TAS Legal Pty Ltd

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ExploRATIO Newsletter

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The Benefits of the "Expedited Procedure" - Exploration Activities

Since the High Court's decision in Mabo, native title has become a fact of life for explorers and miners and a cost of doing business. Unfortunately, the "Expedited Procedure" is sometimes misunderstood, which is unfortunate, having regard to various advantages that arise from this process.

The "Expedited Procedure" for native title matters in Queensland is actually a very beneficial process for explorers (the Expedited Procedure does not apply to resource authorities such as mining leases). Upon the advertising of the intended grant of an exploration permit by the State of Queensland (effectively the DNRM), the "section 29 notice" will contain a statement that the "Expedited Procedure" will apply for that matter.

Should an objection be lodged by a native title party relevant to the area of the exploration permit within four months of the notification date specified in the notice, the objections will be referred to the National Native Title Tribunal ("The Tribunal"). One common misunderstanding is that the objection is an objection to the grant of the exploration permit; the objection is in fact is an objection to the matter being dealt with by the Tribunal under the "Expedited Procedure".

The matter will then (in most cases) be listed for a Status Conference at the National Native Title Tribunal, so that the native title party and the grantee party (the prospective holder of the exploration permit) may discuss and negotiate the terms of an agreement (sometimes called an "Exploration Agreement" or a "Cultural Heritage Agreement"). If agreement can be reached, the terms of such agreements often provide for site surveys of the area of the tenement (effectively native title clearance of areas intended to be explored upon a grant of the relevant exploration permit), as well as other benefits to the native title party. An agreement can in certain circumstances be a "side agreement", or "top up" to benefits that will apply under the Queensland government's "Native Title Protection Conditions" ("NTPCs"). Where a "Section 31" Deed is signed by all parties including the State of Queensland, the tenement will not be subject to the NTPCs, but rather will be subject to the terms and conditions of any agreement entered into with the relevant native title party.

Matters are not always resolved by agreement – objections can be withdrawn, the application for the exploration permit may be abandoned, or the Tribunal may determine whether the objections should be upheld.

Nevertheless, the majority of matters referred to the Tribunal after an objection is lodged by a native title party are often resolved by way of agreement.

An agreement with the relevant native title party, on mutually agreeable

continued overleaf ►

TAS Legal has particular expertise in native title matters.

terms, is advantageous for the grantee party in that it:

(a) creates certainty for the outcome of the application process;
(b) shortens the application process, securing native title clearance without further delay;
(c) gives comfort to the grantee party that it has complied with its Aboriginal cultural heritage "duty of care" (see section 23(a)(iii) of the Aboriginal Cultural Heritage Act 2003).

The savings for an explorer in terms of time and money is noteworthy, particularly if native title clearance is secured at an early stage through the "Expedited Procedure" where an imminent "wet season" could interrupt exploration activities in the near future.

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Featured Case Note: WA: Exploration and mining rights affected by miscellaneous licences

Objections to applications for miscellaneous licences are the principal matter by volume dealt with in the Western Australian Warden's Court.

Access agreements between applicants for miscellaneous licences and underlying exploration licence or mining lease holders are concluded between the parties primarily to protect the rights of the underlying holder. They in particular generally specify that should the underlying holder wish to develop the land beneath the infrastructure constructed on the miscellaneous licence, then the infrastructure and the miscellaneous licence will be removed or re-routed.

Now the law in relation to the rights of the underlying holder has been clarified by Warden Wilson in ***Michael Laurence Henry v Fox Resources Ltd [2015]*** **WAMW 14.**

Harvey had applied for a miscellaneous licence for the construction of a road, bore, generator, workshop, storage, and administration facilities. Fox objected on the grounds that granting of the licence would injuriously affect its operations on its exploration licence, part of which had already been converted to mining lease tenure.

Warden Wilson held, (in the light of ss. 91(b)(iii) and 117 of the *Mining Act 1978* (WA) read together as required by *Re Roberts; Ex Parte Western Reefs Ltd v Eastern Goldfields Mining Company Pty Ltd (1990)* 1WAR 546, and in conjunction with *FMG Chichester Pty Ltd v Hancock Prospecting Pty Ltd [2008]* WAMW 13) that the rights of an exploration licence holder (including the right pursuant to s.67 to mark out an apply for a mining lease over the land the subject of the exploration licence) would [at 79.]

