QR'S RAIL ACCESS UNDERTAKING IS APPROVED BY THE QCA*

On 20 December 2001 the Queensland Competition Authority approved Queensland Rail's draft rail access undertaking, bringing to a close 3 years of public consultation, negotiations and drafting, and paving the way for the introduction of competition in the provision of rail haulage services to the mining industry in Queensland.

Whilst competition will not happen overnight, the finalisation and approval of QR's Access Undertaking is a very important and significant step along the path towards competition.

Copies of QR's approved Access Undertaking are available on QR's website at:
www.networkaccess.qr.com.au

The next significant milestone on the path to third party access to QR's rail network will be the development of a standard access agreement for coal carrying train services.

Under clause 5.2 of QR's approved Access Undertaking, QR is required to prepare and submit to the QCA for approval a draft standard access agreement for coal carrying train services. QR is required to submit this draft by 20 March 2002.

Once the QR draft standard access agreement is submitted to the QCA, it seems likely that the QCA will make that draft available for public comment. The QCA must respond to QR on the draft standard access agreement within 60 days after QR submits the draft (or within such longer period as the QCA notifies to QR).

If the QCA requires changes to be made, QR will have 60 days to make those changes and submit an amended draft standard access agreement to the QCA.

As a result, it would appear that a final approved standard access agreement for coal carrying train services could be expected sometime around the middle of 2002.

QUEENSLAND LAND AND RESOURCES TRIBUNAL DECISIONS**

The full text of these cases can be accessed via the LRT's website: www.lrt.qld.gov.au

***In Re Doyle & Ors v Jeebropilly Collieries Pty Ltd* [2001] QLRT 83 (Smith DP)**

Costs – Special Circumstances

Background

In 1996 Jeebropilly Collieries Pty Ltd (the Respondent) applied for a mining lease part of which covered the Doyles' (the Applicants) land. The Applicants did not object to the Respondents'

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* Bruce Adkins, Senior Associate, Corrs Chambers Westgarth, Brisbane.

** Rachel Scarrabelotti, Research Officer to the Presiding Members, Land and Resources Tribunal.

mining lease application but as the landholders they became involved in compensation proceedings. The compensation hearing was set down for 9 November 1998 but was put back to commence on 29 January 1999. On 25 January 1999 the Respondents gave notice that the Applicants' land had been excised from the lease and on 28 January the Applicants' solicitors advised the Wardens Court that as their clients were no longer affected they had no intention to appear. There was no mention of costs. On 1 February 1999 the Wardens Court ordered the compensation proceedings be struck out. In July 1999 the Applicants started proceedings in the Warden's Court seeking an award of costs under s. 368 of the *Mineral Resources Act* 1989 (MRA) for the costs they incurred in relation to the Respondents' mining lease application. While the Mining Warden's decision remained reserved, the Land and Resources Tribunal (LRT) received jurisdiction and the matter was transferred. Also, s. 368 of the MRA was repealed and s. 50 of the *Land and Resources Tribunal Act* 1999 (LRT Act) came into force. It is established that in these circumstances s. 50 of the LRT Act is to apply[1], such that absent special circumstances, each party bears their own costs.

Claims for Special Circumstances

Before the Tribunal both the Applicants and the Respondent claimed special circumstances existed warranting an award of costs in their favour. The special circumstance the Applicants pointed to was the Respondents conduct in excising their land from the lease just before the compensation hearing. The Applicants also sought costs for expenses incurred in commercial negotiations between the parties in which the Respondent was attempting to purchase the Applicants' property. The Applicants solicitor admitted they had failed to apply for costs at the time "in error" and subsequently that the slip rule was applicable to overcome this. The Respondent claimed special circumstances in that the Applicants' failure to apply for costs at the time of the compensation proceeding, and their application of July 1999, put the respondent to unnecessary expense. The Respondent argued that the proper time for the Applicants to have made an application for costs was at the time of the compensation determination on 29 January or 1 February 1999. The Respondent further submitted that the slip rule had no application here, as the costs application was not a mere oversight but rather an afterthought.

