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EPA refusing to assess some significant proposals

Josie Walker, Principal Solicitor

It is a central part of Western Australian environmental law that the Environmental Protection Authority ("EPA") has the power and responsibility to assess proposals in Western Australia which are likely to have a significant effect on the environment. In fact, parliament has decided that the EPA's environmental impact assessment process should actually prevent significant proposals from being commenced, and prevent other ministers and government agencies from issuing any other approvals, until the EPA's assessment is complete.

The environmental impact assessment process under the *Environmental Protection Act 1986* (WA) is therefore the primary, foremost, principal approval process for proposals which may significantly affect the environment, and parliament has required that process to be undertaken by the independent expert EPA. Yet in a series of recent decisions the EPA appears to be deferring its responsibilities to other, non-expert agencies which may not actually assess environmental impacts at all.

In recent decisions on proposals such as Polaris Metals Pty Ltd's drilling program in the Helena-Aurora Range and Austral Bricks' clay and shale extraction in the Shire of Serpentine-Jarrahdale, the EPA decided not to assess the proposals on the basis that another decision maker had the power to do the assessment. This is problematic at a practical level for several reasons:

- The other decision maker may not have the expertise or resources to assess environmental impacts;
- The other decision-maker may decide not to assess environmental impacts adequately or at all, even if they have some power to do so. Ironically, they may decide not to assess environmental impacts on the basis that the EPA found that the proposal was not environmentally significant. If this happens, the EPA can't force the decision-makers to reconsider the environment, or even recall its own decision;
- The other decision-maker may not have the same powers as the EPA to require the proponent to prepare environmental impact assessments. The EPA can require investigations, further information, and for information to be the subject of independent reviews. Few other agencies have these powers at the assessment stage;

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Great Western Woodland, home of the Helena-Aurora range. – Jenita Enevoldsen

contents

Lignite withdraws Collie coal exploration licence applications

Jess Smith, Outreach Solicitor

One of the EDO's clients recently had a win in the Perth Warden's Court when Lignite Pty Ltd withdrew its applications for three coal exploration licences in Collie. The exploration licences covered large areas of land in Collie, including the Collie townsite itself.

Several objections were lodged in relation to the grant of the exploration licences, which had been applied for in April 2011. The EDO provided assistance to one of the objectors, a resident of Collie whose land was affected by the exploration licence applications.

At a mention hearing on 16 December 2011, Lignite sought to withdraw the exploration licence applications on the condition that the objectors not seek any costs against Lignite. The objectors agreed to the withdrawal on this basis and the Warden therefore granted Lignite leave to withdraw with no orders as to costs.

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EDO tackles toxic rare earth exports to Malaysia

Moshe Phillips, Paralegal

The EDO, on behalf of its client the Anti-Nuclear Alliance of Western Australia ("ANAWA"), has asked the Environmental Protection Authority ("EPA") to carry out a full public assessment of the processing and export of rare earths from a mine at Mt Weld, 35km south-east of Laverton, to a rare earths plant in Malaysia. The Australian company Lynas Corporation Ltd owns and operates the rare earths mine and has recently completed construction of the world's largest rare earths processing plant, the controversial Lynas Advanced Materials Plant ("LAMP") in Kuantan, Malaysia. The construction of the plant has been met with overwhelming opposition in Malaysia due to environmental, health and other related concerns. The EDO was engaged by ANAWA to advise on Lynas's operations under Australian law, which culminated with the referral of the project to the EPA on 6 March 2012.

Rare earths are a set of 17 chemical elements which are used to make modern electronic devices including high performance magnets and light emitting diode phosphors, iPads and Prius cars. However, the rare earths ore from Mt Weld also contains the radioactive elements thorium and uranium, which remain present in the concentrate.

