WESTERN AUSTRALIA*

LEGISLATION

MINING AMENDMENT ACT 1993; MINING AMENDMENT REGULATIONS 1994

These both came into operation on 1 July 1994, and make a number of important amendments to the minerals regime under the *Mining Act* 1978 (WA) ("the Act"). Notable changes include:

- The establishment of environmental inspectors to ensure compliance with environmental conditions attached to the grant of mining tenements.
- New amalgamation provisions for exploration licences.
- A fixed four-year term for prospecting licences.
- The introduction of a new class of tenement, the retention licence, which allows tenement holders to retain identified ore reserves which cannot be mined in the short term.
- Provision for special prospecting licences for gold over existing mining leases.
- Extension of tonnage limits and depth restrictions on mining leases for gold where the consent of the primary tenement holder is obtained.

Environmental Provisions

The *Mining Amendment Regulations* 1994 provide for the use of inspectors appointed under s 11 of the Act of ensure compliance with environmental standards: reg 120F. The power to make these regulations is derived from the new s 162(2)(aa), inserted into the Act by the *Mining Amendment Act* 1993.

Pursuant to reg 120G an inspector may enter a tenement or mine to inspect it. Refusal to allow an authorised inspector entry constitutes an offence: reg 120G(3).

Further, if an inspector is of the opinion that a mine, or any activity connected with that mine, is having, or is likely to have, an adverse effect on the environment, the inspector may issue a written direction to modify operations: reg 120H. Unless a review is requested under reg 120J, the terms of the direction must be complied with: reg 120K. In addition, a term of a contract which purports to exclude, restrict or modify a person's obligation to comply with a direction is void: reg 120K(4).

A tenement holder to whom a direction has been issued, may request a review of the decision to issue the direction, or of the terms of the direction, within seven days of receipt of that direction. This is done by delivering the request with reasons in writing to the State Mining Engineer (reg 120J). While a review of the direction is being conducted, the tenement holder is in no way bound by its terms.

Under reg 120L an inspector may also issue a stop work order on a tenement holder, where the inspector believes that the tenement holder is not complying with either:

(a) a provision of the Act or the *Mining Regulations* 1981; or
(b) the tenement conditions,

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or, alternatively, that an accident or unexpected event has occurred or may occur under the control of the tenement holder, where the inspector believes that as a result of that non-compliance or accident or event, there is, or may be, a significant adverse effect on the environment.

The effect of such an order (which is reviewable) is to stop all mining operations. A tenement holder on whom such an order is served cannot recommence mining operations unless written approval has been given by the Minister or a senior inspector: reg 120O.

New Amalgamation Provisions for Exploration Licences

The Act formerly provided (in the now repealed s 105(2)) that the holder of an exploration licence could, without marking out the land, apply for the amalgamation of any mining tenements with the exploration licence where those mining tenements had been surrendered, forfeited or had expired after grant of the exploration licence and were situated wholly within its boundaries.

The new s 67A allows the holder of an exploration licence to amalgamate existing "secondary tenements" it holds with that exploration licence, and also allows the holder of an exploration licence to amalgamate other "secondary tenements" which are surrendered, forfeited, or expire during the period in which the exploration licence is pending, or after its grant, with that exploration licence.

"Secondary tenement" is defined in s 67A(7) to mean a mining tenement situated wholly within the boundaries of the land subject to the exploration licence, and in the case where the exploration licence was granted in respect of an application made on or after the commencement of s 16 of the *Mining Amendment Act* 1990 (proclaimed 28 June 1991), includes any part of a mining tenement (other than a retention licence) situated within the boundaries of the land in question.

Where a s 67A application is made, and the term of the secondary tenement expires, the term of that secondary tenement is extended until determination of the s 67A application.

A Fixed Four Year Term for Prospecting Licences

A prospecting licence will now remain in force for a period of four years from the date on which it is granted (increased from a two-year period). Furthermore, it will no longer be possible to apply for an extension of a prospecting licence (repeal of ss 45(3)-(6)).

These changes will not effect tenements already granted prior to 1 July 1994, or tenements for which an application for extension of term has been lodged prior to that date.

Insertion of Division 2A — Retention Licence

This new division introduces a new form of mining tenement, the retention licence, which is an intermediate form of tenement between the exploration licence and the mining lease.

