LAND COURT OF QUEENSLAND

CITATION:	*Valantine v Henry* [2018] QLC 21
PARTIES:	**Lois Maree Valantine** (applicant) v **Thomas Peter Henry** (respondent)
FILE NO:	MRA007-17
DIVISION:	General division
PROCEEDING:	Determination of compensation payable for grant of mining lease
DELIVERED ON:	17 August 2018
DELIVERED AT:	On the papers
HEARD ON:	Submissions closed 17 November 2017 Matter allocated 19 March 2018
HEARD AT:	Brisbane
MEMBER:	PA Smith
ORDERS:	**1. Compensation is determined for the grant of MLA 100020 in the total sum of Twenty Thousand dollars ($20,000)** **2. Ms Valentine is ordered to pay Mr Henry the sum of $20,000 by way of yearly instalments of $1,000, the first instalment to be paid within 1 month of the grant of MLA 100020 and the further instalments yearly thereafter for the 20 year term of the lease.**
CATCHWORDS:	MINING LEASE – COMPENSATION – DETERMINATION OF COMPENSATION – compensation amount – factors to be considered – value of land – area of mining lease – severance – land use – access – area of mining lease

MINING LEASE – COMPENSATION - exclusive possession – landholder rights – landholder right of entry and access to mining lease area – whether miner may exclude landholder from mining lease area

EVIDENCE – GENERAL PRINCIPLES – RULINGS AND FINDINGS – whether evidence speculative, argumentative or relevant – Land Court not bound by rules of evidence

EVIDENCE – GENERAL PRINCIPLES – RULINGS AND FINDINGS – evidence of things said in a without prejudice preliminary conference – whether evidence should be excluded

Land Court Act 2000, s 7
Mineral Resources Act 1989, s 235, s 279, s 281, s 403

Barrett v Weir and Gregcarbil Pty Ltd [2009] QLC 182, applied
Carabella Resources Limited v Goodwin [2016] QLC 32, applied
ERO Georgetown Gold Operations Pty Ltd v Henry [2015] QLAC 4, considered
ERO Georgetown Gold Pty Ltd v Henry [2015] QLC 22, applied
Henry v ERO Georgetown Gold Operations Pty Ltd [2015] QLC 13, applied
Horn v Sunderland Corporation [1941] 2 KB 26, followed
Mitchell v Oakhill and Mitchell (1998) 19 QLCR 66, applied
North Queensland Mining Pty Ltd v Struber & Anor [2016] QLC 4, applied
Richardson v Barrett [2001] QLRT 89, applied
Salmon v Armstrong [2002] QLRT 54, followed
Shaw v Heritage Holdings Pty Ltd (1992-93) 14 QLCR 139, applied
Smith v Cameron (1986) 11 QLCR 64, applied
Valentine v Etheridge Shire Council [2016] QLC 55, applied
Zapponi v Struber & Anor [2010] QLC 67, applied

APPEARANCES: Not applicable

Background

[1] The applicant miner Ms Valantine has applied for Mining Lease 100020 (MLA 100020). MLA 100020 is situated on Lot 2 GB 110 and known as 'Flat Creek Station' (**Lot 2**). Lot 2 is located approximately 28 kilometres south, south-west of Georgetown and is 13,800 ha in size and is used for grazing, cattle breeding, and

fattening, and has a carrying capacity of approximately 1,380 adult equivalent (AE) beasts. Lot 2 is adequately equipped with bores, tanks and dams and has minor seasonal watercourses over the land.

[2] Lot 2 is owned by the respondent landowner Mr Henry who, in addition to his grazing operations, also operates a Council approved eco-tourist facility on Lot 2 which includes camping, bird watching, hiking, and tourist walks. In addition the respondent holds ML 100067, also located on Lot 2. Fossicking tourism is organised by the respondent and this also occurs on Lot 2.

[3] The purpose of MLA 100020 is to mine gold, tin ore, diamond, lead ore, tantalum/tantalite, and silver ore. The term sought for MLA 100020 is 20 years. MLA 100020 has a total area of 58.1600 ha and a surface area of 56.02 ha. The mining lease site will contain living quarters/camp, mining waste and soil dumps, a water pipeline, processing plant, tailings dam, water management, workshop, machinery, storage, and a vehicular haul road.

