The legislative favours for a donor mining company being prosecuted for criminal offences

1. Introduction

Sand mining on North Stradbroke, the world's second largest sand island, just 40km from the Brisbane CBD, has been controversial since the Fraser Island Inquiry finding that sand mining causes "major, permanent and irreversible environmental harm". The Federal Government immediately withdrew required export licenses for the mineral sands and this ended mining on Fraser. The decision survived a High Court challenge.

It was then generally accepted that factors such as future eco-tourism, the recreational and other non-commercial needs of a growing population and aboriginal cultural heritage considerations outweighed short term economic benefits derived from permanently damaging the fragile, coastal landscape. As a result, in the 1970's and 1980's, State governments stopped mineral sand mining all along the populated east coast of Australia, with the exception of North Stradbroke.

The attached map shows the location of the three mines operated by Sibelco Australia Limited, a private Belgian owned company. The "Yarraman" mine, near Point Lookout, will close down this year. Last year, despite 2025 being its legislated end date, Sibelco announced the closure of the silica mine known as "Vance". Third mine, which Sibelco calls the "Enterprise" mine, is central to its operations on the island.

2. The criminal prosecution of Sibelco

The company denied the closure of its silica sand mine had anything to do with the ongoing trial of criminal charges against it relating to the unlawful removal and sale of up to $80 million worth of non-mineral sand from that mine over two decades. Although the company's criminal responsibility is yet to be determined, in 2009 the Supreme Court held that the company, then called Unimin Australia Limited, had no lawful authority to sell the sand and that local government and other approvals were required. This decision was upheld on appeal.

The company was charged in late 2009, more than five years ago. It changed its name to Sibelco Australia limited in December, 2010. Various applications brought by Sibelco have substantially contributed to the extraordinary delay. It even challenged, in the Supreme Court, the Magistrates ruling that it had a case to answer. Not surprisingly, it was unsuccessful. It then appealed, but in an ex tempore judgement, the Court dismissed it. In 2013, the magistrate ordered the company to pay $255,000 in costs for failed applications. The trial concluded last August, with the verdicts yet to be handed down.

3. The expiry of a critical mining lease granted during the Bjelke-Petersen era

With the expiry of mining leases from 2007, particularly a key Enterprise mine lease ML 1117, opponents to sand mining on North Stradbroke actively opposed their renewal and lodged objections with the Mines Minister. The opposition was galvanised with a win by environment groups and indigenous owners in the Court of Appeal, preventing

an expansion by the mining company into the (lawful) sale of island non-mineral sand from the Enterprise mine leases to the construction industry on the mainland.

Under a peculiar provision of the Mineral Resources Act (s.286C), mining can continue beyond the expiry date of mining leases until a decision is made on a renewal application, and there is no time limit.

ML 1117 had expired in 2007. The application remained undecided for years, despite calls by environment groups and indigenous owners to refuse it. The Supreme Court had confirmed in an unrelated case that the minister had to be satisfied of all the various factors listed in section 286A (1) of the MRA before renewal was possible – Papillon v Minister for Mines. The opponents to renewal on Stradbroke argued that if the minister had not made a decision after three years, that indicated a lack of satisfaction of one or more of the factors.

There were substantial environmental, aboriginal cultural heritage and other arguments against renewal. But they primarily related to two factors in s.286A(1) which the minister had to be satisfied of:-

(d) having regard to the current and prospective uses of the land comprised in the lease, the operations to be carried on during the renewed term of the lease—
(i) are an appropriate land use; and
(ii) will conform with sound land use management.

(g) the public interest will not be adversely affected by the renewal.

The circumstances had altered since the lease was last renewed in late 1988. Subsequently:-
• half of the island had been included in a Federal Government declaration of the Moreton Bay Ramsar area, intended to protect internationally recognised wetlands. Part of one lease was within the Ramsar boundary and the mine was now surrounded by Ramsar area. There had been a number of past incidents on the island where sand mining had seriously damaged off lease areas.
• there was a native title claim over most of the island, including all areas under mining lease;
• the government's policy announcement in June 2010 that all areas under mining lease would be declared national park by 2027.

