THE INTERFACE OF SENSITIVE PRIVATE LAND ISSUES AND MINING: VICTORIAN REFORMS SEEKING RESOLUTION

Elda M Poletti*

The importance of section 45 of the Mineral Resources Development Act 1990 (Vic) and the issue of its effectiveness to address competing land uses became the subject of a Ministerial Inquiry in 2005, and resulted in amendments to section 45 by the Mineral Resources Development (Sustainability Development) Act 2006.

This paper begins with a brief historical review of section 45 and then compares section 45 with approaches taken by other State and Territory jurisdictions. The problems with section 45 in protecting the rights of mining licensees and also landowners/occupiers are highlighted by the Tech-Sol case and the Ministerial Inquiry. Finally, the reforms of section 45 as the response to these issues are reviewed and their effectiveness considered.

1. INTRODUCTION

The issue of competing land uses between mining companies and landowners is reflected in all Australian mining legislation since the nineteenth century. It remains an issue for the twenty first century as mining activity has increased in recent years and encroached closer to rural and urban communities.[1] In 2004, this issue came to the attention of the Victorian Civil and Administrative Tribunal (VCAT) in *Tech-Sol Resources PL v Minister for Energy Industries and Resources.*[2] The case highlighted the difficulties inherent in section 45 as a mechanism for managing the competing rights of licensees to undertake mining activities[3] on private land and the rights of landowners and occupiers.

The importance of section 45 and its effectiveness to address competing land uses was the subject of a Ministerial Inquiry in 2005, and resulted in amendments to section 45 by the *Mineral Resources Development (Sustainability Development) Act 2006.* This paper explores the development of section 45 as a reflection of the competing land use dilemma and contrasts the Victorian approach with that taken by other Australian jurisdictions. Finally this article considers the ability to manage competing land use rights in the context of the current reforms to section 45.

---

* BA, LLB, LLM, Legal Counsel (Natural Resources), Dept of Primary Industries Victoria. The views expressed are those of the author and do not represent a statement of government policy.

1 In 2003-04 the total value of mineral production in Victoria was $620.7 million. Victorian Competition & Efficiency Commission, *Regulation and Regional Victoria Challenges and Opportunities Final Report* (2005) 1, 275.

2 [2004] VCAT 1648.

3 In this paper a reference to 'mining' includes exploration unless otherwise indicated.

The origin of section 45 can be found in the *Mining on Private Property Act 1884* which addressed competing land use issues at a point in time prior to the grant of a resource authority. The Act reflected the view that the mining industry was important to the survival of the colony and aligned the interests of miners with the government's public interest as the '… greatest of all our public interests ...'[4] The approach taken by the Act was based on a defined area of protection from mining activity that applied to sub-surface activity only and took as its point of reference certain private and public buildings[5] without the consent of the owner. No guidance was given by the 1884 Act as to the point of measurement, nor did it contemplate changes to the buildings in the future. The 1884 Act also introduced the requirement for consent in writing which was to be obtained from the owners or trustees of the land where a public or community building was situated.[6] This requirement would survive until its removal by the *Mineral Resources Development Act 1990* (Vic).

Given the powerful alignment of mining interests with the public interest, where a conflict in land use arose with a private landowner the power of compulsory acquisition could be used to resolve the conflict in favour of the mining operation.[7] The 1884 Act supported mining on private land despite any opposition by an owner, and the rights of an occupier or nearby owners and occupiers were not acknowledged. However once a mining lease was issued, compensation could be paid to the owner of the land subject to a mining lease and an adjoining or nearby owner for injury or depreciation to land or any building arising from the mining operation.[8]

The *Mines Act 1897* demonstrated a shift that gave greater recognition to the rights of landowners and created a more balanced approach to determining competing land use issues. The increasing reach of private property rights was achieved by firstly extending the requirement for owner consent to mining on land to a depth of 100 feet of a garden, orchard, and vineyard and 400 feet for a half acre in a city, town or borough. Secondly, the range of private/public uses of land protected by the legislature was extended to include registered places of worship, except that the degree of protection was decreased from 150 yards to within 100 yards and no protection remained for churches in the mining districts.[9] Lakes were included for the first time with artificial reservoirs, and while a mining lease could be granted with the consent of the owner or trustees, the 1897 Act provided for the Minister to determine the proximity to which mining could be undertaken near a lake or artificial reservoir.[10]

---

4 Victoria, *Parliamentary Debates,* Legislative Council, 2 July 1884, 635 (Donald Melville).

5 The sites were a garden, orchard or vineyard, or land situated in a city, town or borough or within 100 yards of a spring, artificial reservoir, dam, sheep wash, and wool-shed in bona fide occupation, a dwelling house, out-office building or manufactory. *Mining on Private Property Act 1884* (Vic) s 32.

6 *Mining on Private Property Act 1884* (Vic) s 34.

7 Section 34 provided that a mining applicant could compulsory acquire land within 100 yards of a hospital, church, asylum, cemetery and waterworks except for public and community buildings.

8 *Mining on Private Property Act 1884* (Vic) s 16.

9 Sandhurst, Castlemaine and Ararat. *Mines Act 1897* (Vic) s 71(5).

10 *Mines Act 1897* (Vic) s 71(7).