The EDO's investigation into Lynas's Australian operations has uncovered a raft of significant changes to the proposal since the project's original approval under the *Environmental Protection Act 1986* (WA) in 1992. The project that was approved in 1992 was of a much smaller scale with all processing to be undertaken in Western Australia. Since then the project has been changed on a number of occasions. Most significantly, the secondary processing of ores which was to have occurred in Northam was moved offshore. By moving the processing offshore, Lynas will benefit from cheaper labour costs and less stringent environmental conditions. Furthermore, the operations at Mt Weld are now in the process of scaling up to a beneficiation output of 75,000 tonnes per year, whereas the project as it was assessed in 1992 only considered an output of 10,000 tonnes per year. The EDO, in its submission attached to the referral of the project, argued that the project is now substantially different from that which was assessed and approved in 1992. The submission contended that the project now represents a distinct proposal that must be assessed according to the *Environmental Protection Act 1986* (WA) so the environmental impact can be assessed in its entirety.

The potential impacts of the LAMP in Malaysia provided further motivation for the EDO to pursue this matter. Lynas's Malaysian plant is situated within a small industrial park in Kuantan, on the east coast of the Malaysian peninsula. The site is near an environmentally sensitive tropical mangrove peatland (which is prone to flooding) and which has a very high water table only 1m below the surface. Moreover, the South China Sea is only 3.5km away and the surrounding area is densely populated, with 700,000 people estimated to be within a 30km radius of the LAMP.

The question of how to dispose of the waste has been a major sticking-point for Lynas and a chief cause of the huge demonstrations the project has provoked in Malaysia. The refining process involves large quantities of highly hazardous chemicals and reagents such as sulphuric acid, magnesium oxide, hydrochloric acid and phosphoric acid. Due to the substantial quantities of highly toxic materials used in the process of producing rare earth products, a permanent waste solution is critical. However, the existing facilities only have the capacity to store solid waste for the first two years of the project. It has been Lynas's plan that filtered waste water is to be discharged into the adjacent Balok River, an important mangrove habitat with four species on the global protection list of the International Union for Conservation of Nature. Waste water discharged into the river will also be a significant threat to crabs, prawns, lobsters, river fish, cockles and oysters, and will therefore threaten local livelihoods.

The idea of toxic waste derived in Australia and being dumped on Malaysians because it is cheaper and the environmental regulatory framework is much weaker poses serious ethical issues in addition to the environmental concerns. The EDO's referral asks the EPA to consider the increased impacts of the Mt Weld rare earths proposal due to the processing being moved offshore. Through its involvement in this case, the EDO is urging Western Australian authorities to act responsibly not only in relation to our local environment, but also to consider the impacts of local actions on the broader global environment. ■

Kuantan residents take their anti-Lynas message to the streets. – Lee Tan

Expert committee to scrutinise coal mining and coal seam gas proposals

Josie Walker, Principal Solicitor

Legislation has been introduced into the federal Parliament to establish an expert committee on the impacts of coal mining and coal seam gas ("CSG") proposals on water resources. The establishment of this committee has been driven by the groundswell of opposition to mining in rural areas of New South Wales and Queensland. It was also one of the commitments which independent and Greens MPs obtained from Labor after the last election to enable Labor to form government.

An interim Expert Committee has already been established to start providing advice to the Commonwealth Government informally on these issues before the legislation is passed.

Under proposed new provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), if the Commonwealth Minister believes that a coal mining proposal is likely to have a significant impact on water resources, then the advice of the Committee must be obtained before the Minister decides whether to grant approval. However, this would only apply to projects where the Commonwealth already has an approval role. Projects which currently require Commonwealth approval are those having an impact on a matter of national environmental significance, such a Commonwealth-listed threatened species, a national heritage area or Ramsar wetland.

If a state signs on to the National Framework Agreement on Coal Mining and CSG, the state environment ministers may also seek advice from the Expert Committee in connection with projects going through the state environmental assessment process. To date Western Australia has not signed on to this Agreement.

There is some resistance to the establishment of the Committee by state agencies who believe that involvement of an additional layer of Commonwealth scrutiny will slow down the assessment of applications for new resource development, costing the state economic growth.

However, in the author's view, Western Australia has more to gain than other states from obtaining the advice of the Expert Committee on new coal and CSG developments. Part of the charter of the Expert Committee is to look at likely hydrological impacts not only of individual development proposals, but also the cumulative impacts of coal and CSG development in a region. This is a particularly critical issue for Western Australia, where coal mining and CSG are being proposed for new, relatively untouched, areas. An analysis of cumulative impacts is important to determine whether these new industries ought to be allowed to gain a foothold in areas where this type of development is untried, and may be highly detrimental to other land and water users.

