QUEENSLAND*

MINERAL RESOURCES ACT AMENDED

The *Mineral Resources Amendment Act* 1995 (Qld) contains more than 100 sections amending the Act of 1989-1992. Environmental concerns are to the fore.

In a new definition[1] "environmental impact" is described as a positive or adverse impact, a temporary or irreversible impact, a cumulative impact, a potential impact that is highly likely to happen, or, if unlikely to occur, would have serious or irreversible consequences. The Act also adopts the concept of a "hazardous substance" from the *Contaminated Land Act* 1991 — a substance that because of its quantity, concentration, acute or chronic toxic effects, carcinogenicity . . . corrosiveness, flammability or physical, chemical or infectious characteristics may pose a hazard to human health or the environment when improperly . . . managed."

PROSPECTING PERMITS

In 1989 the "prospecting permit" was the new face of the historic miner's right. Under the *Mining Act* 1968, a miner's right lasted for 12 months and conferred a roving licence over unoccupied Crown land and (subject to consent) over occupied Crown land. The *Mineral Resources Act* reduced the life of the permit to three months and provision was made for a "family prospecting permit". The old "roving commission" was terminated and as a general rule the prospecting area was limited to a maximum of 300 hectares.

Now s 3.2, as amended, confines prospecting permits to a "single person". In lieu of the 300-hectare limit there are to be two classes of permit. The first and more extensive kind covers an entire mining district. The other — a "parcel prospecting permit" is limited to one piece of land (or two or more adjoining pieces of land) owned by the same person. A "district" permit may be issued for any period from one to two months; a "parcel" permit lasts for three months.

Prior to the 1995 amendments, aggrieved applicants for, or holders of prospecting permits could appeal from a decision of a mining registrar to the Minister. This cumbersome procedure now gives way to an appeal to the Warden's Court.[2] If the registrar does not initially give reasons for a decision the person affected by it may file a request for reasons within 28 days thereof.[3] (This follows and enlarges the "right to reasons" in s 32 of the *Judicial Review Act* 1991 (Qld), which is linked to Supreme Court applications.) The Warden may "stay" the decision appealed from pending the decision on appeal (*Mineral Resources Act*)[4] and the Warden's Court, in this new appellate jurisdiction is not bound by the rules of evidence.[5] The appeal is in the nature of merits review; if it succeeds the Warden may do anything which the mining registrar could and should have done.[6]

* John Forbes, Qld Information Service Reporter.

1. *Mineral Resources Act* 1989, s 1.8.
2. Section 3.22.
3. Section 3.22A.
4. Section 3.22B.
5. Section 3.22C.
6. Section 3.22D.

MINING CLAIMS

The useful procedure of "without prejudice" negotiations between applicants and landowners is continued.[7] The 1995 amendments enable the mining registrar to convene such a conference on the registrar's own initiative. In deference to the most recent waves of anti-lawyer sentiment it is now provided[8] that a person who "assists" parties to a registrar's conference may not be a "lawyer". The same applies to conferences involving exploration permit holders and applicants for mining leases.[9] (The usual expression "legal practitioner" does not appear. It is not clear whether this reflects loose drafting or a fear of floods of unregistered graduates from our pullulating law schools.)

When an application for renewal of a mining claim is granted the landowner is notified of the renewal within 28 days[10] as amended. One wonders why notice is not required until the renewal is a fait accompli.

Within 28 days of the termination of a mining claim the ex-holder must give the mining registrar a "final rehabilitation report" setting out what has been done to repair the land.[11] If the registrar is not satisfied by the report, further remedial action may be ordered. Failure to comply with such an order is punishable by a maximum fine of $18,000. It may be simpler to impose a fine upon a retired mining claim holder than to collect it. However, "strong environmental action" has formally been taken.

EXPLORATION PERMITS

Since 1989 the holder of an exploration permit has been bound to "control . . . the impact on the environment of any activities", and to "undertake rehabilitation of the surface of land disturbed".[12] The 1995 Act inserts a new s 5.15A providing for ministerial guidelines as to "the things [an] environmental impact statement must address". These are to be publicly advertised before the Minister (within 28 days) issues final guidelines after considering any submissions which the advertising evokes.[13]

Notices of intention to enter a landowner's property are required to be more elaborate. They are to be accompanied by a copy of the relevant code of practice and of any ministerial directions about protection of the land and the environment.[14] This information is to be given again when a notice of entry expires (three months after initial entry).[15]

Within 28 days of expiry of an exploration permit there is to be a final rehabilitation report, whereupon further remedial work may be ordered.