Consequential amendments have been made to a number of sections within the Act to include this form of tenement.

The primary purpose of the retention licence is to provide secure tenure, for a limited time, to enable an explorer to hold an identified mineral resource

which is not a commercially viable proposition in the short term, but for which there are reasonable prospects of development in the longer term.

The land in respect of which a retention licence is granted, must be of an area sufficient to include the land in or under which an identified mineral resource is located, as well as such other land as may be required for future mining operations of that identified mineral resource: s 70B(4). In the case where the applicant for a retention licence is the holder of two or more primary tenements, a retention licence may be granted in respect of the whole or any part of the land within the boundaries of those tenements: s 70B(3).

Section 70A defines "identified mineral resource" to mean a deposit of minerals identified "in the prescribed manner".

A retention licence remains in force for five years: s 70E(1). It may be renewed for another five year period by making an application to the Minister in "the prescribed time and in the prescribed manner". Further renewals are also permitted: s 70E(2). Where the licence expires while an application for renewal is being considered, its term is deemed extended until the application has been dealt with (s 70E(3)).

The Minister may require the applicant for, or holder of, a retention licence to lodge at the office of the mining registrar a security for compliance with the conditions subject to which the licence was granted, and compliance with specified provisions of Division 2A of the Act: s 70F.

A retention licence is also liable to forfeiture, pursuant to s 70K, which provides conditions for forfeiture that are substantially similar to s 63A of the Act (which covers exploration licences).

The holder of a retention licence applying for a prospecting or exploration licence over the relevant land immediately following expiry, surrender or forfeiture of the retention licence is covered by s 70N, which is identical to the new s 85A detailed below.

In addition, the holder of a retention licence has, subject to compliance with work and expenditure conditions, the right in priority to apply for one or more mining leases or general purpose leases in relation to the land in question: s 70L.

Grant of a retention licence is made by the Minister, following his receipt of the Warden's recommendation. It is made in respect of the whole or part of the land the subject of the primary tenement, and is made on such terms as the Minister considers reasonable: s 70B(1).

Application for a retention licence must be accompanied by a statutory declaration made by the applicant to the effect that there is an identified mineral resource in the relevant area, and that mining of this resource is impracticable for the time being. In making this declaration, one or more of the following reasons, listed in s 70C(2), must be referred to:

(i) the mineral resource is uneconomic, or subject to marketing problems, but may reasonably be expected to become economic in the future;
(ii) the resource is required to sustain the future operations of an existing or proposed mining operation; or
(iii) there are existing political, environmental or other difficulties in obtaining requisite approvals.

If an application is made by the holder of a primary tenement, and the term of the primary tenement expires, it is deemed to continue in force until

either the retention licence is granted or if refused, for a period of 30 days after that refusal: s 70C(6).

There is provision for objection to retention licence applications.

The Minister may at any time by notice in writing require the holder of a retention licence to show cause why a mining lease should not be applied for in respect of all or part of the land the subject of the retention licence: s 70M(1).

The rights conferred by a retention licence are listed in s 70J.

Special Gold Prospecting Licences

Amendments are made to ss 56A and 70, and a new s 85B is introduced, which deals with special gold prospecting licences on a mining lease. Before the amendments, special gold prospecting licences were allowed over prospecting licences and exploration licences. The inclusion of facility to apply for them over mining leases will enable parties to avoid the high legal costs that may be associated with tribute arrangements, while also giving the prospector access to land which is not required in the short term by the current lessee.

As with the special prospecting licence requirements for the other tenements, with special prospecting licences over mining leases tonnages allowed to be mined are restricted, unless prior permission is obtained to mine larger quantities, and depth limitations apply.

Special prospecting licences may be converted to mining leases for gold. If a conversion takes place the limitations on tonnage and depth also apply to the substitute lease.

The amendments impose a further condition on the grant of a special prospecting licence under s 56A, in that the Minister may now authorise that mining be carried out in the area in question to a depth greater than 50 metres below the lowest part of the natural surface of the land, where the prior written consent of the holder of the primary tenement and the prior written approval of the Minister has been obtained: s 56A(6).

A similar approach is adopted in s 56A(8), which concerns applications for a mining lease for gold in respect of the land subject to a special gold prospecting licence.