Another role of the Expert Committee is to advise on the carrying out of bioregional assessments. A bioregional assessment is the analysis of the hydrology, ecology and geology of an area for the purpose of determining the likely impacts of CSG or coal mining on water resources in the area. A bioregional assessment of a proposed new coal mining province such as the Canning Basin in the Kimberley could help to identify potential water resource conflicts before they occur.

Thus, by signing on to the National Framework and actively seeking the advice of the Expert Committee, the government of Western Australia could improve public confidence in decision-making in relation to new coal mining and CSG proposals.

Laying pipes to carry coal seam gas. – jeremybuckinghamMLC@flickr

Strategic assessment: urban development under the microscope

Josie Walker, Principal Solicitor

Managing biodiversity in the urban environment will be a key challenge for the residents of the Perth and Peel regions over the next 20 years, as the population is set to increase by 35-40%. The pressure to release more land for residential development will threaten remnant vegetation patches on the city fringe, while existing urban reserves will be placed under greater pressure due to increased usage and climate change.

Traditionally, environmental impact assessment has been focussed on the impacts of individual large projects such as industrial plants, mines and tourist developments. Meanwhile, the incremental impacts of a multitude of small-scale developments, such as residential subdivisions, have often slipped under the radar.

The Commonwealth government has responsibility for particular aspects of the environment which are governed by international treaties. These include the protection of threatened species, listed migratory species and Ramsar wetlands. These are known as "matters of national environmental significance". Under the Environment Protection and Biodiversity Conservation Act 1999 any action which is likely to have a significant impact on a matter of environmental significance requires approval.

However, the vast majority of urban development proposals are never assessed by the Commonwealth, because in isolation they do not reach the threshold of significance. Even where they do, there is no system in place to ensure that dozens of small-scale approvals do not add up to catastrophic consequences.

The Commonwealth and state governments are now attempting to address this problem by conducting a strategic assessment process for the Perth Peel Region. The idea behind the strategic assessment is to draw up a plan (called the "MNES Plan") for conservation of biodiversity on a landscape scale, and to carry out an assessment to determine whether the Plan will adequately protect matters of environmental significance within the plan area. Once the Plan is endorsed by the Commonwealth Minister for Environment, individual actions which are consistent with the Plan will not require Commonwealth approval.

This process is still in its early stages. In September 2011 the terms of reference for the MNES Plan were placed on public exhibition by the Western Australian Department of Premier and Cabinet. The final terms of reference are yet to be released. Following this, a draft MNES Plan will be prepared in consultation with relevant government agencies, and we hope, community and conservation groups. The Department has said that the draft MNES Plan will be released for public comment some time in 2012, although this timeframe seems optimistic.

It is not yet clear how the MNES Plan will be designed to provide certainty for biodiversity protection in the urban area. The EDO has argued that a key element of the MNES Plan should be the protection of remnant habitat for listed threatened species via legally binding planning instruments.

EDO members are encouraged to have their say on the MNES Plan when it is released, or beforehand if the opportunity arises. A robust plan will be critical for conserving the biodiversity of the Perth and Peel regions for the next twenty years and beyond. ■

EPA assessment refusals

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- The public is excluded from many other decision making processes;
- Very few other decision making processes give members of the public a statutory appeal right. The process for appealing EPA recommendations is open to everyone, allows people to raise factual (rather than only legal) concerns, and can result in the overturning of a decision (rather than just sending the decision back to the same decision-maker);
- The other decision maker may not have the resources to assess the environmental impacts. Again, if this happens, the EPA can't force the decision maker to consider the environment, or even recall its own decision.

The EPA's decisions are also problematic for several legal reasons.

The EPA has tried to give itself the ability to refuse to accept proposals for assessments on the basis that another decision maker has the power to do the assessment under the non-binding, non-statutory, *Environmental Impact Assessment Administrative Procedures 2010*. In section 7 of these *Administrative Procedures*, the EPA states that:

> In determining whether a proposal is likely to have a significant effect on the environment, the EPA may have regard to the following … (j) the extent to which other statutory decision making processes meet the EPA's objectives and principles for [environmental impact assessment].

