QUEENSLAND*

WARDEN'S COURT RECEDES, A NEW TRIBUNAL MOOTED AND QUEENSLAND BRANCH CONFERS

WARDENS' POWERS: THE LAST WORD?

In the dying days of the Mining Act 1968, there was a sudden rush to peg out the jurisdictional limits of the Mining Warden's Court. The cases have been noted in this journal[1]. They depend upon a precious and not entirely consistent jurisprudence which distinguishes disputes which are 'essentially' about mining from others which merely have a mining background. Under the old Act, the Warden's Court had jurisdiction over 'any agreement relating to mining or prospecting' and when that jurisdiction was correctly invoked it excluded all other courts including the Supreme Court. But finally the empire struck back with an artificially narrow classification of cases which are deemed to be 'with respect to' or 'related to' mining. When the pegging-out was complete the mining lease once held by the Warden's Court was no more than a modest mining claim. By a bare majority, the High Court allowed this judicial amendment of the 1968 Act to stand[2]. The judges in Canberra may well have felt that there was no point in re-agitating an esoteric argument about a State law which was on the verge of being repealed. But the point has not entirely vanished after all.

Now, several months after the old Act was laid to rest, one more case on the old s. 80 is about to be reported[3]: That case also touches on the difficulty of reading the Petroleum Act 1923 (Qld) 'as one' with the Mineral Resources Act 1989 — a piece of legislative laziness criticised in *Australian Energy Limited v. Lennard Oil NL*[4]. In *International Oil*, the Supreme Court was asked to declare the respective rights of joint venturers to oil found in production areas covered by their licence. The first question was whether the dispute was a Warden's Court matter; if so the Supreme Court could not hear it at that time. But the Court, brandishing the *O'Grady* principle, pushed the barrier aside. Although an Authority issued under the Petroleum Act was indeed a 'mining tenement' the present action was not one for the Warden's Court because, while the dispute was 'closely connected' with mining it was an ordinary contract case which did not involve the actual process of mining.

There can no longer be a question whether a case comes within the *exclusive* jurisdiction of the Warden's Court. The powers of that Court in mining cases are now concurrent with those of the ordinary courts[5]. But if

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1. (1989) 8 *AMPLA Bulletin* 1, 35 and 102 and (1990) 9 *AMPLA Bulletin* 33.
2. *O'Grady v. North Queensland Co. Ltd* (1990) 169 CLR 356.
3. *International Oil Lease Service Corp. v. Australian Energy Ltd* QLR, 2 Mar. 1991.
4. [1986] 2 Qd R 216, 220.
5. Mineral Resources Act 1989, s 10.20.

a party elects to sue in the Warden's Court, there can still be a question whether the case is a mining matter within the meaning of the Act. Only then is the Warden's Court available as an *alternative* to the Supreme Court, District Court or Magistrates Court (depending on the amount claimed). If the Supreme Court thinks that the case is really just a common law claim with a 'mining background' the Warden's Court has no say in the matter at all and proceedings in that court must be abandoned and recommended elsewhere. In this respect *O'Grady* and kindred authorities on the old Act are still alive. If a case is not 'with respect to' mining according to the restrictive *O'Grady* test, the reduced jurisdiction of the Warden's Court disappears completely.

It is not likely that the Supreme Court will surrender the territory which it regained in *O'Grady* and other cases of that ilk. Therefore, the Wardens' residual jurisdiction 'with respect to' mining is even more limited than it would have been a few years ago. Parties who bring their actions in the Supreme Court (or depending on amount claimed, the District or Magistrates' Courts) will risk no jurisdictional challenge, but those who remain faithful to the Warden's Court will have no such assurance. A better way of abolishing the Warden's jurisdiction without actually saying so could scarcely be devised. Ironically Queensland has just decided to develop a small cadre of specialist Wardens in the style of Western Australia. Perhaps the Act should be amended to remove the restrictions imposed by the *O'Grady* principle, without re-introducing exclusive jurisdiction.

MINISTERIAL DISCRETIONS NOT THE LAST WORD?

It would be wrong the suggest that Queensland mining law is unique in giving departmental officers, in the name of the Minister, wide and powerful discretions to create, deny or modify property rights in natural resources. Most of the discretions noted below exist in other States, but there may be some truth in a comment made at more than one AMPLA Conference, that our discretions are more discretionary than others. At all events the various Queensland Acts and decisions made thereunder have undergone remarkably little judicial review. It appears that when major developers did not wholly succeed in their applications, they calculated that they would gain better compromises, immediately or in the future, by eschewing the luxury of taking the Department to court. For economic as well as diplomatic reasons smaller fry have even less choice. However, informed public servants may well retort that in the courts themselves the rule of law has given much ground to more or less inscrutable discretions in recent years.

