CASE NOTES

Western Australia

***Re Shire of Swan: ex parte Saracen Properties Pty Ltd* [1999] WASCA 135**

This case concerns an interpretation of the meaning of "offensive trade" under the *Health Act* 1911 by the Full Court of the Supreme Court of Western Australia.

The legal dispute in this matter arose out of a determination by the Shire of Swan of an application for development approval for a proposed brick and tile processing plant. In order to deal with the planning approval application, the Shire of Swan had to apply the provisions of the Shire of Swan Town Planning Scheme No 9. Under the Town Planning Scheme, a 'noxious industry' use could not be approved in the area in question, nor indeed in any part of the Shire. After receiving a copy of legal advice obtained by a local community group opposed to the construction of the brickworks, the Shire determined that the brickworks were a 'noxious industry' and accordingly could not be approved under the scheme.

The companies proposing to construct and operate the brickworks ('the Applicants') sought a writ of certiorari to quash the decision of the Shire refusing to approve the development application. On 14 June 1999 McKechnie J granted an order nisi for the writ of certiorari. On 30 July 1999 the order nisi came before the Full Court sitting with the bench of five judges. The Hazelmere Progress Association Inc, the Residents and Ratepayers group for the area in which the construction of the brickworks was proposed, sought to intervene in the case. The Full Court permitted the Progress Association to intervene, and after hearing submissions from the Applicants, the Association and the Shire the Court ruled unanimously that the order nisi should be dismissed.

The point of statutory construction upon which the case turned was whether the brickworks were a 'noxious industry' within the meaning of the Shire of Swan Town Planing Scheme No 9. As is common with such Schemes in Western Australia, this Scheme provided that a noxious industry is 'an industry in which the processes involved constitute an offensive trade within the meaning of the *Health Act* 1911'. Section 186 of the *Health Act* provides that an 'offensive trade' means and includes any of the trades specified in Schedule 2 of that Act. Schedule 2 lists a number of specific industries and also provides that the definition of 'offensive trade' includes 'any trade that, unless preventative measures are adopted, may become a nuisance to the health of the inhabitants of the district.'

In 1984 the Full Court of the Supreme Court had considered the meaning of these words in a similar context to the present case: *City of Cockburn v McNiece Industrial Systems Pty Ltd* (Unreported, Library No 5523, 24 September 1994). The majority in that case, comprising Burt CJ and Wallace J, took the view that these words were broad enough to cover any trade

which may become a nuisance to the health of inhabitants of a district if preventative measures are not adopted, even if in practice the trade would be unlikely to become a nuisance due to the presence of those preventative measures.

The Applicants challenged the correctness of the *McNiece* decision. One argument put by the Applicants was that the interpretation adopted by the majority in *McNiece* was contrary to the policy of the *Health Act* because it was too accommodating and failed to distinguish between those industries where there is a real and distinct threat of a nuisance as opposed to industries or trades where the risk is remote. Murray J, with whom Anderson J and Parker J agreed, rejected this contention:

> 'The policy of the legislation, as it seems to me, is to maintain control for planning and public health purposes over industrial processes which are, or may in the way subscribe to Schedule 2 of the Health Act, become, a nuisance to public health. The legislative scheme is not framed so as to give up that control in the case of any industry or trade which, in particular cases or generally, adopts measures which, if they are maintained, will prevent the apprehended nuisance from developing in fact.'

The significance of this decision lies in the fact that Town Planning Schemes in Western Australia have commonly imported the definition of 'offensive trade' from the *Health Act* into their Town Planning Schemes, and have provided that such industries are not permitted in particular zones. The decision is a reminder by the Supreme Court that such industries include industries that may not in their ordinary operations cause a nuisance to health to inhabitants of a district, but which have the potential to do so if preventative measures fail.