The strength of owner rights was also reinforced by removal of the power to compulsorily acquire land with a garden, orchard, vineyard, or half acre in a city, town, or borough for mining purposes.[11] But in the event that consent could not be obtained, then the issue of competing land use was resolved by the mining warden as an independent third party. While a mining lease could still be granted for a depth greater than 100 or 400 feet below the relevant protected site without the consent of the landowner, the 1897 Act like its predecessor, recognised the right of the owner to be paid compensation.[12]

After 1897, only minor changes were made to the legislative provisions for mining on private land that sought to reduce the protection offered to landowners even further. In 1904, dams were required to have a capacity of at least 400 cubic yards and a woolshed had to be substantially built.[13] In 1915 the protected area around a cemetery, reservoir or waterworks was reduced from 150 yards to 100 yards.[14]

3. THE CURRENT ACT

By 1990 a myriad of issues associated with land use was reflected in a legal environment that had become more complex with the development of laws for planning, the environment, the protection of archaeological sites and relics and indigenous issues. The *Mineral Resources Development Act 1990* (Vic) was an example of the broader legislative landscape and cast its purpose of encouragement for '…an economically viable mining industry…' in terms that showed the competing nature of these interests and required a balanced approach with social and environmental objectives.[15]

Land affected by mining activity is often not owned by the licensee[16] and the Act recognises that before a licensee can carry out mining on the land covered by the licence they must obtain all necessary consents and other authorities[17] which may also operate as legal mechanisms to balance competing interests in land use. For example, the planning permit process is required to balance economic and sustainable uses of land, the protection of natural resources and secure a pleasant living environment for all Victorians.[18] But there is no specific protection of individual interests[19] and no guarantee that in the consideration of various interests, the rights of an individual would outweigh broader economic interests.

The Act recognises that mining may adversely impact on the ability of an owner/occupier to enjoy and use the land. Accordingly, the Act addresses the consequences of mining on private land and requires the licensee to obtain the written consent of the owners and occupiers, or enter into

---

11 Ibid, s 71(1)(3).
12 Ibid, s 71.
13 *Mines Act 1904* (Vic) s 35.
14 *Mines Act 1915* (Vic) s 333(4).
15 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 1.
16 Martin & McLean Lawyers with S R Molesworth QC, '*Mineral Resources Development Act 1990 Inquiry into Sections 45 and 46 Report and Recommendations*' 14.11.2005 p 6.
17 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 43(1).
18 *Planning and Environment Act 1987* (Vic) s 4(1)(a)(b)(c).
19 Martin & McLean Lawyers with S R Molesworth QC, op cit n 16, at 55. The Inquiry noted the General Implementation directions in the State Planning Policy Framework makes no specific reference to protection of individual interests.

registered compensation agreements with them.[20] Compensation can be obtained for loss of possession of the whole or part of the surface of the land, loss of amenity including recreation and conservation values and loss of opportunity to make planned improvements to the land.[21] Only low impact exploration can be undertaken without the need to satisfy any of the above requirements.[22] The dilemma of how to provide for competing uses on the land is left to section 45.

4. SECTION 45 PRIOR TO 2006 REFORMS

The 1884 Act and its subsequent reforms to 1990 sought to resolve the issue of competing land uses between landowners and miners *before* a mining lease was granted.[23] This meant that once the lease was granted, future mining work was guaranteed by the term of the lease and not dependent upon the continuing consent of the owner. This contrasts with the section 45 introduced by the *Mineral Resources Development Act 1990* which applied *after* a licence had been granted for exploration and mining activity. However the 1990 Act reflected its predecessors in the way in which it sought to deal with the issue of competing land use by identifying many of the same protected sites and buildings and in the same manner, ie by requiring the consent of the owner and occupier of land[24] for a licensee to do any work under the licence within or under 100 metres of a protected private building or site.[25]

Section 45 did extend the concept of protection for private land use beyond the boundaries of the mining licence to include adjacent owners and occupiers. Section 45 did not distinguish between the rights of an owner/occupier of land and those of an adjoining owner/occupier, but determined the protection afforded to them by reference to an identified site and distance therefrom. While section 45 did not create a distinction between owners and occupiers, it did have this effect in relation to the degree of protection offered to different land uses. A lesser degree of protection was also afforded to private land uses based on the nature of the mining activity. Mining work within, or under 100 metres of a garden, orchard, vineyard, reservoir, lake, church, hospital, public building or cemetery, did not require consent from the owner and occupier where the licensee did not need a planning permit. Usually this has occurred if the mining operation involves exploration or small-scale commercial mining or an environment effects statement has been prepared for larger more complex operations.

Section 45 also added a new dimension of protection to historical and indigenous rights, enabling work to be undertaken within or under 100 metres of an archaeological site or relic with the consent of the appropriate person or body.[26] For an archaeological area defined under the

---

20 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 43(1)(e).

21 Ibid, s 85(1).

22 Ibid, s 43(1).

23 *Mining on Private Property Act 1884* (Vic) s 32.

24 *Mineral Resources Development Act 1990* (Vic) s 45(2).

25 The buildings and sites are a dwelling house, a substantial farm building, factory, windmill, bore, spring, dam (not a mining dam or a dam with less than 0.3 mega litre capacity), garden, orchard and vineyard – *Mineral Resources Development Act 1990* (Vic) s 45(1).

