

LIGHTNING RIDGE OPAL MINING- REPORT REGARDING REVIEW

--Murray Wilcox AO QC

RECOMMENDATIONS AND PRINCIPAL SUGGESTIONS

Recommendations on compensation payable by prospectors/miners to landholders

- (i) As a matter of urgency, the Minister fix rates of compensation for opal prospecting licences and mineral claims, using ss.175 and 223A of the *Mining Act 1992*.
- (ii) In the longer term, amendments be made to Division 1 of Part 13 of the Act, enabling the Minister to set compensation rates, from time to time, by notice published in the Gazette.
- (iii) The rates initially set by the Minister be \$80 plus 10 cents per hectare for opal prospecting licences and \$ 50 per annum for mineral claims.

Principal suggestions regarding other issues raised during the review

- (iv) The Department of Trade and Investment, Regional Infrastructure and Services should comprehensively plan opal mining activities, not only in new release areas like OPA 4, but also in currently mined areas where new claims will likely be sought. Such planning should include detailed consideration of environmental and Aboriginal heritage issues and the siting and construction standard of access roads.
 - (v) As part of its preplanning, the Department prepare, and make available to applicants, standard Mining Operations Plans, for adoption and use by them.
 - (vi) The Department accept responsibility for collection and distribution of compensation payments.
 - (vii) The Department institute a system of notifying landholders, by email or SMS, about the grant of a mining right over their land.
 - (viii) The Department establish a webpage for each rural property in the Lightning Ridge mining district and there maintain a record, accessible to the landholder, of all current mining rights affecting that property.
 - (ix) The Department publicise the rules about access to mining sites and consider issuing identification cards and vehicle stickers.
 - (x) Dogs not be permitted on mining claims or opal mining prospecting areas.
 - (xi) The Government consider whether to limit the time during which particular land is available for opal mining.
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Mr Mark Paterson AO,
Director-General,
Department of Trade and Investment, Regional Infrastructure and Services.

1. Following preliminary discussions in late 2010, on 28 March 2011 your predecessor, Dr Richard Sheldrake, wrote to me confirming my engagement to undertake the following tasks:
 - “a. conduct an impartial review and recommend a methodology for establishing appropriate levels of compensation to landholders affected by minerals claims at Lightning Ridge;
 - b. identify a process that allows on-going assessment of future compensation;
 - c. meet with local landholders and miners to identify other specific issues of concern, and
 - d. prepare a report for me outlining your findings for completion by July 7 2011, subject to the trip proceeding as planned in the week of May 9 2011.”
2. The trip to Lightning Ridge did proceed as planned in the week commencing May 9, 2011. This is my report.

BACKGROUND

The Lightning Ridge opal fields

3. In a report written in November 1984 for the then Department of Mineral Resources, JJ Watkins said:

“Opal has been mined at Lightning Ridge since 1903. During this time a moderate production was achieved until the late 1950’s when production increased markedly due to the introduction of mechanized mining methods. Estimated production over the last 6 years has averaged \$13 million per annum. Processing methods, although still water intensive, have become significantly more efficient. Based on rates of water consumption, the extraction (or processing) rate of potentially opal-bearing claystone is estimated at 206 000 tonnes per year.

...

“The estimated life of the existing opal fields at Lightning Ridge is about 50 years. The potential for significant new discoveries of opal which may extend this life is moderate. There is good potential for significant new discoveries in outlying areas particularly in the ‘seam country’ near Grawin.”(1)
4. In the 26 years that have passed since these words were written, new fields have opened. Mechanical extraction and processing have increased, with the use of large and expensive equipment. So it is reasonable to assume that the value of average annual production is now higher than \$13 million. However, it is impossible to say to what extent. Because of fear of “ratting” (theft from shafts and claystone piles),

opal miners are notoriously secretive about success. (2)

5. The Lightning Ridge opal fields lie within the Lightning Ridge Mineral Claims District, as constituted by the Governor under s.173 of the *Mining Act 1992* (“the Act”) and also the Narran/Warrambool Reserve (“the Reserve”).
6. The Reserve was apparently first constituted in 1989, the purpose being to reserve land for opal mining, as distinct from other minerals. As explained in a 2006 publication of the Department of Primary Industries (3), the reservation “ensures that the opal miner, traditionally an individual, will continue to have reasonable access to areas of country for opal prospecting and mining and whose collective resources are more likely to locate opal than limiting titles to a few large mining companies.”
7. The area contained within the Reserve was extended in 2001, 2005 and again last year. As now constituted, the Reserve extends from the Queensland border in a south-westerly direction for approximately 110 kilometres, with a width of approximately 30 kilometres. I understand it now contains all the land believed to be prospective for black opal.
8. Pursuant to s.220 of the Act, the Minister has constituted four opal prospecting areas (“OPA”s). In each of those areas, under s.224 of the Act, the Minister has also constituted opal prospecting blocks.
9. OPA 1 includes the township of Lightning Ridge and some nearby areas that have been worked since the early days and now lie outside any Western Lands lease. Some of these areas are now managed by the Land and Property Management Authority (“LPMA”) as “Preserved Fields”; that is, areas of land that are deliberately not rehabilitated after the cessation of mining but, rather, retained for their value as historical mementos, tourist attractions and for scientific study. In earlier times, it was common for miners to erect homes—even substantial homes—on their claim areas. Some of these homes remain in the Preserved Fields, and are still occupied. Plans are well advanced for the erection of a \$40 million Opal Mining Centre on a Preserved Field close to the township.
10. OPA 1 also includes the whole or part of 17 properties held by private persons under Western Lands leases for farming and grazing purposes. Although there has been some mining activity on many of these properties, extensive activity seems to be limited to only a few of them.
11. OPA 2 runs from the northern boundary of OPA 1 to the Queensland border. It contains some or all of 29 Western Lands leasehold properties used for farming and grazing, including some that are partially in OPA 1. The main mining activity in OPA 2 appears to be in its extreme north, particularly on “Mehi”.
12. OPA 3 adjoins OPA 1 to the south. It takes in some or all of 12 farming/grazing leasehold properties. The OPA includes the district known as Grawin, which has been a centre of mining activity for many years, and also an exempted community facilities area called Gumborah.

13. OPA 4 lies to the south of OPA 3. It contains all or some of 26 farming/grazing lease areas, the southernmost of which surround, on three sides, the Narran Lakes Nature Reserve and Narran Lake itself. Narran Lake is an internationally significant wetland protected under the Ramsar Convention.
14. I understand no mineral claims have yet been issued over land in OPA 4. Although some opal prospecting blocks have been constituted in that OPA, and some access routes determined, this process is not yet complete.

The town of Lightning Ridge

15. Lightning Ridge township is situated off the Castlereagh Highway, between Walgett and Goodooga. The town is within the Shire of Walgett and has a permanent population of about 3000 people. There is a large transient population, comprising both opal miners and tourists.
16. Tourists are particularly important to the continuing prosperity of the town. According to the local Visitor Centre, in 2010 some 26,000 people visited Lightning Ridge, to see the fields and absorb something of their history and culture. In discussions with me, representatives of Walgett Shire Council emphasised the local economic and social importance of the opal fields. This importance is illustrated by the recently opened, and most impressive, swimming and diving centre which, I understand, was erected substantially through donations, in cash, kind or labour, by members of the mining community.

Mining at Lightning Ridge

17. In his 1984 report, JJ Watkins noted that opal mining at Lightning Ridge had traditionally been the domain of the smaller miner.” He gave three reasons:
 - “1. The sporadic occurrence of precious opal.
 2. The small size of the mining tenement, or claim (50 m x 50 m);
 3. The restriction on the number of claims per person (2).” (4)
18. Watkins described the various mining and processing methods used in 1984. Mining methods ranged from hand mining (pick and shovel with hand windlass), through the use of a self-tipping hoist or blower to extract opal-bearing claystone (“opal dirt”), electric or pneumatic jackhammers or underground diggers to break up the claystone to heavy equipment such as Caldwell drilling rigs or bulldozers(5).
19. Watkins noted that, in the Lightning Ridge field, “opal is generally found as nodules (in groups or singly) distributed throughout claystone lenses near their junction with the overlying sandstone.”(6) Accordingly, any bulk extraction method must be supported by a secondary process to separate the nodules from the claystone. “Dry puddling” was then occasionally used but Watkins noted its relative inefficiency and the more usual use of wet processing, using a “wet puddler” or an agitator. He described both these appliances as “highly water

intensive”, with the result that water availability is “a major limiting factor to mining operations” and “an added disincentive for prospecting in outlying areas.” (7)

20. In her submission on behalf of the Lightning Ridge Miners’ Association (“LRMA”), Secretary/Manager Maxine O’Brien stated that opal is generally found at depths of between 10 and 30 metres below the surface, in a layer of claystone immediately below a level of sandstone. She said:

“The opal dirt is ...removed with jackhammers and/or hydraulic digging machines and transported to the surface either in large buckets on an automated hoist or via a ‘blower’, which is very like a large vacuum cleaner.