[4] Mining on MLA 100020 will operate using a progressive rehabilitation method subject to the Environmental Authority (**EA**). Although the EA will not be granted for MLA 100020 until the grant of the MLA occurs after the matter of compensation has been determined, a draft EA has been issued. It is clear from the draft EA that disturbance from mining is restricted to 10 ha at any one time in accordance with the standard conditions.

[5] The draft EA relates to two mining tenures – ML 100011 and MLA 100020. That however does not mean that the area of disturbance allowed on MLA 100020 should be half of the 10 ha. The draft EA allows significant disturbance to occur, up to a maximum of 10 ha, at anywhere on either mining lease. As there is no evidence to the contrary, this determination will proceed on the legal basis that the applicant is entitled to disturb up to 10 hectares entirely located on MLA 100020 at any one time.

[6] There is dispute between the parties as to access to MLA 100020. I will deal with the question of access under a separate heading.

[7] Mining has long occurred in the vicinity of MLA 100020 as was noted by the Land Appeal Court in *ERO Georgetown Gold Operations Pty Ltd v Henry*.[1] In the latter part of the nineteenth century gold was discovered in the vicinity of the Gilbert River, which is the western boundary of Lot 2. The Green Hills mineral field was declared on 23 April 1896. An associated town called MacDonald Town was established, and surveyed in 1896. Thus the mining of gold has long taken place on Lot 2 and its' surrounds.

[8] The parties dispute the value of the land in the area of the mining lease and the diminution of land value as a result of the mining lease, and have not been able to agree on compensation.

[9] As compensation has not been agreed, the determination of compensation was referred by the Mining Registrar to the Land Court pursuant to s 279(5) of the *Mineral Resources Act 1989* (**MRA**). Pursuant to Land Court Practice Direction 1 of 2017, the referral by the Mining Registrar results in the miner being deemed the applicant and the land holder being deemed the respondent.

Hearing on the papers

[10] The hearing of this matter was listed for a one day hearing on 30 October 2017. However, at a Hearing Review held on 19 October 2017, the parties agreed that it was appropriate for the matter to be heard on the papers. Orders were made for the filing of submissions and replies. Subsequently, on 19 March 2018, the matter was allocated to myself for a decision on the papers.

[11] In addition to the substantive submissions, both parties relied on extensive compensation statements that they had filed.

[12] The applicant was assisted by an agent, Ms A Smith, and the respondent by the legal firm of Emanate Legal.

Principles of compensation under the MRA

[13] Section 279 of the MRA provides that a mining lease shall not be granted or renewed unless an agreement in relation to compensation has been filed at the office of the

[1] [2015] QLAC 4, [4].

Mining Registrar, or in the absence of such an agreement, a determination of compensation has been made by the Court. In this matter, as already indicated, no agreement has been lodged with the Mining Registrar and the matter has been referred to the Court for determination.

[14] The issues which must be considered by the Court are set forth in s 281(3) and (4) of the MRA which provide as follows:

> **281 Determination of compensation by Land Court**
> …
>
> (3) Upon an application made under subsection (1), the Land Court shall settle the amount of compensation an owner of land is entitled to as compensation for—
>
> (a) in the case of compensation referred to in section 279—
>
> (i) deprivation of possession of the surface of land of the owner;
> (ii) diminution of the value of the land of the owner or any improvements thereon;
> (iii) diminution of the use made or which may be made of the land of the owner or any improvements thereon;
> (iv) severance of any part of the land from other parts thereof or from other land of the owner;
> (v) any surface rights of access;
> (vi) all loss or expense that arises;
>
> as a consequence of the grant or renewal of the mining lease; and
>
> (b) in the case of compensation referred to in section 280—
>
> (i) diminution of the value of the land of the owner or any improvements thereon;
> (ii) diminution of the use made or which may be made of the land of the owner or any improvements thereon;
> (iii) all loss or expense that arises;
>
> (4) In assessing the amount of compensation payable under subsection (3)—
>
> (a) where it is necessary for the owner of land to obtain replacement land of a similar productivity, nature and area or resettle himself or herself or relocate his or her livestock and other chattels on other parts of his or her land or on the replacement land, all reasonable costs incurred or likely to be incurred by the owner in obtaining replacement land, the owner's resettlement and the relocation of the owner's livestock or other chattels as at the date of the assessment shall be considered;
>
> (b) no allowance shall be made for any minerals that are or may be on or under the surface of the land concerned;
>
> (c) if the owner of land proves that the status and use currently being made (prior to the application for the grant of the mining lease) of

certain land is such that a premium should be applied—an appropriate amount of compensation may be determined;