26 For archaeological relics the person or body is nominated under section 18(a) of the *Mineral Resources Development Act 1990*. The consent of the Heritage Council is required for a place or object on the Heritage Register under section 45(4A) and the consent of the Executive Director for an archaeological

Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) work within this area could be undertaken if the licensee did not need a planning permit or had undertaken an environment effects statement.[27] However a complete prohibition against work by a licensee applied to an Aboriginal area where the work contravened a declaration in force under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) or the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic).[28]

Like its predecessors, section 45 in providing a 100 metre lateral and depth protection zone as part of the mechanism for resolving competing land uses failed to outline how the protection zone was to be measured. In relying upon the consent of the owner/occupier to undertake mining activity within the protected zone, section 45 also did not make clear the consequences for future mining operations where the works change, or the consent is revoked by the owner or subsequent owner of the land or changes are made by an owner to a protected site.

It has never has been the role of section 45 and its predecessors to deal with disputes arising from the use of the provision to resolve competing land uses. Under the Act, the role of dispute resolution regarding mining activity within the protected zone rested with the Minister after referral of a dispute by either a licensee or an owner/occupier to the mining warden for an investigation and report.[29] Alternatively, a licensee could make a request to the Minister under section 46 for authorisation of mining activity in the protected zone in the absence of owner/occupier consent.[30] The 2006 reforms of section 45 had little impact on section 46, and this provision continues to provide little guidance as to how the Minister must determine a competing land use issue within the protected zone. It is however clear from section 46 that the Minister must take into account advice from the Mining and Environment Advisory Committee or consult with the local municipal council and any community group or individual enabling a broad range of issues including social, economic and environmental to be considered.

5. AN OVERVIEW OF STATE AND TERRITORY APPROACHES

Both South Australia and Tasmania follow the Victorian approach of addressing the issue of competing land use after the tenement has been granted. Section 9 of the *Mining Act 1971* (SA) like its Victorian counterpart applies protection from both exploration and mining operations[31] and makes no distinction based on the differing impacts of activity on the land. Similarly, section 9 identifies various land uses that include rural, urban, and community uses and water features.[32] Unlike the Victorian provision, the extent of exemption is not determined by any predetermined boundary, but the limit to which the land is used for the purpose. Also a different approach is taken where the land is used as a place of residence as the exemption applies to an area of 400 metres

---

site on the Heritage Inventory under section 45(4B) of the *Mineral Resources Development Act 1990* (Vic).

27 *Mineral Resources Development Act 1990* (Vic) s 45.

28 Ibid, s 45(6).

29 Ibid, s 97.

30 Ibid, s 46(1).

31 Defined to include prospecting, exploration and mining activities. *Mining Act 1971* (SA) s 6.

32 These uses are a garden, orchard, vineyard, grounds of a church, school, hospital, spring, reservoir or dam, or a separate parcel of land less than 2,000 square metres in a city or town.

from the residence and 150 metres from a building used for an industrial or commercial purpose.[33] The Victorian and South Australian provisions both enable mining work to occur within the protected zone with the consent of the owner, but section 9 disadvantages subsequent owners who are bound to accept the agreement that has been made. Section 9 also waives the exemption if a court determines the compensation to be paid by the mining operator to the owner of the exempted land.[34] Unlike the Victorian provision, section 9 gives the owner the opportunity to influence the manner in which the mining activity is conducted, as consent by the owner or court determination may be made upon such conditions as the parties or the court thinks fit. Once made, the waiver is binding on the successors in title to the land and operates until the mining operations are complete, when the exemption again applies to the land. This approach provides certainty for the mining operator for the life of the mining operation and ensures that when this use of the land is no longer relevant that protection for the use of the land is returned to by the owner.

The *Mineral Resources Development Act 1995* (Tas) like its Victorian and South Australian counterparts provides protection from mining activity without distinguishing between exploration and mining work. The provisions[35] have most in common with the Victorian provision in that they provide a protection zone of 100 metres that applies to all the identified land uses and benefits both owners and occupiers of the land. Equally these provisions give no explanation for the meaning of 'dwelling' or 'substantial' building, and there is no requirement for the consent to be in writing. It is not clear from the provisions whether conditions can be attached to the consent or if the consent can be revoked by either owner or the occupier. These characteristics carry the same uncertainties present in the Victorian provision for both mining operators and landowners.

Three States (NSW, Qld and WA) address the issue of competing land use prior to the grant of a mining tenement. The *Mining Act 1992* (NSW) adopts a complex arrangement of protection for owners and occupiers from mining activities that considers the nature of the mining activity as well as the nature of the particular site and results in providing varying degrees of protection for an owner/occupier. For less intrusive tenements the protection zone applies only to the surface of the land[36] while for a mining lease or claim the Minister may determine the depth to which the tenement may be granted and conditions to minimise damage to the land surface.

Implicit is the legislative intent that land use differs between sites. Greater value is given to land use which involves residential occupation. A dwelling house that is the principal place of residence of the occupier attracts protection within 200 metres and 50 metres for a garden.[37] If there is an improvement on the land[38] protection of the area is not subject to a specific distance restriction. An improvement includes 'other valuable work or structure' and the difficulties associated with such

---

33 A building used for an industrial or commercial purpose must have a value of $200 or more. *Mining Act 1971* (SA) s 9(1)(d)(ii)(A).

34 *Mining Act 1971* (SA) s 9(3).

35 *Mineral Resources Development Act 1995* (Tas) s 19 (exploration licence) s 54 (retention licence) and s 79 (mining lease).