Whether or not other decision making processes might apply, however, clearly does not affect whether a project is actually significant for the environment or not. Significance to the environment is based on values, sensitivity, quality and resilience of the environment, and the extent and magnitude of the impacts (including cumulative impacts). The EPA's responsibility is to decide whether or not to assess a proposal, based on an assessment of the significance of the proposal. It does not have the power to decide something does not need to be assessed because another decision making process might apply, or to decide something isn't significant because of issues which are plainly nothing to do with significance. The *Administrative Procedures* cannot change this.

The fact that other decision making processes may apply and thus cause "duplication" is not a valid reason for the EPA to refuse to perform its statutory duty to assess the significance of proposals.

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Legal challenge to SA uranium mine unsuccessful

Emily Campbell, EDO Volunteer, Jesse Roberts, EDO Volunteer and Josie Walker, EDO Principal Solicitor

Traditional owner Mr Kevin Buzzacott has lost a Federal Court case challenging the approval of BHP Billiton's Olympic Dam uranium mine expansion in South Australia. The case highlights important issues which are also looming about the approval of uranium mines in Western Australia.

The Olympic Dam mine expansion, which was granted approval in October 2011 by the Commonwealth Minister for Environment, Tony Burke, will result in large amounts of radioactive waste being stored above ground. Olympic Dam already has four above ground "tailings" storage cells in use to deal with waste from uranium processing, but BHP Billiton proposes that up to nine more would need to be built to accommodate increased activity as part of the planned expansion. Apart from uranium, the site also extracts and processes copper, gold and silver.

However, BHP Billiton has a questionable track record with its environmental management at the existing site. Its Environmental Impact Statement notes that contact with acidic evaporation ponds as part of the tailings system has been causing bird deaths. The statement also mentioned that dangerous seepage from the existing tailings storage facility had been the subject of an inquiry by a South Australian Parliamentary Committee in the past.

The Federal Court action was filed in February this year, and proceedings were expedited at the request of mine owner BHP Billiton. The judgment was handed down on 20 April, after a two-day hearing.

One important ground of challenge was that the Minister granted approval even though a large part of the expansion project is uncertain, to be defined in yet-unpublished plans and studies that have not been seen by the Minister or the public. This included the assessment of the environmental impacts and the details of the above ground tailings storage.

The Federal Court found that the conditions were legally permissible in this case because it was reasonably clear what criteria would be applied when approving the later management plans.

However, this does not preclude other challenges being made to these types of conditions in the future. In recent years authorities in Western Australia have frequently dealt with key environmental issues through requiring management plans to be submitted after approval. Such decisions may be invalid if it can be shown that the decision-maker did not have enough information about the possible impacts at the time that the approval decision was made.

A second ground of challenge in the Olympic Dam case was that the Minister failed to consider the impacts on the global environment from exporting uranium to other countries. The Federal Court found that the word "environment" under Federal environmental law referred to the environment of South Australia, not the global environment, therefore the Minister was not required to consider offshore impacts.

Western Australia may soon be facing similar issues of its own, with reports that Toro Energy is aiming to get the current Barnett state government's approval for a uranium mine in Wiluna. Toro will be hoping to secure approval early next year, before the state election scheduled for March 2013. The rush for approval comes with state opposition leader Mark McGowan's announcement earlier this year that if Labor is elected into government they will ban any new uranium mines in the state, but will not cancel any approvals already granted.

EPA assessment refusals

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Parliament has passed the *Environmental Protection Act 1986* (WA), and has also passed all the other Acts which set up decision-making processes. Presumably it knew and intended all of those processes would then actually apply! If duplication is a legitimate concern then it needs to be addressed by Parliament, not by one agency simply not performing its function.