Decision

Applying various authorities,[2] Smith DP held that the Applicants' application was made out, principally, as had the application been made on 29 January 1999 under s 368 of the MRA, the Mining Warden would have awarded costs to the Applicants. The Respondent had excised its mining lease application from the Applicants' land only just before the compensation hearing and this constituted special circumstances meriting an award of costs. Smith DP held though that the costs recoverable were limited though to those that related "clearly and unmistakably to the matter before the Wardens Court for the determination of compensation". The Applicants were not entitled to recover any costs of the commercial negotiations. Smith DP ordered that the Respondent pay the Applicants' reasonable costs of the matter before the Wardens Court in

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1 *Leinung v Mann* [2000] QLRT 6; Re Bendell & Ors v Allgas Energy Ltd [2001] QLRT 59.

2 [2001] QLRT 83 at [17] – [20], *Bailey v Marinoff* (1971) 125 CLR 529 at 530, *L Shaddock & Associates Pty Ltd v Parramatta City Council [No. 2]* (1983) 151 CLR 590 at 597, *Gould v Veggelas* (1985)157 CLR 271 at 274-6, *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd [No. 2]*(1988) 62 ALJR 151 at 151-2.

relation to the compensation determination and ordered that there be no order as to costs with respect to the commercial negotiations between the parties.

As to the Respondents' claim for costs, Smith DP found that special circumstances existed: the failure of the Applicants to apply for costs at the requisite time put the Respondent to unnecessary expense. Smith DP ordered that the Applicants pay the Respondents reasonable costs of the costs proceeding before the Tribunal.

Smith DP also granted certificates under s 22 of the *Appeal Costs Fund Act* 1973 for costs thrown away by the parties with respect to their applications for costs before the Mining Warden.

***Bjeulivuk & Uzarevic v Gemstone Exploration Pty Ltd* [2001] QLRT 90 (Koppenol P)**

Partnership – Joint Venture Agreement

Background

In December 2000 Gemstone Exploration Pty Ltd's (the Respondents) representative Mr. Reid, and Mr. Bjelivuk, discussed conducting a mining operation together. Mr. Reid was to supply the necessary machinery and the Bjelivuks and Mr. Uzarevic (the Applicants) were to supply various mining tenements. Further discussions ensued, Mr. Reid inspected the Applicants mining tenements and the parties signed a formal written agreement in February 2001 which they termed a "joint venture partnership". The Respondent commenced mining operations in March 2001. The relationship between the parties began to disintegrate during March and April. On 18 April the Respondent registered a caveat over the Applicants' mining tenements. On 19 April the Applicant sent a letter purporting to terminate the February 2001 agreement on the basis that the Respondent had breached the terms of that agreement. The Applicants requested the Respondents to cease mining and remove all equipment from their mining tenements. On 24 April 2001 the Respondents' solicitors advised the Applicants' solicitors that the Respondent was resuming mining operations.

Application

On 3 May 2001 the Applicants brought an application before the Tribunal under s. 363 of the MRA seeking a declaration that the mining tenements held by them were to be used and enjoyed by them, to the exclusion of the Respondent. The Applicants also sought a permanent injunction restraining the Respondent from entering upon the tenements or carrying on any mining without the consent of the Applicants.

The Respondent filed a counter claim seeking a declaration that the Applicants' termination of the agreement between the parties was a breach of the agreement.

The main issues that arose for determination were whether the agreement between the parties was a joint venture or partnership agreement and whether the agreement had been effectively

terminated. An issue also arose as to how the property of the parties used under the agreement was to be divided.

Construing the agreement

In construing the agreement Koppenol P considered the main indicia of joint ventures and partnerships, noting that, consistent with a partnership agreement, the parties had agreed to share the profits, rather than the products they extracted. In these circumstances Koppenol P held that a partnership existed between the parties.

Termination

In determining if the notice to terminate the partnership was effective Koppenol P noted that there was no reference in the partnership agreement as to the time when the relationship was to continue and that there was no termination clause in the agreement. As such, Koppenol P held that the partnership, not being a fixed term partnership or a partnership for a single venture, had been entered into for an undefined time. As such, under the *Partnership Act* 1891, the partnership could be dissolved by any partner giving notice to the others. The President noted that this power was qualified in that it had to be exercised by a partner bona fide and not for the purpose of deriving an undue advantage,[3] and not fraudulently.[4] Here the President found no evidence of fraud or bad faith on behalf of the Applicant and noted that in any event fraud or bad faith had not been pleaded by the Respondent. In the circumstances the President concluded that the letter of 19 April 2001 effectively dissolved the partnership.