36 *Mining Act 1992* (NSW) s 31 (exploration licence), s 49 (assessment lease).

37 Ibid, ss 31, 49, 62 and 188.

38 Improvement means a substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure other than an improvement constructed or used for mining purposes.

broad terminology is highlighted by *Kayuga Coal P/L v Ducey & 3 Ors*[39] which required the Supreme Court to consider whether the subject dam and contour bank could be considered an 'improvement'. The NSW Act provides the opportunity for competing land uses by utilising the written consent of the owner and occupier of the dwelling house. When consent is given, it is irrevocable, thereby providing certainty for the mining operator for work done in the protected zone that it will not be vulnerable to changes in land use by the owner/occupier or that in the future an owner/occupier may revoke their consent. The NSW Act also provides that a dispute regarding the application of these provisions can be referred to the warden for inquiry and report and decision by the Minister.

The *Mineral Resources Act 1989* (Qld) addresses the issue of competing land use by distinguishing between the types of tenement granted and the point in time when competing land use is considered. Restricted land use appears to be distinguished according to features of land without human habitation and identified as category B uses[40] and category A uses which include a permanent building used mainly for accommodation, business, community, sporting or recreational purposes or a place of worship.[41] The category of private land use and degree of likely human activity also determines the degree of protection provided from mining activity, as a category A use attracts a protection zone of 100 metres and category B a lesser zone of 50 metres.

Given that activities under a prospecting permit, an exploration permit or a mineral development lease will involve lesser degrees of impact on the land and are likely to be of shorter duration, the issue of competing land use is determined after the permits have been granted. While work cannot be undertaken in this zone, access by the mining operator is sanctioned by obtaining the consent of the owner.[42] The greater importance attached to an exploration permit and a mineral development lease is reflected in the nature of consent given. Consent given by the owner of restricted land to a prospecting permit holder can be withdrawn at any time, while the owner can specify the period of their consent to the holder of an exploration permit or mineral development lease and once it is given consent is irrevocable and forms part of the permit.

Given the more intrusive nature of mining work and greater impact on the land over a longer period, this means that for a mining claim and mining lease, the issue of mining on restricted land is determined when the application for the tenement has been made and depends on the written consent of the owner being obtained. [43] Once the consent has been lodged with the mining registrar in the objections period, it cannot be withdrawn.[44] If the written consent of the owner cannot be obtained, the tenement can still be granted, but it cannot include the restricted land.

Section 29 of the *Mining Act 1978* (WA) applies equally to all mining tenements regardless of the differences in the scope of work and impacts, provided that a mining tenement must not be granted in respect of private land except with the consent in writing of the owner and occupier. It utilises two different forms of measurement, 100 metres of various sites which include a garden, orchard, vineyard, plantation, cemetery, dam, substantial improvement and complete protection for a

---

39 [1999] NSWSC 789.
40 A dam, bore, principal stockyard and cemetery.
41 *Mineral Resources Act 1989* (Qld) Schedule Dictionary.
42 *Mineral Resources Act 1989* (Qld) ss 19, 129.
43 Ibid, s 51(2).
44 Ibid, s 51(3).

separate parcel of land of 2,000 square metres or less.[45] The likelihood of mining below the ground having an impact on private land uses is reflected in the ability of a mining tenement to be granted over private land at a depth of more than 30 metres.[46] If a mining tenement has not been granted over private land to a depth of 30 metres, a tenement holder may apply to the Minister for a grant of that land but the Minister must be satisfied as to the consent of the owner and occupier.[47]

The *Mining Act* (NT) addresses the issue of competing land use at a different point in time, ie, when a mining tenement has been granted. The mechanism adopted by the legislature is through conditions imposed on the tenement. Owner and occupier interests are addressed on the resource title[48] via a condition which requires the holder to conduct their activities so as not to interfere with existing dams, reservoirs or storage containers or the rights and lawful activities of any person on the land or adjacent land.[49] A similar approach is adopted regarding the protection of a yard, garden or orchard, but conflicting land use can occur with the written consent of the owner or occupier of the land.[50] Such a mechanism makes it clear that competing land uses can coexist, but the obligation to ensure that they do is placed on the resource tenement holder. The difficulty for the tenement holder is to determine what mining activity constitutes 'interference' with the rights of others to the land and which may rest with the subjective perceptions of land owners. From another perspective, owners and occupiers may find little comfort from such conditions, because the tenement holder can apply to the Minister to waive, suspend or exempt compliance with a condition of a tenement[51] and it is not clear what constitutes the basis for such action.

The Act generally avoids the specification of a protection zone, relying on the key factor of 'interference' which is capable of broad and subjective interpretation. This term is not defined by the Act and as a result, creates uncertainty for the tenement holder, owner and occupier as to the extent of their rights. An exception to this approach is the situation where private land has been designated as an Aboriginal community living area. The NT Act makes it clear that use of the land for mining activity is prohibited by creating a protected zone which is determined not only by a specific measured area of one kilometre, but the determination point of the protected area is designated not by the legislature but the Aboriginal community.[52] This is a unique approach to the determination of competing land use that is not found elsewhere in Australia.

