COMMENT ON BOUNDARY DISPUTES INVOLVING MINERAL TITLES

By J. J. Williamson*

It is difficult to canvass, in detail, all issues involved in this topic without going to considerable length, however Douglas Williamson has done an admirable job in raising the vital issues and the writer would like to compliment him on his paper.

This commentary expands upon certain aspects of his paper from the Queensland perspective (and in this regard follows the order of matters set out in the paper) and then briefly touches upon the recent Queensland Department of Mines Green Paper as it impacts on this topic. Given the title of the topic, comments are confined to the Mining Act 1968–1986 of Queensland ('the Act') and the Mining Regulations of 1979 — petroleum and coal have not been covered. This does not mean that boundary disputes could not arise between tenements granted under these different regimes.

MINERAL TENEMENTS IN QUEENSLAND

It is important for the purposes of this topic to have a basic understanding of the nature of the tenements involved. The three main tenements under the Act are the Mining Claim, Authority to Prospect and the Mining Lease.

The Mining Claim[1] is tailored to the small-scale miner in that it has a short duration (not more than ten years), is of limited size (not more than 100 metres × 100 metres) and entitles the holder to occupy land for residential as well as mining purposes. The Mining Claim cannot be held over private land and must be continuously worked if not subject to labour exemptions.

The Authority to Prospect[2] (ATP) is the mineral exploration tenure available in Queensland. It is available over large areas, entitles the holder to enter Crown or private land (provided in the latter case the holder also holds a current Permit to Enter) for prospecting, investigatory and other authorised purposes. The Minister determines the area (by reference to blocks and sub-blocks on an approved plan), the term (not more than five years), rental and other conditions (which usually relate to work and/or expenditure requirements). The area of the ATP will expressly exclude mining tenements and other ATPs within its area existing as of a nominated time on a nominated date; the area has to be progressively reduced in accordance with the conditions set by the Minister.

Although not specifically provided for in the Act, the Department of Mines also issues a 'retention' form of ATP, designed to cover the stage

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1 Mining Act 1968–1986 (Qld.) Part IV Division 1A.
2 *Ibid.* Division II.

where a deposit is identified but needs to be 'proved up'. These retention ATPs are issued for a maximum of three years with the right to apply for renewal.

The Mining Lease[3] you are familiar with. In Queensland, it has an area of not more than 130 hectares (unless the Minister otherwise approves), has a term not exceeding 21 years, contains general and special conditions as determined by the Governor-in-Council (provided they are not inconsistent with the Act) and is granted in respect of nominated minerals.

Overlapping Tenements

As discussed by Williamson, there exists under the Act the possibility that different tenements may be held by different persons in respect of the same ground at the same time. The Act does not give a tenement holder exclusive possession of the tenement area. Whilst not strictly an 'overlapping' tenement, strata tenements are also contemplated.[4]

Although these matters have already been addressed, it is important to note that there remains the possibility of a boundary dispute between owners of adjacent strata and also the possibility of a boundary dispute in an overlapping or strata situation in respect of surface areas granted with the respective tenements. Under the Act an applicant for a Mining Claim or Mining Lease must, if he desires surface rights, specifically describe and apply for a surface area,[5] otherwise surface rights will not be included in the grant of the tenement.[6] Current policy at the Department of Mines is to examine 'strata' applications and overlapping applications on a case by case basis — if it is likely there will be operational conflicts, these tenements will not be granted.

Application Procedure for Tenements, including Marking Out

Under the Act marking out of a Mining Claim or Mining Lease is an essential part of the application process. The marking out and application provisions in respect of Mining Claims are contained in section 16F and Regulation 9. Essentially, the marking out provisions call for posts (or cairns of stones) to be placed at each angle of the boundary and the application provisions call for a description of the boundaries and surface area, the commencement point being related to a 'survey corner, well marked tree or other fixed or well defined object'. A sketch plan, taken from or being part of an approved map, which shows the boundaries must be included in the application.

A broadly similar process applies to mining lease applications.[7] Where an application for a Mining Lease is in respect of Crown land the whole or part of which is other than surface land, then the applicant does

3 *Ibid.* Division III.
4 *Ibid.* s. 126.
5 *Ibid.* ss. 16H(1A) and 21(2AA) respectively.
6 If an applicant does not apply for surface rights he must prove he has alternate access — s. 21BA.
7 Mining Act 1968–1986 (Qld.) ss. 21(2A), 21(2AA), and Reg. 19.

not have to mark out the land (or that part which is not surface area, as the case may be).[8] Applications for additional surface areas follow the same procedure as for applications for a Mining Lease.[9]

In respect of applications for mining tenures over Reserves see section 44 and in respect of private land see section 123. The provisions are virtually the same for the purpose of this topic.