“ In areas around Lightning Ridge where opal occurs in ‘nobbies’ or nodules, the opal dirt is then washed in ‘agitators’ or converted cement mixer bowls. The opal dirt dissolves in the water, leaving behind the precious and common opal, called tailings.

“The tailings are sorted to identify any precious opal, which is cut, polished and sold to an opal wholesaler.

“The opal bearing clay from areas around Grawin, Glengarry and Sheepyards, south west of Lightning Ridge, is not often washed as the opal occurs in seams and is easily identifiable underground.”

21. This description accords with the observations I made during my visit to Lightning Ridge.

The interaction of landholders and miners

22. As mentioned above, most of the Lightning Ridge opal fields lie within Western Lands leases held for farming and grazing purposes. I understand that each of these properties comprises a mixture of flat arable (“black soil”) land, used by their owners primarily for the growing of crops, and rocky, vegetated ridges that are useful to them only for grazing. Opals have been found only on the ridges, not on the black soil plains.
23. I was told that many landholders engage in opal mining, sometimes on their own leaseholdings, especially during periods of drought. For the most part, however, the mining is carried out by people who come as strangers to the landholder’s property. This fact, and the landholders’ legal inability to prevent mining on their properties, or to refuse entry to a particular mineral claim holder, provide fertile soil for any difference to become acrimonious.
24. Unfortunately at the present time, although no doubt some landholders and some miners have a good one-to one relationship, there is considerable acrimony between the two groups. I think there are ways in which the Department can improve that situation.

My visit to Lightning Ridge

25. On Monday 9 May, I travelled to Lightning Ridge in a chartered aircraft, stopping at Maitland to pick up two officers of your Department, Patricia Madden and Victoria Leeman. On arrival at Lightning Ridge, we were met by James Hereford-Ashley, the Departmental Team Leader at Lightning Ridge, and Warwick Schofield, the local Mine Safety officer. They, and all the other local Departmental officers, gave us great assistance throughout our visit.
26. We spent Monday afternoon touring the town and nearby opal fields and meeting local business people. They left me in no doubt of the importance of opal mining to the town and its residents.
27. Tuesday had been set aside for interaction with the farmers. In company with some local farmers and the Chief Executive Officer of the New South Wales Farmers' Association, Matt Brand, we visited five farming/grazing properties, "Wyoming", "Roxburgh", "Rexene", "Malabar", and "Llandilo". In each case, the relevant landholder was on hand to speak of his or her concerns.
28. At my request, public meetings at the local bowling club had been convened for the Tuesday and Wednesday evenings. Although anyone was welcome to attend, the idea was that the Tuesday meeting would concentrate on the farmers' concerns and the Wednesday meeting on those of the miners.
29. The Tuesday evening meeting was attended by some 50-60 people. It went on for two and a half hours. Much ground was covered.
30. Wednesday was devoted to a tour of places selected by the miners. The itinerary was devised by LRMA and the Grawin, Glengarry and Sheepyards Miners' Association ("GGsMA"). There was some overlap with the properties visited on the previous day but we also spent a considerable time on "Muttibun", a property heavily affected by opal mining. Also, we looked at different issues, including what is being done, co-operatively between miners, by way of open cut mining, "wet puddling" and the stockpiling and disposal of mullock. I was shown several examples of the final ("secondary") rehabilitation that takes place after all the claims in a particular area have expired or been relinquished; it then being assumed there is no longer much likelihood of further mining activity in that area.
31. On the Wednesday evening we held another public meeting. About 30 people attended. The meeting lasted for about two hours and focused on the miners' viewpoint about the contentious issues.
32. On Thursday morning I met with board members of LRMA and GGsMA. I indicated my tentative reaction to the main issues and we had a constructive and helpful discussion. After a sandwich lunch with Walgett Shire Council representatives (Mayor Ian Woodcock, Deputy Mayor Bill Murray, Councillor David Lane and General Manager, Don Ramslad), I held a telephone conference meeting with Mr Brand of the Farmers' Association to advise him of my current thinking.

33. Dr Sheldrake had informed me of his wish to facilitate a “whole-of government” approach to resolving the problems between the miners and farmers at Lightning Ridge. Accordingly, at my request, Ms Madden arranged a meeting, on the Friday morning, with the local representatives of several New South Wales government agencies. Those in attendance were: Pam Welsh (Regional Director of your Department), Superintendent Bob Nolan and Inspector Mark Hoath (New South Wales Police), Shaun Barker (Crown Lands Division of LPMA), Michael Kneipp (LPMA), Barry Alston (Business Development Manager, State and Regional Development). Peter Downes, of the Planning and Infrastructure section of your Department was unable to attend but he sent me a letter urging my support for the “Camps on Claims Scheme”, under which the Department has legitimated the residential use of particular Preserved Area mineral claims.
34. We flew home on the Friday afternoon.

THE LEGISLATION

Various mining titles

35. Consideration of the Mining Act is complicated by amendments that were enacted by Parliament in 2008 but have not come into force. As it is uncertain when, if ever, the amendments will come into operation, I will ignore them for the moment.
36. The Act provides for the issue of various types of mining rights. Several of those types can have application to opal mining but only two are important to this report: opal prospecting licences and mineral claims.

Opal prospecting licences

37. Section 226 of the Act entitles any person to make application, in writing, for an opal prospecting licence over an opal prospecting block. There are some restrictions on the grant of an opal prospecting licence (s.227) and certain grounds upon which a licence may be refused (s.228). If the licence is granted, it will be subject to conditions specified in the Act, including adherence to any registered access management plan (s.229(c)), and also any conditions specified by the Minister by an Order published in the Gazette (s.223A).
38. An opal prospecting licence has effect for the period stated on the map relating to the relevant opal prospecting block—usually 28 days or three months. During that period, the holder has an exclusive right to prospect for opals on that block (s.232(2)). There is no limit on the number of exploration holes the prospector may drill. The Director-General has power to cancel an opal prospecting licence if the prospector has contravened any provision of the Act, or Regulations made under the Act, or any licence condition (s.233).

39. Given that land at Lightning Ridge over which an opal prospecting licence is granted will almost always be land within a Western Lands farming/grazing lease, there is a likelihood of interaction, and a possibility of friction, between the prospector and the landholder. However, I gather that prospecting rarely causes friction. Exploratory drill holes may be numerous but they are usually small and easily filled. The most common interpersonal problem seems to arise out of damage to vegetation caused by drilling trucks.

Mineral claims

40. Part 9 of the Act deals with mineral claims. Mineral claims may be granted only for land in an area constituted by the Governor as a mineral claims district (s.180(2)) and are subject to any special conditions specified by the Minister in an Order published in the Gazette (s.175). The only limitation upon the persons to whom a mineral claim may be granted is that an individual must be at least 18 years of age (s.207). A company may hold a mineral claim and, I understand, this is not uncommon.

41. Mineral claims in the Lightning Ridge mineral claims district must not exceed 2,500 square metres and, where practicable, are to be squares 50 metres by 50 metres: see Ministerial Order gazetted on 18 December 2009. No person may hold more than two mineral claims at a time. However, by using a multiplicity of companies, a particular individual may gain control over many claims. There is at least one example of this having been done—to enable the creation of a substantial open cut mine in OPA 2.

42. Mineral claims remain in force for such period as the Director-General may determine (s.193). They may be renewed indefinitely (s.197). With the approval of the Director-General, they may be transferred to another person (ss.200-201).

43. Section 195 of the Act gives the holder of a mineral claim, in respect of a particular mineral, the right to prospect for and mine that mineral, in accordance with the conditions of the claim. Subject to those conditions, and in connection with the authorised prospecting or mining, the holder may erect buildings and structures, exercise rights in the nature of easements, remove from the claim area any timber, stone or gravel and carry out any mining purpose.

