



LEADING PRACTICE MINING ACTS REVIEW

SUBMISSIONS BY JONES HARLEY TOOLE, LAWYERS

A. INTRODUCTION

1. Jones Harley Toole ("JHT") is an Adelaide based independent law firm practising in the areas of mining, finance, commercial, corporate, property and insurance law.
2. JHT has 30 lawyers (including 11 Principals) and 35 finance, administrative and support staff.
3. The author has acted for exploration and mining companies for over 30 years in projects involving exploration, mining, joint venture and commercial arrangements, native title, landowner and land access matters, with appearances in the Warden's Court on a number of occasions. In addition the author is a co-contributor/author to LexisNexis Energy and Resources Law Reporter in a chapter on Landholders rights.
4. In our view the Mining Act ("the Act") administered by the Department of the Premier and Cabinet, Mineral Resources Division ("Department") has served the State well since it was introduced in 1971. A number of significant amendments were made to the Act in 2011 but there has been no substantial review of the Act since the early 1990's. We welcome a review of the Act that maintains the Act's relevance and efficiency, regulates and promotes Industry and meets Community expectations.
5. In this submission we focus on some practical issues in the administration and operation of the Act where in our opinion, some consideration ought be given to improvement.

B. DEFINITIONS IN THE ACT

Item 1.1 Leading Practice Mining Acts Review (Mining Act 1971 and Mining Regulations 2011) – Using Simple, Accurate Terms and Language in the Mining Act so it Makes Sense to Everyone

6. We support a consistent plain language approach in defining terms in the Mining Act and suggest consideration ought be given to the following:

6.1. Distinction between "Exploration" and "Mining"

The distinction between exploration and mining (operations) though well understood in the industry is not as well understood in the broader community.

Exploration does not always lead to mining. Yet that seems to be the view of some sections of the community.

The intrusion and impact of exploration on land use, land and resource management and the environment (appropriately rehabilitated) is in most cases much less than mining and the distinction between the differing nature of these operations ought be drawn where possible in the Act.

6.2. Definition of "Mining Operator" and "Licence Holder"

The Mining Act defines the "mining operator" to mean "the holder of the relevant mining tenement".

In practice however the mining operator is not always the tenement holder.

The mining operator may for example be a manager appointed by a commercial joint venture to carry out joint venture activities on behalf of joint venture parties, including the licence holder.

Commercial and business arrangements between mining companies may now provide for shared mineral interests in a tenement with each effectively operating its own co-ordinated programs to develop mineral resources in which it may have an interest that is not shared or joint ventured with the licence holder - yet the licence holder remains vicariously responsible for another party's actions.

These types of arrangements which promote effective, efficient and sustainable economic mineral resource development ought be better promoted and more efficiently regulated by the Act.

6.3. Definition of "Mining Operations"

The Act defines "mining operations" as operations carried out in the course of prospecting, exploring or mining for minerals. Consideration ought be given to amendments to improve clarity in the definition and avoid confusion.

The definition is important because often it is the carrying on of mining operations that engages the operation of the Act.

Not every activity carried on by a miner or explorer comprises a mining operation.

For example, in one instance a mining company was faced with an objection to entry to land, which included exempt land, on the basis that the giving of a Notice of Entry was itself a mining operation. The Notice could not be properly served on the land owner, it was argued, unless firstly a waiver of exemption had been agreed or made.

C. INFORMATION

Transparency and accountability in the exploration and mining industry is necessary to enable exploration and mining companies to operate with the confidence of the community. Access to information in relation to a mining operator's exploration operations and mining operations helps to meet this objective.

However access to information which is proprietary or confidential in nature or comprises trade, technical or other secret or like information must be protected and restricted.

Item 1.2 of the Discussion Paper - Should there be open, free and online access or other access to approved programs for environmental protection and rehabilitation (PEPRs)

7. In one recent land access negotiation between a landowner and an exploration mining company relating to an exploration program, the landowner refused to negotiate with the explorer until it was provided with the PEPR for the proposed exploration program (although the PEPR had not then been approved by the Department).
8. **Nature of the PEPR** - A PEPR is a technical proprietary document required from an explorer or miner under the Mining Act before exploration or mining operations may commence on land. A PEPR will contain sensitive technical commercial and confidential information to a mining operator. In many respects it will contain more information than is necessary or required in the case of landowner entry to enable the landowner to understand the nature of the operations that are to be carried out on the land. It may lead to confusion rather than an improved understanding of an exploration or mining program.
9. A further issue in respect to PEPRs is a confusion as to whether landowner access arrangements in relation to non-exempt and exempt land must be finalised and

agreements reached, before the Department will approve the PEPR. A consistent approach is needed so that all parties may operate with certainty as to process.

10. In relation to PEPR's our view is that :

10.1. PEPR's should only become available once approved by the Department;

10.2. confidential and proprietary information should be excluded from otherwise publicly available information; and

10.3. PEPR approval should not be contingent upon land access and compensation matters being agreed with landowners firstly (as that may take some time) but notices of entry and any necessary waiver of Exemption Form should have been served on landowners.