One area in which the application procedure for mining leases could be improved from the point of view of lessening the potential for boundary conflicts is in the area of advertising of applications. The Act[10] only requires publication of the sketch plan if the Warden so directs, but in the absence of this direction only the description is published. This is certainly less helpful to interested parties. The requirements could be recast to require publication of the plan as well as the description, a procedure required in other States.

A different application procedure applies to ATPs in that the boundary is stated by reference to blocks and sub-blocks on an approved Departmental plan.[11] Although Williamson points out in his paper that there is unlikely to be any real scope for doubt as to the locations of the boundaries of this type of tenure because the boundaries are described by reference to a map, it is important to note that the conditions of ATPs issued in Queensland contain a condition (Clause 6) to the effect that a holder may at any time survey and mark the boundary of his ATP. If a holder did mark his boundary and did it incorrectly, similar boundary dispute problems could arise as arise with Mining Claims and Mining Leases.

In respect of the question of availability of ground for inclusion in a Mining Lease application it should be mentioned that if an existing mining tenement is included within the area of a Mining Lease application when pegging and application is made, but the tenement expires before the application is granted, the better view is that the land in that tenement becomes available for grant pursuant to the application, notwithstanding that it was not available upon the original date of pegging and application.[12] The longer the delay between application and grant, the more significant this point becomes. Long delays between application and grant have been experienced in Queensland.

The holder of or an applicant for a Mining Claim or a Mining Lease has a duty to maintain posts and boundary markers until a survey has been completed by a licensed surveyor.[13] Breach of this provision will only result in a fine, which does nothing to encourage such maintenance and in turn does nothing to reduce the likelihood of boundary disputes.

In other respects the Act and Regulations could go further to assist in reducing the potential for boundary conflicts. Currently, the Act does not require Mining Claims to be surveyed, nor does it require a survey of a Mining Lease in every case (although Regulation 22 permits the Minister

8 *Ibid.* s. 21(2AC).
9 *Ibid.* s. 21(CA).
10 *Ibid.* s. 21(6)(b).
11 *Ibid.* ss. 17, 44(i) and Reg. 18.
12 See *e.g.* s. 22 which favours this view.
13 Reg. 107A.

to require an applicant to have a survey conducted and section 87 permits the Warden to order a survey in the event of a dispute between tenement holders). Indeed, section 32 permits the grant of a lease and the issue of an instrument of lease notwithstanding that the boundaries and area are known only approximately. (Department of Mines practice is not to issue the instrument of lease prior to finalisation of the survey, but delays are experienced in having surveys completed or checked by the Department.)

In these circumstances, it is possible (and often happens) that boundary markings are not maintained nor is a survey undertaken for a considerable period either because the lessee does not require the issue of an instrument of lease or because of delays within the Department. This provides ripe ground for boundary disputes and although the Act[14] contains provisions for solving problems where a survey subsequently uncovers discrepancies, it can be an expensive business for the miner (in terms of litigation or shifting improvements) where boundaries are adjusted to conform to survey. Non-maintenance of the boundary markings combined with delays in surveying can therefore have severe consequences.

Perhaps a solution is for surveys to be required at the time of application. The writer endorses Williamson's comment where he states that 'too often it is found that the datum post has been positioned and described by reference to something quite uncertain . . .'. Given that surveying techniques are improving and that surveys can be conducted more rapidly (and more cheaply?) there appears to be less reason why surveys could not be required (at least for Mining Leases, if not Mining Claims) at the time of application. It is a question of measuring the cost to the industry of requiring surveys against the cost to the industry of boundary disputes. With mining becoming increasingly capital-intensive, the balance, this writer suspects, is swinging in favour of surveys at an earlier stage of the application and grant process.[15]

Curing Defects in Marking Out

Originally, title to mining tenements was dependent far more on valid marking out and occupation of the tenement — less emphasis was placed upon registration. In these circumstances proper marking out and maintenance of pegs was vital to title. Over the years, more emphasis in mining legislation has been placed on registration as part of the process of acquiring proper title.

In this combined situation two main questions arise — firstly at what stage does one acquire title and secondly can that title be attacked by alleging non-compliance with application and registration procedures?

14 See particularly ss. 32, 33.

15 Interestingly Reg. 98 of the 1900 Regulations under the old 1898 Mining Act of Queensland (which regulations were in force until the current Act was introduced), provided that the Warden 'shall not submit a recommendation for the issue of any lease until the land applied for has been surveyed and described by a duly licensed or mining surveyor and a correct plan, field books and description have been lodged at the Warden's Office . . .'.