44. Section 211 applies where the mineral claim holder is entitled to a right of way that has been indicated or described in the manner prescribed by the Regulations. In such a case, the mineral claim holder “must ensure that substantial gates or grids” (or, if the landholder so requires, both) “that comply with subsection (4), are placed wherever fences are intersected by the right of way.” Subsection (4) requires any gate or grid to “be of a design and construction that is adequate to prevent stock from straying.”

45. The Director-General is authorised by s.203 of the Act to cancel a mineral claim under certain circumstances, including the holder’s contravention of

any provision of the Act or Regulations or conditions of the claim.

COMPENSATION: THE STORY SO FAR

The statutory compensation provisions

46. Section 267(1) of the Act provides that, upon the granting of an opal prospecting licence, “a landholder becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by the licence.”
47. The term “compensable loss” is widely defined, by s. 262 of the Act, as “loss caused, or likely to be caused, by:
- (a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations, or
 - (b) deprivation of the possession or of the use of the surface of land or any part of the surface, or
 - (c) severance of land from other land of the landholder, or
 - (d) surface rights of way and easements, or
 - (e) destruction or loss of, or injury to, disturbance of or interference with, stock, or
 - (f) damage consequential on any matter referred to in paragraph (a)-(e), but does not include loss that is compensable under the *Mine Subsidence Compensation Act 1961*.”
48. Section 266(1) confers a right, similar to that under s.267(1), upon the granting of a mineral claim..
49. Sections 266(2) and 267(2), respectively, of the Act say that the compensation in relation to a mineral claim and opal prospecting licence consists of:
- . such amounts as may be determined by agreement between the mineral claim holder (or opal prospecting licensee) and the landowner;
 - . such amounts as, in default of any such agreement, may be assessed by the Land and Environment Court, on application by either party; and
 - . such amounts as may be payable pursuant to an order of the Land and Environment Court, being amounts payable out of a fund established by the mineral claim holder (or opal prospecting licensee) with the Court, the quantum of which may be fixed by regulations, in order to compensate a landholder who could not initially establish an entitlement to compensation but does so at a later date.
50. No relevant regulation has yet been made and there has, so far, been no determination of compensation by the Land and Environment Court.

51. Subsection (3) of ss.266 and 267 authorise the Land and Environment Court, instead of assessing compensation in respect of a particular mineral claim (or opal prospecting licence), to assess compensation in relation to all mineral claims (or opal prospecting licences) within a mining division or any particular group of claims within a division. In that event, the Court “may assess compensation as a fixed amount per mineral claim (or licence) or as an amount per mineral claim (or licence) to be calculated at a fixed rate.”
52. Subsection (4) of each of the two sections contains an important prohibition: the holder of a mineral claim (or opal prospecting licence) “must not exercise any right conferred by the claim”(licence) unless:
- . he or she has first served on the landholder notice of intention to exercise those rights; and
 - . there is in place a compensation agreement between the mineral claim holder (opal prospecting licensee) and the landholder as to the amount of compensation *or* the compensation determined by the agreement or the Land and Environment Court has been paid to the landowner or into court; and
 - . the holder has paid into court any prescribed sum in relation to possible future claims for compensation.
53. There is a curious gap in each of the subsections; probably a drafting error.
54. The scheme of each subsection (2) is that the amount of compensation will be determined either by an agreement between the mineral claim holder (or opal prospecting licensee) and the landowner or by an order of the Land and Environment Court. In the latter case, it is clear that the compensation must be actually paid, either directly to the landowner or into court, before work is commenced on the land. One would have expected a similar requirement in a case where the amount of the compensation has been agreed between the parties. However, paragraph (b) of subsection (4) uses the word “or”, to convey that it is enough if either subparagraph (i) or (ii) is satisfied. The first of those alternatives is that an agreement has been made; therefore it is not necessary to comply with the requirement of payment contained in the second alternative. As the section currently stands, there is no requirement of payment in a case where the parties have agreed the amount of compensation.
55. It is also important to note that neither s.266 nor s.267 empowers the Minister or the Director-General to fix the amount of compensation, whether in a particular case or more generally. The Land and Environment Court may do this, but not any member of the Executive. The only role of the Executive, under this section, is to specify by regulation the amount, or method of determination, of the miner’s payment into court, for the purpose of establishing a fund covering compensation for future events relating to the claim or licence.

The power to specify special conditions

56. I have already mentioned sections 223A and 175 which empower the Minister, by Order published in the Gazette, to specify conditions that are to apply, respectively, to any opal prospecting licence or mineral claim granted over land in a specified opal prospecting area or mineral claims district. Each section lists conditions that may be specified in such an order. They include, by s.223A(2)(e) and s.175 (2)(g) respectively, “the compensation payable in respect of the carrying out of prospecting operations under opal prospecting licences” (or “prospecting and mining operations”.)
57. I think these provisions are potentially important to the present review.

The McMahon decision

58. In July 1990, and pursuant to a ministerial direction, Chief Warden JL McMahon held an Inquiry under the *Mining Act 1973* in respect of compensation to be paid by holders of claims and opal prospecting licences within the Narran/Warrambool Reserve. Apparently the direction was given because the 1973 Act was to be amended, on 1 August 1990, in such a manner as to require holders to pay compensation in advance; if compensation was not paid, the Mining Registrar was to become obliged to cancel the mining right. It was apparently thought that, except where the mining right holder and landowner had agreed about compensation, unless Mr McMahon made an immediate assessment of compensation, claim holders would not be able to pay their compensation before the new amendments took effect; with the result that the Mining Registrar would then have to cancel their mining rights.
59. With these matters in mind, Mr McMahon undertook an urgent Inquiry into the desirable level of compensation to be paid, as a minimum obligation, in respect of all opal mining rights. After taking evidence, and hearing some submissions, he wrote an interim report in which he ruled that compensation should be set as follows:
- . \$50 per opal prospecting licence, together with 10c per hectare; \$25 of which was to be held in a Compensation Suspense Account for rehabilitation work and the balance to be paid to the landholder: and
 - . \$25 per mineral claim on grant or renewal; half of which was to be held for rehabilitation and the other half paid to the landholder.
60. Mr McMahon’s interim report was adopted by the acting Minister on 1 August 1990. Presumably payments were promptly made and cancellations averted.
61. Mr McMahon subsequently submitted a final report to the Minister in which he explained his reasoning:
- “I would envisage that \$12.50 of this figure go directly to the land holder and that the remaining half being \$12.50 go into a fund to be appropriately

named—perhaps it could be called Compensation Suspense Account. All payments are to be made by the claim holder to the Registrar who is to disburse the payments to the land holders within a reasonable time and is to hold the remainder in his Suspense Account until establishment of the Board. Should any particular holder feel that further loss has occurred, she or he has the right to make an application under Section 126 for further compensation to be paid and in the event of any land holder making himself unavailable to the claim holder to enable compensation to be paid, payment to the Registrar shall be deemed to be satisfactory compliance by the claim holder with the provisions of the Act.”

Problems arise

62. Although the matter of compensation was discussed at meetings of the Lightning Ridge Mining Board in 1991 and 1992, it seems the course devised by Mr McMahon was followed, without much demur, for some years. However, in December 1997 the Board decided to increase the standard compensation payment to \$40 per mineral claim per year: \$10 of this sum being allocated to road maintenance. Although the Board was a purely advisory body without executive power, it seems most claim holders abided by this decision and paid their \$40 either directly to the landholder or to the Mining Registrar.
63. The situation is not fully clear to me but I gather the Board did not operate on the basis that each landholder would receive \$30 for each claim on his or her land. Apparently, the Board thought those landowners with many claims should receive a lesser amount per claim and those with few claims a higher amount per claim. This led some landholders, who were apparently aware that the Board’s decision lacked legal force, to opt out of the Board scheme and to make their own arrangements with holders of claims over their land.
64. In October 2006 the NSW Farmers’ Association asked the Board to increase the standard rate. It argued that the rate of \$40 had been calculated on the basis that grazing land in the mining area was worth about \$4 per acre, whereas it was now worth \$9. LRMA rejected this argument and asked the Board to establish a committee to review the compensation scheme. The Board did not accede to either request.
65. The Farmers’ Association then requested the Minister to fund an inquiry into compensation but the Minister did not do so. Apparently, the Department took the view that the Minister had no power to determine a standard rate.
66. Mr Hereford-Ashley informed the November 2008 Board meeting that the compensation fund had become insolvent; roads expenditure had been exceeding income for some time. The Board set up a subcommittee to examine the position. At its February 2009 meeting, the Board resolved to cease collecting roads money and that, from July, mineral claims applicants would be asked to pay compensation on a “\$30 in, \$30 out” basis; that is, all the compensation to go to the relevant landholder.