The new s 56A(10)-(12) covers the situation where the primary tenement on which a special prospecting licence is situated is surrendered, forfeited or expires. In this event, the special prospecting licence is converted into a prospecting licence, and the provisions of the Act relating to prospecting licences apply (s 56A(10)). Where this occurs, the new prospecting licence is deemed to have been granted on the day upon which the original special prospecting licence was granted. These provisions are not applicable if:

(a) the primary tenement is amalgamated with an exploration licence under s 67A; or
(b) prior to the surrender, forfeiture or expiry of the primary tenement the holder of that tenement applies for a mining lease or a general purpose lease, and the lease is subsequently granted in respect of any land the subject of the special prospecting licence.

Identical amendments to those made to s 56A are made to s 70, except that, unlike s 56A, there is no amending provision relating to the amount of soil permitted to be extracted (since there is no matching subsection in s 70).

Other Changes

The effect of s 57(2c) and (2d) relating to exploration licences is clarified by an amendment to s 57(2e), which now provides that land is unavailable for exploration if that land is the subject of a current mining tenement, *or was when the application for the exploration licence was made.*

Cool-off period on surrender, forfeiture or expiry of mining lease

Section 85 provides that, where a mining lease is surrendered or forfeited or expires the land covered by the lease (or any part thereof) shall not be marked out or applied for as a prospecting licence or exploration licence by the holder of the former mining lease immediately prior to the date of expiry, surrender of forfeiture (or by any other person with an interest in the mining lease immediately prior to that date). This amendment outlaws what had become a common practice of converting mining leases to exploration type tenements (which are cheaper to hold). The Minister had a discretion in relation to proposed conversions to exploration licences, but the Warden grants prospecting licences.

The practice of converting leases back into licences is against the intent of the Act as it encourages operators to hold ground for prospecting or exploration for unlimited periods.

Surrender of tenements subject to plaints for forfeiture

Where a tenement is the subject of a plaint for forfeiture and is surrendered before the application is determined by the Warden, under the new s 96(3a) (applying to forfeiture under s 96), and s 100 (applying to forfeiture under ss 98 and 99), the applicant for forfeiture has a right of priority to mark out or apply for the land for 14 days from the date upon which the applicant is served with notice of the surrender by an officer of the Mines Department. The effect of these provisions will be to stop the practice of defendants surrendering tenements before plaints against those tenements have been determined.

Tailings

Where a tenement expires, or is surrendered or forfeited, and the former holder of the tenement leaves behind tailings "or any other mining product" upon the land, s 114(7) provides that this becomes the property of the Crown at the "expiration of the prescribed period" if the former holder does not remove or treat the tailings within that period.

Section 114A details the rights conferred on the holder of a subsequently granted mining tenement exercisable in respect of mining product belonging to the Crown (by virtue of s 114(7)). Essentially in this situation the tailings become part of the subsequently granted tenement, and tailings lying on existing mining tenements which are not subject to current licences to treat will automatically be included in the grant of that mining tenement.

Affidavits

As a consequence of amendment to s 144, it is now possible for affidavits which are to be used in a Warden's Court or before a Warden to be sworn before the Director, Deputy Director and Manager of the Mining Registration Division of the Department of Minerals and Energy.

Surveys

Pursuant to an amendment to reg 118 and insertion of reg 118C the present system where surveys of tenements are subsidised by the government will no longer apply. Where applicable, it is now the responsibility of the holder of a tenement to arrange for its survey at the holder's cost.

WARDENS COURT DECISIONS

RENDOVA PTY LTD v WEST COAST HOLDINGS LTD
(Perth Warden's Court, 1 July 1994)

This case concerned objections to applications for exemption from expenditure conditions in respect of 14 prospecting licences. The applicants, both being in liquidation, sought to rely on the following grounds:

(a) s 102(2)(e) of the *Mining Act* 1978 (WA) (the "Act"), namely that exemption may be granted where the mining tenement contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future; and

(b) reg 102(2) of the *Mining Regulations* 1981 (WA), which provides that the bankruptcy or liquidation of the holder of a mining tenement shall be a reason for exemption pursuant to s 102(3) of the Act.

The objector claimed that no exploration or other work had been done on the tenements in the relevant period, and that there were no future plans for further exploration or other work on them.