The fact that the EPA might not have the resources to assess significant proposals is also not a relevant consideration for the EPA in deciding whether a proposal is significant. The EPA has been given the duty by parliament to assess significance, and then to assess significant proposals. Plainly then the government should see that the EPA is properly funded to carry out this function. Indeed, it is astonishing in a boom time in major proposals in Western Australia, when even industry is calling for more resources for the EPA to properly assess proposals, that more funding for the EPA has not been forthcoming.

The EPA's recent decisions undermine the scheme of the *Environmental Protection Act 1986* (WA) and the EPA itself. The EPA is passing on decisions about environmental issues to other decision makers when the environmental impact assessment processes and other approval processes are actually structured on the basis that:

- The EPA is the expert decision maker;
- The EPA assesses projects first and then other decision makers follow; and
- The EPA deals with issues of significance based on consideration of environmental factors.

Lignite withdraws applications

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The exploration licence applications were subsequently withdrawn on 23 January 2012.

The EDO welcomes Lignite's decision to withdraw the mining tenement applications. The case is a reminder that participating in the Warden's Court process can sometimes be an effective means of voicing concerns about exploration and mining proposals.

If you are considering lodging an objection to a mining tenement application, we recommend that you seek legal advice before doing so. For further information, see the article "Objections under the Mining Act: a 'how to' guide" on page 7 of this newsletter.

Time for cautious optimism in the Margaret River coal fight

Ed Fearis, Paralegal

Following a couple of recent wins, it could be time for cautious optimism on the Margaret River coal mining fight front. The most public of these wins was the Environmental Protection Authority's ("EPA") recommendation (subsequently accepted by the Minister for Environment, Bill Marmion) to reject Vasse Coal Pty Ltd's proposal for an underground coal mine and related facilities about 15km north-east of Margaret River. This mine was proposed to operate for 15 to 20 years, with a surface footprint of about 40 hectares and underground tunnel network of about 1,200 hectares, including below Margaret River town. Production of approximately 1.0 to 1.5 million tonnes of coal a year was forecast.

In May 2011 the EPA reported that serious risks to important environmental values in the Margaret River region (especially surface and groundwater resources) and the consequential impacts on the social surroundings rendered the Vasse Coal Project environmentally unacceptable. This report followed a public comment period in which the volume of objections crashed the EPA's new electronic submission computer system and caused the comment period to be extended (of the 793 public comments received only three were in support). The EPA's decision was appealed by Vasse Coal and three industry groups: the Association of Mining and Exploration Companies, the Chamber of Minerals and Energy (WA) and the Chamber of Commerce and Industry (WA). In December 2011 the Minister for Environment dismissed these appeals, citing serious risks to environmental values in the Margaret River area from the Vasse Coal Project. The result was thus an important (and rare) win for the environment in the EPA approvals process.

The Vasse Coal Deposit in the Margaret River area has been known about and explored since the early 1970s. However, in recent times interest in mining for coal has been sparked by improving coal prices – in the past decade coal prices have quadrupled, jumping from US$25 to US$100. This has led to a number of companies lodging exploration license applications over the relevant area including, most prominently, Western Coal Pty Ltd. Western Coal currently has five pending exploration licenses stretching over an area between Margaret River town and Dunsborough, just east of both towns.

In November 2011 the EDO was engaged by two local residents to object to two of Western Coal's exploration license applications (E70/4079 and E80/4080) that traversed their properties (there were a total of 80 objections lodged against all of Western Coal's applications). In January and February this year the EDO was busy with preparations for the hearing in the Mining Warden's Court, including the commissioning of an expert report on the impact of coal mining on water quality in the Margaret River area. No doubt spooked by the vigour in which their applications were fought, Western Coal withdrew their applications for licenses E70/4079 and E80/4080 in the week that the objectors' evidence was due to be lodged.

The fight is not over, though. At the time of writing, there are still 12 exploration licenses pending in the Margaret River area, most held by small, private ➤

Forest near Margaret River. – JeremyVandal@flickr

➤ companies. So far the Minister for Environment and Premier Colin Barnett have rejected calls for protective legislation, instead looking to planning and zoning controls to protect the region. However, section 111A(1) of the Mining Act 1978 (WA) confers on the Minister the power to terminate or refuse an application for a mining tenement if "the Minister is satisfied on reasonable grounds in the public interest that ... the land should not be disturbed ... or the application should not be granted". Therefore, following the withdrawal of applications for licenses E70/4079 and E80/4080 the EDO's next step was to try and persuade the Minister that all exploration licenses in the Margaret River area should be terminated or refused on public interest grounds. To this end, the EDO has written a letter to the Minister requesting that he exercise his power under section 111A to terminate or refuse the pending exploration license applications.