D. EXEMPT LAND – WARDEN'S COURT

Land access is a central tenet to an active, efficient, economic and robust exploration and mining industry.

Access to land for exploration and mining must be efficient, timely and economic and take account of the rights of other economic and industry interests including those of land owners, licensees, lessees, the State and aboriginal interests.

Land access for exploration and mining is a major industry issue.

Item 1.3.2 of the Discussion Paper - What terms need to be better defined to better clarify what is exempt land

11. There ought to be some greater clarity in the definition of *exempt land* in the Act.

A recent Warden's Court experience took a day and a half of argument over the definition of a "spring" under the Act with the need for the evidence of expert witnesses to decide whether or not the land was exempt from mining operations.

Item 1.3.4 of the Discussion Paper - Should a landowner have an equivalent right to commence negotiations with an operator in relation to exempt land

12. In principle, there seems to be no objection to a landowner's equivalent right to that of a mining company to initiate negotiations in relation to exempt land.

13. However there are likely to be practical issues – exempt land may be involved in respect to which the explorer or miner may have no intention to carry out mining operations or exploration in which case a waiver is unnecessary.

It is only after a program of work is defined and approved (and that is matter largely for the Mining operator (and the Department)) that it becomes clear whether exempt land may be impacted by any proposed activities or not.

In our submission, the process of resolution of access to exempt land and conditions upon which approval to access such land may be allowed, is likely to be more efficiently dealt with if the explorer or miner is the protagonist, rather than the landowner.

Item 1.3.4 – Fast and Fair Court Processes and Access to Justice

14. **Should the Warden have jurisdiction in respect to exempt land matters**

14.1. There is a dichotomy in the Act in that whilst the Warden does not have jurisdiction to hear nor determine exempt land matters generally and if a waiver of exemption may be allowed (on terms) under the Act, the Warden does have jurisdiction to

determine whether land in the first instance comprises exempt land ***Borthwick & Ors v Australian Graphite [2015] SAWC 1.***

14.2. The Warden's Court provides a timely, relatively cost efficient, informal tribunal process for resolving matters arising under the Mining Act according to jurisdictional limits.

14.3. In our submission this is a matter in which jurisdiction ought be returned to the Warden on a non-exclusive basis.

15. Costs in the Wardens Court

Although the Warden is vested with jurisdiction to award reasonable costs (Regulation 101, Mining Regulations), in proceedings in the Warden's Court, rarely does the Warden order costs against a party to proceedings.

The view has been long held in the Warden's Court that disputes under the Mining Act involve the interests of explorers, miners and landowners with competing but equal rights and it would be unreasonable to award costs against an unsuccessful party in Warden's Court proceedings other than in exceptional cases.

However the power of a Court to award costs against an unsuccessful party in legal proceedings is a disincentive to the institution of legal proceedings for other than proper purposes.

Consideration ought be given to the introduction of some Court Administration Fee or similar that might provide some appropriate check and some balance before Warden's Court proceedings are instituted.

E. NOTICES OF ENTRY

16. Opportunities for improvement.

16.1. Land access is an issue of major importance to mining companies. The use of the Form 21 Notice of Entry is the first legislated opportunity that an explorer or operator may contact a landowner if it wishes to enter land (unless there is some other existing right of access or an existing agreement). It is important that the notice of entry process operates in an efficient, timely and economic manner for the explorer or miner and landowner.

16.2. The content of the form should provide sufficient information to enable the landowner to understand the proposed exploration or mining program, its impacts, timings and effects. The form should not contain so much information as to cause confusion or raise unnecessary concern in the mind of the landowner.

16.3. We think that the balance presently is about right in terms of content that an explorer or miner should provide to a landowner in the Notice of Entry. The form should allow some flexibility to the explorer or miner to vary the terms of the notice but not so as to require a fresh notice to be served.

17. Some Timing Issues.

17.1. The Notice of Entry and the Act allow 21 days from the date of service of the notice before the explorer or miner may enter land.

17.2. It is not entirely clear whether the 21 day period runs from the date of notice or the date of service or receipt of notice by or upon the landowner. That ought be made clear.

17.3. A further issue that arises is that although the miner or explorer appears to be entitled to enter land after the 21 day period has expired, the landowner has a right to object to entry at any time within three months from the date that the notice is given. The explorer or miner's right to enter may therefore arise before the landowner's objection to entry expires.

17.4. Some clarity here would be helpful to avoid confusion as to the respective rights and entitlements of the explorer or miner and landowner.

18. Land Access Code

18.1. In some states (Queensland for example) land access principles are codified, accessible and reasonably understood. Codified access principles add a layer of legislative authority to the conduct of negotiations between mining companies and land owners.

18.2. Some consideration ought be given to the introduction of a Land Access Code.

F. MINING REGISTER

The Register maintained by the Mining Registrar under the Mining Act is an important Register providing information about mining tenements, ownerships, incidents of title and documents that affect tenements.

