LANDHOLDER SERVICES
Pty Ltd ACN 056 205 693 ABN 94 056 205 693
13 Cottesloe Street
Toowoomba Q'ld 4350
Email:
Phone 07 4632 1024
Fax 07 4632 1768
Website: www.landholderservices.com.au

SUBMISSION

Infrastructure, Planning and Natural Resources Committee

Queensland Parliament

INQUIRY

Mineral, Water and Other Legislation Amendment Bill

Submitter: George Houen

18 September 2017

Introduction

I appreciate the opportunity to participate in this review of craft amendments to legislation.

My submission is necessarily brief due to heavy commitments. My focus is on amendments to the Mineral and Energy Resources (Common Provisions) Act 2014, the Mineral Resources Act 1989.

While I commend the amendments overall and recognize that their primary intent is to achieve more effective and even-handed regulation, I believe they add extra complexity and will be more difficult for the folk with limited previous exposure to understand.

Clause 41: new sections 83A and 83B in Common Provisions Act

Existing legislation makes a departmental officer's conference an obligatory step in the negotiation process – to me that has always been an incongruous proposition based on the unrealistic notion that departmental officers administering the resources approvals process are:

a. genuinely impartial; and
b. qualified to act as mediator.

Even the proposed re-branding this provision as an optional step may mislead some landholders who lack experience in dealing with resource developments into believing it offers impartial dispute resolution.

Clause 45: replacing sections 88-91 of the Common Provisions Act

In principle the draft provisions offer a welcome and constructive change with the potential to improve the relevance and fairness of the dispute resolution process.

In day-to-day situations, ADR processes offer the parties the right to choose the services of qualified facilitators with experience in the particular issues of a case – for example in the Common Provisions Act, complex emerging issues such as impacts on groundwater and the make good and related compensation are particularly challenging.

ADR will often fit better with the issues and be more satisfactory, faster, more efficient and more innately fair to both sides than the traditional referral to the Land Court.

But if I may cross-reference to Clause 115 - Mineral Resources Act amendments in the Bill, it is a pity the Bill fails to apply the same modernisation and upgrading principles to the big issue of compensation for grant or renewal of mining leases.

Where there are objections to applications for mining leases and environmental authorities, hearing them obviously should remain the exclusive province of the Land Court, but the advantages of ADR should be made available for mining compensation disputes just as is proposed for the conduct and compensation agreements.

Costs

The amended section 91 of the Common Provisions Act requires the eligible claimants' necessarily and reasonably incurred costs to be paid by the resource authority holder – that is fair and just. This issue concerns the exploration authorities for mining as well as both the exploration and production phases for petroleum.

But the coverage of costs payable by resource authority holder should be simply stated as professional costs necessarily and reasonably incurred by the landholder.

The provision requiring the resource authority to pay the claimant's costs of negotiating for a CCA or deferral agreement is a much-needed reform. As an example, I have clients who in good faith engaged legal representation to respond constructively to the resource authority holder's proposed Alternative Arrangements Agreement concerning a long-running excessive noise dispute.

Those negotiations were detailed and protracted but unsuccessful, and the excessive noise continued. The clients' legal bill for those negotiations exceeded $63,000 but the resource authority holder refused to pay, claiming it was only obliged to do so if agreement was reached. Those clients also incurred significant costs for expert noise monitoring advice and for building design to alleviate noise in the residence.

And while Bill extends the types of professional cost payable by the resource authority holder to agronomist (along with legal, valuation and accounting costs) this selective approach is an unfair distortion. Section 91 should be extended to embrace all necessarily and reasonably incurred professional costs.

That is because the range of professionals whose advice landholders typically require includes hydrogeologist (groundwater); noise monitoring; building design for noise alleviation; hydrologist (surface water); air quality (fugitive gases, dust) agricultural economist (economic impacts of disturbed production); livestock management/animal behaviour expert (disturbance impacts).