For present purposes a select list of major discretions in the Mineral Resources Act 1989 will suffice:

(1) Minister's discretion to grant or refuse an Exploration Permit (formerly an Authority to Propsect);[6]
(2) Minister's discretion to grant or refuse a Mineral Development Licence ('MDL');[7]

6. Ibid., s 5.12.
7. Ibid., s 6.7.

(3) Minister's discretion to renew MDL;[8]
(4) Power of Governor-in-Council to grant Mining Leases;[9]
(4) Minister's discretion to reject application for a Mining Lease;[10]
(5) Warden's power to recommend refusal of or conditions upon the grant of a Mining Lease;[11]
(6) Minister's power to recommend grant of a Mining Lease;[12]
(7) Minister's power to recommend renewal of a Mining Lease.[13]

In some of these cases the Act requires reasons to be given for an outright refusal.[14] So far as they go these provisions are more generous than the common law, which does not require decision-makers other than judges to give reasons for decisions which affect individuals.[15] But they do not go very far because the mere existence of a statutory duty to give reasons does not give a disappointed party any avenue of appeal on the merits. (It is doubtful whether the courts would order further and better reasons to be given unless the 'explanation' is so farcically uninformative that the Act is simply being defied.)

At present the only judicial redress against decisions listed above is review at common law under the prerogative writs. As lawyers well know such actions are not really appeals let alone rehearings *de novo* upon the merits.[16] Traditional administrative law is limited to the grounds of *ultra vires*, bad faith (usually a forlorn plea), error of law on the 'record' and denial of natural justice. Furthermore, if an applicant does succeed on one of those grounds, the court cannot substitute its own decision on the substantive question for that of the errant administrator. The existing decision is merely set aside and the matter goes back to a bureaucracy which may or may not be morally or politically induced to change its mind. The same decision may be made again, with a more careful eye to legal technicalities.

However, it is said that the Fitzgerald Report and a change of government in Queensland herald a new heaven and a new earth in administrative law. It appears that the State will adopt (or adapt) existing Commonwealth laws dealing with 'freedom of information', the federal Administrative Appeals Tribunal (AAT) and modern procedures for handling the old prerogative writ remedies. A State AAT would provide those appeals on the merits from departmental decisions which the common law has always denied. Of course this would apply only to those Acts and decisions which are specifically made subject to the AAT and there's the rub; the list of appellable decisions under the Commonwealth AAT

8. Ibid., s 6.16.
9. Ibid., s 7.3. On the unreality of most distinctions between a decision of the Governor-in-Council and a decision of the Minister, see the judicial comments in *FAI Insurances Ltd v. Winneke* (1982) 151 CLR 342.
10. Mineral Resources Act, ss 7.24 and 7.28.1(b).
11. Ibid., s 7.26.4.
12. Ibid., s 7.28.1(a).
13. Ibid., s 7.43.3.
14. See Mineral Resources Act, ss 6.7.2 and 7.28.3 (mining lease application) and s 7.44 (application for renewal of lease).
15. *Public Service Board of New South Wales v. Osmond* (1986) 159 CLR 656.
16. *R. v. District Court at Sydney; Ex parte White* (1966) 116 CLR 644, 655 and *R. v. Brisbane City Council; Ex parte Read* [1986] 2 Qd R 22, 43.

law remains contentious although the federal tribunal is by no means limited to giving dubious immigration claims a new lease of life.