67. At about this time, the Mining Warden's Court was abolished. Its jurisdiction over mining compensation was transferred to the Land and Environment Court. The Mining Registrar at Lightning Ridge had previously received the portion of the compensation that was payable to the landholders and disbursed it amongst them. Now, however, there was no Mining Registrar; so, initially, the Department took over the banker's role. However, doubts arose regarding the Department's authority to do this. Legal advice was sought.

Legal advice

68. In an Advice dated 12 October 2010, the Crown Solicitor explained the situation:

“At the time when the 1990 Assessment was made, mining registrars had a kind of dual role in being both registrars of the Warden's court and also ordinary public servants employed by the Department with certain functions of dealing with title applications etc. That registrar arrangement continued until the position of Warden and Warden courts were abolished in changes made late in 2008 to the *Mining Act* by the *Courts & Crimes Further Legislation Amendment Act 2008*. There is also a distinction between the Warden's administrative functions (under the 1973 and 1992 Acts) of conducting inquiries at the request of the Minister etc and sitting as Warden's court (the former capacity being what led to the 1990 Assessment).

“The Land and Environment Court ('LEC') was given what used to be the Warden jurisdiction, with the specific exception of Warden administrative and inquiry type matters. The Court's jurisdiction under the 1992 Act would clearly seem to include determining any compensation dispute.

“Nothing in the transitional & savings provisions to the 1992 Act seems to perpetuate or transmute any previously-Warden-related role of mining registrars or any associated payment-in arrangement.” (8)

69. After a detailed examination of its provisions, the Crown Solicitor concluded “the 1973 Act did not allow the Chief Warden to make the blanket assessment in the way he did.” (9) Nonetheless, “the parties can choose to treat the 1990 Assessment as governing the compensation payable in 2010 but they are not obliged to do so...” (10)

70. The Crown Solicitor went on to consider the proper person to receive payments of compensation under the 1973 Act, and under the current (1992) Act, concluding as follows:

“Pursuant to Part 13 of the 1992 Act, amounts of compensation in respect of both mineral claims and opal prospecting licences can be paid either to the person entitled to them or into the Land and Environment Court.

“I can see no role for the Department in receiving or collecting compensation payments. Any role the Mining Registrar might have had in receiving or collecting payments would have been in his capacity as an officer of the Warden’s Court and any reference in the 1990 Assessment of the Mining Registrar, should now be read as references to the Land and Environment Court

...

“The Mining Registrar and/or the Department has no role under the current provisions of the Act in receiving or collecting compensation payments from applicants for grants or renewals of mineral claims or OPLs.” (11)

The Land and Environment Court’s position

71. During the latter part of 2010, there were discussions between officers of the Department and the Land and Environment Court about the possibility of that Court taking over the role of banker. However, the Chief Judge pointed out that the function of the Court was to resolve disputes; any administrative services it provided must be ancillary to that function. The Court could not be required to provide administrative services to people who had no case before the Court.
72. As I understand the situation, it was because of this impasse that Dr Sheldrake commissioned me to conduct this review.

The current position regarding compensation

73. During my visit to Lightning Ridge, Ms O’Brien handed me a copy of a members’ information document listing nine landholders with whom LRMA and GGSMA currently had agreements concerning compensation. Eight of these landholders are private persons, the agreed figures being \$40 per grant or renewal of a mineral claim and \$60 plus 10 cents per hectare for opal prospecting leases. The ninth landowner is the Lightning Ridge and Surrounding Opal Fields Management Reserve Trust which has agreed to accept only \$30 for mineral claims.
74. The document stated that LRMA and GGSMA had no agreement with a further nine named landholders and suggested that relevant members send them money orders for sums calculated on the basis of \$25 per mineral claim and \$50 plus 10 cents per hectare for opal prospecting licences. During my visit, I was shown letters from some of these landholders returning money orders calculated on this basis and demanding higher sums, up to \$100 per mineral claim.
75. The compensation system has substantially collapsed. Only a handful of landholders have current agreements with the miners working on their land. There is no consensus about the appropriate compensation rate and no accepted mechanism for payment of compensation. No doubt most miners would prefer to have an agreement, or an independent assessment, about a fair compensation rate but some miners seem not unhappy about the fact that, for

the moment, they pay nothing at all. On the other side of the argument, while some landholders are being co-operative and reasonable, some have behaved in an aggressive fashion over compensation, leading to much ill-will.

OTHER ISSUES OF CONCERN

The task

76. As narrated above, Dr Sheldrake asked me to identify to him other issues of concern, whether to landholders or miners, that might be raised with me in connection with Lightning Ridge opal mining. A number of issues were indeed raised during my visit to the district; many were later further developed in submissions and discussions. Some issues seem to be of more concern to some people, especially landholders, than is the appropriate amount of compensation.
77. It is my task to identify and explain these concerns, not necessarily to resolve them. However, as I have given thought to all the concerns raised with me, I will comment about each of them, for what my comments may be worth in your consideration of them.

Two preliminary observations

78. Before detailing the particular concerns, it is worth noting that many of them seem to have arisen out of the Topsy-like way that Lightning Ridge's opal mining has developed. It is clear from the old records, particularly Ion Idriess' book *Lightning Ridge* (12), that, in the early days, there was minimal control over miners' activities. Over the years, the degree of control has increased but it seems the Department, and its predecessors, have always been in the position of reacting to miners' actions and demands rather than engaging in advance planning for future demands. Many of the complaints made to me by landholders seem to arise out of inadequate preplanning.
79. OPA 4 offers the opportunity of "getting it right", undertaking sufficient preplanning, and making the necessary sensible decisions, to ensure that the problems of the past do not recur in this new area. But there may also be parts of OPAs 1, 2 and 3, where it is evident there is likely to be significant future activity, in which it would be desirable to undertake the same preplanning, especially in respect of environmental and heritage issues and access arrangements.
80. My second preliminary comment concerns the need for enforcement of whatever rules the Department may make. A constant refrain, during my discussions with farmers and their representatives, was the Department's alleged failure to police the conditions that governed the miners' activities. I need not go into details or make any judgment about the claimed failure. It is enough to make the obvious observation that there is no point in imposing conditions that the Department is unable or unwilling to police.

The landholder/miner relationship

81. As already suggested, the grant of an opal prospecting licence or, particularly, a mineral claim, over land held under a Western Lands lease by another person necessarily creates a relationship between the landholder and the prospector/miner. The relationship is an unusual one because of the lack of choice, at least on one side. The landholder and prospector/miner may previously have known each other, but ordinarily that will not be so. Moreover, the landholder has no say, either as to whether any prospecting licence or mineral claim shall be granted or as to the acceptability of the particular applicant. The grant will entitle the grantee to come onto the Western Lands lease, regardless of the wishes of the landholder, and there exercise the rights given under the grant. The grant may apply to an area that is remote from the lessee's homestead and otherwise of little interest to him or her; but it may not. It may cover an area that is sufficiently close to the homestead, or important in the operation of the property, as to make the grantee's presence and activities a continuing irritant or concern to the landholder.
82. It has long been a principle of New South Wales law that mining rights are granted by the Government over private land irrespective of the wishes of the landholder. Nobody has suggested to me this principle ought not to apply at Lightning Ridge. Nobody has argued that Western Lands leaseholders should be allowed to veto the grant of a prospecting licence or mineral claim, either generally or to a particular person. However, the farmers' representatives do suggest the position in which farmers are placed ought to be remembered when considering the substance of their concerns.
83. Some farmers suggested it is not satisfactory that any person may obtain a prospecting licence or mineral claim. They claimed there had been cases where farmers had found people with serious criminal records—even for murder-- working on their properties. They expressed concern for the safety of their families. These farmers submitted the law should be changed so as to require a police check of applicants for prospecting licences and mineral claims; people having a criminal record of specified seriousness should be ineligible for a grant.
84. I understand the concern that lies behind this submission. However, the price of its acceptance would be an additional step in the processing of applications for prospecting licences and mineral claims, with consequential expense and delay. Whether those results are worth incurring is a matter for political judgment.
85. Virtually all of us face the possibility that a person with a serious criminal record may come to work, or reside, near us. Whether the circumstances of landholders affected by opal mining are sufficiently different to justify special protection is a matter I pass on for consideration by you and/or the Minister.