It is difficult to conceive that the minister could have been genuinely satisfied that continuation of mining on land earmarked for national park and bordering protected Ramsar wetland, would be "an appropriate land use". See my 2011 Financial Review article for other considerations.

The opponents had experienced counsel's advice that in the special circumstances applying on North Stradbroke, there were good prospects of overturning, on judicial review in the Supreme Court, any renewal under the MRA. They called on the Minister, in writing, to refuse to renew. Instead, the Bligh government passed special legislation to side-step the MRA and the legislative process which had commenced with the application for renewal of ML 1117, lodged in 2007.

4. The North Stradbroke Protection and Sustainability Act 2011

This Act extended sand mining on North Stradbroke Island in April, 2011. Despite a

contrary myth spun in the media to overworked journalists with little time to check facts, this special legislation renewed key, expired, mining leases at the main mine to the end of 2019, with mining subject to a restricted mine path, which was doubled in size in July, 2011.

The mining company lost a chance of renewal of expired leases for a longer period, but the special legislation extinguished the legal rights of opponents to challenge the renewals in the Supreme Court and possibly end mineral sand mining on North Stradbroke Island by 2015.

The explanatory notes to the 2011 Bill introduced into parliament by Labor's Kate Jones conceded that the intention was to extend sand mining. For example, at page 3, the stated policy objectives were to be –

*"…**achieved by renewing or extending certain leases needed for mining**."*

The explanatory notes, at page 6, also conceded that the main mine could not have continued without the renewal of a key expired lease:-

"…***the Bill also renews a key lease at Enterprise Mine, which expired over three years ago, prior to the current leaseholder acquiring the mine and without which the mine would not be able to operate***"

and that:-

"***the holder of a mining lease does not have a right to renewal*"**

This statement was an oblique reference to section 286A of Queensland's Mineral Resources Act (MRA). The explanatory notes were otherwise silent about the usual expired lease processes and the Bill's breaches of fundamental legislative principles. These are contained in the Goss government's Legislative Standards Act 1992. Wayne Goss's second reading speech, (Hansard 6 May, 1993 p.5003) explained that the origin of this legislation lies in the Fitzgerald Report.

The Bill was passed without the breaches involving the impact on the rights of the opponents to sand mining being identified or debated by parliament. This was despite two island environment groups writing to every member of parliament to inform them of the proposed interference with their legal rights. Both environment groups were recognised as environmental "stakeholers" in mining company and government publications concerning sand mining on the island.

Annexure 1 contains extracts from the Legislative Standards Act relating to fundamental legislative principles and the relevant function of an explanatory note. Annexure 2 contains notes concerning the Queensland Law Society's "seriously deficient and unbalanced" submission on the Bill's compliance with fundamental legislative principles, which contributed to parliament's extinguishment of existing rights without any attempt to justify this.

5. Sibelco's expensive, undeclared political campaign prior to 2012 election.

Sibelco was not satisfied with the special legislated renewal of expired leases and the

extinguishment of opponents' rights. It had wanted sand mining extended at the Enterprise mine to 2027, so it could mine out the mineral sand deposits. Long standing evidence from the mines owner until 2009, Consolidated Rutile Limited (CRL), a public company, established that this was the latest date by which heavy mineral sand deposits on North Stradbroke would be exhausted.

Prior to the 2012 State election, Sibelco conducted a very expensive, orchestrated political campaign against the Labor government. The goal was to overturn Labor's limited extension of Enterprise mine to 2019 and obtain an extension to 2027. The campaign included 108 prime time television advertisments, full page newspaper advertisments, cimema advertising, social media and so on. None of this was declared to the Queensland Electoral Commission. Months after the due date, Sibelco only declared $91,840 spent directly in Newman's Ashgrove electorate. The overall third party expenditure limit at that time was $500,000. As far as I am aware, there has been no investigation of Sibelco's declaration.