The powers of the mining registrar to convene settlement talks between landowners and permit holders are supplemented by s 5.39F. The registrar may recommend to the Minister further action "to ease concerns" and the Minister may give directions which become conditions of the Exploration Permit.

7. Section 4.18.
8. Section 4.18A.
9. Section 5.39A, 7.19A.
10. Section 4.41.
11. Section 4.56A.
12. Section 5.15(1)(b) and (c).
13. Section 5.15B.
14. Section 5.35.
15. Section 5.35A.

MINERAL DEVELOPMENT LICENCES

Applicants for these concessions must now submit proposals for environmental protection.[16]

The licence may be extended to other minerals under new s 6.26A.

MINING LEASES

A lessee may apply for approval to drill and to do certain other work on land not included in the surface area comprised in the lease.[17]

In 1990 the original s 7.21 was replaced by elaborate provisions for environmental impact reports at the discretion of the Minister. Additional sections now deal with draft guidelines which are to be publicly advertised[18] and then settled after public submissions.[19] When the EIS is ready, a copy is to be given to the Chief Executive (formerly Director-General) for public exhibition.[20]

It is a condition of a mining lease that the holder shall conduct an "environmental audit" with respect to any proposed plan of operations or alterations to such a plan.[21]

Under an amendment to s 7.34(2), the Minister may require additional security to be provided at any time during the currency of a mining lease. (Previously the power had to be exercised "before operations . . . under the mining lease commence[d]".)

There appears to be a perception that liaison between the Warden's Court and the Land Court in matters of compensation could be improved. Now, in the event of an appeal to the Land Court, that authority must consider all matters relevant to the appeal that the Warden's Court had to take into account.[22]

An application for renewal of a mining lease shall confirm that existing environmental plans will continue, or propose a new scheme.[23] Within 28 days of a renewal the lessee must notify every landowner affected.[24] The general rule that a mining lease area must be surveyed[25] has been repealed.

New ss 7.48 and 7.48A deal with plans of operations and environmental audit statements. The normal life of a plan of operations remains five years.

Final rehabilitation reports with respect to other tenures have already been noted. A new s 7.71 obliges an ex-lessee to lodge a final report and an audit statement within three months of termination of a lease. Failure to comply with a ministerial direction to take further action may result in a fine of up to $120,000.

THE OFFICE OF WARDEN

In September 1993, in Vol 12(3) of this bulletin, we published a note entitled "Wardens: Improving the Appearance of Independence". It said, in part:

16. Subsections 6.4(m) and (n).
17. Section 7.5A.
18. Section 7.21A.
19. Section 7.21B.
20. Section 7.21C.
21. Section 33(1)(d).
22. Section 7.39(4a).
23. Section 7.43(2).
24. Section 7.44A.
25. Section 7.45.

> There is a remarkable contrast between the counsels of perfection set for mining wardens in the *Mineral Resources Act* 1989 and some of the working conditions provided for them since the new Act was passed. At present the warden's salary is drawn from the funds of the Minerals and Energy Department, his court room is located in the Department's head office, as are his own chambers . . . [These] arrangements . . . deserve careful reconsideration.

Hitherto s 10.9 allowed the Governor in Council to appoint as a Mining Warden any person who was a duly qualified legal practitioner or who was "qualified for admission" as such. The field is now (slightly) restricted to "lawyers" of five years' standing. The term "lawyer" is not defined. The salaries and allowances of Wardens will in future be paid under, and secured by the *Judges (Salaries and Allowances) Act* 1967.[26]

NON-COMPLIANCE WITH OFFICIAL DIRECTIONS

The offence of failing to comply with a direction of a mining registrar, field officer or other authorised person now carries a maximum penalty of $90,000.[27] Previously it came under the general provisions of s 11.26, which prescribes a maximum fine of $12,000. Hitherto an appeal against a direction lay to the Minister. Section 11.20A now provides an appeal on the merits to the Warden's Court. No time limit is stated. The form of the hearing on appeal is not prescribed; it is simply stated that the Warden may make any inquiry considered appropriate.