Creation of the relationship: the miners' problems

86. I found dissatisfaction on all sides about the procedures related to the grant of prospecting licences and, particularly, mineral claims.
87. Many miners complained that the procedure for obtaining the right to work a claim is unduly complex and time-consuming. A standard mineral claim may now be granted for up to two years (13) but, as I understand the situation, they are mostly granted for one year at a time. A person who applies for a one-year mineral claim currently pays a total sum of \$185. This sum comprises an Application Fee of \$130, which goes to Consolidated Revenue, an Environmental Levy of \$20, which is reserved for "rehabilitation and environmental maintenance work on areas not currently under mineral claim" (that is, secondary rehabilitation of old workings), a Roads Levy of \$25, used for "establishment of new roads, maintenance of roads; purchase, installation, repair of grids, gates, access signage" and a Mullock Levy of \$10 for "maintenance and environmental rehabilitation work on stockpiles of mullock" (14)
88. In addition to this payment, an applicant for a mineral claim must provide \$700 security, in cash or by bond. The bond is to cover any cost incurred by the Government that may arise out of any breach by the mineral claim holder of a condition imposed by the Act, the Regulations or the claim—the most likely breach being failure to clean up the claim area and/or carry out primary rehabilitation.
89. The payments made at the time of application do not, currently, include compensation to the landholder. This is regarded as something for the miner to arrange. However, at present, this mostly is not done. Even when they are disposed to do so, miners often have difficulty in engaging the landholder in serious discussion about compensation. By general consensus, it is not a viable option for miners to have the Land and Environment Court assess a compensation fee. Therefore, most miners are not entitled to commence mining. Yet they do.
90. During their discussions with me, the miners expressed a strong and unanimous view that it would be preferable for an applicant for a mineral claim to be able to pay a specified, appropriate compensation sum to the officer of the Department who receives the Application Fee and levies, leaving the Department to account to the relevant landholder. This would not only save miners what is sometimes a time-consuming task, it would avoid poisoning the landholder- miner relationship, at its outset, with a dispute about compensation.
91. The conditions laid down for OPA 4 require a claim holder, prior to mining work commencing, to appoint a Mine Operator for the claim, and to ensure, first, that this person has completed the Department's Mine Operators' Workshop and, second, that all people who will work

on the claim have also completed the Department's Safety Awareness Course and Environmental Awareness Course.

92. I found no opposition to these requirements but there was concern about another requirement: the obligation (15) to prepare, and obtain approval of, a Mining Operations Plan. It was pointed out to me that many miners have limited education and/or skill in the drawing of plans and completion of formal documents. Although it was accepted there ought to be a Mining Operations Plan, it was argued it would be desirable for the miner to have the option of adopting a standard plan prepared in advance by the Department. After all, the argument ran, there is not much room for innovation on a claim area only 50 metres square. Most miners follow the same methodology, so why make everybody prepare their own document? And why impose on the miner the delay of waiting for the Department's Environmental Officer to come up from Dubbo to assess the plan?
93. I think there is force in this argument. There is indeed a high degree of similarity in the methodology adopted by holders of Class A mineral claims. Anybody who wishes to do something different, such as open cut mining or the processing or storage of materials, in any event needs a different class of claim.
94. As I see the situation, it is the responsibility of the Department to determine whether a particular area is to be opened up for mining and, if so, the limits of any excluded areas. In making that decision, the Department should consider all the matters listed in ss. 237-239 of the Act and also issues of Aboriginal heritage. The Department should then create a Management Plan, along the lines of that prepared for "Wyoming" in 2007 (16). This would include a comprehensive access road system and identification of trees etc that are to be left untouched by miners. It would then be relatively easy for the Department to prepare a standardised Mining Operations Plan, relating to claims in that release area, that would be made available for adoption by grantees of mineral claims. Those attending the Department's Environmental Awareness Course should be taken through all these documents and made to understand the importance of complying with them.
95. In suggesting the desirability of a standard Mining Operations Plan, I do not exclude the possibility of a particular applicant preparing a different plan and putting it forward for approval, as now. I only wish to simplify life for the vast majority of grantees who are happy to adopt the methodology they see all around them.

Creation of the relationship: the landholders' problems

96. I found widespread dissatisfaction about the quality of communications between the Department and landholders affected by the grant of prospecting licences and mineral claims. Mr Hereford-Ashley assured

me his office sends a letter to the relevant landholder each time a mining right is granted. I accept the assurance; nonetheless there is clearly a problem. Perhaps many landholders do not have a satisfactory system for storing this information, perhaps problems arise because they lose track of when a particular claim will expire. Whatever the reason, it is clear that many landholders reach the stage where they have little idea about the number of current claims over their land and the identity of the people who hold those claims and/or are authorised to work on them; and who, therefore, are entitled to access. I was shown correspondence in which solicitors for landholders had sought information of this nature under the *Freedom of Information Act*. In each case they received a list of names, in return for Departmental charges exceeding \$200, but the list was of little value—it did not indicate which mineral claims were extant, where on the property they were, or how the listed people might be contacted.

97. This situation is totally unacceptable, especially in the digital age. It ought to be possible for the Department to establish on its website a page for each property affected by opal mining activity. There ought to be a plan of the property upon which is marked the location of each opal prospecting licence and mineral claim and the name and contact details of the holder. Desirably, I suggest, there ought also be a list of the people authorised to work on that claim, being people who have completed the Safety and Environmental Awareness courses. The landholder should have access to that page at any time. Whether there should be wider access is another question. I do not see why not; but the Department would have to consider any privacy implications.
98. Even though I envisage that the landholder could inspect the webpage relating to his or her property at any time, it would be courteous, and I think easy, for the Department automatically, at the time when the claim is granted, to send an email or SMS notifying the landholder of that event. This would give the landholder advance knowledge of the new person coming to his or her land and an opportunity to make personal contact with the newcomer. Many of the current problems would be mitigated by earlier and better personal contact between landholders and the miners on their land.

Unauthorised persons

99. Several landholders complained about the number of people coming to claims on their land. They said these were not confined to workers on the claim; people came there to camp, or even to participate in nighttime parties. I have no way of evaluating these allegations but, if they are correct, this behaviour is wrong. A mineral claim holder is entitled to access someone else's property only for the purpose of carrying out mining operations. The claim holder is entitled to invite, or permit, another person to enter, or remain upon, the property only if that person is entering or remaining for that same purpose. I recommend the Department draw these limitations to the notice of all Lightning Ridge

claimholders and warn them that any contravention may lead to cancellation of their claim. If the Department does that, it needs to be prepared to make good its threat, to investigate any complaint of contravention that may be made to it and, where satisfied of the contravention, cancel the claim.

100. The suggestion was made to me that it would be desirable for each claim holder to identify to the Department the people who would be working on his/her claim area and for those people to be given an identification card, and perhaps a sticker for their vehicles. This would assist a landholder in sorting out who was, and who was not, entitled to be on his/her land pursuant to the claim. I recommend consideration of this suggestion.

Access tracks

101. Issues arising out of miners' access to their claims were, by far, the most numerous complaints made to me by farmers.
102. During my inspection tours, I saw many instances where a track to a mining area had become unusable in wet weather, so vehicles had been driven over a different route, creating a second, sometimes even a third, track. The effect was to leave a significant area of churned up country, substantially without grass and susceptible to erosion. The reason, of course, was that the track had not initially been adequately constructed. Perhaps a bulldozer or grader had passed along its route but little or nothing had been done by way of drainage works; after rain, water ponded on the track and drivers avoided the pond.
103. Further, vehicles can carry on their tyres seeds of invasive weeds. The greater the ground area over which miners' vehicles run, the wider the possible distribution of weed seeds.
104. I thought the farmers' complaints about this situation to be entirely justified. It is one thing to require farmers to permit access by miners to their claims, it is another thing to expect them to suffer this sort of damage to their land.
105. The answer is clear: access roads must be planned, and properly constructed, before any area is opened up for mining. There should be an access management plan, under Part 10A of the Act, which should deal, amongst other matters, with those set out in s.236D (1) (a) and (b), namely:

“(a) the rights of access that the holder of a small-scale title has in relation to the land to which the plan applies, including rights in relation to:

- (i) access points to the land, and
- (ii) routes of access across the land, and
- (iii) the manner in which, and the times at which, rights of

access may be exercised,

- (b) the conditions to which the holder of a small-scale title is subject in relation to his or her exercise of any such right of access, including conditions in relation to:
 - (i) maintaining routes of access, and
 - (ii) preserving the safety of persons and stock, and
 - (iii) avoiding interference with the land management practices being adopted in relation to the land affected by the right of way, and
 - (iv) environmental protection.”

