TRANSFERS OF MINING LEASES AND ENVIRONMENTAL AUTHORITIES IN QUEENSLAND – PRACTICAL PROBLEMS AND RECENT EXPERIENCES*

Introduction

A significant aspect of the transfer of any mine, or any interest in a mine, is the transfer of the relevant interest in the mining lease/s and associated environmental authority.

In Queensland, typically the sale agreement would be conditional upon the seller of the interest applying for and obtaining:

- indicative approval for the transfer of the mining lease/s under section 300 of the *Mineral Resources Act 1989* (Qld) (MRA); and
- approval of the Environmental Protection Agency (EPA) to the transfer of the environmental authority (mining activities) (EA) associated with the mining lease/s under section 259 of the *Environmental Protection Act 1994* (Qld) (EP Act).

These conditions are extremely important to the purchaser because, before it will hand over the purchase price at completion, the purchaser requires certainty that registration of the transfer of the mining lease/s and associated EA will be achieved following completion.

Generally the departmental processes for obtaining the necessary "pre-approvals", and thereby achieving the required certainty, are quite straightforward and do not present any difficulties. However recent experiences have highlighted that this is not always the case.

Indicative Approval for the Assignment of an Interest in a Mining Lease

The holder of an interest in a mining lease who wishes to assign all or part of that interest is required by section 300(4) of the MRA to apply in writing to the mining registrar for the Minister's approval of that assignment.

Upon an application being made under section 300(4), the Minister must, under section 300(6) of the MRA, give notice to the applicant:

> "(a) that, subject to compliance with this Act in respect thereof and with any conditions specified in the notice within 3 months from the date of the notice or such other period as is specified in the notice, the Minister will approve the exercise; or
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> (b) that the Minister does not approve the exercise."

An approval given under section 300(6)(a) is generally known as an "indicative approval" because, under section 300(8) of the MRA, upon an applicant subsequently lodging a transfer form and otherwise meeting the conditions in the indicative approval, the Minister must approve the assignment and record it in the register.

A little known, or else generally disregarded, provision of the MRA is section 300(5), which provides that if a mining lease is mortgaged, then an application for indicative approval for the assignment of an interest in that mining lease must be accompanied by the mortgagee's consent.

Despite section 300(5) of the MRA, the approach consistently taken by the Department of Natural Resources, Mines & Energy (DNRM&E) for at least the past 10 years has been to process applications for indicative approvals without the consent of any mortgagees, but to include as a

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condition of the approval that either the consent of the mortgagees must subsequently be provided, or else the mortgage released. This was a sensible approach which has worked quite well.

However, I have had recent experience where the relevant mining registrar refused to process an application for indicative approval for the transfer of a mining lease without the consent of the mortgagees (of which there were eight) being provided. Whilst this ignored a Departmental approach of more than 10 years standing, it was difficult to argue that the registrar was wrong to insist upon the consent of the mortgagees given the very clear wording of section 300(5).

A requirement to obtain the consent of mortgagees at the indicative approval stage, rather than at completion of the transaction, will often be quite problematic. In my case there were numerous mortgagees, each of whom had the benefit of pre-emptive rights which had not yet expired or been waived, and could not reasonably be expected to provide their consent whilst pre-emption remained open to them. Even where a mortgagee has no pre-emption rights, they will generally require commitments from the purchaser in return for the giving of the consent – commitments that the purchaser would typically only provide at completion.

After much discussion with the Mining Registrar and, I should say, co-operation on his part, the Mining Registrar eventually provided what one might call a "Clayton's" indicative approval. That is, a letter from the mining registrar (as delegate for the Minister) stating that it was NOT an approval given under section 300(6) of the MRA, but that so long as the conditions set out in the letter were met (the conditions being typical of those found in an indicative approval), then the transfer of the interest in the mining lease would be approved under section 300(9) of the MRA.[1] While the "Clayton's" indicative approval did not give the absolute certainty that an indicative approval would have given, it gave sufficient comfort to the purchaser, and the transaction proceeded on that basis.

