MINING ACT AMENDMENTS IN WESTERN AUSTRALIA

*by Michael Hunt**

The Mining Act 1978–1983 of Western Australia, which commenced operation on 1st January 1982, has been extensively amended.

Many of the amendments have been introduced to take account of the recommendations for change made by the Mining Act Inquiry 1983 of which I was Chairman. However there are many amendments having their origin elsewhere mainly as a result of Departmental officers recommending changes because of their experiences administering the Act over the past four years.

Conversely several of the recommendations made by my Committee have not been implemented. Of these, the most important were recommendations designed to facilitate exploration and mining on private land. In Western Australia, a private landholder has a right of veto to prevent any entry onto his land for exploration or mining purposes. This veto has operated so that very little of the South West of Western Australia (that portion on the South West side of an imaginary line drawn roughly between Geraldton and Esperance) has been explored. The Government introduced legislation last year to remove this veto but it was defeated in the Opposition controlled Upper House of Parliament.

Other important recommendations not yet acted upon by the Government include restructuring the Warden's Court system and making amendments based on the costs of holding title to the mining tenements.

The amendments are contained in the Mining Amendment Act 1985 and are extensive — the amending Act comprising 110 sections. However 16 of these sections have not yet been proclaimed because the Regulations to support their introduction have not yet been prepared. The remaining sections have been proclaimed to operate as from 31 January 1986.

Some of the more important areas are mentioned below. References to sections are to the Mining Act as amended by the Mining Amendment Act. Except as noted, the sections mentioned below came into force on 31 January 1986.

1. Miner's Right
   Although it is not necessary to hold a Miner's Right to apply for a mining tenement, it is only the holder of a Miner's Right who is given rights under s. 20 in relation to Crown Land (which includes pastoral lease land covering many of the areas of mineral interest in Western Australia). Therefore I recommend that all explorers and miners in Western Australia should hold a Miner's Right.
2. Aerial Exploration
   A 'vehicle' has been defined to include an aircraft and a helicopter. s. 20(5a)(d)(i) now requires an explorer to take all necessary steps to prevent damage to livestock (which now may include disturbance of stock and the cost of rectifying it) by operation of vehicles.
3. Reserved land
   Unauthorised exploration or mining on reserved land may now result in forfeiture of the tenement: s. 23(b). It has now been made clear that land within and 'A' Class Reserve or National Park situated in the South West of the State may not be marked out without the consent of the Minister for Minerals and Energy and the consent of the Minister for the Environment: s. 26(2)(a).
4. Sub-surface Rights over Private Land
   The veto of the private landholder earlier referred to, in fact only applies to the surface and below that to a depth of 30 metres. In practice this was seen as sufficient to deter any explorer.
   However, in an attempt to secure tenure for exploration purposes, the practice has arisen of actually seeking rights below 30 metres (called 'sub-surface rights'). Having obtained some tenure to the land by grant of the tenement, albeit not over the surface, the explorer may then 'at his leisure' attempt to negotiate with the landholder an agreement to obtain surface rights.
   This practice has now been given further statutory acknowledgement. First, no person other than the tenement holder may be granted a mining tenement over the surface (or below it to 30m) thus foreclosing the landholder from doing a deal with another explorer who has been alerted to the area by the activities of the first explorer obtaining a tenement over the sub-surface s. 29(5).
   Secondly, an explorer may now make an application which is specifically limited to serve copies of his application upon the owner, occupier and mortgagee of any private land although he will remain required to serve the local municipality: s. 33(1a). This will be an enormously useful provision for applicants for exploration licences. The service requirementss have proved to be a nightmare in that they require service on the owner, occupier, mortgagee and local shire within 14 days (although Wardens frequently grant extensions of time). In one recent application for extension time, evidence was given that over 20,000 copies of a particular application for an exploration licence would be required to be served. Not surprisingly, the Warden granted an extension of time for service (one year).
   Provision already existed under s. 29(5) for the holder of a tenement limited to sub-surface rights to negotiate the owner's consent to extend those rights (and thus the tenement) to the surface. This provision has been reinforced: s. 33(1b).
5. Permit to Enter
   A permit to enter now remains in force so as to entitle the holder to re-enter the private land to maintain his pegs: s. 30(3).

