) following the issue of the negotiation notices.

Accordingly, after expiry of that period, the landholders issued election notices under s 537A of the P&G Act, nominating for the negotiations to be referred to arbitration for resolution.

Pursuant to the election notices issued by the landholders, the arbitration was to commence on 6 December 2013.

The proceedings at first instance

APLNG informed the landholders that it did not agree to the referral of the negotiations to arbitration, and resisted the notices.

The landholders commenced proceedings in the Supreme Court on 29 November 2013, seeking a declaration regarding the lawful effect of the election notices.

On 3 December 2013, Justice Atkinson ruled in favour of the landholders, declaring that the lawful effect of the election notices was to require the parties to use reasonable endeavours to finish the arbitration prior to 24 December 2013, and that the arbitration could be held even though APLNG did not agree to it and even if it did not attend.

The appellate proceedings

APLNG filed an appeal from her Honour's decision on 6 December 2013. That appeal has not yet been heard.

At the same time, APLNG filed an application in the Court of Appeal seeking an interlocutory injunction to restrain the landholders and the arbitrator from proceeding with the arbitration, effectively until the Court of Appeal has delivered its judgment in the appeal proceedings.

On 9 December 2013, Muir JA delivered judgment in which he granted the injunction sought by APLNG.

The injunction

APLNG asserted that, as it had not agreed to the form of ADR nominated in the election notice, it could not be compelled to attend.

In granting the injunction, Muir JA expressed the view that APLNG's position was at least '*fairly arguable*'. While recognising that this was ultimately a matter for determination of the Court of Appeal, his Honour noted the wording in s 537A(2)(b) of the P&G Act and observed that the respondent's position seemed to be at odds with the thrust of the statutory regime which, in his view, is directed to negotiated settlements, failing which the issue of compensation is to be determined by the Land Court.

In granting the injunction, Muir JA rejected the respondent's argument that this was a case of mere inconvenience for APLNG and that the arbitration should take place despite the appeal proceedings. In particular, his Honour accepted that if the injunction was not granted APLNG would be forced to participate in an arbitration costing some hundreds of thousands of dollars. Related to this, his Honour noted that there was considerable doubt about how, if at all, costs of the arbitration proceedings would be recovered if the appeal was successful. Further, Muir JA observed that if the arbitration was to take place when it was not sanctioned by the P&G Act, the parties would have been sent down a route which the provisions of the Act sought to avoid, and this may have adverse long-term consequences on the parties' relationship.

The relevant provisions of the P&G Act

Section 537A of the P&G Act, which creates the right for parties to these negotiations to issue an election notice, states as follows:

> ***Parties may seek conference or independent ADR***
>
> 1. *This section applies if, at the end of the minimum negotiation period, the parties have not entered into a conduct and compensation agreement or deferral agreement.*
> 2. *Either party may by a notice (an **election notice**) —*
>   a. *to the other party and an authorised officer—ask for an authorised officer to call a conference to negotiate a conduct and compensation agreement; or*
>   b. *to the other party—call upon them to agree to an alternative dispute resolution process (an **ADR**) to negotiate a conduct and compensation agreement.*
> 3. *If the notice calls for an ADR, it must—*
>   a. *identify the ADR; and*
>   b. *state that the party giving the notice agrees to bear the costs of the person who will facilitate the ADR.*
> 4. *An ADR may be a process of any kind, including, for example, arbitration, conciliation, mediation or negotiation.*
> 5. *However, the facilitator must be independent of either party.*

Section 537AB(3) states that

> 3. *If an ADR was called for, the parties must use reasonable endeavours to finish it within 20 business days after the giving of the notice (also the **usual period**).*

Under s 537AB(5), that period can only be extended by agreement.

Section 537B permits a party to apply to the Land Court for the determination of compensation if, relevantly, a party called for ADR and the person facilitating the ADR does not finish it within the period required under s 537AB, or if only one party attended.

