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North Stradbroke Island Expired Mining Lease Renewal Applications – Is compensation payable if mining lease renewal applications are refused?

Background & issue for opinion

1. Instructing solicitors act on behalf of a number of organisations interested in the environment on North Stradbroke Island where much of the land has been the subject of mining leases granted and from time to time renewed to facilitate mineral sand mining.

2. The terms of a number of those mining leases have expired yet applications for their renewal, made well before the expiry of their terms have not been decided.

3. To take as examples the leases of two very large areas, ML1117 & ML1121, the immediately preceding term of ML1117, which contains an area of 2,331 hectares, expired on 31 October 2007. In the case of ML1121 which contains an area of 3,688 hectares, its last term expired on 31 October 2008.

4. Your clients have made representations which seek rejection of the mining lease renewal applications without further delay.

5. Notwithstanding your clients' representations there has not only been a very substantial delay in making any decision but as well government representatives have apparently suggested that a refusal to renew mining leases might expose the State to claims for hundreds of millions of dollars in compensation by the mining company.

6. The question is whether there is any basis upon which to conclude that refusal of the applications for renewal of mining leases should be prevented by the prospect of a claim for compensation by the mining company.

Relevant principles & statutory renewal provisions

7. It is a fundamental proposition that the State has no power to enter into any contract to create or dispose of any interest in Crown lands other than by way of a mechanism authorised by an Act of Parliament. That proposition is both fundamental and long established including by decisions of the High Court of Australia in the early years of the federation.

8. In ***O'Keefe v Williams*** (1907) 5 CLR 217 the Chief Justice stated reasons including:

> *"...no Minister of the Crown has any authority to enter into any agreement for the disposition of an interest of the Crown in Crown lands which is not authorised by the law."*

9. That proposition has been repeatedly affirmed, including by further decisions of the High Court. The general principle was restated more than 30 years ago in the context of a Queensland Appeal to the Privy Council involving a failed claim by a mineral sand mining company seeking to assert a claim for compensation in connection with an alleged agreement for mining leases to allow mineral sand mining in the Cooloola Region on the coast north of Brisbane. It is somewhat ironic that the company concerned was from the same company group to which ML 1117 the expired mining lease central to the Enterprise mine, was issued **Cudgen Rutile**. In that case which went to the Privy Council, ***Cudgen Rutile (No 2) Pty Ltd v Chalk*** (1974) 4 ALR 438, one in which the then Queensland Government took on the mining company, Lord Wilberforce delivering a unanimous judgement observed:

> *"As a starting point, their Lordships accept as fully established the proposition that, in Queensland, as in other States of the Commonwealth of Australia, the Crown cannot contract for the disposal of any interest in Crown lands unless under and in accordance with power to that effect conferred by statute. In Queensland the legal basis for this power, and for the limitations upon it, is to be found in the Constitution Act of 1867, of which s 30 provides for the making of laws regulating the sale, letting, disposal and occupation of the waste lands of the*

Crown, and s 40 vests the management and control of the waste lands of the Crown in the legislature.

...

It follows as a logical consequence that when a statute regulating the disposal of Crown lands, or of an interest in them, prescribes a mode of exercise of the statutory power, that mode must be followed and observed, and if it contemplates the making of decisions, or the use of discretions, at particular stages of the statutory process, those decisions must be made, and discretions used, at the stages laid down. From this, in turn, it must follow that the freedom of the Minister or Officer of the Crown responsible for implementing the statute to make his decisions, or use his discretions, cannot validly be fettered by anticipatory action; and if the Minister or Officer purports to do this, by contractually fettering himself in advance, his action in doing so exceeds his statutory powers.

...

This rule is particularly applicable as regards the grant of mining leases, as to which Ministers are given wide powers coupled with discretions to be exercised in the public interest."

10. There are examples, including in decisions of the High Court, where agreements by Minsters of the Crown have been held invalid as a fetter in advance of the public duty under the Statute.[1]

11. It follows that any forecast, even by a Minister of the Crown, as to what might be done pursuant to a Statute providing for the grant or renewal of mining leases cannot operate to bind either the Minister, much less the Governor in Council, to grant the mining lease renewal. That conclusion becomes even more apparent upon a consideration of the provisions of the act in question.

12. In Queensland, the statute governing mining leases is the *Mineral Resources Act 1989* ("the *MR Act*").

[1] ***Watson's Bay & South Shore Ferry Co v Whitfeld*** (1919) 27 CLR 268.

13. Mining leases are granted for a fixed term however s. 286 of the *MR Act* allows an application for renewal to be made, within the last year of the term but, unless a shorter period is allowed by the Minister, at least six months before the current term of the lease expires.