6. Grant of Uncontested Prospecting Licence
   Where a mining registrar is satisfied that an application for a prospecting licence is made over Crown land (not already the subject of a mining tenement) which expression includes pastoral lease land, no objection has been filed, the pastoral lessee has been served with a copy and thirty days has elapsed after service, then the registrar may grant the licence: s. 40(4). This provision obviates the need for a Warden's Court hearing and should lead to the more rapid grant of many prospecting licence applications.
7. Extensions of Term of Prospecting Licence
   The Minister had power to extend the term of a prospecting licence for a further period of two years. Some delays occurred whilst waiting for the Minister's decision and power has now been included for the Minister to delegate his authority under this provision: s. 45(3). This section has not yet been proclaimed.
8. Prospecting Licence Conversion to Lease
   The Act confers upon the holder of a prospecting licence the right in priority to any other person for the grant of a mining lease over the same land. Doubts have been expressed as to the security of tenure of the prospecting licence holder during the period between the expiration of the prospecting licence and the grant of the mining lease. Provision has now been included making it clear that the term of the prospecting licence continues until the application for the lease is granted: s. 49(2).
9. Security relating to Prospecting Licence
   A security must be lodged in respect of all prospecting licence applications within twenty eight days: s. 52(1).
10. Special Prospecting Licence over existing Prospecting Licence
    Formerly the Act provided for a prospecting licence for gold and/or precious stones to be granted over an existing prospecting licence. This structure has now been extensively modified. First, a special prospecting licence is now limited to gold. Secondly, there is a specific limitation on the tonnage of ore which may be extracted (namely 500 tonnes) without Ministerial approval. Thirdly, there is a depth limitation (namely it is limited to 50 metres from the surface). Fourthly, no more than one special prospecting licence may be granted over a prospecting licence. Fifthly, a special prospecting licence may be converted to a lease in which event no more than 750 tonnes of ore per year may be mined and the depth limitation to 50 metres continues. Sixthly, upon expiry, the ground the subject of the special prospecting licence reverts to the primary prospecting licence holder. Seventhly, no transfer or other dealing in the special prospecting licence may be effected without the consent of the primary tenement holder. Finally, one person (including any person who would for the purposes of the Companies Code be taken to be associated with that person) may hold only one special prospecting licence. These provisions are contained in a substantially amended s. 56(A).
11. Security for an Exploration Licence
    This security is now required to be lodged with the Mining Registrar within twenty eight days after lodging the application: s. 60.
12. Dealings in an Exploration Licence
    During the first year of the term of an exploration licence, a legal or equitable interest in or indirectly without the prior written consent of the Minister (or his delegated officer) unless the dealing arises in the administration of a deceased or insolvent estate or in the course of winding up of a company. However, this provision does not prevent or affect the validity of any agreement made in contemplation of a dealing where the agreement expressly provides the consent required by this section is to be obtained as a condition of that dealing: s. 64. This will be a most important practical amendment. The effect will be that any agreement (including a farm in or joint venture agreement) relating to an interest in an exploration licence should be made expressly subject to obtaining Ministerial consent and should recognise the possibility that Ministerial consent may not be forthcoming. It wold be prudent to ensure that the commencement date or settlement in any such agreement should not arise until after the Minister has consented. As yet, there is not indication of the sort of factors which the Minister will take into account in deciding whether or not to grant his consent.
13. Compulsory Partial Surrender of Exploration Licence
    At the end of the third and fourth years of the term of an exploration licence compulsory surrenders of area are required to be made by partial surrender documents which must be lodged before the end of the third and fourth years respectively. The provision previously stated the consequence of failing to lodge the partial surrender document was the deemed surrender of the whole exploration licence. This seemingly harsh provision has been continued and indeed reinforced. One concession is that the requirement is no longer to give one month's prior notice which, in itself, has been a trap for at least one company: s. 65(4).
14. Exploration Licence Holder's Priority for Grant of Mining Lease
    An amendment similar to that noted at Item 8 above for prospecting licences has also been made in relation to exploration licences: s. 67(2).
15. Special Gold Prospecting Licence on an Exploration Licence
    The structure previously contained in the act permitting a special prospecting licence to be granted over an exploration licence has been amended substantially in the form noted in Item 10 above in relation to a special gold prospecting licence on a prospecting licence: s. 70. The only major differences are that the limit on the number of special gold prospecting licences on an exploration licence relates to the area of that exploration licence. No more than one special gold prospecting licence is permitted for every 200 hectares of the exploration licence area.
16. General Purpose Lease
    It is no longer necessary that the grantee of a general purpose lease be the holder of a mining lease: s. 86(1). The maximum permitted area of a general purpose lease has ben reduced to 10 hectares and is limited in depth to such depth below the natural surface as is specified or where no depth is specified then to 15 metres below the natural surface: s. 86(3). This section has not yet been proclaimed.