Partnership property

As to the partnership property, Koppenol P concluded, "that the separate property of each partner which was used in the partnership has remained the separate property of that partner", there being no mention in the agreement and no conduct on behalf of the parties that led to any other result.[5]

Order

Following these conclusions Koppenol P granted the declaration and injunction sought by the Applicants, and ordered that the Respondents counterclaim be dismissed.

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3 *Bilioara Pty Ltd v Leisure Investments Pty Ltd* [2001] NTCA 8 applying, *Neilson v Mossend Iron Co* (1886) 11 App Cas 295.

4 *Walters v Bingham* [1988] 1 FTLR 260.

5 *Kelly v Kelly* (1990) 64 ALJR 234 at 237.

***Barrett v McLoughlin* [2002] QLRT 1 (Koppenol P)**

Meaning of "agent" under the MRA

Background

This was an application for leave to appeal against an order made by Smith DP, directing a Mining Registrar to grant a mining claim. Before Smith DP the Applicant here had objected to the grant of the mining claim on the basis that the Respondent had been "illegally mining" on the mining claim area for a period of 18 months to two years. Evidence was led that the Respondent had been authorised by the holder of the lease to conduct some mining and that the Respondent strayed off the lease into the proposed mining claim area. The Deputy President found that the Respondent had been working the lease based on an arrangement with the holder of the lease and that although the Respondent had conducted illegal mining that had occurred due to a "simple mistake" in checking compass bearings.[6]

Application for leave to appeal

The Applicant appealed on the basis that the "simple mistake" explanation could not apply as the Respondent was not lawfully entitled to mine on his own behalf on the lease area. The Applicant's agent pointed to s 235(1) of the MRA which states that the holder of a mining lease and any agent or employee of the holder is entitled to enter the lease area and mine. The Applicant's agent submitted that the term "agent" did not include persons who were merely permitted by the mining lessee to be on the lease, and as such, Mr. McLoughlin was therefore unauthorised to mine and accordingly his activities were illegal.

Koppenol P applied *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd*[7], in which the Full Court of Western Australia held that the word "agent" in s 85(1) of the *Mining Act* 1978 (WA) included persons authorised by the lessee of a mining lease to mine for their own account. Noting that s 85(1) of the *Mining Act* was materially similar to s. 235(1), Koppenol P held that s 235(1) of the MRA should be similarly construed, and that the word "agent" had an extended meaning and included persons authorised by the lessee of a mining lease.

In these circumstances, as the Applicant had not demonstrated that there was an issue about whether the Respondent was engaged in "illegal mining", Koppenol P refused leave to appeal.

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6 [2001] QLRT 56 at [18], [52], [2001] QLRT 82, at [37], [38].
7 (2000) 22 WAR 101.

Armstrong v Miles **[2002] QLRT 3 (Koppenol P)**

Meaning of 'mine'

Background

This was an application for leave to appeal against a recommendation by Kingham DP that a certain mining lease be granted. The Objectors to the mining lease application had submitted that the mining lease could not be granted on the basis that the mining activities proposed by the Applicant did not constitute 'mining' under the MRA,[8] but rather fell within the statutory definition of 'explore'[9] and were exploration activities. The proposed activities involved excavation of 100 small test slots over the surface of the application area. The Applicant's evidence disclosed that the activities proposed were intended to ascertain the extent of mineralisation and to identify the most prospective areas for subsequent production. The Applicant intended that if he found economic deposits he would peg them and apply for a mining lease or leases over the areas identified. The Applicant claimed that the testing program was a proper facet of mining and a necessary preliminary aspect of mining.

The questions for Kingham DP were whether the proposed activities of the Applicant fell within the definition of mine, and whether the definitions of 'explore' and 'mine' were mutually exclusive. The Deputy President held that the definitions of 'explore' and 'mine' were not mutually exclusive and that the MRA "should not be interpreted to use the definition of explore to read down the definition of mine".[10] As such Kingham DP held that the Applicant's proposed activities fell within the definition of mine and recommended that the lease be granted.