106. The term “small-scale title” is defined by the Dictionary to the Act as meaning a mineral claim or an opal prospecting licence.

107. I make clear that I am not suggesting sealed roads to every claim area, or even intensely constructed gravel roads; but there need to be tracks that are sufficiently formed and drained to remain easily usable after rain, so that drivers will not feel the need to head off elsewhere.

Grids

108. Another access issue arises out of the fact that miners prefer grids, rather than gates, at the intersection of access roads and fences. There is then no need for them to stop. Grids have the advantage, from the landholder’s point of view, that there is then no problem about gates being wrongly left open. However, a grid must be regularly cleaned. If it fills with soil, stock can easily cross over.

109. Landholders, naturally enough, do not see why it should be their job to clean grids on mining access roads. LRMA and GGSMA apparently agree; they are prepared to accept responsibility for keeping the grids clean. However, it seems there is often delay in this being done.

110. I do not see any great problem about grid cleaning. LRMA and GGSMA perhaps need specifically to inform both miners and landholders about their position and to set up a procedure whereby they respond promptly to any report that a particular grid needs attention. A regular inspection routine may be advisable.

Unregistered vehicles

111. Many farmers complained to me about the use, on their land, of unregistered vehicles. If a vehicle is not registered, it may not have recently been inspected for roadworthiness and it may be without third party insurance. Both these possibilities are matters of legitimate concern to the farmers on whose properties they are used. However, it is not an offence for a person to use an

unregistered vehicle on private land; the offence occurs only when the vehicle is driven on a public road.

112. I raised the matter of unregistered vehicles with the police officers who attended our Friday morning discussion with New South Wales government officers. They said unregistered vehicles were often used in rural areas, especially by farmers on their own properties. The officers agreed such vehicles are sometimes driven—they thought only for short distances—on public roads and that this is an offence. They undertook to instruct their local officers to be more vigilant.
113. I accept that the use of unregistered vehicles is widespread throughout rural areas. I do not see the need for any special, Lightning Ridge, rule about it. The problem is self-limiting; there is only a certain amount of off-road work for a miner to do. If farmers find significant, blatant, use of public roads by unregistered vehicles, they should draw the matter to the attention of the local police.

Rehabilitation of claims

114. The rehabilitation of claim areas is a two-stage process. The first stage involves the mineral claim holder filling the mining shafts with mullock, closing all their openings to the outside world, piling mullock over the openings and removing all other materials and rubbish from the area. If the job is well done, nothing should be left except pyramids of mullock at the former openings.
115. The second phase is usually performed by LRMA or GGSMA, on behalf of the Department and remunerated out of the Environmental Fund. A contract usually involves an extensive area of land, comprising many individual claims. The work includes removal of any remaining materials and mullock, except the pyramids over the shafts, breaking up all compacted areas, such as roads and former storage sites, replacement of topsoil, where possible, and perhaps some planting of native trees and bushes. The idea is that, in time, casual observers, at least, will not realise the area was ever mined.
116. I was shown secondary rehabilitation sites that met this standard. Sufficient time had elapsed for regrowth of trees and bushes. Because the mullock pyramids remained, it was possible for a careful observer to discern the extent of the previous mining activity; however, the pyramids were not obvious or intrusive.
117. Nonetheless, in the short term, the mullock pyramids are visually intrusive. This is a point of grievance to many landholders. They argued it would be preferable for the material placed on top of the old shaft openings to be left level with the surrounding land;

thereby making it immediately difficult to see that mining had taken place.

118. The problem, however, is that the fill material placed within the shafts subsides, with time and the entry of water. Whatever is placed over the former shaft opening will then also subside, creating a hole at ground level. The hole will present a danger to persons and stock who walk over that site.
119. No doubt there are occasions when the mineral claim holder does not do a good job in first phase rehabilitation. In such a case, the remedy is for the landholder to contact the Department and request that it not release the mineral claim holder's bond until the job is carried out satisfactorily. If there is a problem about second phase rehabilitation, the landholder again has a remedy, by contacting the Department, upon whose behalf the job was done.
120. I see no need to change the rules or remedies about rehabilitation. However, I pass on the observation of Mr Brand, of the NSW Farmers' Association, that some farmers might welcome the opportunity to tender for secondary rehabilitation work on their properties.
121. To the extent that landholder rehabilitation dissatisfaction is a complaint about the practice of leaving mullock pyramids over former shaft openings, I disagree. In the interests of safety, this is essential.

Dogs

122. A number of landholders complained about miners' dogs. Two landholders each claimed to have shot more than one hundred untagged, uncontrolled dogs on their property. I was shown photographs of sheep that had been savaged by dogs.
123. There was a tendency, amongst some landholders, to attribute all uncontrolled dogs to miners. That seems unlikely. Some may have been brought to the property by miners, but it is impossible to know how many.
124. I do not think it is necessary to quantify the problem of miners' dogs. The issue can be resolved by reference to principle. There is no need for any miner to bring a dog onto a landholder's property. The only arguable justification for doing this is so that the dog can guard the miner's property while the miner is underground. However, it is easy enough for the miner to bring along a lockable receptacle and store in it any transportable, valuable item of equipment.

125. Paragraph 12 of the Class A conditions applicable to OPAs 1, 2 and 3 prohibits the claim holder from keeping, or allowing to be kept, on the claim area more than one dog. It says, if the claim is not fenced, “the dog must be chained up or kept under effective control.” I saw no fenced claim area during the course of my inspections; if the condition is to be observed, the dog would have to be chained up all the time. No dog owner is likely to do that.

126. The Class A conditions for OPA 4 (para. 25) forbid the bringing of any dog onto the claim area or areas in its vicinity. This is the preferable rule. It should be adopted for all areas. It is apparent from my discussion with the boards of LRMA and GGSMA that such a change would not be controversial.

Longevity of claims

127. During the Tuesday public meeting, it was suggested there ought to be a “sunset clause” for claims; that is, a limit upon the number of years during which a particular area of land could be the subject of a mineral claim. Many landholders supported this idea. They argued it was unreasonable for them to be required to suffer the inconvenience of mineral claims over their land indefinitely, year after year; often while there was only occasional activity on the claim by the mineral claim holder. The people putting this argument urged that the law be amended so as to ensure that no land was subjected to claims for more than, say, five years; some said ten years.

128. Some landholders may not mind the renewal of mineral claims over their land, year after year, for many years; provided they receive adequate compensation upon each renewal of a claim. Some properties are so affected by mineral claims that annual compensation payments, if received, would constitute a significant proportion of the landholders’ income. Those landholders might not welcome a “sunset clause”.

129. However, other landholders see mining activity as being a net disadvantage to their property; if they had a choice, they would say “no” to mining and forego the compensation revenue. For people in that situation, it must be galling to have claims renewed indefinitely, particularly where there is only intermittent activity on the claim and the holder seems to have no program for working out the claim in an efficient, planned way.

130. During my two days of inspections, I saw hundreds of claim areas. I saw mining activity in only two of them. I was surprised at the lack of the activity, particularly having regard to the time

of year. I was told that many mineral claim holders prefer not to work in the summer heat; activity builds up with the advent of cooler weather in autumn. My inspection was in May, the weather being fine and mild.

131. However, this year, there has been good rainfall and extensive local flooding. There is plenty of water and farming activity. The wider economy is booming and employment is readily available to most people. Many miners come to their claims, for lack of alternative work, in dry times or periods of economic downturn. Those people would not be coming this year. It might be a mistake to assume activity on the claims is always as limited as during my inspection tours.