The full extent of the campaign was revealed in a report tabled in parliament in November, 2013 by Jackie Trad MP. The report was prepared by Sibelco's PR company, Rowland, when nominating for an award.

6. Campbell Newman's broken election promises and the $1.5 Billion benefit to Sibelco

There was substantial public interest in the Stradbroke issue in the lead up to the 2012 State election and Campbell Newman was under pressure to announce the LNP's policy. He did that on a popular radio program in late January, 2012. The audio and written transcripts record that Newman promised he would restore rights on Stradbroke and not give Sibelco anything more. He twice denied that he would extend Sibelco's mining interests.

In April, 2012, shortly after the election, Tim Carmody SC, as he then was, confirmed in a legal opinion sent to Mr Newman the same month, that Sibelco, under existing mining legislation, had lost a chance of obtaining an extension of expired mining leases to 2027, but that opponents lost their rights to legally challenge and possibly prevent any extension. In September, 2012 the Australian published an article I submitted in which I mentioned the opinion in another context involving the Queensland Law Society.

More than a year after the election, on 19 July, 2013, at a parliamentary Estimates hearing, Mines Minister Andrew Cripps was asked (p.8 of the transcript) whether the LNP government intended a longer time frame for sand mining. Cripps answered –

" It may involve a longer time frame…"

At the same hearing, Cripps was asked by Labor's Jo-Anne Miller (at p. 26 of the transcript):-

"…the Premier assured the public prior to the last election that he would not give Sibelco anything more than what they had prior to the North Stradbroke Island Act and would not extend those mining interests. Can the Minister assure us that Sibelco will not be given an extension in area or time for any of the mining leases on North Stradbroke?"

Cripps eventually answered (at p. 29) that Sibelco had put forward a proposal to him for it to continue mining until 2035 –

…" I reiterate that that is a proposal that has been put forward by Sibelco for us to consider. It is not necessarily what the Queensland government will implement".

On 30 October 2013, at a parliamentary committee hearing examining the amendment Bill, Sibelco's CEO, Campbell Jones, said (p. 9 of the transcript) he met with Campbell Newman on …"one or two occasions"

Later that day, Newman was asked in parliament whether he had discussed Sibelco's electoral support at these meetings. He answered that he could not recall when he met Sibelco's CEO but he simply told Jones what was in the public domain prior to the 2012 election. (Hansard 30.10.13 p.3702).

But would the company have spent a small fortune backing Newman without an indication from him that he was willing to break his public pre-election promise to restore rights and not give Sibelco anything more?

In November, 2013 the Newman government amended the North Stradbroke legislation to increase the area able to be mined by 300% to over 10 sq km of mostly undisturbed vegetation and to allow Sibelco, in 2019, to extend mining leases to 2035. It also removed the usual judicial review rights of opponents. On its own figures, unless the Newman amendments are repealed, Sibelco stands to benefit by $1.5 Billion in additional revenue.

In a dissenting parliamentary committee report (at p. 131) Labor's Jackie Trad said the Bill… "has all the hallmarks of a morally corrupt 'cash for legislation' deal" for the reasons which she summarised.

Newman attempted to cover up his broken election promises. During debate on the amendment Bill, Newman misled parliament by falsely claiming that his 2012 election policy was to extend sand mining to 2035 and "everyone knew" this (Hansard, 20.11.13 p.4105). But all of the evidence, including from his Mines Minister Andrew Cripps at the committee hearing, its absence from the LNP's website list of policies prior to the election and Newman's previous public statements, exposed this answer as a lie. In Queensland it is a criminal offence for anyone, including politicians, to lie when giving evidence at a parliamentary committee hearing, but this law does not apply to parliamentary debates.

7. The Quandamooka High Court action against the Newman amendments

On 4 July, 2011 the Federal Court, by consent of all parties, including the mining compay, recognised native title over most of the island, including over all land under mining lease.