17. Miscellaneous Licence
    It is no longer necessary to hold a mining tenement in order to apply for a miscellaneous licence. The term of a miscellaneous licence has now been prescribed as five years: s. 91. This section has not yet been proclaimed.
18. Plaint for Forfeiture of Exploration Licence or Mining Lease
    A plaint for forfeiture by a person alleging non-compliance with expenditure conditions concerning an exploration licence or a mining lease must be instituted durng the expenditure year or within eight months thereafter. Given that the holder of the tenement has two months within which to file his annual report this means that a plaintiff must act within six months of noting that the annual report has not been filed (or that the annual report as filed is deficient): s. 98(2).
19. Exemption from Expenditure Conditions
    An application for exemption from expenditure conditions must be made before the end of the year for which the exemption is sought: s. 102(1).
    The reason for inclusion of such a provision was to counter the injustice of allowing an application for exemption to be made retrospectively (sometimes more than one or two years late) so as to defeat a plaint for forfeiture. The policy behind this is that the 'policing system' of plaints for forfeiture which is aimed at causing holders strictly observing expenditure conditions or seeking exemption must be allowed to operate.
    Accordingly, my Committee of Inquiry recommended that retrospective applications for exemption should not be permitted and the Regulations should require an exemption application to be lodged before the end of the year to which it relates. Unfortunately this recommendation was taken literally in the sense that no time after the expiration of the expenditure year has been allowed at all. Further the amendment has been included in the Act not the Regulations (the Regulations allow an extension of time for doing certain acts by satisfying the warden or the Minister that such an extension should be permitted but the Act does not).
    The consequence is that the holder of a tenement must decide before the end of the relevant year whether or not to seek exemption. Obviously this is impractical and there is urgent need for reform to allow the exemption application to be made within sixty days after the end of the tenement year. This will then bring it into line with the requirement to lodge an annual report within sixty days. It is probably only at the time of completion of the annual report that many tenement holders will be aware as to whether or not they have complied with the expenditure requirements. There is urgent need for amendment to this section.
20. Extended Exemption from Expenditure Conditions in special circumstances for mining leases
    Normally an exemption can be granted for a maximum of one year's expenditure conditions. However, in an endeavour to accommodate the arguments in favour of a retention lease the Act has been amended to allow for up to five years exemption from expenditure conditions where the Minsiter is satisfied that the reasons given are sufficient to warrant the granting of such an application: ss. 102(1b) and 102(7).
21. Grounds for exemption from expenditure conditions
    The grounds for exemption from expenditure conditions have been expanded in circumstance where mining is not viable at the relevant time due to economic or marketing problems, mining is at the time impracticable because of political, environmental or other difficulties in obtaining requisite approvals or where the aggregate expenditure on a group of tenements forming one geological project is sufficient to meet the individual requirements for each tenement of that group had the aggregate expenditure been capable of being apportioned: s. 102(2).
22. Incorporation of Secondary Tenement within Exploration Licence Boundaries
    Where a tenement is situated within an exploration licence's boundaries and that tenement is surrendered, forfeited or expires, then the holder of that exploration licence may make application to amalgamate that tenement within the exploration licence provided no other person has in the interim marked it out — s. 105(2). This section has not yet been proclaimed.
23. Exploration Licence Applications lodged contemporaneously
    Where applications for exploration licences have been lodged contemporaneously (for example, in the same mail) if the parties are unable to reach any agreement between themselves then priority will be determined by ballot conducted by the warden in open court: s. 105A(3). This section has not yet been proclaimed.
24. Differential rates of royalties
    The Minister is given a discretion as to the basis on which a rate of royalty should be applied taking into account particular circumstances: s. 109(2).
25. Grant cures irregularities
    A mining tenement which has been granted shall not be impeached or defeasible on account of any informality or irregularity in the application or proceedings prior to the grant: s. 116(2).
26. Dealings in tenements
    The Act now expressly provides that a legal or equitable interest in a mining tenement may be mortgaged, charged or otherwise encumbered, thus resolving a doubt for lenders as to the validity of the Regulations empowering mortgages and to the validity of a charge: s. 119(1). An authorised agent is now authorised to sign an instrument creating a legal or equitable interest: s. 119(2).
    Very important provisions for lawyers are then enacted in s. 119(3) to (15) inclusive. Broadly speaking, these provisions require the Minister to establish a register of mining tenements and of all instruments creating or assigning a legal or equitable interest in a mining tenement. All instruments creating or assigning a legal or equitable interest in a mining tenement or otherwise affecting or dealing with such an interest are required to be lodged for registration.
    Where an instrument is lodged for registration but the document is in the opinion of the registering officer erroneous or defective he may reject the lodgement but where he is of the opinion that the error

or defect can be corrected then he can afford provisional registration of the document and notify the lodging party that a correction is required to be made.

