

**MINING IN NATIONAL PARKS — RIGHT TO TRANSFER MINING LEASE — RENEWAL OF MINING LEASE — WITHDRAWAL OF RENEWAL APPLICATION\***

***Manna Hill Resources Pty Ltd v State of South Australia (No. 2) [2001] SASC 382***

A recent Supreme Court decision deals with the inter-relationship between Ministers for the Environment and Ministers for Mining when dealing with mining in national parks. Although the case centres on the wording of the particular proclamation it may mirror similar proclamations for other national parks that attempt to preserve the rights of existing miners and explorers (possibly to avoid compensation claims) and limit the rights of future explorers.

In *Manna Hill Resources Pty Ltd & Or v State of South Australia (No. 2) [2001] SASC 382*, Gray J of the Supreme Court of South Australia, refused to overturn the decision of the Minister for the Environment and Heritage not to allow the transfer of mining leases from BHP to Manna Hill (“the Mining Leases”).

**Facts**

Several months prior to the expiry of the Mining Leases BHP had applied to renew the Mining Leases although it was not contractually bound to do so. It did so in order to give Manna Hill more time in which to obtain the consent of the Minister to the transfer. Just prior to expiry BHP withdrew its application to renew and this most probably created a fatal factual flaw in the plaintiffs’ cases as there were no extant leases. Whether BHP used its best endeavours to facilitate the transfers was not an issue in the case.

The Mining Leases covered areas in the Gammon Ranges National Park which was constituted by a proclamation of the Governor’s Deputy under the *National Parks and Wildlife Act 1972 (SA)* (“National Parks Act”). That proclamation relevantly provided special measures for specified exploration licences and mining leases as follows;

3. Declare that the rights of entry, prospecting, exploration and mining pursuant to the Mining Act, 1971-1981 as are contained in the exploration licences and mining leases specified in Schedule 2 *may be exercised* in respect of the Crown Lands hereby constituted as a national park and defined in Schedule 1 subject to the following conditions:
  - (a) that the exercise of those rights be subject to the powers of management and control vested in the Minister, the Permanent Head and the Director by virtue of the *National Parks and Wildlife Act, 1972-1981*; and
  - (b) that the exercise of those rights be subject to the plan of management to be prepared pursuant to the *National Parks and Wildlife Act 1972-1981*, in respect of the Crown lands which are hereby constituted as a national park and defined in Schedule I including any amendment to that plan or any plan substituted therefor.

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4. Declare that rights of entry, prospecting, exploration or mining pursuant to *the Mining Act, 1971-1981 may be acquired or exercised* in respect of the Crown lands hereby constituted as a national park and defined in Schedule 1 subject to the following conditions:
- (a) that prior to any of such rights being acquired the approval of the Minister for Environment and Planning be sought and obtained; and
  - (b) that the exercise of any such rights as are acquired be exercised:
    - (i) subject to the powers of management and control vested in the Minister, the Permanent Head and the Director by virtue of the *National Parks and Wildlife Act, 1972-1981*;
    - (ii) subject to the plan of management to be prepared pursuant to the *National Parks and Wildlife Act, 1972-1981* in respect of the Crown lands hereby constituted as a national park and defined in Schedule I including any amendment to that plan or any plan substituted therefor.

Schedule 1

Sections 1293, 1313, 1314 and 1315, Out of Hundreds (Copley).

Schedule 2

Exploration Licences numbered 627, 871 and 934; Mining Leases numbered 4059, 4060, 4061, 4062, 4063, 4064, 4066 and 4067.”

The leases referred to in schedule 2 to the proclamation are the leases in which Manna Hill claimed to have an interest.

Section 43 of the *National Parks Act* prohibits mining in reserves proclaimed under the Act, subject to sub-sections (2) and (5) which read as follows:

- (2) The Governor may, by proclamation, declare that subject to any conditions specified in the proclamation rights of entry, prospecting, exploration, or mining may be acquired and exercised in respect of land constituting a reserve or portion of a reserve, to which subsection (1) applies.”
- (5) A proclamation under this section in respect of land constituting a national park, ... must not be made unless -
  - (a) the proclamation is made for the purpose of continuing rights of entry, prospecting, exploration or mining vested in any person immediately before the commencement of this Act in respect of that land.

Section 39 of the *Mining Act 1971 (SA)* provides that the following rights are conferred by a mining lease:

A mining lease-

- (a) confers an exclusive right upon the holder of the lease to conduct mining operations subject to the provisions of this Act and the terms and conditions of the lease for the recovery of minerals from the land comprised in the lease.

The transfer of a lease is regulated by section 83:

- (1) Subject to subsection (2), a lease or licence, or an interest in a lease or licence, under this Act shall not be assigned, transferred, sublet, or made the subject of any trust or other dealing, whether directly or indirectly, without the consent in writing of the Minister, and any such transaction entered into without that consent shall be void.

A local group of aboriginals, claiming native title of the relevant area, joined in the application stating that they supported mining in the area.

### **Inconsistency**

The first issue to resolve was how the *Mining Act* and *National Parks Act* were to operate together. His Honour resolved that if there was any inconsistency that he would read the *Mining Act* as subject to section 43 of the *National Parks Act* which was enacted for the special purposes of controlling mining activities in land constituting reserves. In so interpreting the acts, Gray J chose to apply the normal principle of statutory interpretation that a general provision should not derogate from a special provision.

The proceedings were dealt with as agreed questions of law and fact based on a set of agreed facts.

Questions 1 and 2, which alleged that part of the proclamation was ultra vires were abandoned.