The explanatory notes and parliamentary statements by the then Premier and Minister strongly linked the 2011 legislation with the "imminent" settlement of the native title claim.

In June, 2014 the native title corporation commenced an action in the High Court Seeking a declaration that the Newman government amendments are invalid under the Australian Constitution because they undermine the Federal Court's 4 July 2011 native title determination and the Indigenous Land Use Agreement with the State Government. Native title rights are exercisable on the expiry of the mining leases.

When the former government, in April 2011, extended the Enterprise mining leases to 31 December, 2019, this was intended to be the definite end date of the mine. No more extensions were to be permitted. The Indigenous Land Use Agreement between the State Government and the Quandamooka people was signed in June, 2011. Quandamooka asserts that the ILUA binds the State government to the 2019 end date. The Newman State Government denied this.

8. The criminal trial, the continuing offending and the prima facie case of stealing and fraud against Sibelco

To make matters worse, when the LNP legislated the intended $1.5 Billion benefit for Sibelco, breaking Mr Newman's election promises, Sibelco was on trial for the criminal charges mentioned on page 1. These were related to the sale of millions of tonnes of non-mineral sand removed from Stradbroke without permits under the Integrated Planning Act, the Environmental Protection Act and the Forestry Act.

Additionally, there was evidence, which had been passed on to the Attorney-General, Jarrod Bleijie, that after it was charged and during the criminal trial, Sibelco had continued the same unlawful activity. Mr Bleijie refused to take any action to uphold the integrity of the courts and the criminal justice system, despite substantial evidence of the continuing unlawful actions. He had also refused to request the Director of Public Prosecutions to review all of the evidence and decide whether he agreed with the opinion of two experienced criminal lawyers, one a senior counsel, that there was a prima facie case of stealing and fraud against Sibelco. Their opinion had been based on an independent investigation report by a former Fitzgerald Inquiry investigator and former senior officer with the Criminal Justice Commission.

In August, 2014 the criminal trial concluded, with the Magistrate reserving his verdicts, which are yet to be delivered. It is over five years since Sibelco was charged.

Richard Carew
Partner
Carew Lawyers
6 February, 2015

Note to delegates attending the conference 'Accountability and the Law: safeguarding against Corruption in Queensland', Customs House, 9 February, 2015

I acted for a number of environment groups and individuals, including indigenous owners, who in 2010, in the Queensland Court of Appeal, successfully prevented an expansion of Sibelco's interests on North Stradbroke Island into the (lawful) sale of non-mineral sand. This case is linked to text on page 1. I also acted for a respondent in the Federal Court native title claim over the island, which concluded with a consent determination in favour of the claimants in July 2011. My wife is the president of Friends of

Stradbroke Island Inc. I have had published a number of articles in the media on various aspects of this topic. They include:-