NATIVE TITLE AND JUDICIAL ACTIVITY

The National Native Title Tribunal opened for business on 2 January 1994. While it has not yet established a single claim of Native Title it has dealt with several non-claimant applications. Two of them are summarised here.

MINING TITLE CLEARED

On 23 March 1995 Mr Flood, Member, gave his decision in *Re Jozic.* The applicant was the holder of a mineral claim near Lightning Ridge, New South Wales. It was found that Native Title had been extinguished by the grant of a Homestead Lease in 1892.

The applicant's material included a "tenure history report" from the State Department of Conservation and Land Management and a submission by the Crown Solicitor for New South Wales that Native Title, if any, was extinguished in 1892 by a grant under the *Crown Land Act* 1882 (NSW) which required continuous residence for at least six months per year. As additional evidence of exclusive possession the Crown referred to a fencing condition, to the original grantee's right to sue trespassers, and to an absence of references to, or reservations of, native rights in the legislation.[28]

There was no opposition to Mr Jozic's application although notice of it was given to the Aboriginal Legal Aid Service and 12 other Aboriginal organisations. However, Mr Flood invited the parties to consider whether it would be "just and equitable", within the meaning of s 70(1)(b) of the *Native Title*

26. Section 10.9B.
27. Section 11.20.
28. Compare the Queensland Crown grants in the *Waanyi* case, NNTT 14 February 1995; *Minister of Lands v MacPherson* (1991) 22 NSWLR 687 at 689; *Mabo (No 2)* (1992) 175 CLR 1 at 110 per Deane and Gaudron JJ.

Act, "to make a determination which in my view will be held by the High Court to have no binding effect". This was an allusion to *Brandy v Human Rights and Equal Opportunity Commission*[2] which casts doubt upon the validity of ss 166 to 168 of the *Native Title Act*. Those sections purport to make decisions of the Tribunal binding upon registration in the Federal Court. The parties declined the challenge, whereupon the Member made a decision "which will stand or fall according to the vagaries [sic] of High Court decisions and/or any legislative initiative".

Section 70 of the Act provides that an order may be made in an unopposed case if the Tribunal is satisfied that the applicant has made out a prima facie case. Seemingly determined to make a routine case interesting, the learned Member suggested that absence of opposition to a non-claimant application is not in itself a strong indication that a prima facie case (against native title) exists, in view of the "short" time allowed for lodging objections (two months). Apparently the fact that some 12 or 13 potential claimants of Native Title had been notified, none of whom had raised a claim, did not matter.

On one point, counsel for the New South Wales Aboriginal Land Council was prepared to contribute to an appearance of complexity. In a curious mixture of formal admission and technical opposition to Mr Jozic's application, the Council submitted that, since Jozic's rights were already safe his application should be dismissed as "frivolous or vexatious" within the meaning of s 147 of the *Native Title Act*. The Tribunal found that argument "attractive", but in view of the fact that Mr Jozic was not legally represented the Tribunal decided not to "run with" this argument itself. And so, at inordinate length, the non-claimant application was granted.

CLEARANCE NOW — COMPENSATION LATER?

Mr Flood dealt with another non-claimant case on 4 April 1995: *Re Greater Lithgow City Council.* The Lithgow Council wanted to build a retirement village for local citizens on 400 square metres of Crown land, but it had no desire to become involved with the mysteries of Native Title.

This time the application was not merely unopposed; it was positively welcomed by three Aboriginal people, one of whom declared that the proposed village was a "fantastic idea". But once again the "clearance" process was not allowed to appear simple.

> The Council . . . did not have the expertise or research to prove that there was no continuing association . . . I could not, if required, find that native title had been extinguished by past Crown dealings. The past . . . status of the land as a Reserve . . . and its current dedication for public recreation are not necessarily inconsistent with native title although possibly amounting to a restriction on . . . full expression [of same].