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" ... always have priority over ...(a) miscellaneous licence and standard conditions will enforce the possibility of ... having to remove his [miscellaneous licence] infrastructure ... if necessary".

Objections to Coordinator-General's conditions on a draft EA – the confusing twist to the omission of Section 47D of SDPWO

The right to object to a resource project on environmental grounds has once again been brought into focus following the introduction of the State Development and Public Works Organisation and Other Legislation Amendment Bill 2015on 17 July 2015 ("the Amending Legislation").

Section 5 of the Amending Legislation omits Section 47D of the State Development and Public Works Organisation Act (SDPWO) which had been introduced by the previous LNP government. Section 47D(2) had the effect of ensuring that any submission to any conditions imposed on a draft Environmental Authority (EA) from the Coordinator-General could not be taken to be an objection to same.

It should be noted that until 31 March 2013 (when the "Green Tape Reduction" legislation relevantly commenced*), there was a statutory restriction on the right to object to a condition of the Coordinator-General found within a draft EA in section 216(2) (of the Environmental Protection Act (EPA)). The (former) section 216(2) prior to its repeal provided that "..a Coordinator-General's condition included in the draft……cannot be objected to by anyone".

The practical effect of the omission of section 47D was nevertheless unclear given the continuing operation of section 190(2) of the EPA. Section 190(2) provides that where a mining lease is or is included in a "coordinated project", any "stated conditions" for any approval must include any conditions of the Coordinator-General and must not be "inconsistent" with same.

This led to some uncertainty in the Land Court as to whether its' legal duty to make recommendations to the Minister, as part of the objections process, could be arguably "inconsistent" with the Coordinator-General's conditions - see, for example, **_Hancock Coal Pty Ltd v Kelly & Ors and Department of Environment and Heritage Protection_ (No. 4) [2014] QLC 12 (8 April 2014)).

The statutory purpose of the omitted section 47D from SDPWO (as stated in the Explanatory Notes) was to clarify the confusion for the Land Court regarding the issue of "inconsistency".

The upshot of these amendments is that whilst an objection to the condition or conditions of the Coordinator-General in a draft EA can be lodged, it is not entirely clear whether the Land Court can successfully entertain such an objection. The Land Court's new "strike out" powers may assume greater significance in light of same.

*(*Environmental Protection (Greentape Reduction) and Other Legislation Amendment Act 2012)*

*(**NB At the time of this decision, the former s216(2) of EPA was still in operation).*

"..a Coordinator-General's condition included in the draft……cannot be objected to by anyone"

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Substantial changes to mineral legislation and administration in Queensland

The Queensland Department of Mines and Petroleum announced substantial changes to administration, policy and proposed legislation on 12 October 2015 at a select industry briefing attended by TAS Legal.

Inter alia, changes include an inability to renew a tenement, with terms extended to 10 years for a new exploration "authority". Maximum areas will be abolished.

Obligations imposed on the authority holder will include presentations to DNRM at mid-tem on achievement of compliance with the work programmes and expenditure budgets submitted in the holder's original application. On the basis of this presentation, determination will be made on the requirement to reduce up to 50% of the area of the tenement on a case-by-case basis.

Annual reporting will be carried out on a self-assessment basis via a checklist against those work programs and budgets.

Enabling legislation by is expected by 2017.

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About TAS Legal Pty Ltd

TAS Legal is a rapidly growing boutique legal firm practising exclusively in mining and exploration law and Native Title, with offices in Brisbane, Melbourne and Perth.

TAS Legal provides advice to clients currently operating in all Australian States, Europe, Africa and North America.

The principals of TAS Legal provide specialist commercial and corporate advice for clients of TAS, and external individual clients, under the provisions of the relevant Legal Profession Act in force in each State, with combined experience in excess of 60 professional years in the mining, exploration and legal industries.

Most importantly, TAS Legal understands the exigencies of exploration and mining. We know the pressures that your company is under, whether at the height of a boom or in the depths of a recession, and how important it is to do deals, or rescue tenements, in a timely manner.

We would welcome the opportunity to discuss your tenement management needs and the possibility of acting as agents on your behalf in a specialist capacity or on a full-time basis.

** Individual liability limited by a scheme approved under professional standards*