In terms of proportion, the Court noted that generally harm must not be disproportionate to cure. Although works may be "necessary" in the physical sense for the owner's own limited purposes, it must be reasonable in a wider context to carry out the action. AHigh risks an event will occur may justify urgent action; but not necessarily so if damage likely to ensue from the event is minor. (p10).

The s 341(2)(a)(iii) standard of "reasonable" conduct is an objective standard. It should be assessed on the facts known at the time and a consideration of common-sense.

The Court also noted the overlap between section 341(2)(a)(ii) and (iii).

> Conduct more readily can be regarded as "reasonable" when any immediate adverse effects can be, and have been, remedied. Where damage will be irreparable, one should pause long before acting. When resulting damage can be repaired, in whole or in part, it is harder to describe action taken as "reasonable" when the damage is left Aunrepaired.

On the facts, the Court found that the actions taken by the defendants were neither "reasonably necessary: at the time they were taken (ie consent could have been obtained), nor in proportion to the damage which they caused. Moreover, the Court concluded that the second limb of the defence was not established noting that it was not reasonable to carry out self-help erosion control work of this character without first obtaining a resource consent (page 12).

The company director was fined $12,000 plus costs and his employee $1,000.

The decision demonstrates that attempts at self-help or "quick-fix" solutions to environmental problems will need to establish a real degree of risk or urgency in their "necessity" to be able to rely on the defence in s 341. Actions taken for which consents could have been sought without a real risk of damage, or which cause greater damage then they avert, will tend to show a lack of "reasonable" consideration or "common-sense" on the part of the offending party.

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Russell McVeagh acted in these proceedings

# WESTERN AUSTRALIA

## Metropolitan Region Planning Scheme and the Grant Of Mining Tenements: *City of Cockburn v Boral Resources (Australia) Ltd*

On 28 October the Full Court of the Supreme Court held unanimously in *City of Cockburn v Boral Resources (Australia) Ltd*[5] that a Class "C" Reserve created under the *Land Act* 1933 (WA) and classified as a reserve for parks and recreation under the Metropolitan Region Town Planning Scheme could be the subject of a mining tenement application without having also to be the subject of a planning approval under the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) (the "*Metropolitan Planning Act*"). The case turned on the interpretation of the interaction between the *Metropolitan Planning Act* and the *Mining Act*.

The case arose in relation to an application by Boral Resources Ltd for a mining lease pursuant to the *Mining Act* 1978 (WA) in order to mine silica sand from the reserve land which is under the care, control and management of the City of Cockburn. The City lodged an objection to the lease application saying that the land was needed for vegetation conservation and for recreation and that the extraction of the sand would be a development requiring approval by the Western Australian Planning Commission. By s.120(1) of the *Mining Act*, the Warden and the Minister are required to "take into account the provisions of any town planning scheme in force under the *Town Planning and Development Act* 1928" when considering an application for a mining lease, but the provisions of any

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5 Unreported, Library number 970549.

such scheme "shall not operate to prohibit or affect the granting of a mining tenement or the carrying out of any mining operations authorised by this Act". Section 120(2) provides that if the grant of a mining lease would authorise the carrying on of mining operations contrary to the provisions of a town planning scheme, then the Minister for Minerals and Energy should not determine the application until after s/he has consulted the Minister for Planning.

The City of Cockburn argued that section 120 did not apply to the Metropolitan Region Scheme and that that Scheme was capable of operating to prohibit or affect the grant of a mining tenement and that planning approval under the Region Scheme is required, "perhaps before the granting of a mining tenement but certainly before the commencement or carrying out of any mining operations which amount to "development" for the purposes of the Scheme"[6]. The Warden, in hearing the City's objections, held that section 120 should be read so as to include reference to the *Metropolitan Planning Act* and that his decision would have nothing to do with planning.

The Supreme Court held that s.120 *Mining Act* could not be read to include a reference to the *Metropolitan Planning Act.* However, that did not exhaust the operation of the *Mining Act* in relation to the reserved land. The Court found that the reserved land fell within the terms of s.24(1)(g) of the *Mining Act* (land reserved under any Act not already mentioned in s.24(1)) and was thus subject to the procedural requirements of s.24(7) which required the consent of the Minister for Minerals and Energy to the carrying out of mining operations and further required the Minister for Minerals to consult with the Minister for Planning before giving that consent. In the light of these provisions, the Court held that the Metropolitan Region Scheme did not operate to prevent the grant of a mining tenement or the carrying out of mining operations under the tenement nor require the grant of a planning permit for development.

As the Warden seemed to accept that the City of Cockburn could continue with its objections on environmental grounds (consistent with *Re Warden French; Ex parte Serpentine-Jarrahdale Ratepayers and Residents Association* (1994) 11 WAR 315), as distinct from the wider planning issues, the Court held that the Warden had not made a jurisdictional error and discharged the order *nisi*, refusing a writ of certiorari.

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[6] Transcript of reasons of Steytler J, p.4.