Serpentine-Jarrahdale Ratepayers and Residents Association Inc v Baxter and Others **(Perth Mining Warden's Court, 8 July 1999)**

This matter involved objections to the grant of two mining leases by the Serpentine-Jarrahdale Ratepayers and Residents Association. The objections have a long history, having being lodged in 1991 and 1992, and having involved two separate judicial review applications on jurisdictional and standing issues respectively: see *Re Warden French: ex parte Serpentine-Jarrahdale Ratepayers and Residents Association* (1994) 11 WAR 315, *Re Warden Heaney: ex parte Serpentine-Jarrahdale Ratepayers and Residents Association* (1997) 18 WAR 320.

This decision is significant because it is the first environmental objection considered by the Mining Warden's Court since the Full Court of the Supreme Court confirmed the Warden's jurisdiction to hear such objections: *Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd* (Unreported, Lib No 980734, 21 December 1998).

There were a number of grounds to the Association's objection to the grant of the two mining leases. These grounds included the impact of mining on groundwater levels and other water users; the impact of noise, dust and truck movements on local residents; and the impact of mining on bushland and wetland areas within the proposed mining leases. The Association also objected to the grant of the mining leases on the basis that the applicants proposed exploration of the proposed tenement area rather than mining and accordingly that the application for mining leases was premature and inappropriate.

Expert evidence was heard over four days on a range of issues, including the natural values of certain bushland and wetland areas which had been designated as having regional conservation significance under a State Government document entitled *Perth's Bushplan*. Evidence was given by the Manager of Baldivis Estates, a winery within the mining lease area, as to the impacts of mining on the winery and in particular on its tourism activities. Evidence was called by the applicants in response to the Association's evidence, and also as to the history of exploration in the mining lease area and the extent to which an economic deposit had been identified.

In his detailed reasons for decision, Mining Warden Calder considered the role of the Warden in respect of environmental objections to the grant of mining tenements. He concluded that

> 'it will be generally be more appropriate for a Warden to proceed upon the basis that unless the Warden is able to conclude that the ground applied for is over land which is of significant environmental importance and that the land could not be the subject of the grant of a tenement with appropriate conditions being imposed which would protect the environment during the carrying out of the proposed activities and which would ensure the appropriate preservation and continuity of the environment after the cessation of those activities, the Warden should recommend the grant of the tenement subject to the Minister being satisfied that all relevant environmental matters have been properly investigated and that the terms and conditions of the grant will properly and appropriately safeguard the environment.'

The Warden concluded that in the present case the mining lease applications should be granted, but that the land in respect of which the mining leases are granted should not include any part of the Baldivis Estate land, any part of the land included within the *Perth Bushplan* sites, or any land adjacent to or in the vicinity of any of the above areas where it is the opinion of the Environmental Protection Authority that the mining of such land could not be carried out without unacceptable impacts on those areas.

The Warden also recommended that the Minister for Mines refer the applications of mining leases to the Environmental Protection Authority pursuant to section 38 of the *Environmental Protection Act* 1986.

In respect of the argument by the Association that the Mining Lease applications were premature, the Warden found that the *Mining Act* does not expressly or impliedly require that the applicant for a mining lease must show that they have a detailed proposal for actual mining operations. The Warden noted that in the present case the applicants had expended a considerable amount of money on exploration and there was no evidence that they would not the capacity or intention to mine the leases if the leases were granted and if further studies indicated that mining would be economically viable. The Warden left open the possibility that in another case it may be found that it would be contrary to the public interest and the policy of the *Mining Act* to grant a mining lease whether there the applicant did not have a firm proposal to commence mining operations. A final issue that was touched upon by the Warden was whether the standard 'no mining' condition upon the grant of mining leases was unlawful. This condition requires that no productive mining

may take place until a plan of proposed operations is approved by the State Mining Engineer. It was argued by the Association that this condition amounted to an unlawful delegation of the Minister's powers. The Warden rejected this contention, finding that sections 10 and 11 of the Act support the making of the 'no mining' condition.