Clause 115: compensation proceedings by direct application – Mineral Resources Act

The proposed change allowing a proponent or an affected landholder to apply direct to the Land Court for compensation to be determined is OK, but the Bill ignores a huge anomaly in that same section – one which has caused distress, wasted costs and risked injustice to landholders ever since the Mineral Resources Act commenced in 1990.

Section 281 should be further amended to provide that:

a. where there are no objections to either the mining lease or the environmental authority, the applicant may apply to the Land Court for compensation to be determined; but

b. where there are objections against either the mining lease or the environmental authority the applicant may apply to the Land Court for compensation to be determined only after the Court, having heard and determined the objections, has made its recommendations to the respective Ministers.

Understandably, given it is allowed by the present section 281, some miners seek to avail themselves of the opportunity to have compensation determined early – and where there are objections that means prematurely.

However, where there are objections to either the mining lease or the environmental authority or both, the evidence required for a determination does not exist until those objections are heard and the Court has made its recommendations. Fundamental aspects such as the size and shape of the mining lease, the mining method and the environmental conditions are up in the air and their impacts unknown until the objections are heard and decided.

In my experience of such cases, the Land Court when asked has usually agreed to adjourn such premature applications until the evidence is available, but there is no certainty that it will do so. The result can be spectacularly unfair if the hearing proceeds.

In one case, by the time I was engaged to represent the landholders in the objections hearing the Land and Resources Tribunal (since replaced by the Land Court) had already accepted the miner's application. It had heard and determined the compensation, then heard an appeal on it.

But before the objections hearing was completed my client landholders reached agreement with the miner on vastly different terms to those determined by the Tribunal. As a result those premature compensation and appeal hearings were completely wasted and their decisions rendered meaningless. At least $300,000 that the parties had jointly spent on those hearings was thrown away.

Inconsistent Standards

Submissions above relating to the greater reliance on ADR in negotiations also apply to mining compensation, in my opinion. But the Common Provisions scheme - as to use of ADR and as to landholders' costs payable by the mine proponent - do not apply to negotiations of compensation for grant of mining leases or claims. In practice there is no reason why the same options could not be extended to grant of lease compensation, and in principle there is no good reason to discriminate that way.

DATE: 18TH September 2017

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13 Cottesloe Street
Toowoomba Q'ld 4350

Phone 07 4632 1024
Fax 07 4632 1768
Email: ghouen@bigpond.net.au

Secretary

Infrastructure, Planning and Natural Resources Committee

Parliament House

Cnr George & Alice Streets

BRISBANE QLD 4000

Dear Dr Dewar,

Would you please place this further correspondence before the Committee as the issue is important.

The issue is the claim by Department of Natural Resources and Mines (DNRM) that deleting from section 81 of the Common Provisions Act the term **in *relation to the eligible claimant's land*** and substituting it with the term **on the eligible claimant's land** will not change landholder's compensation entitlements, and that the entitlement to compensation has always been limited to effects of authorised activities on the claimant's land.

DNRM made these claims in its briefing to Parliament's Infrastructure, Planning and Natural Resources Committee regarding Clause 37 of the Mineral, Water and other Legislation Amendment Bill.

My further investigation of that issue has included a review of the relevant legislative history. In summary I maintain that DNRM's advice to the Committee is wholly incorrect because:

1. The term ***in relation to the eligible claimant's land*** has been used in the P&G Act to define the scope of *compensatable effects* for the past 13 years and the relevant former section 145 of the MR Act dating back to 1990 was also consistent with that term.

2. To my knowledge, prior to these DNRM claims it has not previously been stated officially or unofficially - including when CCA provisions were introduced in 2010 - that indirect effects within a tenement where no CCA is involved (such as noise from activities on other people's land) were not compensatable.

3. Proper construction of the term *in relation to* in this context is that the term is of wide and general import covering resource activity effects generally, not just effects from activities on the eligible claimant's own land. The closeness of the relationship between the offending resource activities and the claimant's land is to be judged having regard to the nature and purpose of the Act's provisions and the context in which it appears.