The principle lines of argument that the EDO ran in its section 111A submission relate to the impact of coal mining on the environmental values and local communities that the Margaret River area supports.

Firstly, underground coal mining is likely to adversely impact local surface and groundwater quality. The Vasse Coal Deposit is located approximately 160-500m underground in the Sue aquifer. The Sue aquifer is overlain by the Leederville aquifer. The Leederville aquifer is the major regional aquifer in the south-west of Western Australia and has a known groundwater discharge feature to the Margaret River. It provides water for local agriculture, town drinking supplies and local ecosystems (which house a number of threatened fauna). There is also a high degree of hydraulic connectivity between the Sue and Leederville aquifers. Therefore, it is highly likely that mining in the Sue aquifer would result in the inflow of large volumes of water into the mining void, with a resultant reduction in groundwater availability. Moreover, water entering an underground mine would need to be extracted and disposed of. However, this water is likely to be heavily contaminated; typical contaminants including coal particles and dust, sulphuric acid, heavy metals and organic compounds. It is highly doubtful whether this water could be disposed of safely.

Secondly, it is likely that significant amounts of native vegetation would need to be cleared in order to accommodate underground coal mining – principally, to upgrade transport routes. However, native vegetation in this area includes a number of endangered species and is the habitat for a number of endangered species of fauna. (Indeed, the south-west of Western Australia is internationally recognised as a global biodiversity hotspot.) Moreover, clearing of native vegetation, particularly if it occurs in State Forests, has the potential for impacts beyond the direct effect on native flora and fauna. This could include the spread of dieback and weeds, dust deposition on vegetation, and chemical spills.

Thirdly, coal mining in the Margaret River area will adversely affect local communities. Tourism, agriculture and viticulture are currently the economic mainstays of the area, and there is concern among all sectors that coal mining would damage these industries. For example, it is arguably not in the public interest to allow coal mining in an area which is heavily reliant on nature tourism, because the actual or perceived impacts of coal mining will discourage tourism and tourism-related investment. What's more, genuine concerns have been raised about the impact of emissions such as dust, noise, light and waste products from construction, processing and transport activities in what is a relatively densely populated rural area.

In dismissing the appeal against the EPA's decision on the Vasse Coal Project, and then formally rejecting the Project, the Minister for Environment commented that "Margaret River is a unique region with important environmental values which should be protected ... This decision provides the people of Margaret River with certainty that the State Government recognises the uniqueness of the region, both from an environmental and social perspective." Let's hope that this rhetoric will be translated into further action, and that another blow against coal mining in the area will soon be struck. ■

Objections under the Mining Act: a "how to" guide

Moshe Phillips, Paralegal, and
Josie Walker, Principal Solicitor

There has been an observed increase in public concern over resource developments recently, which is likely due to the resource industry encroaching on more populated areas than in the past. In particular, the proposal by Vasse Coal Pty Ltd to start a coal mine near Margaret River has highlighted the potential for conflict between mining and agriculture. The EDO is experiencing a surge in inquiries regarding mining applications and opportunities to object.

Under the *Mining Act 1978* (WA) any person is entitled to object to the grant of a prospecting licence, exploration lease or mining lease. However, would-be objectors should be aware that they are involving themselves as a participant in court proceedings, and that certain demands will be placed upon them as a consequence. Objectors will be asked to appear in the Mining Warden's Court on the dates specified by the Warden, and to provide evidence to support their case and submit other documents if ordered by the Warden. There is a risk that failure to comply with any of the Warden's directions could lead to the objector being ordered to pay the other side's legal costs. While many objectors in the Warden's Court are not legally represented, the process can be stressful and bewildering for non-lawyers, and therefore should not to be undertaken lightly.

