> which… is reasonably open and more closely conforms to the legislative intent. (Emphasis added)

The Court confirmed that it may also refer to reports of law reform bodies for this purpose.

The Court disagreed, however, with the applicants' submission as to the correct interpretation of the Explanatory Statement. The reference to "capacity which was available" is intended to be an estimation of the "ordinary capacity of the station when it was operating normally and after the outages and problems had been eliminated."[4]

The Court also disagreed that the applicants' interpretation was in greater accordance with the objectives of the Act than the respondent's. If the applicants' interpretation were to be accepted, inefficient planning and mismanagement would result in a greater entitlement for an operator compared with an operator who has carefully planned and efficiently implemented the initial operation.

SOUTH AUSTRALIA

MINING CLAIM DECLARED INVALID*

Boral Resources (SA) Ltd v Matthews [2006] SASC 121 (Supreme Court of South Australia, 28 April 2006, Doyle CJ, Bleby and White JJ)

Mining claim – Marking out

Facts and Legislative Background

In February 2004 Boral Resources (SA) Pty Ltd instructed a surveyor to peg a mineral claim over a reserve known as the former Mount Monster Quarry. Boral held a miner's right over the area issued under s 20 of the *Mining Act 1971* (SA). Regulations 13 and 14 of the *Mining Regulations 1998* (SA) govern the pegging of a mineral claim. Regulation 13 provides that the shape of a mineral claim must, as far as practicable, approximate a rectangle. Subregulation 14(2) provides that a post must be securely placed in the ground at the corner of the relevant area. Subregulation 14(4) provides that the direction of the boundaries of the claim must be clearly indicated by trenches, piles of stones, or substantial indicator markers fixed to each post. Subregulation 14(5)provides that if it is impracticable to comply with any preceding subregulation (which include subregulations 14(2) and 14(4)) then a person can peg out a mineral claim in some other manner but in accordance with subregulation 14(6) the person must lodge an appropriate notice within seven days after the pegging. The notice must outline the actual manner of the pegging.

The surveyor engaged by Boral, Mr Whitney, pegged Boral's claim on 26 February 2004 but he did not place a post in two corners of the mineral claim area. In evidence Mr Whitney said that scrub on the land prevented him achieving a line of sight to the corners that he did not peg. In

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4 at [10].

* John Tarrant, Lecturer, Law School, University of Western Australia.

addition Mr Whitney had made no attempt at all to indicate the directions of the boundaries which was a requirement of subregulation 14(4). After Mr Whitney completed his limited pegging operation Boral lodged an application to register the claim and asserted in the application that the claim was properly pegged. No notice of the failure to comply in full with subregulations 14(2) and 14(4) was lodged by Boral as was required by subregulation 14(6).

The respondent, Mr Matthews had seen Mr Whitney's posts and pegged a claim over the same reserve. Unlike Mr Whitney, Mr Matthews had the use of a handheld global positioning system and he was able to locate all of the corners of the claim and place posts as required under the regulations. Mr Matthews then applied to register his claim. However, Mr Matthews was directed by the Registrar that he must remove his posts because the Registrar was under the mistaken belief that the claim could not be pegged without the consent of the relevant Minister. This matter was resolved by early June 2004.

Proceedings in the Warden's Court

Mr Matthews filed a plaint in the Warden's Court on 16 July 2004 claiming that Boral had not complied with the regulations when it pegged the claim. Central to Boral's defence was regulation 100 which provides as follows:

> If application is made to the Warden's Court for a declaration of invalidity of a mining tenement on the grounds that the tenement has not been lawfully acquired in accordance with these regulations, the declaration must not be made unless the Court is satisfied that a breach of these regulations is a breach in a material respect and that the matter is of sufficient gravity to justify the making of the declaration, but the Court may order the rectification of any non-compliance with these regulations.

The Senior Warden, Dr Cannon, held that it was not impracticable to comply with the regulations and that the supposed impracticability was self imposed because Mr Whitney had inadequate equipment. The Senior Warden concluded that the breaches in relation to the pegging of the claim were breaches in a material respect. Accordingly it was declared that the pegging of the claim by Boral was invalid.

The first appeal

Boral appealed to the Environment, Resources and Development Court of South Australia. In *Boral Resources (SA) Ltd v Matthews*[1] Cole J had no difficulty in agreeing with the approach taken by the Senior Warden. She agreed with the Senior Warden that 'this was not a case of impracticability' because Mr Whitney had 'chosen a surveying method which did not suit the terrain'.[2] She concluded that there was 'sufficient basis, on the evidence and the law, for the Senior Warden to exercise his discretion in the manner that he did'.[3]

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1 [2005] SAERDC 89.
2 Ibid at [9].
3 Ibid at [15].

The second appeal

Boral then appealed to the Supreme Court of South Australia. In *Boral Resources (SA) Ltd v Matthews*[4] Doyle CJ held that '[w]hen considering the gravity of the matter as a whole, it is relevant to bear in mind that there was no excuse for the failure to comply with the Regulations'.[5] Doyle CJ concluded that the Warden 'rightly found that the Regulations were breached in a material respect' and that 'the breach was not a trifling one'.[6] Both Bleby and White JJ agreed with Doyle CJ in dismissing the appeal.

Conclusion

The decision in *Boral* highlights the importance of complying strictly with any pegging requirements. The consequences of a failure to comply, where compliance is completely possible, are dire indeed.

WESTERN AUSTRALIA

REFUSAL TO GRANT MISCELLANEOUS LICENCE*

BHP Billiton Minerals Pty Ltd & Ors v Westover Holdings Pty Ltd [2006] WAMW 4 (Perth Wardens Court, Warden Calder, 24 March 2006)

Application for Miscellaneous Licence – Delegation by Governor to Departmental Officer of power to prescribe purposes for which Miscellaneous Licences can be granted – Warden of opinion that delegation invalid – Refusal to grant Miscellaneous Licence

Background

The decision concerned the determination of an application for a Miscellaneous Licence by BHP Minerals Pty Ltd, Mitsui Iron Ore Corporation Pty Ltd and Itochu Minerals and Energy of Australia Pty Ltd (the Applicant). A portion of the area over which the application was lodged encroached on an Exploration Licence held by Westover Holdings Pty Ltd (the Objector). The application stated that the area was required for the purpose of "overburden management including rehabilitation and on-going monitoring and drainage control". There was some uncertainty surrounding the extent and the exact nature of the operations that were proposed to be conducted by the Applicant on the area of overlap with the Exploration Licence. Section 91(1) of the Mining Act 1978 (WA) (the Act) provides that a Miscellaneous Licence may be granted for any of the purposes prescribed. The Governor is given the power under section 162(1) of the Act to make regulations that are contemplated by the Act. Under this power the Governor enacted regulation 42B(n) which provides that a Miscellaneous Licence may be granted for any purpose directly

4 [2006] SASC 121.
5 Ibid at [38].
6 Ibid at [35].
* Emma Bullen, Law Graduate, Allen Arthur Robinson.