4. Judgement in the only relevant decided case in the Land Court (Nothdurft v QGC) is consistent with the above construction also. It deals with an eligible claimant with compensatable effects caused by activities both on its property and on other owners' land within the tenement. However under DNRM's interpretation Nothdurft would potentially not have a claim at all if all the exceedances were caused by activities on other people's land within the tenement.

5. Other cases which support that construction are listed in this paper. DNRM has not offered any counter-argument or facts regarding proper construction of the expression *in relation to*.

6. In 2010 conduct and compensation provisions were first applied to both the P&G Act and the MR Act. Negotiation for conduct and compensation agreements (CCA) was regulated and a party could only apply to the Court for determination of the CCA if negotiations were unsuccessful.

7. Loss of the process for claimants or relevant tenement holders in non-CCA cases to request the court to decide the compensation for effects caused on other people's land was probably an unintended consequence of the CCA provisions, but under the existing section 81 the entitlement to compensation still exists.

DNRM has not provided any evidence nor any valid argument to support its claims that Clause 37 of the Bill does not change any compensation provisions and that in any case compensation has only ever been available for effects of activities on the eligible claimant's land.

DNRM has not given any reason why, if its claims are correct, the proposed amendment replacing ***relating to the eligible claimant's land*** with **on the eligible claimant's land** is necessary.

DNRM states:

In its advice responding to the Committee on submissions received, DNRM's statements about the effects of the section 81 amendments (paraphrased) were to the effect that:

a. *there's no change in the obligation to compensate neighbouring landholders*

- **incorrect – eg. see 2.iii below:**

b. *the provision (now s. 81 of the M&ER(CP) Act 2014) has always only been about compensation for landholders upon whose land the advanced activities are carried out*

- **incorrect – see below**

c. *a Conduct and Compensation Agreement is only required where a resource authority intends advanced activities on private land*

and

d. *the Act only allows the Land Court to determine compensation where advanced activities (or preliminary activities for which compensation is claimed) are to occur*

as to the P&G Act:

- **technically correct now, but only because with introduction of the CCA process in October 2010, no provision was made to preserve access to the Court for those eligible claimants and tenement holders in respect of the statutory right to compensation for "indirect" compensatable effects <u>in relation to the claimant's land.</u>**

as to the MR Act:

- **as for the P&G Act, technically correct now but only because with introduction of the CCA process and compensation provisions harmonised with the P&G Act provisions in December 2010, no provision was made to preserve access to the Court for eligible claimants and tenement holders in respect of a statutory right to compensation for "indirect" compensatable effects <u>in relation to the claimant's land.</u>**

e. *there is no power for the Court to determine compensation where no activities are carried out on the claimants land.*

- **see comments above.**

<u>Legislative History</u>

Petroleum and Gas Act (P&G Act 2004)

a. When it commenced in December 2004:

   i. the Act contained effectively the same defined terms as are current, with meanings not materially different to those presently in use;

ii. the Act provided for compensatable effects in relation to the eligible claimant's land which for present purposes represent no change;

iii. the expression "in relation to" is, as substantiated by cases* is an expression of wide general import and is to be interpreted having regard to the nature and purpose of the section and the context in which it appears, such that it can apply to an indirect relationship (likes noisy infrastructure in the gasfield but not on the eligible claimant's land);

iv. while it provided for parties to reach agreement on compensation, the 2004 Act also provided, in section 533, that to the extent it had not already been settled in an agreement, an eligible claimant or authority holder could apply to the tribunal (Land and Resources) to decide the holder's compensation liability or future liability;

b. In the version of the P&G Act dated 29th October 2010, new conduct and compensation agreement (CCA) provisions substantially the same as those in the present version of the Mineral and Energy Resource (Common Provisions) Act (MER(CP) Act 2014) commenced, however;

i. the only provision in the amended 2010 Act for the tribunal (Court) to determine compensation was where negotiations for a CCA were unsuccessful;

ii. thus while eligible claimants still had statutory entitlement to compensation for indirect compensatable effects (ie. loss of property value from noise generated within the tenement but on other people's land) the Act failed to give the parties the right to request the tribunal (Court) to decide compensation;

c. Now the Bill, in Clause 37, would redefine and radically reduce the scope of compensatable effects by limiting them to effects arising from authorised activities on the eligible claimant's land instead of the much broader "in relation to the eligible claimant's land".