These questions have been addressed in the paper, but the following points may be made:

- In terms of vesting of title the better view of the provisions under the Act is that title vests on grant (and certainly no later).[16] Ground not legally available when a tenement is pegged and applied for but which expires before the grant of a tenement should become available for inclusion in the grant.
- In terms of whether the Act provides for a system of registration of title or title by registration, the better view is that it generally provides for the former.[17]
- The present situation in Queensland is that tenements can be attacked, even after grant, for non-compliance with application and registration procedures. However in relation to Mining Leases it is important to remember the provision of the last paragraph of section 21(1) which is as follows:

  > For the purposes of this subsection a person shall be taken to have complied with the provisions of this Act if he has, in the opinion of the Governor-in-Council, substantially complied with those provisions.[18]

- Although this language could not be used to overcome fundamental flaws in an application for a Mining Lease, it presents serious problems to potential plaintiffs wishing to attack validity of title. On the other hand, it will not solve the lessee's difficulties in a boundary dispute which does not involve validity of title.
- This writer believes the trend in mining legislation, especially in view of the actual or proposed computerisation of Mines Department records in various States, is towards a Torrens-type system of title by registration. This is not necessarily a sinister trend if it is accompanied by a Torrens type guarantee of title.

TITLE AS PEGGED V. TITLE AS DESCRIBED

As discussed earlier, mining legislation generally has moved over the years from a stage of title based on marking out and possession to a stage of title based on marking out and registration. This move has widened the scope for boundary disputes given that discrepancies can exist between the tenement as marked out and the tenement as described in the application — these discrepancies can in some cases be quite serious. The problem is exacerbated where boundary markings are not maintained.

An occurrence which happens too often is highlighted by the following example: old pegs of an existing tenement (Tenement A) have dis-

16 *E.g.* s. 21(1) of the Act which provides that 'Upon the application of any person . . . the Governor in Council may, subject to this Act, *grant and cause to be issued* to the applicant a lease . . .' (emphasis added). Language elsewhere in the Act also makes this distinction.

17 Reg. 31(3)(a) *e.g.* provides that 'The ownership of such mining lease . . . shall pass to the transferee under such transfer when such transfer has been approved by the Minister pursuant to the provisions of s. 37 of this Act' and Reg. 31(3)(b) then provides that 'Such transfers shall forthwith upon approval by the Minister then be registered'.

18 A similar provision exists in respect of mining lease applications over Reserves — see s. 44(1)(d). S. 116 of the Act had the effect of requiring strict compliance with marking out procedures in respect of private land, but this section was repealed in 1982.

appeared or are unrecognisable; a prospective applicant either does not know of or is unsure of the exact location of Tenement A and inadvertently partially overpegs it with his Tenement B, whilst at the same time believing that his pegs abut Tenement A; the applicant's sketch plan in his application demonstrates an intent to abut Tenement A; a second applicant comes on the scene and sees the pegs for Tenement B and pegs his Tenement C, intending to abut Tenement B; no survey is carried out until some years later, when the discrepancy is found, but in the meantime both the applicants have built improvements or carried out work on the suspect areas. A boundary dispute arises between the holders of the tenements. This example highlights a court's dilemma in ascertaining the dominant intention of the applicant for Tenement B. If the court gives preference to the pegs, then because he overpegged existing ground which was unavailable, he will lose part of his tenement even though the holder of Tenement A is partially to blame for not maintaining his old pegs; at the same time the applicant's description of the boundaries in his advertisement will be inaccurate or misleading and third parties will be ill-informed.[19] On the other hand, if a court gives preference to the area as described in the application, the advertisements will be fully informative and the applicant will obtain the area abutting Tenement A but this will work an injustice on the applicant for Tenement C, who relied on the pegs for Tenement B but who will now lose his ground.

Although there appears to have been an upsurge in boundary disputes of recent years, they are certainly not new. As early as 1913 the High Court was considering a case with facts which squarely raised the problem of discrepancy between marking out and description — *Mt. Bischoff Tin Mining Co. v. Mt. Bischoff Extended Mining (No Liability).*[20] In that case the Court, based on the weight of evidence, favoured the pegs rather than the description. Perhaps this was because more accurate surveys which had found discrepancies were not conducted until many years after grant and because boundary markings had been faithfully maintained and respected for some time. This was a classic case involving physical markings versus paper title — a factual situation repeated many times since.