6. SECTION 45 ISSUES AND REFORM

The issues associated with section 45 have been considered in *Tech-Sol Resources PL v Minister for Energy Industries & Resources*[53] and a subsequent Ministerial Inquiry.[54] In the *Tech-Sol*

---

45 *Mining Act 1978* (WA) s 29.
46 Ibid.
47 Ibid, s 29(5).
48 This applies to an exploration licence, exploration retention licence and a mineral claim under the *Mining Act* (NT).
49 *Mining Act* (NT) ss 24, 45(h) and 89(h).
50 *Mining Act* (NT) s 166(1)(e).
51 Ibid, s 172.
52 Ibid, s 174AA.
53 [2004] VCAT 1648.

Resources P/L case the Tribunal considered two decisions by the Minister to serve notices under section 110 of the *Mineral Resources Development Act 1990* for non-compliance with section 45 of the Act. The notices were issued as a result of complaints by the owners of land located within 100 metres of work being carried out by Tech-Sol Resources under their mining licence. They required the company to reinstate the 100 metre protection zone by removing all plant, equipment and structures and re-establish the land.[55] Subsequently a Ministerial Inquiry was established to review the operation of sections 45 and 46 and to recommend options for the reform of these provisions.[56]

6.1 Protection for Private Land Use

The Inquiry expressed the view that section 45 has a very broad application given the modern planning and environmental controls that apply to mining operations. The Inquiry considered that the protection of the public interest in public places was sufficiently protected by these processes[57] and recommended that a number of public sites be removed from section 45.[58] The Inquiry also recommended that domestically related sources remain, but the protection zone be reduced to 30 metres for exploration activities because the environmental controls imposed on the mining operation via the work plan could address environmental and protection issues. [59]

The Inquiry recommended a modified form of section 45 based on the protection of a private home/rural homestead[60] and assumed improvements in associated processes and better integration with planning and environmental approval requirements.[61] A new definition of 'dwelling house' was proposed that referred to usage and to curtilage.[62] For a dwelling house on a smaller allotment less than 0.4 hectares, the 100 metres would be measured from the boundary of the allotment. All other allotments would be measured from the outside perimeter of the dwelling house together with the orchard and ancillary farm buildings in bona fide use.[63] The Inquiry recommended that the items relating to Aboriginal and cultural heritage should remain with the observation that current processes work well, but should be reviewed in the context of Aboriginal heritage reforms.[64]

The Inquiry adopted the view that interpretation and measurement of the lateral 100 metre protection zone should be clarified to remove ambiguity by reference to both the protected place and the buffer zone.[65] The Inquiry did not favour legislative amendment to give guidance to the measurement of the 100 metres, but suggested either an appropriate Regulation or the development

---

54 Martin & McLean Lawyers with S R Molesworth QC, *Minerals Resources Development Act 1990 Inquiry into Sections 45 and 46 Report and Recommendations* (2005) 1.

55 [2004] VCAT 1648, para 2.

56 Martin & McLean Lawyers with S R Molesworth QC, op cit n 54, 125.

57 Ibid 81-82.

58 Ibid. The Inquiry suggested that a factory, reservoir or lake, church, hospital, public building and cemetery be removed.

59 Ibid 78-79.

60 Ibid 75.

61 Ibid.

62 Ibid.

63 Ibid 80.

64 Ibid 85.

65 Ibid 96.

of guidelines which could specify the agreed point of measurement for each protected place.[66] The Inquiry observed that there was little reason why the protected area should extend to a depth of 100 metres and given the absence of technical evidence was not prepared to make a recommendation for the depth requirement.[67] In the *Tech-Sol Resources P/L* case the Tribunal rejected the arguments that consent could only be given subject to conditions of distance and depth and found that section 45(2) was an enabling provision that did not limit the conditions capable of being included in the consent.[68]

6.2 Mining Activities

The Tribunal in the *Tech-Sol Resources P/L* case accepted that 'work' in section 45 meant work done under the licence and adopted a broad interpretation of work which included the result of an action or exertion[69] so that part of a diesel tank and storage area for equipment were all features of work under the approved work plan and required consent.[70] The Inquiry took a narrower view and recommended a definition that centred upon 'core operational works'[71] in an attempt to lessen the consent requirements in relation to ancillary and minor works for their negligible impact upon the interests of a landowner or occupier. The Inquiry recommended that the exploration process should still be subject to the requirements of section 45, given that exploration activities are not subject to the planning process.[72] Low impact exploration however, ought not to be subject to section 45, given the minimal impact of such activity, except where the activity occurred near a dwelling house.

6.3 The Consent Mechanism

In the *Tech-Sol Resources P/L* case the parties observed that there was no mechanism whereby a purchaser of land adjoining a mining licence could be put on notice of an existing consent as there was no obligation under the Act for registration.[73] The Inquiry recommended that consents under section 45 should be in writing and registered so that the consents were available for inspection by the public.[74] This would give certainty to the mining industry and landowners regarding the existence of consents.[75] The Inquiry also recommended that a standard pro-forma consent document should be prepared to assist people to give consent with confidence.[76]

The Inquiry recommended legislative amendment to deem current mining operations compliant with section 45 that would otherwise be in breach of the section as a result of the uncertain effect

---

66 Ibid 97.
67 Ibid 86-87.
68 [2004] VCAT 1648, para 22, 23.
69 Ibid, para 29.
70 Ibid para 28.
71 Martin & McLean Lawyers with S R Molesworth QC, *Minerals Resources Development Act 1990 Inquiry into Sections 45 and 46 Report and Recommendations* (2005) 100.
72 Ibid 77.
73 [2004] VCAT 1648, para 11, 13.
74 Martin & McLean Lawyers with S.R. Molesworth QC, op cit n 71, 88.
75 Ibid.
76 Ibid 91.