(d) loss that arises may include loss of profits to the owner calculated by comparison of the usage being made of land prior to the lodgement of the relevant application for the grant of a mining lease and the usage that could be made of that land after the grant;

(e) an additional amount shall be determined to reflect the compulsory nature of action taken under this part which amount, together with any amount determined pursuant to paragraph (c), shall be not less than 10% of the aggregate amount determined under subsection (3).

[15] Although s 281 sets out the matters to be considered, it does not define any method of assessment. In *Smith v Cameron*, the Land Court held:

> "The section in my opinion merely identifies matters which shall be taken into consideration in making the assessment. It does not prescribe a method of valuation. No doubt each case will depend on its own facts and circumstances but it seems to me that either method is open to the valuer."[2]

[16] In *Shaw v Heritage Holdings Pty Ltd*, the Land Court said:

> "The method of assessment remains a matter which will be governed by the facts and circumstances of each case in which event emphasis may shift from one method to another."[3]

[17] In considering *Mitchell v Oakhill and Mitchell*, the then President of the Land Court, referring to s 281(3) of the MRA, found:

> "The latter section does not prescribe a method of valuation. In my view, as long as the amount of compensation finally determined sufficiently accounts for each of the matters referred to in the sub-section, it is not necessary to quantify an amount in respect of each of the matters referred to."[4]

[18] In determining compensation under s 281 of the MRA, I have adopted the same approach I took in *Richardson v Barrett*.[5] This means the matters set out in the section are concepts to be taken into account in determining compensation, not a notion of separate heads of compensation requiring separate and discreet treatment to arrive at an accumulated figure.

[19] The overriding principle is of equivalence, ensuring that, so far as money can do it, the landholders are placed in the same position as if the mining lease was not granted.[6]

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2 (1986) 11 QLCR 64, 74 -75.
3 (1992-93) 14 QLCR 139, 146.
4 (1998) 19 QLCR 66, 71.
5 [2001] QLRT 89, [9], [10] and [14].
6 *Horn v Sunderland Corporation* [1941] 2 KB 26 at 43 per Jacobs J.

Of course, great care must also be taken to ensure that there is no "doubling up" of compensation.

Objections by the respondent to parts of the applicant's evidence

[20] At paragraphs 33 to 35 of his submissions, the respondent objects to certain statements contained in the applicant's affidavit filed on 13 October 2017. The respondent submits that the statements should be excluded on the basis of speculative and argumentative; relevance; and having occurred in a without prejudice Preliminary Conference. All such submissions are disputed by the applicant in her reply.

[21] As regards those parts to which objection is made on the basis of speculative and argumentative and relevance, I am of course bound by the provisions of s 7 of the *Land Court Act 2000* which provides that the Land Court is not bound by the rules of evidence and must act according to equity, good conscious and the substantial merits of the case without regard to legal technicalities.

[22] Given that this matter is being heard on the papers without oral evidence and therefore without the usual ability for the court to determine the credit of the various witnesses, I do not propose to exclude the evidence on these grounds. That then leaves the confidentiality point.

[23] The applicant contends that the comments were made before a Member of the Land Court at a teleconference.

[24] I have reviewed the Land Court file. What the file clearly shows is that a Preliminary Conference was conducted by his Honour Member Isdale on 4 April 2017, with the applicant attending by telephone. Matters discussed at a Preliminary Conference are confidential, and it is important for public confidence in the ADR systems of the Land Court that such confidentiality be maintained. It would appear that the applicant may have been confused as to the basis of her appearance on 4 April 2017. That however is not the point.

[25] I am satisfied that the whole of paragraph 2(a)(iv) and the words in the second paragraph of paragraph 2(b)(ii) in the applicant's affidavit filed 13 October 2017 reveal confidential details from a Preliminary Conference and must be excluded.

[26] For completeness, I should add that, even if the material referred to in the paragraph above had not been excluded, my overall determination of compensation would not have changed.