The Warden recommended the applications for approval and stated (at p 6):

> I have heard undisputed evidence that the grounds the subject of the mining tenement contains (sic) a large mineral deposit which is uneconomic at the relevant time, but which may reasonably be expected to become economic in the future. It is clear that over the course of the project large amounts of money have been spent on it to bring it to its present state of development. It is not the policy of the *Mining Act* to require the spending of money for the sake of spending money.

The Warden also said the Applicants were entitled to a recommendation in their favour under reg 102(2), given that they were "presently in liquidation", and that the rationale behind this provision is the protection of creditors of a company in liquidation. Here virtually the only assets of the applicants were the tenements in question, and to refrain from granting an exemption would "jeopardise the prospect of the creditors obtaining any satisfaction".

Counsel for the objector submitted that the Applicants did not show that 11 of the 14 tenements contained mineral deposits, and therefore that the requirements of s 102(2)(e) were not satisfied here. On this point, the Warden stated that, whilst the applicants had not fully delineated the mineral deposits on these tenements (unlike the other three tenements where the main ore body was situated), they indeed ascertained that the relevant minerals do exist. This was enough for the exemption to be granted.

DAVID BARRY GILES v WILLIAM JAMES McLARTY
(Mt Magnet Warden's Court, May 1994)[1]

This matter concerned plaints for forfeiture of seven mining leases and 12 prospecting licences for non-compliance with expenditure conditions. A number of issues were addressed.

Abuse of Process

The initial submission made on behalf of the defendant was that the plaints should be dismissed as an abuse of process given that:

(a) the plaintiff had given evidence that he was motivated to issue the plaints in order to pressure the defendant to pay money allegedly owed to him; and
(b) the plaintiff had entered a joint venture agreement with Peregrine Resources NL ("Peregrine") whereby the latter company had allegedly agreed to pay the plaintiff's legal expenses.

On the first point, the Warden decided that there was insufficient evidence to indicate abuse of process.

In relation to the second point, the Warden found that on the evidence a bargain had been entered into by the plaintiff and Peregrine whereby the plaintiff would pass on the benefits of the action to Peregrine, and Peregrine would pay the plaintiff's legal expenses. The Warden noted that the plaintiff had taken no steps to produce the alleged agreement with Peregrine, or otherwise demonstrate that it was not champertous. He held that it was champertous, and exercised his discretion to dismiss the plaints on this ground.

Estoppel

The plaintiff alleged that, as the defendant had filed Form 5 reports detailing expenditure on each tenement, he should not be permitted to give evidence of additional expenditure not detailed in those forms (which the defendant sought to do). The plaintiff claimed that he had relied on the representations contained in the forms in limiting his investigations and the preparation of his case.

In the absence of any authority on this point, the Warden decided that the essential fact at issue was whether or not there had been the required expenditure. To accept the argument that some form of estoppel exists would prevent this essential issue from being determined. Further, he stated (at p 18) that:

> it would require an express provision in the Act before a defendant was prevented from giving evidence of expenditure other than that contained in the Form 5 . . . that is not to say however that the untruthfulness of a Form 5 filed is not a significant factor in matters of credibility and in placing upon a defendant an evidential burden where the Form 5 is demonstrated to be untrue or that the expenditure claimed in it has not occurred.

The Forfeiture Point

The Warden, notwithstanding his decision to dismiss the plaints as champertous, nonetheless considered the question of forfeiture, and whether expenditure conditions attaching to the tenements had been met.

1. The Warden's decision in this matter is the subject of applications for writs of mandamus and prohibition (on the champerty point) currently pending before the Supreme Court.

The Warden found on the evidence that the defendant had essentially abandoned his tenements, and any decision by him to expend further moneys on them was conditional on the development of an efficient extraction process.

The remaining questions addressed by the Warden were:

(a) what constitutes "expenditure"; and
(b) how that expenditure may properly be divided between the various tenements subject to plaint or otherwise held by the defendant.

In relation to the first question, the Warden made the following observations:

(a) The Act contains no definition of "expenditure". However, in the definition of "expenditure conditions" in s 8(1) it specifically refers to expenditure of money. He stated (at 23) that whilst the everyday definition of expenditure may include spending things other than money, the specific wording and context of the Act "in my view only permits the meaning of spending money".[2]
(b) There is a difference between spending money, and merely incurring a liability, and (at 24);

> the very wording of the Act and Regulations require that money be spent and makes provision for only one exception, namely work by tenement holders themselves for which an appropriate credit, reduced to an amount of money, may be claimed.