Mineral Resources Act

d. From commencement in September 1990 until 10th December 2010, section 145 of the MR Act provided a right for an owner to recover in the Land Court compensation for damage or injury suffered or loss incurred by reason of exploration activities.

e. By Reprint no. 12 effective 10th December 2010, Schedule 1 section 10 of the MR Act established:

i. an owner or occupier as eligible claimants;
ii. a compensation liability upon the holder;
iii. compensatable effects relating to the land of the owner or occupier ;
iv. the requirement for a conduct and compensation agreement wherever advanced activities were to be undertaken-

all in terms harmonised with those in the P&G Act.

f. Schedule 1 Section 22 replaced section 145 with a right to apply to the Land Court for compensation to be determined if the CCA negotiation process was unsuccessful, also in effectively the same terms as used in the P&G Act.

g. That is, as of December 2010 eligible claimants (owners or occupiers of land within the tenement) on whose land no advanced activities occur) as well as tenement holders were deprived of the right they had held, since the MR Act commenced in September 1990, to apply to the Court for compensation to be determined.

h. Now the Bill, in Clause 37, would redefine and radically reduce the scope of *compensatable* and this would affect and possibly disqualify existing eligible claimants as well as future claimants.

i. If DNRM's claim that the compensation entitlement has always been limited to compensatable effects from activities on the claimant's own land is given credence, that may trigger applications by tenement holders for review of compensation due to a change of circumstances, ie. that the parties were misinformed as to their rights when negotiating the CCA.

Mineral and Energy Resource (Common Provisions) Act 2014

i. the Act - in Part 7 Compensation and Negotiated Access - replaced the previous compensation provision of the P&G Act and MR Act, consolidating them into a single statute.

j. As it stands, section 81 of the Common Provisions Act adopts the concept of ***compensatable effect relating to*** the eligible claimant's land originally established in the P&G Act.

k. As detailed in 1.iii above, the expression ***in relation to*** clearly extends to cover compensatable effects whether generated by activities on the eligible claimant's land or throughout the tenement.

l. The proposed amendment replacing ***relating to the eligible claimant's land*** with ***on the eligible claimant's land*** would:

i. substantially alter the meaning of the provisions in place since commencement of the P&G Act in 2004;

ii. consequently reduce eligible claimants' existing right to compensation; and
iii. disqualify others who are presently eligible claimants.

m. That is, owners of land within a tenement but on whose land no resource activities are undertaken, who clearly have a statutory right to compensation now in respect of compensatable effects such as loss of value of the property, costs, damage or loss or consequential damages caused by noise, air pollution etc., would be stripped of that right.

o. Such arbitrary cancellation of existing rights is not excused by the fact the legislation as it stands fails to provide a process for those eligible claimants not directly affected by resource activities to apply to the Land Court to have their compensation determined. That situation is clearly due to an official oversight which the Government is duty bound to correct.

Definition of: *in relation to*

The expression ***in relation to the eligible claimant's land*** is, on legal advice, of wide and general import and can apply to an indirect relationship. In a particular case the closeness of relationship is to be determined having regard to the nature and purpose of the section and the context in which it appears:

> *Fountain v. Alexander* (1982) 150 CLR615 at 629
>
> *Australian Broadcasting Corporation v. University of Technology, Sydney* (2006) 237 ALR 625 at [13]
>
> *Construction, Forestry, Mining and Energy Union v. Pilbara Iron Co (Services) Pty Ltd* (No. 3) 92012) FCA 697 at [61]-[643]

The expression *in relation to* was first applied to define the scope of the term *compensatable effects* in the P&G Act commencing in 2004. Its use in that context extended to the Mineral Resources Act when its compensation, notice of entry and conduct provisions were harmonised with the P&G Act provisions in 2010, and continued again when those provisions were consolidated into one scheme in the Common Provisions Act in 2014.