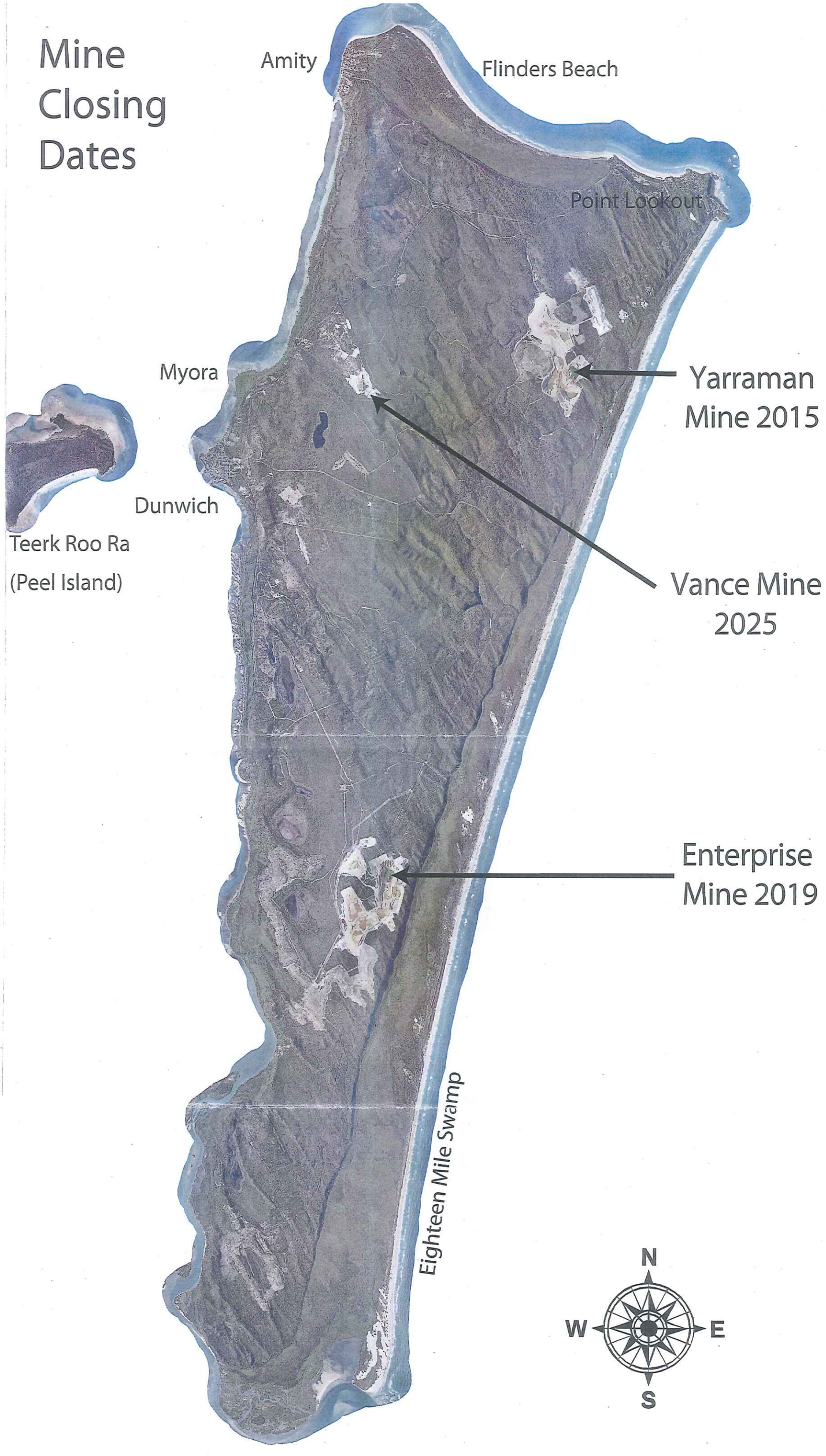
Nth Stradbroke mine decision defies law Financial Review 16.9.11
Errors need to be corrected and be seen to be corrected The Australian 14.9.12
Newman's Straddie sand mining bill: the Sibelco favours Independent Australia 5.7.14
The Government is lying about Stradbroke Island sand mining Brisbane Times 15.7.14
Campbell Newman is in quicksand over mining on Stradbroke The Guardian 10.8.14
Campbell Newman lied about Stradbroke island mining promises Brisbane Times 22.1.15
(The articles' titles are not mine)

Annexures

Annexure 1 contains extracts from the Legislative Standards Act relating to fundamental legislative principles and the relevant function of an explanatory note, which were not complied with in 2011 and 2013.

Annexure 2 contains notes concerning the Queensland Law Society's "seriously deficient and unbalanced" submission on the Bill's compliance with fundamental legislative principles.