132. I have considerable sympathy with the call for a limitation on the number of years during which particular land may be subjected to mineral claims, especially if the holder of that land seeks a limit. However, there would not be any point in imposing a limit upon the number of times one miner could renew his/her mineral claim if, after the expiration of the last renewal, it were open to someone else to take out a claim over that same land. A “sunset clause” makes sense only in the context of a rule rendering that land then off limits to everyone. Whether the Government would be prepared to adopt such a rule, I do not know; it would seem to go against the New South Wales tradition that mining trumps all other land uses. Nonetheless, this is a matter warranting consideration.

Landowner legal liability

133. Several landholders raised concern about the position in which they might find themselves if an accident occurred on their land. They supposed a case where a mineral claim holder had left an obstruction on the ground, or had inadequately filled a shaft, and this resulted in an injury to someone or damage to property. They worried that it might not be possible to identify the mineral claim holder responsible for the problem, or that person might be untraceable or insolvent; so the potential plaintiff would look to the landholder, arguing that the landholder had, or should have, become aware of the danger but had failed to eliminate it.

134. In the absence of appropriate legislation, I think this concern would be justified. However, s. 383A of the Act seems to cover the situation. That section says:

- “(1) The landholder of land within which any person (other than the landholder) is authorised to exercise any power or right:
- (a) by or under this Act, or
 - (b) by any authority, mineral claim, opal prospecting licence or permit under this Act,

is not subject to any action, liability, claim or demand arising as a consequence of that person's acts or omissions in the exercise, or purported exercise, of such power or right.

(2) In this section, landholder includes a secondary landholder.”

135. The word “landholder” is defined in the Dictionary to the Act so as to include the holder of a lease under the *Western Lands Act 1901* over the land.

136. In the light of s.383A of the Act, I do not share the concern about legal liability that was expressed to me.

Preservation Areas

137. I received from the Australian Opal Centre in Lightning Ridge a letter dealing with Preserved Areas. The letter said the opal field landscape of the Lightning Ridge district “represents a mining heritage that is totally authentic, continuous, dynamic and functional. ...the Lightning Ridge opal fields are of state and national significance, rating very highly on all standard criteria for mining heritage assessment...”

138. The letter referred to the rehabilitation requirements of your Department. It concluded:

“At present there are no moves to preserve any sites that are more recent than 1987. This means that evidence of workings that have been enormously productive and integral to the economic and social development of this district in the past 25 years—indeed, the last in situ evidence of some of the greatest black opal finds in the history of humankind—will be obliterated...”

“Reversion of deregistered mining ground back to ‘marginal grazing’ does not always improve ecological outcomes, is not always economically rational and is conducted without due consideration of the principles of Economically Sustainable Development. When many other values apply to the workings, and many new uses are feasible and readily available, the environmental and financial benefits of complete rehabilitation are dubious. It may be prudent to review the standard of required rehabilitation works, not only for future mining areas but for current sites and leases both within and outside of the Preserved Fields. If areas can be stabilised, secured and preserved with minimal disturbance and without major and costly ‘reversion’ work, there will be long-term benefits for all stakeholders, including the landholders.”

139. The value of this letter is that it squarely invites the Government to consider the importance of the existing Preserved Areas and the question whether they ought to be extended—especially to include

areas mined out during the last 20 years. However, the letter tends to gloss over the important distinction between land in private ownership and land in public ownership. It is possible strongly to argue that, over time, the Government should accumulate a selection of workings, preferably representing different eras of activity, in order to protect them and make them available to visitors and for scientific study. There may be a case to select one or more areas mined during the last 20 years. However, it seems to me fundamental that, as in the past, the Government then be willing to purchase the relevant Western Lands lease. It would not be fair to require a private landholder to preserve a mining field in an unrehabilitated state. Whatever the interest of that field to some, it is not clear that it would return significant income to the landholder. If mining structures on land are to be preserved in the public interest, then the public should meet the costs of doing this.

140. I see a problem about using the notion of preservation to argue for a general reduction in rehabilitation standards. I believe the proper approach is to select a limited number of the best examples of a particular era or area, and acquire and preserve those examples; but to require all other sites to be thoroughly rehabilitated and restored to the use of the Western Lands leaseholder, in a condition as near as possible to its condition at commencement of mining. Any general reduction of rehabilitation standards will simply mean mess, and loss of production, over a large area.
141. In the context of Preserved Areas, I mention that I was handed copies of correspondence concerning the proposed purchase of land at Grawin from Mr Adrian Newton. Apparently the proposal has been under negotiation since at least 2005 and a price was agreed in 2009. But Mr Newton has not yet succeeded in persuading the Government to settle the matter.
142. It is no part of my task to investigate the reason for the delay in settling this transaction. I mention the matter only because the delay is notorious in the district and is damaging the Government's reputation for fair dealing. The longer it goes on, the harder it will be for the Government to negotiate the purchase of other properties required for Preserved Areas and otherwise.

Effect of opal mining on Aboriginal heritage

143. One of the matters raised at the first public meeting was the effect of opal mining upon the Aboriginal heritage in the area. One of the speakers, Richard Lake, subsequently sent me a letter, on behalf of the Dharriwa Elders Group, in which he itemised past effects. He said places of Aboriginal cultural significance have already been destroyed by opal mining in OPAs 1,2 and 3. He argued "this destruction needs to be identified, recognised, apologised and compensated for and the places restored if possible." Also, measures

should be put in place to ensure this destruction does not occur again. Mr Lake urged “preventative measures, including prosecution, miner education, surveys to properly determine where mining can and cannot safely occur, marked no-go and buffer zones, on-ground supervision of mining and monitoring of the environmental and cultural features.”

144. Mr Lake’s letter argued the need for thorough heritage studies, made in accordance with both State and Commonwealth legislation and involving the local Aboriginal community, before decisions are made about the areas to be made available for opal mining. He thought it unrealistic to expect individual prospectors and miners to have sufficient knowledge to recognise places and items of Aboriginal heritage value; if those places and items are to be protected, this must be because the Department has taken meaningful steps to that end; mining must be kept away from important Aboriginal sites.

COMPENSATION RECOMMENDATIONS

Blanket v. individual assessment

145. As already noted, the Act presently provides for individual assessment of compensation—either as the outcome of an agreement made between the particular landholder and mineral claim holder or as a determination of the Land and Environment Court in litigation between those two parties. On the other hand, the practice, overwhelmingly, has been for a “blanket” approach. In 1990 Mr McMahon selected an amount that he envisaged would be paid by all mineral claim holders to their respective landholders. That is what happened. Even when the figure was varied, the variation was to the blanket sum. Some people opted out and made their own arrangements but there is no indication that any arrangement turned on the degree of damage or disadvantage expected to be suffered by the particular landholder because of the activities of a particular miner. It seems the opting out landholders sought to extract their preferred sum from every miner on their land.
146. This practice indicates two things. First, an industry belief that there is not much difference in the amount of compensation that ought to be paid by one mineral claim holder as against another; each claim causes the landholder much the same degree of damage and disturbance. That belief is not surprising. The claim areas are all the same size and the mining methods adopted by the various mineral claim holders are all much the same. No doubt some claim holders are more considerate and tidy than others, but that would not usually be knowable in advance, when compensation is being assessed. Anyway, if there is proper rehabilitation, those matters are not important in the long term.

147. Second, there is no appetite for court assessment of the level of compensation. In over 20 years, nobody has thought it worthwhile incurring the trouble and expense of court action in order to procure an individual assessment of compensation. That is telling, although not surprising, bearing in mind the smallness of the compensation sums that have been paid, even sought.
148. Continuing to allow parties to agree the amount of compensation sounds attractive. However, the legislation must provide an alternative to agreement; otherwise the landholder would acquire an effective veto over the grant of the claim.
149. Once the need for an alternative is recognised, a blanket approach becomes inevitable. There is no point in the legislation continuing to rely on a mechanism, individual assessment by a court, that people will not use. Compensation must be handled administratively, using a blanket approach.
150. A blanket approach has the advantage of being easily manageable. The Departmental officer receiving the application for a grant or renewal of a prospecting licence or mineral claim would already know the amount of the compensation payment and be able to collect it, along with the Application fee and the levies.
151. Of course, this would not prevent the landholder and miner making any private arrangement they wished. But that would not be the concern of the Department.

The legal mechanism for a blanket assessment.