14. To take ML1117 as an example, the MR Act required that the application for renewal be lodged at least six months before expiration of the relevant term of the lease. In the case of that lease, the relevant term expired on 31 October 2007 so that the application for renewal should have been received by May 2007, now almost four years ago.

15. Section 286A of the *MR Act* governs decisions in response to mining lease renewal applications.

16. The first point is that only one organ of government, the Governor in Council[2] is empowered to grant an application for renewal of a mining lease.

17. It follows that no other government representative, even the Premier or the relevant Minister, has power to decide and grant an application for renewal of a mining lease. Whilst those persons are included in the membership of the Executive Council, they do not constitute, alone, the Executive Council, let alone the Governor in Council. For reasons which are discussed below in connection with the question whether a viable claim is available for damages flowing from refusal of an application for renewal of a mining lease, it is of critical importance to identify the statutory repository of the power to grant an application for renewal of a mining lease because the answer to that question excludes the competence of any other office holder or government representative to create any obligation to grant a mining lease renewal application.

18. The separate role of the Minister under s. 286A is quite different to that of the Governor in Council in that the function of the Minister is in the nature of what might be described as a filter for preliminary consideration of mining lease renewal applications.

19. The physical process for an application for renewal of a mining lease is initiated by lodgement of the application with the Mining Registrar.[3]

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[2] *"the Governor acting with the advice of Executive Council;"*: *Acts Interpretation Act 1954*, s.36. See also s.27 *Constitution of Queensland 2001*.
[3] Section 286(1) *MR Act*.

20. The statute prescribes an approved form for the application, a fee and requirement that the application be accompanied by a statement dealing with a number of matters relevant to the renewal proposal.[4]

21. The statement in support of the application is required to address, *inter alia*:

> "*whether the operations to be carried on during the term of the renewed lease are an appropriate land use and will conform with sound land use management;*"[5]

22. Indeed if required information is not provided following notice from the Mining Registrar, the Minister has power to refuse the application without further ado.[6]

23. An applicant for renewal of a mining lease has no unconditional right to have its application considered by the Governor in Council because the Minister has a power of refusal at an earlier stage in the application process.[7]

24. Section 286A(1)(a)-(g) contain the presently relevant matters which must first be considered by the Minister in response to an application for renewal of a mining lease.

25. Whilst the application for renewal is made to the Minister, through the Mining Registrar,[8] a review of the relevant provisions shows that whilst the Minister has powers to refuse[9] the application and to consider matters relevant to it,[10] the power to grant the application is conferred only upon the Governor in Council.[11]

26. Section 286C of the *MR Act* provides that, subject to certain preconditions, a lease remains on foot until any properly made application for renewal is "*withdrawn, refused or granted*".

27. Those provisions, for continuation of mining activity on leases even though their terms have expired, have been described by the Editor of the Courier-Mail in the following terms:

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[4] Section 286(2) *MR Act*.
[5] Section 286(2)(c)(vi) *MR Act*.
[6] Section 286AA(2) *MR Act*.
[7] Section 286A(6), (7) & (8) *MR Act*.
[8] Section 286(1) *MR Act*.
[9] Sections 286AA(2) & 286A(6), (7) & (8) *MR Act*.
[10] Section 286A(1) *MR Act*.
[11] Section 286A(1) *MR Act*.

> "*… legal loopholes had allowed mining companies to continue extraction, despite the expiry of up to 13 leases, simply because they had applied to renew those leases. No one could fairly conclude that the Beattie or Bligh governments have been unfriendly to mining interests.*"[12]

28. With the further passage of time, the failure of the Minister to deal with the expired lease applications and the continuation of substantial mining activity 24/7, the implicit editorial criticism gains yet further weight.

29. It would be, to say the least, unusual in any commercial context, for a lease renewal application to be held over for decision years after expiration of the term of the lease.

30. It is I think material to refer to one particular aspect of matters required to be considered by the Minister in deciding whether he is satisfied of the various matters identified under s. 286A(1) prior to passing on the application for renewal of mining leases for final decision by the Governor in Council.

31. That particular matter arises out of s. 286A(1)(d)(i) which requires the Minister to decide whether:

> "*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;*"

32. The topic of appropriate land use with respect to the areas in question has been the subject of specific pronouncement by the Queensland Premier. I am instructed that the Premier's announcement identifies areas of proposed national park which encompass all of the expired mining leases.