Mine Closing Dates



Annexure 1 – the Goss government's Legislative Standards Act

As mentioned in the paper, a Fitzgerald Report recommendation led to the Goss government enacting the Legislative Standards Act 1992. The establishment of fundamental legislative principles (FLP's) was supposed to ensure that parliament would not disregard or interfere with rights and liberties without good cause and that this would be explained in the explanatory notes and be subject to debate. Below are relevant extracts from the Act:-

4 Meaning of fundamental legislative principles

(1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to—

(a) rights and liberties of individuals;

3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(b) is consistent with principles of natural justice; and…

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and…

(j) has sufficient regard to Aboriginal tradition and Island custom; and

23 Content of explanatory note for Bill

(1) An explanatory note for a Bill must include the following information about the Bill in clear and precise language—

…(f) a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency;

(2) If the explanatory note does not include the information mentioned in subsection it must state the reason for non-inclusion.

The explanatory note to the Bill was completely silent on the impact of the legislation on the rights of opponents to renewal and did not state any reason for non-inclusion. The only breaches of the FLP's mentioned were those which impacted upon Sibelco's rights. At no point did the explanatory note or the parliament identify or discuss the requirements of s.286A of the MRA and the consequences of the requirement for the minister to be satisfied of all factors before there was any power to renew an expired lease.

Annexure 2 – the Queensland Law Society's submission and its correction

Coincidentally, there was also a "seriously deficient and unbalanced" Queensland Law Society submission, to use Senior Counsel's assessment of it. A copy of the submission dated 30 March 2011 and the Society's correction of it dated 4 July, 2012 are attached. This is a brief summary of the events.

The Society was under no statutory duty to present a submission which was fair and balanced, but as the Society is an organisation of professional lawyers, society members, the public and the parliament were entitled to expect a fair and balanced submission and, if it be the case that significant mistakes occurred, they were all entitled to expect that the Society would promptly correct its submission This did not occur. Later, the Society's Council amended its rules to make it much more difficult in future for members to bring about warranted corrections to parliamentary submissions or other actions which occur on behalf of members.

The QLS's Planning and Environment Committee was responsible for the submission. It only mentioned the Bill's impact on mining rights. I complained to the QLS in May 2011, but the committee resisted correcting its submission. I subsequently discovered that the Chair of that committee acted for the Queensland Resources Council and had been involved in that Council's submission on the same Bill, on behalf of its member, Sibelco.

I brought this to the Society's attention. In December, 2011 the QLS agreed to correct its submission, in terms which were negotiated with me. However, the Society then reneged. Shortly after the 2012 election, I received and forwarded to the QLS, senior counsel's opinion, which concluded that the QLS submission and the explanatory note were seriously deficient and unbalanced in not referring to the breaches of the FLP's affecting the opponents to the renewal of expired leases, whose rights to legally challenge the renewals in the Supreme Court were to be extinguished.

But senior counsel's opinion what not sufficient to persuade the QLS to do the right thing and correct its submission. It was not until, under the QLS Rules, fifteen (15) mostly senior members, including myself, requisitioned the QLS secretary to call a special general meeting of members to consider a motion requiring the QLS to correct its submission. The requisition was withdrawn without a meeting being called, because the Society's President decided to send the previously agreed letter to the parliament. However, because the Society refused to bring the correction to the attention of members, I submitted the article to the Australian, which was published in September, 2012.

In early 2013, the QLS Council, without notifying members, secretly changed the relevant rule so that now, instead of 15 members, 100 members are required to call a special general meeting. Unfortunately, if the Society's important role in identifying breaches of the Legislative Standards Act goes awry in the future, it will be more difficult to make the Society accountable to its members, the public and the parliament.

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Your Ref:

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4 July 2012

Scrutiny of Legislation Secretariat
C/- Parliament House
George Street
BRISBANE QLD 4000

Dear Sir/Madam

North Stradbroke Island Protection and Sustainability Bill 2011 (the Bill)

The Queensland Law Society writes to you concerning its submission to the then Parliamentary Scrutiny of Legislation Committee on the *North Stradbroke Island Protection and Sustainability Bill 2011 (the Bill)*. A copy of the Society's submission dated 30 March, 2011 is attached. We note that the Bill was passed without amendment and commenced on 14 April (the Act).

We have become aware of some controversy concerning the Society's submission on North Stradbroke Island sand mining, following media coverage of it.