The applicant's submissions as to the determination of compensation

[27] The applicant submits that she has provided and relied on her own evidence to assess the quantum of compensation including:

- Researched land types provided by the DAFF,
- Stocking rates from the CSIRO and DAFF,
- Published information concerning neighbouring properties,
- Advertised agistment rates in the area and region,
- Legislation relating to minerals, rights of the Crown, mining and the environment.

[28] The applicant submits that only five hectares or 0.004069% of the respondent's property will be disturbed at any one time during mining operations within MLA 100020 even though the EA allows for a total disturbance of 10 hectares. Because of this, the applicant contends that the respondent will have access to the remaining 99.9959% of his property for grazing and other business activities.

[29] The applicant says she will continually be rehabilitating the land within MLA 100020, and the land will be returned to its prior use and will not be resumed from the respondent's property thereby reducing the usable land over a relatively small area at any one time.

[30] The applicant is prepared to pay the respondent compensation in the amount of $14,141.60 for mining for the term of the lease, payable in equal instalments in advance, once mining commences on MLA 100020. Compensation is to be paid annually while the lease remains in force.

[31] The applicant submits the offer of compensation is based on '… the absence of any substantive and validating evidence from the respondent and limited factual information from the respondent…'[7]

[7] Applicant's Outline of Submissions filed 3 November 2017, p 6, para 14.

[32] The applicant says she has existing compensation agreements in place and lodged with the Mining Registrar for mining leases on neighbouring properties that also run cattle on country equal to or of greater value than Lot 2. These properties also operate tourist activities similar to Flat Creek Station. The applicant submits that these compensation agreements are either less than or equal to the compensation currently being offered to the respondent. Those compensation agreements were not provided in evidence.

[33] The applicant says the value of Lot 2 has increased as a result of past mining activities carried out on the property.

[34] The applicant submits there are a number of statutory provisions relevant to the determination of compensation in this matter. They are:

- Sections 8, 9, 235, 277, 276, 281, 308, 309, 313, 314, 363, 397, and 402 MRA,
- Sections 122, 318E, 318Z of the *Environmental Protection Act 1994* (**EPA**),
- Sections 24B, 318, and Schedule 3, of the *Environmental Protection Regulations 2009* (**EPR**).

[35] The applicant in her Response Compensation Statement calculates the compensation payable in this matter as follows:

> "**Assessment of the Compensation statement of the Respondent**
> …
> 1. The applicant offers compensation for the whole of the mining lease once mining commences as follows.
>
> a. Section 281(3) MRA: $11.45/56.14 ha/annum: $642.80
>
> b. Section 281(4) MRA:10% in accordance with section 281(4)(e): $64.28
>
> 2. Total compensation per annum in the amount of: $707.08
>
> 3. Payable in advance to the respondent once mining commences, Applicant to advise the landholder 3 month [sic] prior to the commencement of mining activities and annually thereafter while the lease remains in force."[8]

[36] Accordingly, the applicant submits that the appropriate orders for the court to make are:

> "**AR70-72 Applicants response to 70-72.:**

[8] Applicant's Response to the Respondent's Compensation Statement filed 13 October 2017, p 12.

1. The applicant seeks a determination:

   a. that compensation be determined in the total amount of $14,141.60 for mining and access for the term of the lease;

   b. payable in equal annual instalments in advance to the respondent once mining commences;

   c. Applicant to advise the landholder three months prior to the commencement of mining activities with compensation to be paid annually thereafter while the lease remains in force."[9]

[37] There is clearly a tension between the applicant's proposed orders 1(a) and 1(b) and the assessment of compensation in paragraph 35 above quoting the applicant's compensation statement. The sum of $14,141.60 appears to contemplate 20 years of compensation, consistent with the proposed term of the lease, at $707.08 per year, while proposed order 1(b) seeks to have the sum of $14,141.60 paid in equal yearly instalments once mining commences, rather than the yearly sum of $707.08. For instance, 1(b) would appear to read that, if mining did not commence until after 10 years of no mining, the yearly payment would be $1,414.16. This appears to be quite inconsistent with the applicant's intention as shown in her compensation statement.

The respondent's submissions as to the determination of compensation

[38] The respondent submits that compensation for the grant of MLA 100020 should be assessed and paid on the premise of the total disturbance of the total tenement area being 58.16 ha for the 20 year lease term.