33. It follows that, according to the Premier of the State, the land in question is suitable for national park purposes.

34. On that basis it is difficult to conceive that the Minister could be satisfied that continuation of mining would be "*an appropriate land use*" justifying approval of the mining lease renewal applications according to the assessment which must be made

[12] The Courier-Mail Monday, June 21, 2010.

pursuant to the provision set out in paragraph 31 hereof. That is because the mining operation is extremely intensive in that it involves the wholesale destruction of not only the above ground ecosystem but as well the sub-surface ecosystem by excavation to a depth of 100 metres. The notion that land suitable for a national park might be subjected to such a destructive process cannot, according to any rational view, constitute an *"appropriate land use"* having regard to the future intention that the land is to be constituted a national park area. The very purpose of a national park is to be found in the *Nature Conservation Act 1992* the object of which Act is stated in s.4 as *"the conservation of nature"*. That objective is further emphasised in the definition of what constitutes *"the cardinal principle"* for the management of national parks that is to:

> *"provide, to the greatest possible extent, for the permanent preservation of the area's natural condition and the protection of the area's cultural resources and values; and …*
>
> *ensure that the only use of the area is nature-based and ecologically sustainable."*[13]

35. It is therefore, I think, self evident that it is extraordinarily difficult to conceive, having regard to the hurdle imposed by the provisions set out in paragraph 31 hereof, that any proper exercise of the Minister's power could lead to a result other than that the applications for renewal of the leases should be refused.

36. Whilst, in the abstract sense, it is I think unnecessary to enter upon the merits of the application for renewal in order to determine whether, in principle, there is any basis for compensation in the event of a refusal of a renewal application, it is useful to note that the actual context in which the question arises is one in which, to put it at its lowest, there appears to be a clear case that the applications should be refused if the Minister faithfully carries out the statutory function entrusted to him pursuant to s. 286A(1)(d)(i) of the *MR Act*.

37. On their face, the provisions of the *MR Act* provide for either refusal or approval of an application for renewal of a mining lease but contain no provision for compensation of the applicant in the event of refusal of a renewal application.

[13] Section 17(1)(a) & (c) *Nature Conservation Act 1992*.

38. As is evident from the provisions of the *MR Act* referred to above, mining leases are for a fixed term so that the mining lease expires either at the end of its term or, if a proper application for renewal is made, in the event that that application is refused.[14]

39. It also emerges from the provisions referred to above that the holder of a mining lease has no right to its renewal. All that the mining lessee has is a right to make and have determined an application for renewal of the term. But if that application is refused in accordance with the provisions which recognise that choice, the mining lease comes to an end and no compensation is payable.

40. Although it is not critical to the legal principles involved, it is, as a merit issue, relevant to note that the present holding company Sibelco apparently effected its takeover after the term of significant leases had expired and without any suggestion whatever of any assurance that leases would be renewed. It took a commercial gamble.

41. It will be apparent from the provisions set out above that there is no basis for a contract to grant a renewal of a mining lease. The terms of the *MR Act* plainly do not include any such mechanism.

42. The lease renewal applications can properly be refused without any exposure of the State to a viable claim for compensation.

43. It is difficult to identify any proper outcome upon a diligent application of the law other than refusal of the lease renewal applications.

Conclusions

44. In Queensland the principle recognised in cases of high authority referred to above together with the provisions of the *Mineral Resources Act 1989* each show that there could be no valid contract binding the Governor in Council to grant an application for renewal of a mining lease.

45. As no one other than the Governor in Council has the power to grant such a renewal a contract with anyone else would obviously be invalid and hence unenforceable either by way of specific performance or by an award of damages.

[14] Section 286C(2). Of course in the event that the renewal application is granted the lease will then continue in effect until the expiration of the extended term.

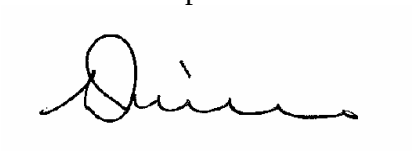
46. No credible claim for damages would be available so that any purported claim made would be liable to be struck out by way of procedure analogous to the demurrer which was employed by the State of Queensland against ***Cudgen Rutile*** in the proceedings culminating in 1974 referred to in paragraph 9 above.

47. It follows that, as the State of Queensland ought well know from its experience in the ***Cudgen Rutile*** case, there is no credible basis upon which the State is exposed to any claim for damages for failing to grant a renewal of any expired leases. Any suggestion to the contrary lacks credibility.

48. In any event, the Parliament has the power, for the avoidance of doubt, to legislate to prevent approval of any application for renewal of mining leases and to negative any claim for compensation flowing from either cancellation or refusal to renew mining leases. That is precisely what was done by the Parliament in enacting s. 418C with respect to mining leases in the Shelburne Bay area.

49. I advise accordingly.

With compliments



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