Now if and when a Queensland AAT is created, will it be given the power to review discretionary decisions made under the Mineral Resources Act (other than judicial decisions which are already subject to appeal on the merits?[17] Last July the Electoral and Administrative Review Commission — a child of the Fitzgerald Report — published citizens' responses to its Issues Paper of May 1990 on 'Judicial Review of Administrative Decisions and Actions'. Mining interests do not appear on the list of respondents but a 'co-ordinated' submission on behalf of Government Departments was lodged by the Premier's Department and the office of the Attorney-General. It noted with apparent disapproval that judicial review of public administration in Queensland is presently 'limited to ... the manner or legality of the decision-making process through cumbersome common law procedures'. It went on to recommend certain exemptions from any new regime but the list did not include executive decisions under the Mineral Resources Act. But of course quite a number of giants may still be slumbering — or keeping their powder dry until a State AAT is closer to becoming a reality. One need not assume that the only party anxious to keep the AAT away from the Mines Department will be the Department itself. It may occur to other interested parties that if the AAT does stray into the mining field objectors as well as miners could ask the tribunal to second-guess the public service. Incidentally we have it on good authority that the Act will soon be amended to make non-profit associations eligible to lodge and pursue objections to mining lease applications; at present an objector must be an individual or a company, and the definition of 'company' in s. 1.8 does not embrace unincorporated bodies or organisations formed under the Associations Incorporation Act 1981 (Qld). Mining companies may be content if the AAT were given power to order costs to successful parties to appeals in mining cases; the Warden's Court already has power to award costs against objectors, and not only where an objection is frivolous or vexatious.[18] But this deterrent seems unnecessary, provided that appellants are not supplied with public funds. An objector's own costs before the AAT may be heavy; the short history of the federal AAT shows that 'informal' proceedings soon become quite highly judicialised and expert witnessses can be more expensive *pro rata* than legal representatives.

However, it should not be assumed that only objectors would welcome a system of appeals on the merits. Quite a few miners who wisely decide that a prerogative writ against a refusal or an unwelcome condition would be a waste of time and money may take another view if it is possible to gain a different and binding substantive decision in an independent tribunal.

AMPLA SEMINAR ON THE NEW ACT

A well attended seminar on the Mineral Resources Act was conducted by the Queensland Branch of AMPLA in Brisbane on 20 March 1991. Frank and friendly exchanges between practitioners and officers of the Department were the order of the day.

17. Mineral Resources Act, ss 10.40 to 10.41.
18. Ibid., s 10.15.1.

It was said that no significant compensation case has yet been contested under the new Act. However, it was pointed out that only a landowner may require a 'without prejudice' conference before a Registrar under s 7.19 so that if an owner is intransigent this useful procedure will not be available. It was felt that on this and other points the Act will have its first real test when the economy recovers and competitive temptations to 'cut corners' are experienced once more.

One particularly provocative comment was to the effect that 'basically the industry in Queensland is not in compliance with its lease condition requirements'. This elicited neither an admission nor an unequivocal denial. One respondent suggested that it was a matter of selecting the right (or wrong) stage in a 'lease cycle' to make the judgment. A non-complying lease in Year 5 might be exemplary in Year 15 when production is well established, debts liquidated and cash flow assured.

On its face, the new Act pays much more attention to environmental matters than its predecessor. It is a prime object of the Mineral Resources Act to 'encourage environmental responsibility in prospecting, exploring and mining'.[19] There is a counterweight to environmental zeal in s 11.9 which requires the views of the Minister for Mines to be taken into account before a National or Environmental Park is created. The effect of that section will vary as Ministerial fortunes and inter-departmental ambitions wax and wane.

Delegates wondered whether the new rules would be beneficial or merely 'bureaucratic roadblocks'. It was anticipated that the environmental lobby would draw strength from Commissioner Fitzgerald's forthcoming report on Fraser Island. One speaker suggested that for all his undoubted talent and integrity Fitzgerald tends to indulge the Australian *penchant* for bureaucracy. It was devoutly hoped that the Pelion of 'EARC' (the Electoral and Administrative Review Commission) and 'CJC' (the Criminal Justice Commission) would not be piled on the Ossa of 'yet more tiers of bureaucracy on tiers of bureaucracy'. A delicate attempt was made to harness public service rivalries. The Department was discreetly urged to resist extremist or empire-building tendencies in other sectors of the public service and to retain full control over the environmental aspects of mining: 'One is far better off with a department which is not a single-issue department'. The men from Mines welcomed the tribute to their traditional sovereignty particularly at a point in history when the Department was 'not entirely trusted in government' and when its environmental section was straining to 'get runs on the board'.

The subject of aboriginal land rights was carefully circumnavigated. Some nervousness arose from the fact that the relevant department had just placed strong submissions before the Fraser Island inquiry, apparently without prior consultation in Cabinet or with other departments. The Mines Department's view was that aborigines should no more hold power to veto grants of mining rights than landowners or any other interest group.

19. Ibid., s 1.3(d); see also ss 5.15.1 (exploration permit conditions); s 7.21 (Minister may order study); s 7.25.7 (investigating Warden to await results of study) and s 7.33 (conditions of mining lease).