

## WESTERN AUSTRALIAN BRANCH SUBMISSION TO THE MINING INDUSTRY LIAISON COMMITTEE

### ON THE PRIVATE PROPERTY PROVISIONS OF THE MINING ACT (W.A.)

This submission is being made on behalf of the Western Australian Branch of AMPLA at the request of the Mining Industry Liaison Committee.

1. It is not the policy of AMPLA to take a position on the debate as to whether the existing right of private land owners to veto the grant of tenements upon the land, ought to be removed (for ease of reference 'private land' is used in this paper to mean land within the categories set out in s. 24(1) over which a power of veto presently exists). The arguments for and against the amendment to the current position have been fully canvassed in the past and this paper therefore only briefly comments on the legal and practical issues that should be borne in mind, if any change is to be implemented.
2. As is referred to in the paper presented by the Department of Mines, legislation in other States distinguishes between the exploration and mining stages. The Department of Mines has recommended that at the exploration stage, a power of veto should rest with a Tribunal with power for the Minister to override where exploration/mining on adjoining land has outlined an economic deposit which extends under the subject private land. At the mining stage, the Department of Mines recommends that the veto rest with the Tribunal with powers to the Minister to override where exploration previously authorised on that land has outlined an economic deposit or an economic deposit has been discovered on adjoining land. In both cases, the Department of Mines recommend the quantum of compensation be determined by the Tribunal.
3. Support exists for the distinction between the exploration and mining stages in considering the question of land owner's rights. However, one must also have regard to the present structure of the Act, namely the various types of tenements that may be granted under the Mining Act and the procedures leading to their grant. It can be said that, generally, prospecting licences and exploration licences would be sought by a miner for the exploration stage, whereas a mining lease would be required during the mining stage. However, a small quantity of mining may be carried out under a prospecting licence and exploration licence and it is not uncommon for a miner to hold a mining lease even though only exploration is still being carried out on the ground. General purpose leases and miscellaneous licences are usually associated with mining operations, but there are exceptions. That is, the Act presently principally distinguishes between types of tenements. The activities which the holder is entitled to carry out flow from the type of tenement held.
4. Prospecting licences and miscellaneous licences are granted by the Warden (with, in the case of a miscellaneous licence, the right of the applicant to appeal to the Minister against any refusal to grant by the Warden) whereas mining leases, exploration licences and general purpose leases are granted by the Minister, following a recommendation by the Warden. In the *Tortolla* case, Brinsden J. decided that the Warden's discretion on the hearing of an application for a prospecting licence was limited to deciding whether the applicant had complied with the relevant provisions of the Mining Act relating to the pegging and application of the prospecting licence. That is, the Warden does not have a discretion on issues such as whether the applicant is a suitable person to hold a prospecting licence. However, the Minister has an absolute discretion on the granting of exploration licences and mining leases and can take into account whatever factors he thinks fit in deciding whether to grant such a tenement. Commentators have questioned the correctness of the *Tortolla* decision and it is possible that it may not be followed by a Full Court.
5. Support exists for keeping changes to the system consistent with the present structure of the Act. Assuming that the existing veto enjoyed by land owners is to be removed, support exists for leaving the decision on the question of whether a tenement should be granted and exploration and mining permitted on private land, with the authority presently ultimately responsible for the grant of the tenement. That is —
  - (a) in the case of prospecting licences and miscellaneous licences — the Warden/Tribunal will deal with all issues leading to their grants (and will have the power to veto exploration over private land);
  - (b) in the case of exploration licences, mining leases and general purpose licences — the Minister, upon the recommendation of the Warden/Tribunal, will have the final decision and the power to veto exploration and mining over private land.
6. There is considerable merit in a separate Tribunal to deal, on a consistent basis, with the grant of tenements and the carrying out of exploration and mining on private land. Rather than establish a separate Tribunal however, a strong recommendation can be made for the establishment of a Warden or Wardens, who would sit principally in Perth on a continuing basis and who deal only with mining matters. As well as hearing all usual matters arising under the Mining Act, such Wardens would hear all matters relating to the application for tenements over private land (that is, including matters such as pegging disputes, etc. as well as the question of whether the tenement should be granted over private land). Such Wardens would also hear and determine all matters of compensation (in the absence of agreement) for the carrying out of exploration and mining on such private land. After a full hearing, the Warden would make a decision (in the case of PL's and MsL's) or a recommendation to the Minister (in the case of ML's, EL's and GPL's). If the Minister does grant a tenement over private land, the

compensation payable to the private land owner is determined by the Warden (the Minister should have no involvement in matters of compensation). The Warden should have the power to form a tribunal by bringing in one or two suitably qualified persons to deal with the issue of exercising the veto and the assessment of compensation.

7. A perceived advantage in the establishment of the specialised Wardens is that there is a minimum disruption to the present system leading to the grant of tenements. An additional advantage will be that the specialised Wardens will be available, on a full-time basis, in Perth or on circuit to hear other cases (that is, not involving private land) that may be referred from the various mineral fields around the State. Further, it would appear that many of the issues canvassed when considering the question of whether exploration and/or mining should be permitted on private land are also relevant to the issue of the level of compensation to be paid. It would be more efficient for these issues to be canvassed before one of the specialised Wardens rather than possibly being divided between the Warden, the Minister and the Tribunal.
8. One difficulty with the recommendations of the Department of Mines is that, in the case of exploration licences and mining leases, given the discretion of the Minister, little is gained from giving the power of veto to a Tribunal. Such a situation would, in fact, be limiting the present discretion of the Minister. If the Minister's discretion was to be limited to factors other than the existence of private land over the ground applied for, the Minister may need to give reasons for any refusal and then it could be open for the applicant to take action against the Minister, on the basis that he improperly exercised his power for example, by taking into account an irrelevant factor. Likewise, in the case of prospecting licences, the Department of Mines recommendation brings the Tribunal and the Minister into the decision making process.
9. A further difficulty that is perceived with the recommendations of the Department of Mines is that there could be practical difficulties with deciding what constitutes an 'economic deposit'. Allowing an overriding power to the Minister in these circumstances may well have the practical effect of severely limiting the scope of the Tribunal. The concept opens the way to a perceived risk of unproductive argument.

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