The more recent cases have been canvassed in the paper. By way of comment on the *Whitfield* case, it appears that the Western Australian Mining Act is different from the Mining Act in Queensland in that the former provides that non-compliance with marking out will not result in forfeiture. It is likely that the result in *Whitfield* would have been the same in Queensland but for different reasons,[21] unless there were serious flaws in the marking out and application process. The Warden in *Whitfield's* case felt that if marking out provisions were strictly complied with and pegs properly maintained, the incidence of boundary disputes would dramatically decrease. The writer agrees with these sentiments, but with respect,

19 As Stephen J. pointed out in *Scurr v. Brisbane City Council* 133 CLR 242, 252, in a case dealing with advertising of a town planning application, 'However, unless adequate information is contained in advertisements not only will effective objection be rendered difficult, but the very need to object may not be sufficiently appreciated'.

20 (1913) 15 CLR 549.

21 See comments on s. 21(1) above.

there are two problems with this reasoning — (i) it is inevitable that with all the best intentions, marking out procedures will not always be fully complied with, and (ii) boundary markings will not always be properly maintained.

As discussed earlier, perhaps the solution lies in a combination of a Torrens-type system of registration of title and a requirement for surveys at an earlier stage of the application process. (This would also avoid the expensive and wasteful 'merry-go-round' situation in the *Anisimoff* case described by Williamson, where over-pegging follows over-pegging).

REMEDIES

Section 80A of the Act, introduced in 1982, specifically invests the Supreme Court of Queensland with jurisdiction to hear and determine proceedings concerning validity of mining tenements and ATPs. Section 80 provides that subject to section 80A a Warden's Court has jurisdiction to hear and determine actions relating to mining tenements (including the area, dimensions and boundaries thereof) and provides that a Warden's Court has power to determine legal and equitable claims and to grant equitable relief. Actions may be heard summarily with the consent of all parties.[22] The relief sought will generally determine where the action should be instigated — if declaratory relief is sought or validity of a tenement is at issue, the matter will be determined at first instance in the Supreme Court.

GREEN PAPER

Although the recently-released Queensland Department of Mines Green Paper in respect of the Mining Act and Regulations is the subject of another paper at this conference, it is perhaps worth mentioning the following points which are of special significance to the topic at hand:

- The Green Paper[23] proposes that the prohibition of mining on improved private land be removed. This is a step in the right direction for the mining industry, however it should be recognised that this will open up the scope for boundary disputes where surface rights are sought by miners. This again highlights the need for surveying at an early stage of the application process.
- The proposal for a central register of all mining tenures in Brisbane,[24] which will eventually be computerised, should reduce the incidence of boundary disputes where over-pegging is a potential problem, as comprehensive up to date information should be available on search (although this will not of itself cure discrepancies between marking out and description).
- On Page 11, the Green Paper proposes that holders of Mining Claims may be directed to have surveys carried out should there be boundary disputes. As discussed earlier, this perhaps does not go far enough as a survey will only be done when a dispute already exists.

22 S. 89.
23 Green Paper 8.
24 *Ibid.* 9.

Consideration should be given to requiring surveys for Mining Claims.

— A new tenure — the Mineral Development Licence — is proposed, to bridge the gap between the ATP and the Mining Lease. On pages 14 and 15 the Green Paper proposes that the area of a licence would be 'described by a metes and bounds description from a datum post'. (Presumably, proper marking out would also be required.) This raises the same scenario for potential boundary disputes as currently exist for Mining Claims and Mining Leases. The Paper does not address the question of surveys for these new licences.[25]

— In relation to Mining Leases the Green Paper[26] states that 'There is concern with the delays involved in the granting of Mining Leases. Part of the delay is caused by the inability of applicants to accurately describe the ground applied for and translate such description to an approved chart. It is considered that this problem can only be overcome by industry education and responsibility and not by legislation'. On Page 17 the Green Paper proposes that 'all Mining Leases should be required to be surveyed before they are granted'. This latter proposal is certainly a step in the right direction in terms of reducing the potential for boundary disputes but given the problems with descriptions, the delay between application and grant and given that large amounts of capital may be spent within this period, it would be a better solution to require surveying at an even earlier stage, say at application or before hearing.

— The Green Paper proposes[27] that Wardens Courts be abolished and that Magistrates Courts determine questions of title to mining tenements.

— It is interesting to note that the Green Paper does not specifically address the question of overlapping tenure and 'strata' title. Presumably these will continue to be permissible under the new legislation.

25 Cl. 6 of the current standard conditions for ATPs, including retention ATPs, allows the Minister to require a survey and marking out if any doubt arises as to the boundary of an ATP.

26 Green Paper 15, 16.

27 *Ibid.* 19.