Any person who wants to explore for or mine minerals on any land in Western Australia needs to apply for the relevant licence or lease for the activity that they are planning to carry out. These licences and leases under the *Mining Act 1978* (WA) are referred to collectively as "mining tenements". Three common types of mining tenements are:

- A **prospecting licence**, which entitles a person to enter land to explore for minerals. The maximum area of a prospecting licence is 200ha; ➤ *next page*

"How to" guide to the Mining Act

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- An **exploration licence**, which entitles a person to enter land to explore for minerals. The maximum area of an exploration lease is 21,700ha;
- A **mining lease**, which entitles a person to extract minerals from the land and undertake other operations which are necessary for that purpose.

A mining tenement cannot be granted over the surface of private land which is being cultivated or grazed, or over an allotment of less than 2,000m^2. In practice, this means that private landowners usually have a veto over surface mining on their land. However, the need for landowners' consent can be avoided if the mining company only seeks the right to explore or mine more than 30m below the surface of any private land.

Any person (whether or not they own land in the vicinity) can object to the grant of a mining tenement. If an objection is lodged, the Warden for the relevant mining district will conduct a hearing to determine whether or not the tenement should be granted.

Objections to the grant of any mining tenement can be made on public interest environmental grounds. However, it is rare that public interest objections will be considered in relation to exploration licences. It is slightly more common for public interest considerations to be a factor in the grant of mining lease applications, because of the greater impact of mining compared to exploration. In either case, objectors will need to convince the Warden that there are special circumstances which justify the Warden refusing the application on environmental grounds, rather than allowing environmental impacts to be dealt with by environmental conditions imposed by the Department of Mines and Petroleum ("DMP") or the Environmental Protection Authority.

An objection must be lodged in the prescribed objection form ("Form 16–Objections") and submitted to the relevant registry for the mining district in which the application is located. Form 16 is available on the DMP website. Under "grounds" the objector should state briefly the reasons why he or she says the tenement application should not be granted; for example, "potential for groundwater contamination", or "dust impacts on local residents". This document does not need to contain any arguments or evidence to support these grounds. If the Warden agrees to hear from the objector, the objector will be given an opportunity to submit evidence and to make arguments at a later date. However, the objector will be limited to elaborating on the grounds which were stated in the objection form, unless the Warden grants leave for additional grounds to be raised.

Objections must be lodged within 35 days of lodgement of the tenement application, except for objections by landowners who have been notified of an application for a mining tenement, who may also lodge objections up to 21 days after receiving notification. The Warden has discretion to allow an objection to be lodged later if there is a good explanation for the delay, and a recommendation has not yet been forwarded to the Minister for Mines. An objector must serve a copy of the objection on the applicant as soon as practicable after lodgement.

The first step after an objection is lodged is that the applicant and the objector will be advised of a date to appear before the Warden for an initial "mention hearing". At the mention hearing, the Warden will make orders for certain steps to be taken to prepare for a final hearing of the matter. For example, the Warden may order the mining company or the objectors to provide more details (called "particulars") of their application or objection. The Warden may also set a date for the filing of evidence, or set a date for the final hearing, or for a further mention hearing. There may be several mention hearings before the final hearing depending on the difficulty and complexity in preparing the matter for the hearing.

The Warden has complete discretion regarding the extent to which he decides to hear and accept evidence from public interest objectors. It cannot be taken for granted that all objectors will necessarily be allowed to submit evidence or make oral arguments at the final hearing.

Evidence in the Warden's Court is normally presented in the form of affidavits (sworn statements) by witnesses. If necessary, documents are attached to support what is said in the affidavit. Non-lawyers should seek assistance from a lawyer on how to prepare an affidavit in the proper form. Evidence may also be accepted from technical experts who are able to comment on the likely environmental impacts of the proposal. Technical experts should be independent; that is, they should not themselves be objectors. It should be made clear to any expert when they are engaged that their duty is to give their unbiased expert opinion to the Court, not to argue for any party's point of view.

Any person who submits an affidavit or expert report to the Warden's Court needs to be available to appear in person at the hearing, to be cross-examined by the other side.