given to consents by the *Tech-Sol Resources P/L* case.[77] The amendment was considered necessary to remove the risk to investors and existing mining projects from the consequence of illegal operations and legal challenge. The Inquiry proposed that the consents should relate to the current mining project and to the approved work plan.[78]

In the *Tech-Sol Resources P/L* case the Tribunal found that a consent does not have the effect of binding a subsequent owner or occupier.[79] The Victorian Competition & Efficiency Commission noted the necessity of providing certainty with consents under section 45 for both the mining industry and landowners.[80] The Inquiry recommended an amendment to section 45 to provide that a consent given under section 45 binds subsequent owners and occupiers.[81] The Inquiry considered that it was unreasonable and economically unsupportable to expect that a consent would cease upon a change in ownership or occupancy, particularly in circumstances where a mining operation might continue for many years.[82] The Inquiry also recommended that the owner's consent should also incorporate an occupier's consent[83] on the basis that if an occupier was not bound by the consent given by an owner it would create uncertainty for all parties.

The Tribunal also expressed the view that new structures or works by an owner could increase the protection zone and trigger a new consent.[84] The Inquiry considered that it would be unacceptable for '…each simple or standard variation to an approved work plan to require a revisiting of a granted consent.'[85] But significant changes to a mining operation that required a new planning permit or a supplementary environment effects statement should trigger a new consent from the landowner.

The Tribunal found that non-compliance with a condition of a consent might result in the withdrawal of the consent.[86] The Tribunal observed that while an owner might be prepared to consent to work within 100 metres, a subsequent owner might not, and section 45 was silent as to the effect of a change of ownership or occupation on a consent.[87] A licensee who undertakes work within the protection zone runs the risk that a further consent will be required in the event of a new owner or occupier.

Where there is a capricious or unreasonable withholding of consent or the withdrawal of an existing consent, or the protection zone is extended, the Tribunal considered that a licensee might request the Minister to authorise the work under section 46.[88] While the Inquiry similarly considered the role of section 46 in this regard, the Inquiry observed that it was undesirable to

---

77 Ibid 72.
78 Ibid.
79 [2004] VCAT 1648, para 16.
80 Victoria, Victorian Competition & Efficiency Commission, *Regulation and Regional Victoria Challenges and Opportunities Final Report* (2005) 1, 304.
81 Martin & McLean Lawyers with S R Molesworth QC, *Minerals Resources Development Act 1990 Inquiry into Sections 45 and 46 Report and Recommendations* (2005) 91.
82 The Inquiry referred to Bendigo Mining project as likely to continue over a 50-year period.
83 Martin & McLean Lawyers with S R Molesworth QC op cit n 81, 93.
84 [2004] VCAT 1648, para 17.
85 Martin & McLean Lawyers with S R Molesworth QC op cit n 81, 92.
86 [2004] VCAT 1648, para.21.
87 Ibid para 17.
88 Ibid para 18, 21.

place the Minister between two disputing parties and recommended the consideration of alternatives but without expressing a preferred option.[89]

7. LEGISLATIVE REFORM

Changes to section 45 by the *Mineral Resources Development (Sustainable Development) Act 2006* constitute the government's response to the Ministerial Inquiry and represents major reform of this provision which has in many respects, remained unchanged since 1897. The legislative reforms reflect the Inquiry's approach in that they do not introduce a radically different approach to the point in time when competing land use issues should be determined, but continue to accept that this process occurs after a resource tenement is granted and the nature of the work is known.

7.1 Private Land Use

In the future, the range of competing land uses identified by section 45 has been redefined to focus on the existence of a dwelling house before an approved work plan was registered in respect of a licence. To enable a dwelling house to be the reference point for determining the land uses that will be protected, a new definition of dwelling house has been included that not only describes its use as a primary residence with kitchen, bathroom and sanitary facilities but extends to a building with dual usage, ie, secondary small scale commercial purposes. Section 45 also introduces a new dimension of land size to the dwelling house which dictates the point of reference for measuring the protected zone. If the allotment on which the house is situated is more than 0.4 hectares, a distance of 25 metres from the outer eaves of the dwelling house is used,[90] but for smaller allotments, the boundary of the allotment forms the limit of the protected zone.[91]

The manner in which land uses are protected by section 45 have been made simpler as a result of using a dwelling house in combination with allotment size because fixed reference points are used and it is no longer necessary to determine the protection zone by reference to broad land use concepts such as 'garden' or 'orchard' that are subject changes in growth and reduction. This approach should also ensure that a substantial farm building, a dam, garden, orchard or vineyard, can continue to receive protection where they are sufficiently proximate to the dwelling house. This reform approach to the operation of section 45 ameliorates the impact of the removal of these land uses from section 45(1) and represents a major shift in the way in which competing land uses are addressed.