[39] The respondent says that access to Lot 2 should take into account the impact over Flat Creek Station including the impact on Flat Creek Road Reserve maintained from time to time by the respondent and Etheridge Shire Council. This area is calculated by the respondent to be 1.8 km (rounded up to two hectares) from the boundary of Lot 2 on the north boundary of MLA 100020.

[40] The respondent submits the applicant has the right pursuant to s 235 of the MRA to exclude the respondent from the whole of the area of the mining lease regardless of the applicant stating the respondent will have grazing access to rehabilitated land within the tenement area. The respondent claims that this and the mining infrastructure put in place by the applicant will impact the respondent's access to the

[9] Applicant's Reply Submissions filed 17 November 2017, p 25.

land within the mining lease area, the value of the land, and the subsequent compensation amount to be paid to the respondent.

[41] The respondent claims the impacts arising from MLA 100020 will not only be to the surface area of the land, but will have a broader impact on:

- Access to watering points by cattle,
- Loss of access to a water bore located within MLA 100020 thereby impacting water points located adjacent to the mining lease,
- The potential for damage to the water bore,
- Loss of access to other parts of the land impacting the operation of the property,
- Loss of amenity through visual disturbance, dust and noise created by the mine;
- Disturbance to cattle grazing,
- Changes to overland water flow and erosion,
- Damage to farm infrastructure,
- Tangible risk of the introduction and spreading of weeds
- Increased risk to workplace health and safety through the presence of outside personnel, vehicles, machinery and activities,
- Reduced utility of the land in the area of the mining lease,
- Deprivation of the land,
- Diminution in the value of the land,
- Reduced productivity of the land,
- Reduction in attractiveness and saleability of the land,
- Disruption to eco-tourism and camping business,
- A blot on the title as a result of the grant of MLA 100020.[10]

[42] The respondent has referred to two previous Land Court decisions relating to mining activities on Lot 2, they being *ERO Georgetown Gold Operations Pty Ltd v Henry,*[11] and *Henry v ERO Georgetown Gold Operations Pty Ltd.*[12]

[43] The respondent in his Compensation Statement calculates the compensation payable in this matter as follows:

"**Assessment of Compensation (Respondent)**

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10 Compensation Statement of the Respondent filed 11 September 2017.
11 [2015] QLC 22.
12 [2015] QLC 13.

51. The Respondent considers the total amount of compensation payable by the Applicant for the grant of the ML is as follows:

"

		Calculation	**Subtotal**
a)	Thirty dollars ($30.00) per hectare of the ML per year;	$30.00 x 58.16 ha x 20 years	$34,896.00
b)	Access to and from the ML, within the Land, using Flat Creek Road	Approximate distance to ML within the Land, using Flat Creek Access = 1.8km Width of access track required for the purposes of the Applicant's mining operations. Width of Caterpillar D10 being typical machinery required for mining operations = four (4) metres (adopt 5 for safe operations of two (2) lane passing traffic). Approximately ten (10) metres wide for two (2) lane traffic = 1.8 hectares (adopt 2 hectares). 2 hectares x $30.00	$60.00
c)	10% in accordance with 281(4)(e) of the MRA;	(a) + (b) = $34,956 x 10%	$3,495.60
TOTAL			**$38,451.60**"[13]

[44] The respondent proposes appropriate orders for the court to make which are consistent with the above calculations.[14]

Dispute regarding access

[45] Access to Lot 2 is via a formation locally known as Flat Creek Road. Flat Creek Road is a Council maintained road. Flat Creek Road runs up to and through MLA 100020. In this regard, reference should be had in particular to the recommendation of his

13 Compensation Statement of the Respondent filed 11 September 2017, para 51.
14 Respondent's Outline of Submissions filed 3 November 2017, p 12, paras 70 and 71.

Honour Member Isdale relating to MLA 100020 in *Valentine v Etheridge Shire Council*.[15] Although there is dispute between the parties as to access, it is clear to me from the application material and Member Isdale's recommendation, that the reason the surface area of MLA 100020 is 2.14 hectares smaller than the overall area of the ML is that the surface area of Flat Creek Road contained within MLA 100020 is excluded. The map of MLA 100020 supplied by DNRM with the referral material clearly shows the road cutting through the surface of the ML. It is also clear that access to the western and eastern parts of MLA 100020 is gained via easterly and westerly access points from Flat Creek Road just to the north of the ML.