(c) A tenement holder may still "mortgage or pledge" in order to obtain funds, but such borrowings must be a separate transaction. The funds obtained must still actually be expended — the incurring of a liability is not enough. It was noted that this may result in the "perhaps unsatisfactory position" that a tenement holder may have to borrow from a third party at less favourable rates rather than enjoy credit with someone who has worked on his tenement if he wishes to claim the expenditure.
(d) Contribution of capital equipment by a syndicate member is not to be classed as expenditure, whereas if this equipment is purchased it would constitute valid expenditure.[3]
(e) In determining expenditure problems may arise where accounts are paid in a different expenditure year to the year in which the work is done, however (at 25):

> the Act and Regulations would clearly attach importance to the date of payment rather than to the date on which either the work was done or the invoice rendered.

(f) Work done in relation to plant design was sufficiently connected to mining operations and the mining tenements to be claimable. However the defendant could not claim for his labour, except for work done on the tenements themselves. The rate allowable would be the amount which he would receive for doing similar work, not what he might charge his business.
(g) There is no reason why money spent on the hire of equipment used in the working of the tenements should not fall within legitimate expenditure (and the fact that the defendant hired the equipment from a company in which

2. Here the Warden declined to follow *Bakarra Pty Ltd v Juler Pty Ltd* (1991) 10 *AMPLA Bulletin* 13, and referred to *Kevin Craig v Spargos Exploration NL and Queen Margaret Gold Mines NL* (Kalgoorlie Warden's Court, 22 December 1986) as supporting his finding.
3. Here the Warden declined to follow *Bernard Anthony Woiner v Asia Oil & Minerals Ltd* (1991) 10 *AMPLA Bulletin* 61.

he has an interest is acceptable, as long as the hiring rates are similar to commercial rates). The hire payments would only be claimable where the equipment had actually been used on the tenements during the expenditure year, or where it was necessary to retain the equipment in order to maintain an operation during a temporary shut down or to hold it in preparation for a mining operation.

(h) Where work has been done on the tenements by virtue of a tribute agreement this cannot be said to be expenditure as no money has been expended by the holder. Nor has money "caused" to be expended by the holder under reg 31 since there is a difference between merely causing work to be done and (in this case) merely permitting another to work on the tenement.[4]

(i) In relation to the employment of a caretaker, such expenses are claimable where operations are temporarily suspended, since that clearly relates to mining operations, however they would not be claimable where operations have been abandoned.

In relation to the second question, the Warden held that there is no statutory basis for allowing expenditure to be transferred from one tenement to another on the grounds that they form part of a common project, other than where there is an application for exemption on that basis.

However if there is expenditure in relation to mining plant used in relation to several tenements that expenditure is relevant to each tenement despite the fact that the plant is situated on only one of them. Similarly, where there is expenditure by way of research, and the expenditure is relevant to all tenements, this may be apportioned.

To determine how expenditure is apportioned between a project the question to be asked is what is reasonable taking into account all the facts. The matter is not resolved necessarily by reference to any calculation based on number or size of tenements or amount of production.

The question whether or not there is a project will also depend on the circumstances. Relevant factors include the proximity of tenements to one another and the nature and size of the plant constructed.

On the question of forfeiture the Warden found that it was necessary to take into account his finding in this case of false expenditure reports, and the failure to provide satisfactory explanation in relation to their falsity, the extent in shortfall of expenditure, the amount of work done notwithstanding it may not constitute "expenditure", the existence of a joint venture agreement with a third party which appeared to cover future work, and the apparent abandonment of the tenements during the period of research into whether a more efficient extractive process could be devised.

Conclusion

The case was decided in favour of the defendant on the ground of abuse of process. However, the Warden noted that had the case been decided on the forfeiture issue, the plaintiff would have succeeded. In most cases there would have been an order or recommendation for forfeiture since for most of the tenements there was a shortfall in expenditure of sufficient gravity to warrant that action. In the remaining cases there would have been a fine.

4. Here the Warden again declined to follow the *Woiner* case.