19. Section 15A of the Act provides that:-

"Register of Mining Tenements etc

(1) The Mining Registrar shall keep a register of –

(b) registered claims; and

(c) leases and licenses issued under this Act; and

(d) instruments registered under this Act."

20. Under Section 63ZBA of the Act, a Mining Native Title Register is established in which details of mining native title agreements under the Act are to be recorded.

21. Apart from a relatively few in number references in the Act requiring leases, licences and claims to be entered in the register or documents or instruments to be entered in the Register, the Act offers little by way of explanation of the purpose of the Register under the Act and the status of instruments entered in the Register.

22. Consideration ought be given, in our view, to expanding the classes of instruments or documents that may be entered in the Register.

What is an Instrument?

23. Under Section 15A(1)(d) the Mining Registrar is required to keep a register of... instruments registered under this Act.

24. There is some tautology here as the Act offers little guidance as to the type(s) of instruments to be registered under the Act. The result is that the types of instruments registered under the Act are those that the Registrar chooses to accept for registration.

25. "Instrument" is not defined in the Act. However;

25.1. the Concise Oxford Dictionary defines an instrument as a formal, especially legal, document; and

25.2. (elsewhere defined) a legal "instrument" is a "legal term of art that is used for any formally executed written document that can be formally attributed to its author, records and formally expresses a legally enforceable act, process or contractual duty, obligation, or right, and therefore evidences that act, process or agreement."

Under the Real Property Act, "Instrument" is defined to mean and include "every document capable of registration under the provision of any of the Real Property Acts or in respect of which any entry is by any of the Real Property Acts directed, required or permitted to be made in the Register Book".

26. At its simplest, an instrument refers to any formal legal written document.

Minister's Consent

27. Regulation 44 of the Mining Regulations deals with the transfer of leases and provides that the procedure for applying for the transfer of a lease involves applying for the Minister's consent to the transfer and that subject to the obtaining of that consent and other matters including the lodgement of an appropriate form of transfer, the payment of any departmental fees and other outstandings and on the payment of any stamp duty that the transfer of the lease is approved but does not take effect until a memorial of the transfer is entered in the Mining Register.
28. Regulation 58 provides similarly in the case of transfers of licences in the context of ministerial consent.
29. Again in the case of dealings under the Act under Section 83, Regulation 70 of the Mining Regulations deals with the way in which the Minister's consent must be obtained and further provides that the Mining Registrar must enter a memorial in the Mining Register of a consent of the Minister under Section 83 of the Act and register a copy of any instruments submitted for the purposes of an application under that section.
30. Regulation 71 provides that in the case of unregistered instruments if required to be registered by the Act or by the Regulations, then until registered the instrument has no force or effect.

What Instruments should be registered under the Act

31. In our view, as the Act itself imposes no limitation on instruments that might be registered, any instrument that relates to a tenement should be capable of registration at the request of the tenement holder and any instrument that involves a dealing with a tenement or the tenement holder must be entered in the Register by the Mining Registrar.
32. In our submission the Mining Register would be more beneficial were it to comprise a record of all documents (instruments) that affect or impact exploration and mining tenements. An incomplete register presents an inaccurate picture of the tenement to which it relates.

What information should appear in the Register

33. Issues of confidentiality and commerciality need to be recognised in the information that appears in a public register. For this reason it is suggested that:
- 33.1. Instruments entered in the Register should not be made freely available to third parties except with the consent of the licence holder and all parties to the Instrument, other than:
- 33.1.1. a copy of the lease, licence or claim itself;

- 33.1.2. instruments that relate to the term or conditions of the lease, licence or claim; and
- 33.1.3. information through normal tenement searching that is presently publicly available.

33.2. a pro forma information template be developed of a "memorial" of any instrument to be registered and that template be lodged at the same time as an instrument is lodged for registration by a lodging party – that information could then be recorded in the Register.

G. SIMULTANEOUS EXPLORATION LICENCES FOR DIFFERENT MINERALS OR CLASSES OF MINERALS

Item 3.5.1 of the Discussion Paper - Opportunities to modernise EL's and ELA's

- 34. Consideration ought be given to the creation of overlapping mineral specific exploration licences. Agreements and arrangements between mining companies now not uncommonly allow mineral rights on one exploration licence to be shared between two or more unrelated or related companies.
- 35. This allows opportunities to different companies to target and focus on different minerals opportunities with different target objectives over the one exploration licence. This leads to a more efficient and economic use of resources and greatly enlarges the mineral development potential over the same area of land.
- 36. Overlapping tenements however do create a unique set of operational issues and the activities of different parties with various mineral interests over the same land will need to be co-ordinated to ensure that exploration and mining operations are carried on co-operatively, efficiently, economically and with a minimum of interference between tenement holders.
- 37. In addition some limitation, it is suggested, would need to be placed upon the total number of mineral specific exploration licences that might be granted over the same land.

DATED : 19 MARCH 2017

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