Counsel for the New South Wales Aboriginal Land Council gave a disquisition upon the meaning of "traditional association", stressing that it was not to be confused with "ancient historical practices frozen in time". Pre-1788 practices have changed "through 200 years of resisting colonisation" but the proper question is this: "Does the Aboriginal society in question have a conscious system of rights and responsibilities in relation to the land?" It is doubtful whether this test does much to answer a question left wide open in *Mabo (No 2)*, particularly by Toohey J, who suggested that continuity of native customs and local associations is elastic enough to survive European influences such as the

29. (1995) 69 ALJR 191.

"profound" effects of Christianity, the use of schools and other modern facilities and (in the case of the Murray islanders) a change from gardening, fishing and barter to a cash economy substantially dependent upon government allowances.[30] We seem no closer than we were in 1992 to knowledge of when changes of degree become a change in kind — that is, when "connections" and customs become so attenuated that they cease to exist.

In the *Lithgow Council* case, despite the absence of any counterclaim, the Tribunal declined to hold that extinguishment had occurred. Instead, it made what it was pleased to call a "creative" use of s 24(1)(c) of the *Native Title Act*, which states that where an unopposed non-claimant application has been made "any future act by any person in relation to the area that is done before the making of any approved determination of native title . . . is valid", subject to compensation by taxpayers if Native Title is ever established. With that possibility in mind the application was adjourned sine die while Lithgow could build its retirement village.

The most remarkable feature of the *Lithgow Council* case is a lengthy dictum, entirely obiter, which suggests that the Tribunal is not only a quasi-judicial or administrative authority but a polemical "educator" as well. In the following dicta there is no concession such as one finds in the joint judgment of Deane and Gaudron JJ in *Mabo* itself: "We have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this court."[31]

While gratuitous obiter dicta are not unknown in this new department of the law it is notable that the passage quoted below occurs in a case in which there was no conflict, and in which three Aborigines expressed support — indeed, enthusiastic support — for the proposed development. Even so, the Tribunal saw fit to declare:

> We, the newcomers, have a responsibility for the plight of the descendants of the original owner occupiers . . . Soon after [British settlement] began the invasion of their gene pool. We shamefully treated and taunted the offspring of these usually violent sexual encounters. Those we referred to as having "a touch of the tar brush" or "half caste black bastards" found refuge in Aboriginal societies or were stolen from their mothers and communities by the state. Despite all this suffering, however, Australia's indigenous people have survived and although often damaged remain distinguishable in heritage, culture, cohesion and loyalty . . . The modern put-down in many urbanised areas is that *they* (always *they*) are not real Aborigines because *they* are not full blood tribal people . . . . More often than not these statements are made by people who have never met or spoken with Aboriginal people. . . . Too often Aborigines have been denied the chance to live on their land and to hunt, fish or gather on that land and waters; are we now to tell them they have abandoned a traditional lifestyle and therefore they have lost their Native Title in those few places in Australia where Native Title has not otherwise been extinguished by past Crown dealings? I hope we can accept that modern Aborigines still identify with their homelands in ways that *transcend common law notions of property or possession.*

Simultaneously the Commonwealth is spending considerable resources on a process of "reconciliation" and the President of the Tribunal is emphasising its role in "mediation". The preamble to the Act itself urges that the "ascertainment of native title . . . if possible, [be] done by conciliation". But what of the above?

30. (1992) 66 ALJR 408 at 488.
31. (1992) 175 CLR 1 at 120.

HIGH COURT REJECTS BIAS APPEAL

In the March issue of this Bulletin[32] we noted a decision of the Supreme Court of Western Australia quashing a decision of Judge Greaves of the Liquor Licensing Court concerning Perth's old Swan Brewery site and the Dreamtime serpent Wagyl, for apparent bias. Subsequently, the beneficiaries of Judge Greaves' decision sought special leave to appeal from the decision of the Supreme Court to the High Court of Australia. I am indebted to the solicitors for the respondent to the High Court application for information that special leave was refused on 20 April 1995 upon the ground that an appeal against the finding of apparent bias had "no prospect of success".

32. "Crusaders and Apparent Bias" in (1995) 14(1) *AMPLA Bulletin* 4.