(d) Legislative amendments will be introduced to Parliament in June 2003.

APPEAL SEEKING TO LIMIT AMBIT OF THE DEFINITION OF "MINE" IN THE MINERAL RESOURCES ACT 1989 (QLD)

Armstrong & Anor v Miles & Anor

[2002] QCA 504, Supreme Court of Queensland Court of Appeal 2659/02; 22 November 2002 per McPherson and Davies JJA and Dutney J

Facts and nature of action

Appeal from a decision of the President of the Land and Resources Tribunal refusing leave to appeal a decision by Ms Kingham, a Deputy President of the Tribunal. Ms Kingham recommended that, amongst other things, an application pursuant to s245 of the *Mineral Resources Act* 1989 (Qld) ('Act') by the first respondent for a mining lease on land owned by the appellants be granted.

The appellants had objected to the mining lease on the basis that the proposed activities constituted exploration and not mining, thus did not comply with the Act and therefore the mining lease could not be lawfully granted. The appellants based their argument on the proposition that the ambit of the definition of "mine" in s6A(1)(a) of the Act should be limited to exclude activities that occur for the purpose of sampling or testing only. In recommending that the mining lease be granted, Ms Kingham rejected the appellants ground of objection raised above, and held that the proposed activities were for the purpose of mining minerals within the meaning of s234(1)(a) of the Act.

Decision

The court dismissed the appeal and ordered that the appellants pay the first respondent's costs. The proposed activities of the respondent, as described by Ms Kingham, were mining minerals, and therefore appropriately the subject of a mining lease granted under s234. The appeal must therefore fail.

Reasoning

The Appellants objected to the application on grounds including that the application proposed activities that constituted exploration and not mining. The term explore is defined in the schedule to the Act to mean "take action to determine the existence, quality and quantity of minerals …by - …(c) extracting and removing from land for sampling and testing an amount of material, mineral or other substance in each case reasonably necessary to determine its mineral bearing capacity or its properties as an indication of mineralisation; …." The appellants claimed that the definition of "mine" in s6A(1)(a) of the Act which provides for the winning of mineral from a place where it occurs, should be limited by excluding from its ambit those activities where the purpose is for sampling or testing only.

The respondent's application outlined the mining program as commencing a testing program of 1 – 2 years, with samples to be taken, and with areas proven to be economic becoming targets for

further lease applications for mining. Ms Kingham summarised the nature of the mining program as follows:

"It is clear from other material tendered by the Applicant and from the evidence he gave at the hearing, that the activities proposed are intended to ascertain the viability of areas for subsequent production. The Applicant stated that if he finds economic deposits he will peg them out and apply for a mining lease or leases to cover the area or areas identified. Further he stated that none of the area applied for may be economically viable and that this will not be known until the testing is done."

As the first respondent's activities were for the purposes of sampling and testing only, the appellant contended that they were not for the purpose of mining minerals within the meaning of s 234(1)(a) of the Act and thus a mining lease could not be lawfully granted. The applicant asserted that the testing program was a proper facet of mining and a necessary preliminary aspect of mining.

The Court applied the reasoning of the majority of the Supreme Court of Queensland in Gonzo Holdings No 50 Pty Ltd v McKie [1996] 2 QdR 240 stating that in that case where samples were taken of the extracted material, the relevant facts were not substantially different to those in this case. Davies JA went on to state that "what was being done there was excavation and removal from the land of material for the purpose principally it seems, of testing mineral content. Yet their Honours plainly thought that was mining within the meaning of the Mineral Resources Act."

Davies JA concluded that:

(a) the appellants argument appeared to be that although exploration may sometimes also constitute mining, if extraction and removal from land of an amount of material is only for the purpose of sampling or testing within the meaning of paragraph (c) of the definition of "explore" it cannot also constitute mining with the definition of "mine";

(b) the appellants were unable to advance any basis for limiting the meaning of "mine" in this manner other than by inference from the definition of "explore"; and

(c) that this is not a sufficient basis upon which to limit the meaning of "mine", and noted that this also seems to have been the view of the majority in Gonzo.

For these reasons, Davies JA held that the proposed activities of the respondent, as described by Ms Kingham, were mining minerals and therefore appropriately the subject of a mining lease granted under s234. The appeal must therefore fail. McPherson JA and Dutney J agreed with the reasons given by Davies JA.