That is, the expression *in relation to* has defined the scope of *compensatable effects* for 13 years.

The recent Land Court decision in *Nothdurft v QGC Pty Ltd* [2017] QLC 41 (PGP114-16) 18 August 2017 is the first and only matter in which the relevant compensation provisions have been judicially interpreted. The primary issue was excessive noise at the eligible claimant's residence. There were activities both on the claimant's land and on other people's land. Exceedances were primarily caused by the compressor station some 6km away and not on land owned by the eligible claimant.

It was common ground that such noise was a compensatable effect in relation to the eligible claimant's land and President FY Kingham decided the matter on that basis. It would not have been so decided if the proposed change to section 81 had been in force.

Nothdurft's case shows that if they were negotiating initial compensation under DNRM's interpretation of the present section 81, or alternatively under section 81 as amended by the Bill, they would have no claim at all if the exceedances were all attributable to activities located on other people's land within the tenement.

Meaning of defined terms (as in the current Act and no material change since commencement of the P&G Act December 2004) as paraphrased:

eligible claimant: means *owner or occupier of land which is in the authorised area of, or is access land for the authority*

compensation liability: means *holder's liability to compensate an eligible claimant*

compensatable effect: means *all or any of the effects in s.81(4)(a), (4)(b) and 4(c) - relating to the eligible claimant's land*

authorised activities: *appears not to be specifically defined in the M&ER(CP) Act*

relating to (the eligible claimant's land): *as accepted in Nothdurfts' case, can apply to loss of value, costs, damage, loss, etc. Cases* including Nothdurft show that the phrase "relating to" is of wide general import. Having regard to the nature and purpose of the section and the context in which it appears it can apply to an indirect relationship, for example noise from a compressor station located 6km away on land not belonging to the claimant, affecting the residence .*

My thanks to the Committee.

Yours sincerelv

George Houen
Landholder Services Pty Ltd

From: George Houen
Sent: Tuesday, 19 September 2017 9:37 AM
To: Infrastructure, Planning and Natural Resources Committee <IPNRC@parliament.qld.gov.au>
Subject: MWOLA Bill - Submissions

Dear Secretary -

If I may be permitted an addendum to my submissions emailed to you yesterday, I overlooked one vitally important matter, as follows.

Clause 37 of the Bill fundamentally alters the meaning of section 81 of the Common Provisions Act. That alteration is not mentioned in the Explanatory Notes to the Bill, suggesting that it is an unintended consequence.

Section 81(4)(a) of the Bill re-defines the term ***compensatable effect*** as:

any of the following caused by the holder, or a person authorised by the holder, carrying out authorised activities on the eligible claimant's land - (emphasis added)

The difference is that the current definition states the definition as:

all or any of the following relating to the eligible claimant's land

I am not a lawyer, but on legal advice I submit that the expression in section 81(4)(a) - *relating to the eligible claimants land* - is of wide and general import and can apply to an indirect relationship. By comparison, if the term - *in respect of* - were used it would imply the need for sufficient or material connection or relationship. In a particular case the closeness of relationship for the term - *relating to* - is to be determined having regard to the nature and purpose of the section and the context in which it appears:

- *Fountain v. Alexander* (1982) 150 CLR 615 at 629
- *Australian Broadcasting Corporation v. University of Technology, Sydney* (2006) 237 ALR 625 at [13]
- *Construction, Forestry, Mining and Energy Union v. Pilbara Iron Co (Services) Pty Ltd* (No 3) [2012] FCA 697 at [61]-[643]

That is, the existing definition extends to compensatable effects occurring on any property within the tenement or in access land that is affected - the Bill re-defines it to limit eligibility for compensation for compensatable effects of activities carried out **only** on the claimant's land.

I would appreciate you placing this further matter before the Committee for consideration.

Regards

George Houen
Landholder Services Pty Ltd

Visit our website at: www.landholderservices.com.au