No instrument is effective to pass any estate or interest, legal or equitable, in or affecting a mining tenement or in any way to charge or encumber a mining tenement or otherwise affect or deal with any interest in a mining tenement unless registered. However, an instrument which is required to be registered or a dealing requiring Ministerial consent may still be valid if the instrument or dealing expressly provides for registration or consent to be a condition of the coming into force of the provisions of that instrument.

These provisions will be of enormous practical effect to lawyers because I submit they require that any document affecting a mining tenement must be made conditional upon registration and must in due course be registered. Of course, this in turn will pose enormous practical problems for the Mines Department in maintaining their registers. The section has not yet been proclaimed to commence operation because it will be necessary for regulations to be proclaimed.

27. Compensation

The previous provision stating that compensation is not payable in respect of Crown owned minerals has been expanded to provide that no claim for compensation may be made under the Act or otherwise in consideration of permitting entry onto any land for mining purposes, in respect of the value of any mineral, by reference to any rent, royalty or other amount assessed in respect of mining of the mineral or in relation to any loss or damage for which compensation cannot be assessed accordingly to common law principles in monetary terms: s. 123(1). Of course, this does still not get over the basic problem that by exercising his right of veto under s. 29 any private landholder can deny the grant of a mining tenement over the surface of his land.

Compensation may be determined by agreement but in default of agreement may be determined by the warden without formal proceedings if both parties agree. If both parties do not agree then compensation shall be determined by the warden in formal proceedings: s. 123(3).

Compensation is payable for deprivation of the possession or use of the surface of the land, damage to the surface of the land, severance, loss or restriction of right of way, loss of or damage to improvements, social disruption and where aircraft are used any damage occasioned by the aircraft shall be deemed to have been occasioned by an entry on the land affected. In addition, in the case of private land under cultivation compensation is payable for any substantial loss of earnings, delay, loss of time, reasonable legal or other costs of negotiation, disruption to agricultural activities, disturbance of the balance of the agricultural holding and the failure on behalf of the holder of the mining tenement to observe laws relating to spread of weeds, pests, disease, fire or erosion: s. 123(4).

28. Costs on an objection to an application for a mining tenement

Historically, wardens have refused to grant costs in relation to applications for mining tenements and objections to them (save in the special case of applications on private land where the Act specifically empowered the grant of costs to a private landholding objector whether or not the objection was successful).

Doubts have been expressed from time to time as to whether this attitude of the warden is correct. An argument can be mounted that in hearing an objection a warden is acting judicially and therefore as a warden's court. Accordingly, s. 134(2) could allow the grant of costs. To my knowledge this argument has never found favour with any warden although I believe it to be correct. Perhaps some recognition of the correctness of this argument has been acknowledged because s. 134(2) has now been amended to provide that an order for the payment of costs shall not be made against an applicant or a person making an objection unless the warden is satisfied that the application or objection so made was frivolous or vexatious.

29. Written reasons for decision

In any contested proceeding the warden is now required to give written reasons for any decision he makes: s. 137(5).

30. Transitional Provisions — private landowner's consent

Problems have arisen in converting a tenement under the old Act to a tenement under the new Act where private land is concerned. The written consent of the private landowner required under the old Act to the grant of a mining tenement was not carried through to the new Act tenement. Provision has now been made that a consent given under the repealed Act to a tenement granted on private land shall be taken to be applicable for the new mining tenement applied for under the new Mining Act.

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INTERNATIONAL NEWS

Centre for Resource Studies, Queen's University, Kingston, Ontario, Canada.

The Centre reports in its Annual Report ending April 1985 that part of its research program includes two studies relating to Australia. They are:

— Australian & Canadian Export Coal: A Policy of Relative Competitiveness. This analysis is being prepared by David Anderson of the Centre and Donald W. Barnett of Macquarie University. The aim is to assess the relative competitiveness of Australian and Canadian export coals in the Pacific Rim market.

— Research has also been undertaken by Ciaran O'Faircheallaigh of the Australian National University to establish the extent to which infra-structure provided to assist mining developments in Northern Australia has contributed to more broadly based economic growth.

The Rocky Mountain Mineral Law Foundation announced its 32nd Annual Institute on July 17, 18, 19, 1986 in Calgary, Alberta. Just after AMPLA Conference! Enquiries to Alberta Travel Box 2500, Edmonton, Alberta T5J 2Z4 or the Foundation.