The concern raised in our submission was whether some aspects of the Bill complied with the *Legislative Standards Act 1992* – in particular the fundamental legislative principles that underlie a parliamentary democracy based on the rule of law (s.4). However, given the time constraints and available resources, the QLS submission was based only upon an examination of the legal drafting aspects of the Bill.

At that stage the only breach of fundamental legislative principles identified was s. 6 (no compensation) and its association with Part 2, Division 2, provisions curtailing some existing mining interests.

Our submission referred only to mining company interests being adversely affected by the Bill. This had the potential to mislead as several expired mining leases were also to be renewed by s.11, providing a benefit to the miner.

Also, our submission did not refer to s.6 impacting upon traditional owners opposed to sand mining continuing. Section 6 may preclude them from claiming compensation for the impact upon their native title rights and interests arising from the renewal of expired mining leases.

In fairness to all involved in the political debate on the continuance of sand mining on North Stradbroke Island we acknowledge that there are other aspects of the Bill which affect the rights and liberties of individuals which were not included in the Society's submission.

It is a fundamental element of the rule of law that laws should have general application and be applied equally to all. The Act breached this principle because it created a special law dealing with expired mining leases in one geographical area, North Stradbroke Island, instead of applying the general process under s.286A of the Mineral Resources Act 1989 (MRA)which applies elsewhere.

The effect of dealing with these expired mining leases outside of the general process under s.286A of the MRA, is that the Minister was not required to be satisfied of all the required statutory renewal factors set out in 286A(1)(a) to (h) and also parties aggrieved by the s.11 renewals do not have any right of judicial review of the decision. This impacts upon the rights and liberties of individuals, including traditional owners and environmental stakeholders.

In conclusion, because of the way the Society's submission has been interpreted we considered that, in fairness and in the public interest, we would write to you and other interested parties. We do so to acknowledge that there are arguments on both sides but to make it clear that we do not support any side in the debate over sand mining on North Stradbroke Island. That is not our role as a professional body.

Yours faithfully

Dr John de Groot
President

cc

Hon Andrew Powell MP
Member for Glass House
Minister for Environment and Heritage Protection
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5/4/11

Your Ref: Scrutiny of Legislation Committee

Quote in reply: Planning and Environment Law Committee

30 March 2011

SCRUTINY OF
30 MAR 2011
LEGISLATION COMMITTEE

BB.11

Ms Julie Copley
The Research Director
Scrutiny of Legislation Committee
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scrutiny@parliament.qld.gov.au

Dear Ms Copley

NORTH STRADBROKE ISLAND PROTECTION AND SUSTAINABILITY BILL 2011

The Queensland Law Society wishes to raise some concern with aspects of the *North Stradbroke Island Protection and Sustainability Bill 2011* (the Bill) which breaches fundamental legislative principles.

The Society has no comments on Government's stated policy with respect to mining on North Stradbroke Island and acknowledges the right of Government to settle and implement its own policy position. The Society merely raises concern with aspects of the drafting of the Bill which would appear not to have sufficient regard to the rights and liberties of individuals.

The *Legislative Standards Act 1992* sets fundamental legislative principles which underlie a parliamentary democracy based on the rule of law. The principles require that legislation must have sufficient regard to the rights and liberties of individuals.

In the Bill a number of lawful mining interests are terminated unilaterally on various future dates. These terminations are subject to clause 6 of the Bill which denies any 'compensation, reimbursement or otherwise' to any person by the State due to the operation of the Bill. This effectively denies a party who presently lawfully enjoys use of one of the affected mining interests a portion of their legitimate expectation without recourse to any form of compensation or review of the decision.

The concern of the Society is that clause 6 breaches the fundamental legislative principle of having sufficient regard to the rights and liberties of individuals, as it denies compensation to a party whose lawful tenements have been extinguished by the State.

Thank you for providing us the opportunity to put these views to the Committee.

Yours faithfully

Bruce Doyle
President