The hearing may be held in the Warden's Court, or on site at the location of the proposed tenement. At the hearing, each side may be given an opportunity to make oral arguments in favour of their case. The Warden will consider the evidence lodged by each side, and witnesses may be asked to attend to be cross-examined by the other side, or to answer the Warden's questions.

After the hearing the Warden will make a recommendation to the Minister for Mines regarding whether to grant the mining tenement. On receiving the recommendation from the Warden the Minister may decide to grant or refuse the application for a mining tenement. The Minister is not obliged to follow the Warden's recommendations.

The Warden has the power to order a party to pay the costs of another party but this only occurs in exceptional circumstances and normally each party bears their own costs.

Disclaimer: *The above information about procedures in the Mining Warden's Court has been simplified for ease of understanding and is not a substitute for legal advice. We recommend that anyone contemplating lodging an objection in the Mining Warden's Court seek legal advice before lodging an objection. The EDO may be able to provide advice to would-be objectors if the matter meets our casework criteria. Please see our website at www.edowa.org.au for more details of services provided by the EDO.*

Coal mining threat to the Fitzroy River: latest developments

Emily Wilson, EDO Volunteer

The mighty Fitzroy River is a site of great natural beauty and cultural significance. However, Rey Resources Ltd wants to transform the Duchess Paradise site, located along the Fitzroy River, into a coal mine. The initial mine is planned several kilometres away from the Fitzroy River. However, it is located very close to two large tributaries, Mt Wynne Creek and Hardman Creek, which drain directly into the Fitzroy River. According to Dr Peter Cooke, Associate Professor at UWA's Centre for Excellence in Natural Resource Management, the Kimberley is also home to 58 "declared or threatened" species, seven "other specifically protected fauna" species and 77 "priority fauna" species, which could be detrimentally affected by the proposed mine. Moreover, it seems nonsensical to be thinking of starting a new coal mining province in the Kimberley, at a time when the Commonwealth government says it is committed to reducing Australia's carbon footprint. Coal mining will not help local indigenous communities to develop a sustainable economy and job opportunities based on the area's unique wilderness values.

Rey Resources applied for a mining lease over the Duchess Paradise site in December 2010. The EDO is acting for Dr Anne Poelina, a local Nyikina woman, who is objecting to the mining lease application in the Mining Warden's Court. Since September 2011, significant developments have occurred in the fight to protect the Fitzroy River.

Firstly, progress has occurred in the Environmental Protection Authority's ("EPA") assessment of the environmental impacts of the proposed Duchess Paradise coal mine. The matter was referred to the EPA for assessment in June 2011. Rey Resources' draft Environmental Scoping Document ("ESD") went on public exhibition in January 2012. On behalf of Dr Poelina the EDO submitted a response in January 2012 requesting Rey Resources to consider the cumulative economic impacts, the Aboriginal heritage considerations, and the impacts on surface and groundwater and mound springs of the proposed mine. The EPA will now finalise the ESD, following which Rey Resources will prepare its Public Environmental Review ("PER"). The PER will be publicly exhibited in June 2012 with the 8 week public review period ending in September 2012. During the review period, any member of the public may make submissions. The EPA's final report is due to be published in February 2013.

Secondly, the EDO, on behalf of Dr Poelina, has lodged amended grounds of objection in the Mining Warden's Court. These objections encompass environmental issues, the damage the mine could cause to the development of a sustainable nature-based economy in the area, and the social and cultural impacts of the proposed mine on the Nyikina traditional owners. On behalf of Dr Poelina, the EDO has applied for a stay of the mining lease application until the EPA has completed its environmental impact assessment. The stay application will be heard in June 2012. The Mining Warden previously expressed doubts about the utility of proceeding to hear the mining lease application while the environmental process was ongoing. In any event, the Warden is not able to make a final decision regarding the mining lease until the Minister for Environment has given environmental approval.

Given the Warden's doubts and progress being made in the EPA's assessment of the Duchess Paradise project, it can only be hoped that environmental concerns and local efforts to establish environmentally sustainable industries will be allowed to prevail.

A billabong near the Fitzroy River. – ciamabue@flickr

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