This experience highlights a problem with the current drafting of the MRA (and in particular section 300(5)) which will hopefully be addressed in the review of the MRA which is scheduled for this year.

Pre-approval for the Assignment of an Environmental Authority

It is widely recognised that the legislative and policy framework for the assignment of the EA associated with a mining lease does not adequately address the legitimate interests of a purchaser.

The process is that an application to transfer the EA, together with the relevant fee, must be lodged with DNRM&E following completion (along with the transfer of the mining lease and other documents). DNRM&E then passes the application to transfer the EA on to the EPA for processing. In deciding whether to approve or refuse the transfer, the EPA must consider certain matters, including the suitability of the proposed assignee to hold the EA. This would include an assessment of the ability of the proposed assignee to comply with the terms of the EA, and the proposed assignee's past environmental record. This assessment takes place after the EPA has received the application from DNRM&E, and therefore after completion has occurred and the purchaser has paid the purchase price. There is no formal process for the purchaser to obtain "pre-

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[1] Section 300(9) of the MRA provides that "Notwithstanding that subsections (4) to (7) have not been complied with in a particular case, the Minister may approve and record particulars of an exercise of a power as provided in subsection (8) if the Minister is satisfied that, if subsection (4) had been complied with, the Minister would have approved the exercise of power and any conditions the Minister would have specified under subsection (6) have been complied with."

approval" of the transfer of the EA in advance of completion (and therefore in advance of paying the purchase price). This is unacceptable from a purchaser's perspective, as it then takes the risk that the EPA will in fact approve the transfer post completion.

In light of this problem, the EPA is often prepared, upon request, to accept an application for transfer of an EA directly from the parties, rather than via DNRM&E, and to deal with the application in advance of completion. Despite the lack of legislative recognition of the process, the EPA prepares a new EA instrument, in the names of the party/ies who will hold the EA after the transfer, and forwards this to DNRM&E to hold until such time as the transfer of the relevant mining lease is approved and registered, whereupon the new EA instrument is delivered to the parties. At the same time as sending the new EA instrument to the DNRM&E, the EPA sends a copy to the parties as evidence that the transfer of the EA has been "pre-approved". This process has been used successfully in a number of transactions.

However, quite recently I encountered an EPA District Manager who was unwilling to adopt this process. The issue was ultimately resolved by the EPA issuing a letter, in advance of completion, to the effect that they considered the purchaser to be suitable to hold the relevant EA, and that they would process and approve the transfer of the EA to the purchaser at the appropriate time. This gave the purchaser the comfort it required, and the transaction proceeded on this basis.

Conclusion

These issues highlight the fact that the provisions of the MRA and EP Act can create practical difficulties for purchasers wishing to obtain certainty before parting with the purchase price for a mine acquisition in Queensland.

Until such time as the provisions of the MRA and the EP Act are amended, we must rely upon good sense to prevail, and for the DNRM&E and EPA to continue to work co-operatively to facilitate the certainty of outcome demanded by purchasers, despite the lack of a workable legislative framework for pre-approvals.

SOUTH AUSTRALIA

MAINTAINING CONNECTION TO THE LAND*

De Rose Hill & Ors v State of South Australia ([2003] FCA FC 286)

Native title – Connect – Pastoral lease – Extinguishment

In *De Rose Hill & Ors v State of South Australia* [2002] FCA 1342 the trial judge O'Loughlin J found that the native tile claim on behalf of the Yankunytjatjara people failed because they had abandoned their connection with the land being De Rose Hill cattle station. That decision was noted previously in this Journal.[1]

The Full Federal Court has now delivered its reasons in an appeal from that decision. The Full Court considered that the trial judge was wrong in finding that the claimants had abandoned their connection to the land as it was based on his own construct of what connection and abandonment entailed. The correct question under section 223(1)(b) of the *Native Title Act (1993)* (Cth) (NTA),

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1 [2002] 22 ARELJ 23.