Questions 3 and 4 were answered together and turned on the construction of the proclamation:

- 3. Was the approval of the Minister for Environment and Heritage a necessary precondition to the transfers of the Mining Leases identified in schedule 2 to the Proclamation?
- 4. Was the Minister for Environment and Heritage's decision to refuse consent to the Mining Lease ultra vires the Proclamation and therefore void and of no effect in that the Minister for Environment and Heritage was not empowered by the Proclamation to refuse consent to the transfers of the Mining Leases?

Gray J answered yes to question 3 and no to question 4. His Honour held that clause 3 of the proclamation dealt with the existing rights of the then leaseholder BHP, but not its right to transfer. Notwithstanding the Mining Leases and the *Mining Act* grant a right to a lessee to transfer a lease it was held the rights under these particular Mining Leases did not include the right to transfer. This is because clause 3 used language of "may be exercised", while clause 4 used the term "may be acquired or exercised". Clause 4 therefore dealt with the activities of those who had no pre-existing rights such as potential transferees like the plaintiffs or new applicants. These types of

miners required the consent of the Minister for Environment and Heritage before proceeding due to the terms of clause 4(a) of the proclamation.

Gray J's conclusion appears to accord with the literal interpretation of, and policy behind, the *National Parks Act*. In particular, ss43(5) displays an intention to preserve existing mining rights "vested in any person immediately before the commencement of this Act" (although not before a proclamation). Transferees would not qualify for this protection. Further the Judge's distinction between clauses 3 and 4 appears logical and correct.

Question 5 was: "Did the advice of the Minister for Minerals and Energy to the Minister for Environment and Heritage on 15 August 2000 constitute actual or constructive consent to the transfers of the Mining Leases?"

Gray J held that this advice, contained in an internal government communication, did not amount to the written consent required by s.83 of the *Mining Act*. It was merely an opinion of one minister to another on a matter of principle.

Question 6 asked "Was the Minister for Minerals and Energy required, entitled or permitted to have regard to the decision of the Minister for Environment and Heritage of 29 August 2000 in purporting to refuse his consent to the transfers of the Mining Leases on 7 September 2000? If not, was the refusal to consent void and of no effect?"

Gray J held that due to his answer to questions 3 and 4, the answer to this question was yes. The Minister was necessarily required to have regard to the decision of the Minister for Environment and Heritage.

Question 7 was: "Have the Mining Leases expired by effluxion of time or do they remain extant having regard *inter alia* to: (a) the application by BHP to renew the Mining Leases dated 6 November 2000 and/or (b) the provisions of the *Mining Act* 1971 (SA) and/or (c) the advice of the Minister for Minerals and Energy to the Minister for Environment and Heritage of 15 August 2000?"

His Honour held that the Mining Leases had expired. Section 38 of the *Mining Act* provided that mining leases were for a specified period not exceeding 21 years and can be renewed for a further term. Section 38(4) allows for an interval of time between an application for renewal and the grant of the new lease. If an application for renewal is not decided by the Minister before the expiry of the lease, the lease will continue until the Minister determines the application. Because BHP had withdrawn its application for renewal it was difficult for the plaintiffs to argue that the Minister was required to grant the renewal due to the mandatory wording of ss 38(3). This sub-section provides that if the application for renewal is made in the correct period then "the Minister *shall* renew the lease". Not surprisingly the *Mining Act* does not provide for withdrawal of such applications. The withdrawal by BHP was made prior to the expiry of the Mining Leases. Gray J considered that an applicant for a renewal could withdraw an application, subject to the caveat that a withdrawal does not prejudice the rights of a third party. His Honour did not consider whether Manna Hill was such a third party and this could be a major omission in His Honour's reasoning. He must have disregarded Manna Hill's rights because BHP was not obliged to seek the renewal under the contract agreeing to the transfers. This omission may not lead to a different result

because approval of the Minister for the Environment and Heritage may still be regarded as necessary. In the end, the Judge held that if the plaintiffs' argument that an applicant could not withdraw an application for renewal was accepted it would impose burdensome and significant obligations upon applicants against their will. It is debatable how real these burdens are in fact as a lessee could just not work on the lease.

Question 8 asked whether the Minister was obliged to grant the renewal immediately upon receipt of the application for the renewal. Gray J held that the Minister was not so obliged because s 38(4) allowed for an interval between the application and the renewal.

Question 9 was answered under question 7 when His Honour held that BHP's withdrawal was effective.

The result of the case is that the plaintiff mining company was left with no rights under the *Mining Act* or other source that would allow it to mine in the Gammon Ranges National Park. Seen politically it was a victory of the environmental lobby over the mining lobby. Legally, however, it was a case of the special provisions of an act, namely the *National Parks Act* overriding the general provisions of the *Mining Act*. Perhaps the most controversial aspect of the decision is the ruling that the right to mine granted under the *Mining Act* does not carry with it the right to transfer the lease. This may seem curious to many mining lawyers and seem contrary to the normal reading of the *Mining Act* and mining leases that refer to the right to transfer. The law in relation to chattel leases is that they carry with them the right to transfer. However, in the context of the proclamation and s 43 of the *National Parks Act*, the judge's interpretation appears correct.

A notice of appeal has been lodged but it has not yet been set down for argument.

## TASMANIA

### TASMANIAN NATURAL GAS PROJECT\*

The *Gas Legislation (Miscellaneous Amendments) Act 2001*(Tas) was given royal assent on 17 December 2001. The Act amends the *Gas Act 2000* (Tas) and the *Gas Pipelines Act 2000* (Tas).

The stated purpose of the amendments to the *Gas Act* is to assist with the development of a gas retail market in Tasmania and to keep the Tasmanian legislation in line with other jurisdictions (see second reading speech House of Assembly Hansard Thursday 22 November 2001 – Part 3 – Pages 118 – 164).

Some of the more significant amendments include the addition of a new section 31 to the *Gas Act*, which creates certain obligations on gas retailers with exclusive franchises to sell gas to franchise

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