152. As I have already noted, neither s.266 nor s. 267 of the Act presently allows the Minister, Director-General or any other administrative officer to assess the compensation that must be paid by a particular prospector or miner to a landholder.
153. Those provisions would be repealed if the 2008 amendments were brought into force. There would then be a substituted s.266, and a new s. 266A and s.266B, that would give the Minister the power, by Gazette order, to declare “the amount of compensation that is payable under section 266 by the holders of small-scale titles in an area specified by the order” or “the manner in which that amount must be determined” (s.266A(1)).
154. However, the power granted to the Minister by s.266A is heavily qualified by the final words of the subsection: “in accordance with the Land and Environment Court’s assessment under this section or section 266B(2)(b).”
155. The first of those situations arises where the Court’s assessment is a response to a request by the Minister “to assess the compensation that

is payable or determine the manner in which the amount is to be determined.” (s.266A(2))

156. The second situation arises where an individual landholder or holder of a small-scale title has applied to the Court for an assessment of compensation and, with the consent of the Minister, the Court has decided to “assess the amount of compensation payable by all or a group of holders of small-scale titles in the area concerned and recommend to the Minister that an order varying the amount of compensation payable under an order under section 266A be made in respect of the holders affected by the order.”
157. It will be seen that the second situation arises only where there is already an order under s.266A. So the question arises whether it would be desirable for the Government to arrange for the commencement of the 2008 amendments and then use the new s. 266A to achieve a blanket determination by ministerial order.
158. Assuming there are no other issues concerning the 2008 amendments, the answer to this question depends on the desired role of the Land and Environment Court. If the 2008 amendments were to be used, the Minister would need to request the Court to make an assessment and the Court would need to conduct an inquiry, no doubt after appointing people or organisations to represent the respective interests of landholders and miners/prospectors. The Court would then need to agree to make a blanket determination and do so.
159. There is an urgent need for the Minister to put into place a fair and workable compensation scheme. Currently, most landholders are missing out on income they ought to receive and which may be important to their financial health. The compensation issue is also having a detrimental effect on landholder-miner relationships. It is important that it be swiftly resolved. I worry that, if the Minister decided to bring the 2008 legislation into effect, and then request the Land and Environment Court to conduct an inquiry, the process might take much longer than is desirable.
160. A further disadvantage about using the 2008 amendments is that any variation of the Land and Environment Court’s determination would only be possible after a further inquiry, involving yet more expense.
161. In considering alternatives to using the 2008 amendments, it is desirable to distinguish between the best long term action and what should be done, as a matter of urgency, in the short term.
162. In relation to the long term, I recommend that Division 1 of Part 13 of the Act be amended in such a manner as to allow the Minister to fix compensation rates without the necessity for a determination of the Land and Environment Court. This means that it would not be

appropriate simply to commence the 2008 amendments; they should be ignored and s.266 revised in such a manner as to provide for a ministerial order, published in the Gazette, but without the prerequisite of a determination by the Land and Environment Court.

163. Ordinarily, I would strongly argue that a decision relating to the rights, between themselves, of two private persons should be made by a court, not by a member of the Executive Government. However, it is necessary to keep a sense of proportion. Nobody suggests that the amount that should be paid by way of compensation for a mineral claim should exceed \$100 per year. Nobody suggests it should be less than \$30. Any argument relates to what figure, in a range covering only \$70, should be selected. It is simply not worth anybody's while to litigate such an issue. The Minister is well equipped to make a determination about the figure and to revise it as necessary from time to time.
164. The short term issue arises because, as I assume, it would take some months to get any further amendment of s.266 through the Parliament. It is highly desirable to spare the stakeholders such a delay. One method of doing this would be to use the powers conferred by s. 175(2)(g) and s.223A(2)(e) of the Act.
165. It will be recalled that s.175(1) of the Act empowers the Minister, by order published in the Gazette, to "specify the conditions that are to apply to mineral claims granted over land within any specified mineral claims district." Subsection (2) lists various types of conditions that may be specified in such an order. They include:
- “(g) the compensation payable in respect of the carrying out of prospecting and mining operations;”
166. Section 223A provides a similar power, in relation to the grant of opal prospecting licences within a specified opal prospecting district. Envisioned conditions include those specifying:
- “(e) the compensation payable in respect of the carrying out of prospecting operations under opal prospecting licences.”
167. It is not ideal that the matter of compensation be dealt with, in the long term, by an order made pursuant to the Minister's special conditions power, rather than by the provisions of Part 13 of the Act concerning "Compensation". However, ss. 175 and 223A are there, and they each contain a term that would enable the Minister to move swiftly to fix appropriate mineral claim compensation payments within the Lightning Ridge Mining District and opal prospecting licence payments within each of the opal prospecting areas within that district. I recommend these powers be used, without delay, so as to get a compensation regime into place.

The amount of the compensation payments.

168. It is not possible arithmetically to demonstrate that any particular sum is the appropriate compensation for an opal prospecting licence or mineral claim. In the past, some people have attempted to relate the matter of compensation to the value of the leasehold land over which the mining rights are granted. On that basis, the compensation would be minute. Mineral claims in the Lightning Ridge mining district must be limited to 2500 square metres—one quarter of a hectare. If four claims were granted over a hectare, at a rate of, say, only \$10 per claim, that would yield the landholder \$40 per hectare— an annual income much more than the capital value of ridge land.
169. More importantly, calculation by reference to the capital value of the Western Lands lease would be unfair to the landholder. It might compensate landholders for what they have lost, the use of part of their land, but not for what they have gained: a stranger on their property whose activities are likely to cause them inconvenience or worse. The primary reason for granting compensation, in my opinion, is because of the adverse effect of prospecting and/or mining activity on the landholder's management, and enjoyment, of the property. That is something, like pain and suffering in a personal injuries case, that cannot be calculated. The selection of an appropriate amount has to be a matter of judgment but, as with pain and suffering, informed by past practice.
170. In the past, when mineral claim blanket compensation has been assessed, the selected figure has been about \$30-\$40, although the picture is complicated by the diversion of some of this money for rehabilitation work now covered by a levy. In recent times, a number of landholders and miners have agreed on \$40 per year. This provides some guidance in the selection of a blanket figure. However, \$40 has been used now for some years and the Minister would presumably wish to avoid needing soon to vary his figure. So, to take account of inflation, I would be inclined to adjust the \$40 figure upwards, to \$50 per year.
171. One way of testing this figure is to consider the position of a landholder who has multiple mineral claims on his or her property. Ten claims may cause little interference with the running of the property, so a fairly nominal \$500 per year seems reasonable. One hundred claims will be significant to the landholder, justifying significant compensation. Of course, much depends on the circumstances of the particular property but \$5,000 (\$100 per week) seems about right.
172. Historically, the compensation payable in respect of an opal

prospecting licence has been more than for a mineral claim. An opal prospecting licence certainly affects a greater area of land, although for a shorter period and, perhaps, in a less intrusive way. I would keep the idea of a higher sum, with the total figure depending on the area covered by the licence, and suggest a compensation payment of \$80 plus ten cents per hectare. In the fairly typical case of a licence covering about 200 hectares, this will mean a total payment of about \$100.

Murray Wilcox

6 July 2011

REFERENCES

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- (1) New South Wales Geological Survey Report GS 1985/119, in Abstract.
- (2) This is not a new phenomenon. See the *Report of the Royal Commission into the Opal Industry at White Cliffs* dated 10 July 1901.
- (3) *Opal mining in the Narran Warrambool Reserve- A Code of Practice for Landholders and Opal Miners and Prospectors* (second edition, 2006) at page 2.
- (4) Watkins, *op.cit.* at pages 3-4.
- (5) *ibid.* at pages 5-6.
- (6) *ibid.* at page 6.
- (7) *ibid.* at page 7.
- (8) Advice: Re Statutory Compensation Relating to Mineral Claims paras. 3.5 to 3.7.
- (9) *ibid.* at para. 5.15.
- (10) *ibid.* at para. 6.6.
- (11) *ibid.* at paras. 8.5 and 9.4.
- (12) Angus and Robertson, 1940.
- (13) See Order under s.175 of the Act dated 25 November 2009 published in NSW Government Gazette no.207 of 18 December 2009 at para. 4.
- (14) *ibid.* at para. 7.
- (15) Class A-OPA 4 Conditions published by the Department.
- (16) See *Wyoming Access Management Plan*, prepared by Environmental Resources Management Australia on behalf of the landholder, Kevin Parkins.