7.2 Community Uses

The changes to section 45 will most likely affect sites used for community purposes,[92] and in the future the protection of these land uses from mining activity will be subject to the power of the Minister to impose a condition on a licence to protect community facilities.[93] The ability of community organisations to seek protection for their community facilities will depend upon

---

89 Martin & McLean Lawyers with S R Molesworth QC op cit n 81, 117-120.
90 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 45(8)(b).
91 Ibid s 45(8)(a).
92 The removal includes a church, hospital, public building and cemetery.
93 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 26(2)(k).

making a submission at the time when an application for a mining licence has been made,[94] though the nature of the works is often unknown then, or as part of the planning process or the assessment process under the *Environment Effects Act 1978.* Submissions made in this manner are capable of being translated into licence conditions that can tailor protection for community buildings to the particular risks and require the licensee to meet appropriate performance based conditions.[95] This approach is similar to the condition requirement adopted in the Northern Territory.

This reflects the practice of how issues associated with mining and community activities are resolved, with greater focus on using the planning and environment frameworks to address these competing uses.[96] This approach reflects the view of the Inquiry that the public interest associated with public sites is capable of being adequately protected through the planning and environmental processes.[97]

7.3 Mining Uses

The *Tech-Sol* case highlighted the problem associated with a lack of definition of 'work'. Even activities of a minor nature, for example the erection of a fence or the building of power lines or pipelines as project support infrastructure could trigger the need for consent under section 45. Reform of section 45 also considers the range of mining activities that may be undertaken and distinguishes their operation within a protected zone according to the impact of such activities. For example, low impact exploration within the protected zone does not require consent from the owner[98] but other activities which include excavations for exploration using mechanised equipment, the construction of roads or bulk storage of ore, construction or use of dams for tailings[99] recognise a broader range of activities that bear a close connection to the actual removal of ore from the ground. There is scope to broaden the range of 'works' as section 45(7) enables any other activity to be prescribed as 'work'. Mining activities that are captured by the definition of 'works' while they do not reflect the Inquiry's recommendation to identify both 'core' and 'ancillary' works, nevertheless include some 'ancillary' works relating to access and storage infrastructure. It represents a level of detail that is not found in other Australian jurisdictions, but aims to provide clarity for miners and landowners regarding the scope of works to which section 45 applies.

The reforms confirm existing operations (both exploration and mining) within the protected zone that were reliant on owner/occupier consents, and thereby remove the uncertainty created by the *Tech-Sol Resources P/L* case.[100] But it should not be assumed that the reforms simply preserve the status quo regarding the previous operation of section 45. Section 45A demonstrates that current mining activities within the protected zone are preserved to the extent that at the date of commencement of the provision the work is being done in accordance with an approved and registered work plan or work authority. Further, the preservation of mining activities is limited to work done within 100 metres of a dwelling house that existed before the approved work plan was

---

94 Ibid s 24.
95 Victoria, *Parliamentary Debates,* Legislative Assembly, 20 July 2006, 62, 64 (Bob Cameron).
96 Ibid pp 2492, 2494.
97 Martin & McLean Lawyers with S R Molesworth QC, op cit n 81, Rec 3.1, p 82.
98 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 45(7).
99 Ibid.
100 Victoria, *Parliamentary Debates,* Legislative Assembly, 20 July 2006, pp 2492, 2494 (Bob Cameron).

registered.[101] While this reflects the use of a 'dwelling house' as the determinant for land uses to be protected under section 45(1), it means that where mining was undertaken within 100 metres of a site no longer identified by section 45, and no dwelling house existed prior to the approval of the work plan, that land can be used for mining without the need to obtain the consent of the owner. This does however depend on the work is being done in accordance with the approved work plan.

7.4 The Consent Mechanism

Reform of section 45 preserves the power of the owner of the land[102] and a person or body under subsections (4), (4A) or (4B) to consent to future mining activities within the protected zone. It is only in circumstances where there is no dwelling house that the owners of community sites, or a factory, dam, orchard or vineyard, no longer have the power to determine whether mining activity will occur within 100 metres of the site. Where a variation relates to exploration and mining work the subject of a consent under section 45 or permitted by section 45A in the protected zone, or work is authorised by the Minister under section 46, a new consent from the owner of the land will be required under section 47. This provision finally clarifies the circumstances in which a new consent is required within the protected zone and places a limitation on the binding nature of the consent where new works with significant impact are proposed.

The use of the consent mechanism to determine variations to mining work is not applied in the same manner to variations required for exploration activities where a distinction is made between significant and lesser works. The consent mechanism is applied by the Department Head rather than the landowner, and while it applies to new exploration work within the protected zone where a consent is given by a land owner, is permitted by section 45A or authorised under section 46, consent is only required where the Department Head considers that new work will result in significant changes to exploration work

Consent is no longer required from the occupier, who is now bound by the owner's consent, and this reform has much in common with not only the predecessors of section 45, but also similar provisions in South Australia. Section 45(5) makes it clear that an owner's power of consent extends only so far as to require conditions as to depth and distance. This limits the manner in which the consent mechanism can be used by the landowner to address issues associated with use of the land for mining work. This approach is contrary to the broad enabling interpretation given to the power of consent by the Tribunal in the *Tech-Sol Resources P/L* case and SA legislation which enables an owner to impose a broad range of conditions as part of their consent. Nevertheless the owner of land including an adjacent owner, could seek to include conditions regarding land use as part of a compensation agreement negotiated with the licensee under section 85 of the Act.

Once consent has been obtained, it cannot be withdrawn, and binds all subsequent owners and occupiers.[103] The effect of the provisions is such that the consent being tied to the approved work plan is capable of applying to any future licensee and until the completion of the mining operation. The reforms however, do not address the situation where an owner refuses to give consent, or

---

101 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 45A(1).