The right to review compensation in the Land Court, under s537C, is limited in that it requires there to have been a material change in circumstances since an agreement was reached.

The implications

This case reveals some of the shortcomings that can currently be found in the negotiated access and compensation provisions under the Queensland mining and petroleum legislative regimes.

No guidance is offered by the legislation as to the effect of an election notice that calls on the recipient to agree to a form of ADR if it is not agreed to. On one view, a party may simply be able to apply to the Land Court after expiry of the relevant period.

This confusion is created because the notice given under s 537(2)(b) apparently contemplates the parties *agreeing* to an ADR process, whereas the requirement under s 537AB(3) for the parties to use reasonable endeavours to finish the ADR process and the right to apply to the Land Court under s 537B both operate by reference to the expiry of a period after delivery of the election notice. Neither of the latter provisions expressly require agreement on the ADR process to have been reached, or the other party to attend.

Further confusion is created by inconsistency between the intent of the legislation and the provisions seeking to give effect to that intent. As Muir JA recognised, the P&G Act appears to be directed towards requiring parties to seek to reach a negotiated agreement (through ADR, if required) and, failing that, for the Land Court to determine compensation. However, the legislation provides an example of a form of ADR (namely arbitration) that is not directed towards facilitating negotiations but which can instead result in a quasi-judicial determination of rights between parties, potentially in their absence, with very limited rights of appeal.

At least until the appeal is determined, a party to access and compensation negotiations could reasonably adopt the position accepted by Justice Atkinson that an ADR process does not have to be agreed by the other party, and that ADRcan proceed without that party's agreement.

Given the breadth of the nominating party's discretion as to the form of ADR (see s 537A(4) above), this has the potential to be problematic, as the party first issuing an election notice could nominate a form of ADR that results in a binding determination not open to review.

Alternatively, if the Court of Appeal ultimately agrees with APLNG and finds that a matter can only be referred to ADR with the agreement of the parties, it will be interesting to see how notices requesting agreement to a form of ADR will be treated in the future.

It is APLNG's contention that, if the parties fail to agree on a form of ADR, the party that issued the election notice can issue a revised notice for another ADR process or ask for a conference to be called by an authorised officer (**Departmental Conference**). If this is accepted, it is possible that more Departmental Conferences will be required, increasing the already significant strain on the resources of the Queensland Department of Natural Resources & Mines.

Conclusion

This case highlights substantial difficulties with the regime for negotiated access.

It is hoped that the outcome of the appeal will be to reduce or eliminate these difficulties, however it is equally possible that no satisfactory decision will be reached and that the legislature will have to revisit its drafting.

In the meantime, parties to such negotiations need to be alive to the risks that the current regime presents and strive to build and maintain co-operative relationships as far as possible.

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Upcoming presentation

Andrew Shute, Partner, will be chairperson of the Commerical Litigation / ADR session at **The Queensland Law Society Annual Symposium**

This session will include:

- Update on recent noteworthy cases and practice directions that will impact solicitors in practice
- Discovery: an essential toolkit - which will refresh your knowledge of the essentials of discovery and give you the latest information on practice and procedure.

For more information, please visit http://www.qls.com.au/symposium/index

Explorer's Guide to Queensland

The legal landscape facing explorers in Queensland is challenging. In the face of unprecedented public scrutiny, explorers are required to negotiate the various governing legislative regimes at the same time as they manage their relationships with impacted landholders and traditional owners, government regulators, employees, third party contractors and overlapping tenement holders.

The inaugural edition of the Explorer's Guide to Queensland highlights key legal issues and challenges associated with exploration in Queensland.

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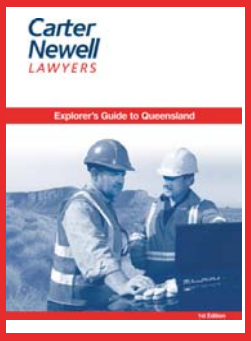

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