

Nth Stradbroke mine decision defies law

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Tony Denholder and Geoff Gishubl from Blake Dawson mistakenly place significant emphasis on North Stradbroke Island mining legislation [to support their argument](#) that sovereign risk is all too real in Australia.

Their analysis of the Stradbroke Island special legislation does not stand up to scrutiny. It is true that the Queensland government's April legislation was criticised by the Queensland Resources Council and others. However, this criticism was largely misinformed and created 'red herrings'. It did not have proper regard to the relative importance of particular leases. Nor did the criticism even acknowledge the existing law that establishes that the renewal of expired mining leases is far from automatic.

The reality is that the Queensland government's actions represent the antithesis of sovereign risk. Mining company Sibelco was a true beneficiary of the special legislation. It gained much more than it lost. The special legislation passed by the Queensland Parliament in April renewed key expired mining leases. The renewal of one in particular, until 2020, was crucial to mining continuing at the Island's largest mine, Enterprise.

Had that large lease not been renewed, mining would have ended much sooner. The critical nature of this lease is acknowledged in the explanatory notes to the legislation. It is highly unlikely that this and two other key leases at another mine on the island could have been renewed under the expired lease provisions of the existing legislation, the Mineral Resources Act of 1989.

Under the expired lease provision of the MRA (s.286A), an expired lease can't be renewed unless the Minister for Mines is satisfied of each of a number of factors set out. The section is quite clear in its terms. A 2009 Supreme Court decision confirmed the need for the minister to be satisfied of each and every factor before there is a legal power to renew.

Usually, a mining company seeking renewal of an expired lease is able to satisfy the minister of each factor. However, in the special circumstances of North Stradbroke Island, the second largest sand island in the world, there were obvious risks that were known to all concerned.

There were several factors which the minister is likely to have had difficulty in being satisfied of but one particular factor stood out. The minister had to be satisfied that: "having regard to the current and prospective uses of the land comprised in the lease, the operations to be carried on during the renewed term of the lease - (i) are an appropriate land use;"

This is clearly a sensible provision, which still applies everywhere else in Queensland. National Parks covering Stradbroke Island have been under consideration for at least two decades. Parliament was informed in 1990 that the then state government was considering declaring 50 per cent of the island a national park. Since then, the population of the adjacent Greater Brisbane area has more than doubled. In June 2010, the Premier identified areas of proposed national park which encompass 80 per cent of the island, including all areas under mining leases.

It is difficult to conceive that the minister could have been genuinely satisfied that continuation of mining on land earmarked for national park would be "an appropriate land use". The sand mining operation is quite obviously extremely intensive and destructive. Judicial review was also available. That option doesn't exist under the special legislation.

It is also relevant that the present holding company Sibelco (until recently named Unimin Australia Ltd) bought out the mining interests of previous owner, Consolidated Rutile Ltd in 2009 – after the term of significant leases had expired.

At the time of the takeover, Unimin acknowledged the risks, including community opinion concerning the environment and government approval hurdles. It was also aware of a then unresolved 1995 native title claim over the island. The acknowledgement of the risks no doubt also took into account the history of opposition to sand mining on the island (and on Moreton and Fraser Islands, where it was stopped years ago) and the needs of the community of southeast Queensland for greater protection of the natural environment for recreational and other purposes.

These needs were recognised on the Premier's website, for example, where it was revealed that southeast Queensland has only 19 per cent national park and public green space compared to Sydney's 49 per cent. Despite the significant risks, Unimin/Sibelco took a commercial gamble that it would be able to obtain renewals of these expired leases.

It appears its gamble has paid off, but it took an extraordinary step by the government to achieve it. Instead of diligently applying the current law, resulting in this foreign company bearing the consequences of the commercial risks it took, the government passed special legislation for Sibelco to extend mining at its Enterprise mine for another nine years and also renewed two other key leases at another mine to facilitate mining until 2025.

This will clearly result in considerable destruction and the consequential devaluing of the future National Park, much of which is also listed federally as 'national estate' and/or protected under the RAMSAR convention – an international treaty for the protection of outstanding wetlands – to which Australia is a party.

In conclusion, the North Stradbroke example doesn't support the authors' arguments, it weakens them. The real significance of Queensland's special legislation in favour of Sibelco is the trashing of the rule of law. Renewing expired leases in one place by a special Act without judicial review, rather than applying the law of the land involves clear breaches of two fundamental tenets of the rule of law, as described by Sir Ninian Stephen: "The first of the four principles is that government should be under law, that the law should apply to and be observed by government and its agencies, those given power in the community, just as it applies to the ordinary citizen; the fourth is that the law of the land, which rules us, should be certain, general and equal in its operation."

Richard Carew is a partner with Brisbane based law firm Carew Lawyers. He acted for a number of environment groups and others who last year, in the Queensland Court of Appeal, successfully prevented a mining related expansion of Sibelco's interests on North Stradbroke Island. Mr Carew also acted for a respondent in the Federal Court native title claim over the island, which concluded with a consent determination in favour of the claimants in July this year.

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