Application for leave to appeal

The Objectors (here the Applicants) sought leave to appeal arguing that the mining lease was sought for exploration and testing purposes only on the basis that the Respondents proposed activities fell within the definition of 'explore' not 'mine' and that these definitions were mutually exclusive.

In considering whether to grant leave Koppenol P pointed out that here the proposed activities were not to ascertain *if* the subject area was mineralised (an activity that could be described as exploration), but rather the proposed activities were to ascertain the exact location and quantity of mineralisation which was *known* to exist, prior to its excavation and removal. In these circumstances Koppenol P held that the proposed activities fell within the definition of "mine". The President also rejected the Applicant's submissions that the statutory definitions of 'explore' and 'mine' were mutually exclusive, following the decisions in *Gonzo Holdings No 50 Pty Ltd v Grundy*[11] and *Gonzo Holdings No 50 Pty Ltd v McKie.*[12] In these circumstances the President refused leave to appeal.

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8 The definition of 'mine' is found in s. 6A MRA.

9 Schedule to the MRA.

10 [2001] QLRT 93 at [15], following *Gonzo Holdings No 50 Pty Ltd v Grundy* [1994] QSC 201 at 205; *Gonzo Holdings No 50 Pty Ltd v McKie* [1996] 2 Qd R 240 at 249.

11 [1994] QSC 201 at 205.

Mount Isa Mines Limited and Itochu Coal Resources Australia Pty Ltd v The Birri People Native Title Claimants **[2002] QLRT 6 (Koppenol P*)***

Native title access agreement

This was the first application for an access agreement pursuant to s 491A of the MRA which had come before the Tribunal. The Applicants were the holders of a low impact exploration permit for coal and the Respondents held a registered native title claim over the land. The parties attempts to negotiate an access agreement were unsuccessful and under s 491A of the MRA the matter came before the Tribunal to determine the terms of an access agreement and also to make a compensation trust decision for the registered native title party under Part 18 of the MRA. The Applicants filed a proposed access agreement in November 2001 in accordance with orders made by Koppenol P. The Respondents filed a list of objections in response and a revised draft agreement was filed by the Applicants in February 2002. The matter was heard by a Tribunal panel consisting of Koppenol P, Dr. E Fesl and Mr. D. Webster, but under the LRT Act the decision is made by the President only.

The following is a list of the Respondents' main objections to the access agreement proposed by the Applicants and the determination of the Tribunal relating to each objection.

- Applicants' entry to the area

The Respondents asserted that the Applicants' entry should be limited to such times and parts of the area so that the Respondents would be able to continue to exercise their native title rights and interests. Koppenol P did not accept this objection on the basis that the Applicants' activities would not impact upon the Respondents' ability to exercise their native title rights and interests, and in light of the fact that the Respondents had never previously accessed the area and there was as yet no Federal Court determination that the Respondents held native title.

- Capacity of the Applicants to assign the agreement

The Respondents asserted that they should have the right to refuse an assignment in circumstances where the Applicant breached the access agreement and the breach was not remedied. In rejecting this objection Koppenol P noted that such a power was not included in the State ILUA or the KERG ILUA (documents which were in evidence), and that in any event, under ss. 141(1)(h) and 488A(2) of the MRA the Applicant had to comply with the MRA and the access agreement, respectively, and these provisions sufficiently protected the Respondents.

- Costs of Liaison Officer

The Respondents submitted that the Applicants should pay the Respondents' costs of a Liaison Officer and pointed out that in the State ILUA and the KERG ILUA, this practice occurs. The Applicants submitted that $2000 would be adequate to cover such an expense. Koppenol P was satisfied that $2000 would be adequate.

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12 [1996] 2 Qd R 240 at 246 and 249.

- Costs of negotiating the access agreement

The Respondents submitted that the Applicants should pay all of the Respondents' costs, including their legal costs, incurred in negotiating the access agreement. The Applicants offered to pay the Respondents $4000 to assist the Respondents in exercising their rights and complying with the obligations under the access agreement, $2000 of which was for the costs of the liaison officer mentioned above. The President noted that he was not satisfied that it was appropriate to deal with such a subject in an access agreement and there was no evidence as to the work undertaken by the Respondents' solicitor during the negotiation for the agreement. As such there was no basis for him to reach a conclusion as to costs. However, the President did order that the Applicants pay the Respondents the $4000 mentioned above.

