Enforcement

The new Act includes a formidable array of enforcement tools. These include inspectors appointed under the Act, stop orders, interim and ongoing protection declarations and substantial penalties. The new Act also introduces the 'cultural heritage audit' which is directed at monitoring compliance with the terms of Management Plans and permits.

Looking Forward

Native title has raised the profile of Indigenous land issues, leaving the Indigenous heritage protection legislation across the States looking inadequate. Like Queensland before it, with Tasmania to follow shortly, Victoria has overhauled its protection scheme. The principal objective of the new Act is to provide better protection for Aboriginal heritage. It seeks to achieve this, for the most part, through the mechanism of the Management Plan. The Government is likely to achieve its objective. The principal criticism of the new Act by some project proponents is that it goes too far; that the burden of the obligation does not, in many cases, match the level of risk. The scheduled May 2008 review of the Regulations promises to be a lively discussion.

WESTERN AUSTRALIA

MISCELLANEOUS LICENCE APPLICATIONS: NON-COMPLIANCE WITH MINING ACT AND MINING REGULATIONS*

Pilbara Iron Ore Pty Ltd v BHP Billiton Minerals Pty Ltd and Hancock Prospecting Pty Ltd [2005] WAMW 25, Karratha Warden's Court, Warden Temby SM, 3 January 2007

Miscellaneous licence – Objection – Non-compliance

Background

Pilbara Iron Ore (Applicant) marked out and applied for two miscellaneous licences for the purpose of roads (L47/132 and L47/134). The miscellaneous licences affected exploration licences held by BHP Billiton Minerals Pty Ltd (Objector). L47/132 also overlapped a Crown lease held by the Objector for the purposes of its railway.

The hearing was confined to objections in relation to the Applicant's purported non-compliance in six respects with the *Mining Act 1978* (WA) (Act) and the *Mining Regulations 1981* (WA) (Regulations).

Decision

Permit to enter a railway lease on private land

L47/132 completely overlapped a section of, and was divided in half by, the Objector's railway lease. L47/134 did not include the railway lease land but the evidence was that the Applicant crossed that land for the purposes of marking out L47/134. The Applicant accepted that the railway lease land was private land for the purposes of the Act.

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In order to mark out both miscellaneous licences, the Applicant had crossed the private land which requires a permit to enter. The Applicant did not have a permit to enter.

The Warden found that he had no alternative but to conclude that the Act and the Regulations were not strictly complied with in respect of either application. The Warden dismissed both applications on this basis but went on to consider the other points of objection.

Land subject to native title claims

There was evidence before the court that there were native title claims over the relevant land. The parties led evidence about whether or not a permit was required by virtue of s 24MD(6A) of the *Native Title Act*.

The Warden declined to make a decision on this issue on the basis that the native title claimants were not a party to these proceedings. This is an interesting basis on which to decline to make findings and perhaps leaves open an argument as to whether public interest arguments are appropriate to be run in relation to the hearing of miscellaneous licences. However, it is more likely the Warden declined simply on the basis of his first finding that the applications were invalidly made.

The land applied for will be split in two and surface tenement cannot be split into two pieces

If granted without the Objector's consent, L47/132 would have been split in half by the railway lease running through the centre of its area.

The Warden determined that this objection was also substantiated and dismissed the application for that miscellaneous licence on the basis of reg 38 which states that a miscellaneous licence may be of any shape but must comprise straight lines where practicable.

Service on pastoral leaseholders

There was evidence before the Warden that the applications had been properly served and the Warden dismissed the objections on this ground.

Regulation 37 (requirements haulage road)

Regulation 37(3) requires an applicant for a miscellaneous licence to provide certain information within 35 days of the application. The notice submitted by the Applicant under reg 37(3) stated 'The road is for hauling iron ore from Mindi Mindi project to a storage and transfer point to be determined'. The Objector submitted that this description was not sufficient to comply with reg 37 as it did not contain details of the storage or transfer points.

The Applicant subsequently applied for leave to amend the notice under s 145(4) and (5) of the Act which the Warden did not grant.

The Warden found that the description provided on the notice was not sufficient to comply with the requirements of reg 37 and would have refused to grant the applications on this basis.

Failure to comply with marking out requirements

There were additional arguments raised relating to the Applicant's failure to comply with pegging the land, Form 20 requirements on the datum post, Form 21 requirements affixing to the post and failure to comply with reg 37(1)(b) and s 93(2).

The only evidence that the Warden had to show that the Applicant had complied with its obligations in relation to marking out the area for the miscellaneous licence was hearsay evidence of an agent of the Applicant. There was no direct evidence on this aspect at all and the Warden found that he could not be satisfied as to compliance on the evidence before him.

The Warden stated that he would also have dismissed the application on this ground.

Conclusion

The Warden therefore dismissed both the applications and invited counsel to make written submissions on the question of costs.

MINING LEASE: EVIDENCE OF EXPENDITURE*

McKnight v Mount Edon Pty Ltd (Warden's Court, Perth, 11-12 January 2007)

Mining lease – Plaint for forfeiture – Evidence of expenditure – Business records – Onus of proof

Background

McKnight commenced a plaint for forfeiture in respect of a mining lease, on the basis of alleged non-compliance with the expenditure condition, against the holder at the time of the alleged non-compliance, Mount Edon Mines Pty Ltd. The current holders, Murrin Murrin Holdings Pty Ltd and Glenmurrin Pty Ltd, were joined as defendants to the proceedings.

Evidence of expenditure in respect of the mining lease was provided by Mr Mark Campana, the tenement manager who had prepared the form 5 for the year in question. Mr Campana tendered, as evidence of expenditure, a computer printout from the company accounting system of the record of expenditure in respect of the mining lease, showing expenditure against various headings. The Defendants produced no original documentary evidence supporting the listed amounts on the printout.

Warden Calder held that the computer printout from the company accounting system of the record of expenditure constituted a business record for the purposes of s 79C(2a) of the *Evidence Act 1906* (WA) and was thus admissible.

Warden Calder held that there is no necessary obligation on a tenement holder to produce all of the documentation in relation to claimed items of expenditure in defence of a plaint for forfeiture. Rather, the need for a holder to produce detailed evidence in defence of a plaint for forfeiture will depend largely on the strength of the evidence brought by the Plaintiff. In this case, the evidence of the Plaintiff was found to be weak as it essentially consisted of evidence of McKnight that, when he visited the tenement, he saw no evidence of recent activity.

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