102 This is a reference to land on which a dwelling house is situated. *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 45(2).

103 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 45(3)(b)(c).

cannot be identified or found. As the Tribunal observed, in such circumstances a licensee may request the Minister authorise the work under section 46.

Finally, a new subsection (3) adopts the recommendations of the Inquiry and provides that consents obtained under section 45 must be in writing and in the prescribed form. This goes beyond the form requirements in other Australian jurisdictions which specify only that the consent must be in writing. The consent must be placed on the mining register[104] which enables consents to be identified as a matter affecting the land for prospective purchasers.

8. CONCLUSION

Only time will test the effectiveness of the recent reforms to section 45 in balancing the competing interests of miners and landowners. Much will also depend on the extent to which improvements can be achieved beyond the scope of section 45 in the planning and environment processes. The reforms do represent a significant departure from a historical form that has survived for 100 years by providing greater clarity and transparency in the manner in which competing interests are to be reconciled. The reforms also reflect the fundamental and historically enduring importance of property rights with a focus on the protection of dwelling houses and associated buildings.

APPENDIX

Current Section 45

45. Prohibition of work near dwellings and certain places and sites

(1) A licensee must not, except as provided by subsection (2), (4), (4A) or (4B) do any work under the licence—

(a) within 100 metres laterally of—

(i) a dwelling house that existed before an approved work plan was registered in respect of the licence; or

…

(xi) land in respect of which an ongoing protection declaration is in force under the **Aboriginal Heritage Act 2006**; or

(xii) any Aboriginal place within the meaning of the **Aboriginal Heritage Act 2006** that is recorded in the Victorian Aboriginal Heritage Register under that Act; or

(xiii) an archaeological site on the Heritage Inventory established under the **Heritage Act 1995** or a place or object included in the Heritage Register established under the **Heritage Act 1995**; or

(b) within 100 metres below any area prohibited by paragraph (a).

Penalty: In the case of a corporation, 1000 penalty units.

In any other case, 200 penalty units.

---

[104] Ibid s 69(2)(a)(iiia).

Default penalty:

In the case of a corporation, 20 penalty units.

In any other case, 10 penalty units.

(1A) Despite subsection (1), a licensee may do any work prohibited by subsection (1) (except work within the prohibited distances of the area relating to a site described in subsection (1)(a)(xiii)) if the licensee is not required to obtain a permit for that work under section 42(7) or 42A.

(1B) Subsection (1A) applies regardless of whether the licensee has any of the consents referred to in subsections (2) and (4).

(2) A licensee may, with the consent of the owners of the land on which a dwelling house is situated, do work within the area prohibited by subsection (1)(a)(i) in relation to that dwelling house or within 100 metres below that area.

(3) A consent given by any owner of land under subsection (2)—

(a) must be in writing and in the prescribed form (if any); and

(b) cannot be withdrawn by that owner or by any subsequent owner of the land; and

(c) binds all subsequent owners and occupiers of the land.

(4) A licensee may, with the consent of any person or body nominated under section 18(a) in relation to the application for the licence, do work within the area prohibited by subsection (1)(a)(xii) or within 100 metres below that area.

(4A) A licensee may, with the consent of the Executive Director (within the meaning of the **Heritage Act 1995**) in respect of a place or object that is included in the Heritage Register established under the **Heritage Act 1995**, do work within the area that is prohibited in relation to that place or object by subsection (1)(a)(xiii), or within 100 metres below that area.

(4B) A licensee may, with the consent of the Executive Director (within the meaning of the **Heritage Act 1995**), in respect of an archaeological site on the Heritage Inventory established under the **Heritage Act 1995**, other than an archaeological site which is a place or object to which subsection (4A) applies, do work within the area that is prohibited in relation to that archaeological site by subsection (1)(a)(xiii) or within 100 metres below that area.

(5) An owner who consents under subsection (2), or a person or a body that consents under subsection (4), (4A) or (4B), may make the consent conditional on the following matters only—

(a) specified distance restrictions;

(b) specified depth restrictions.

…

(7) In this section—

dwelling house means a building that is used primarily, or is intended, adapted or designed to be used primarily, as a residence, (including kitchen, bathroom and sanitary facilities) for an occupier who has a right to the exclusive use of it and

includes a building that may, in addition to its primary residential use, be used for small-scale commercial activities;

work means any of the following activities—

(a) any excavation for the purposes of mining or bulk sampling of ore;

(b) any excavation for the purposes of exploration using mechanised equipment;

(c) any construction or use of any opening, excavation, structure or equipment for access to, or ventilation of, underground workings;

(d) any treatment, extraction, handling or processing of minerals using plant or equipment (other than hand-operated equipment);

(e) any construction or use of roads for the haulage of ore, waste rock or overburden;

(f) the bulk storage of ore, waste rock or overburden;

(g) any construction or use of dams for the storage of tailings, process water or groundwater;

(h) any construction or use of other facilities for the treatment, handling or storage of tailings or other wastes;

(i) any drilling (unless carried out with hand-held equipment);

(j) any other activity specified in the Regulations—

but does not include the carrying out of low impact exploration.

(8) For the purposes of subsection (1)(a)(i) the distance of 100 metres is to be measured from—

(a) the boundary of the allotment on which the dwelling house is situated if the area of the allotment is 0·4 hectares or less; or

(b) in any other case, a distance of 25 metres from the outer edge of any leave forming part of the dwelling house.