- Definition of "cultural heritage material"

The Respondents sought the definition of "cultural heritage material" to be expanded to include sites and areas of land in addition to "items and objects". The Applicants opposed this amendment on the basis that the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987 and the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) awarded the Respondents sufficient protection. The President agreed and refused to amend the definition.

- "Keeping house" for cultural heritage materials

The Respondents requested that a "keeping house" be established by the Applicants for any cultural heritage materials located in the area. In response to this Koppenol P inserted an additional clause into the access agreement detailing the procedure for the preservation, protection and relocation of any cultural heritage materials located by the Applicants.

- Presence and costs of a monitor

The Respondents required the presence of a monitor throughout the period of access and requested that the Applicants pay the costs of the Respondents' monitoring. The Applicants were amenable to the Respondents monitoring their activities but stated that such monitoring should be at the Respondents' expense. The President declined to order a specific amount be awarded for the costs of the Respondents' monitoring, but noted that the Respondents could utilise part of the $4000 mentioned above for monitoring costs.

- Applicants earthmoving equipment

It was submitted by the Respondents that the Applicants earthmoving equipment should be described in the access agreement and should not exceed the minimum size necessary to conduct the work. In response to this objection the Applicants submitted that the activities they were able to conduct were already stipulated in s. 482 of the MRA which defines low impact activities. Koppenol P agreed with the Applicants – the MRA permitted the Applicants to have entry to the area for low impact activities without delineating the type of equipment which could be used. In these circumstances the President declined to include in the access agreement a provision as to the equipment the Applicants could use.

Compensation

The parties agreed that the compensation trust decision should be nil and the President so ordered.

The President found the Applicants' proposed access agreement, after the insertion of an additional clause for the relocation of cultural heritage material, to be appropriate for the purposes of s 491 of the MRA.

Compensation Decisions

A number of decisions have been made recently by the Land and Resources Tribunal regarding compensation payable for mining leases granted over exclusive tenures in the Emerald district in Queensland.[13] The Tribunal adopted a similar approach to that of the Land Court of Queensland and confirmed that compensation was to be assessed as a whole and that the matters set out in the compensation provisions of the MRA did not represent distinct heads of compensation.

In *Richardson v Barrett*, Smith DP held that a property within a known mining field (RA1) was not subject to an "additional encumbrance" by virtue of the grant of the mining lease.[14]

In each of the cases the inclusion of legal and valuation costs in the award of compensation was considered. In *Barry v Barrett*, Kingham DP rejected an application by the landholder to recover the costs of his lay representative under s 281(3)(a)(vi) (loss or expense that arises). In the other matters, Smith DP did not include in his awards of compensation any allowance for legal or valuation fees, due to the lack of evidence about either the existence or the quantum of such costs.

INTEGRATED PLANNING AND OTHER LEGISLATION AMENDMENT ACT 2001 (QLD) — ITS IMPORTANCE IN RELATION TO MINING AND PETROLEUM ACTIVITIES[*]

Introduction

The *Integrated Planning and Other Legislation Amendment Act* 2001 (Qld) (Act No. 100 of 2001) ("IPOLA") was passed by the Queensland Parliament on 12 December 2001 and received royal assent on 19 December 2001. A small number of the provisions commenced on assent. The remainder of IPOLA will commence by proclamation. It is now expected that IPOLA will be further amended and that the proclamation of the remaining provisions of the Act will most likely be held in abeyance until these amendments are also passed. It is expected that IPOLA will be proclaimed by the middle of this year.

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13 *Richardson v Barrett* [2001] QLRT 89; *Deeley v Hicks* [2001] QLRT 94; *Weir & Rasmussen v Barrett* [2001] QLRT 95 and *Barry v Barrett* [2002] QLRT 2.

14 Cf Trickett P of the Land Court, who included compensation for this impact in *Zimmerebner v Hawkins & Anor* (1999) 20 QCLR 71.

* Peter Rowell, Special Counsel, Blake Dawson Waldron.