[46] The DNRM material also refers to the length of access being 1.9 km with a width of 10 metres. This however is inconsistent with Member Isdale's decision on recommendation; Flat Creek Road traversing MLA 100020; my decision in *Henry v ERO;*[16] and the Land Appeal Court decision on appeal in that same matter *ERO Georgetown Gold Operations Pty Ltd v Henry.*[17] I do not accept that the length of access is 1.9 km.

[47] The applicant's submissions and material accept that an area of 0.12 hectares is required from Flat Creek Road to MLA 100020 via Lot 2. I agree. I will proceed with the determination of compensation on that basis.

Is the applicant able to exclude the landholder from the area of MLA 100020?

[48] This question involves the consideration of ss 235 and 403 of the MRA. It has also been the subject of a number of judicial decisions.

[49] Section 235 of the MRA provides as follows:

> **235 General entitlements of holder of mining lease**
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> (1) Subject to section 236 and chapter 8, part 8, division 1, during the currency of a mining lease, the holder of the mining lease and any person who acts as agent or employee of the holder (or who delivers goods or substances or provides services to the holder) for a purpose or right for which the mining lease is granted—
>
> (a) may enter and be—
> (i) within the area of the mining lease; and

15 [2016] QLC 55.
16 *Henry v ERO Georgetown Gold Pty Ltd* [2015] QLC 13.
17 [2015] QLAC 4.

(ii) upon the surface area comprised in the mining lease;

for any purpose for which the mining lease is granted or for any purpose permitted or required under the lease or by this Act;

(b) may do all such things as are permitted or required under the lease or by this Act, including plugging and abandoning, or otherwise remediating, a legacy borehole and rehabilitating the surrounding area in compliance with the requirements prescribed under a regulation.

(2) During the currency of the mining lease, the rights of the holder relate, and are taken to have always related, to the whole of the land and surface area mentioned in subsection (1).

[50] The MRA then goes on to s 403(1) to provide:

403 Offences regarding land subject to mining claim or mining lease

(1) A person shall not—
(a) enter or be upon land; or
(b) use or occupy land; or
(c) erect any building or structure on or make any other improvement to land;

that is the subject of a mining claim or the surface area of a mining lease unless—

(d) the person is authorised by or under this Act, any other Act relating to mining, the GHG storage Act or the Geothermal Act in that regard; or
(e) the person is the owner of the land or is authorised in that behalf by the owner and, in either case, the person has the consent of the holder of the mining claim or, as the case may be, mining lease.

Note—
This provision is an executive liability provision—see section 412A.

[51] These sections were considered by then President of the Land Court her Honour MacDonald in the case of *Barrett v Weir and Gregcarbil Pty Ltd.*[18] Relevantly, President MacDonald had this to say:

"[25] In my opinion, the landowner is entitled to be compensated for the loss of control over the mining lease area as evidenced, for example, by the fact that the mining area may shift from time to time to various parts of the lease without the consent of the landowner. Further, the lease may be regarded as an encumbrance or blot on title so that the applicant's land with the lease in place is worth less than it would be if unencumbered by the lease.

[18] [2009] QLC 182.

> [26] However, I do not accept that the impact of the lease is to deprive the owner of the use of the whole of the lease area for the term of the lease. The effect of s.235 of the *Mineral Resources Act* is that the lessee is entitled to go on to and remain on the mining lease area for purposes connected with mining only. The mining lessee is not given a right to exclusive possession of the lease area. Section 403 of the Act creates certain statutory offences in relation to unauthorised entry onto the lease area. Neither section grants exclusive possession rights to the lessee nor enables the lessee to prevent unauthorised entry onto the lease area. It is clear from the respondents' submissions that they do not object to the applicant's cattle continuing to graze on those parts of the mining lease area that are not from time to time disturbed by the mining operations. Thus in assessing loss suffered from the deprivation of possession of the surface land as a result of the lease under s.281(3)(a)(i) the fact that the landowner may continue to graze his cattle on the undisturbed area of the mining lease should be taken into account. I do not accept therefore that the applicant is entitled to compensation for loss of carrying capacity or agistment for the whole area of the mining lease." [19] (citations omitted)

[52] President MacDonald's observations are consistent with those of then Deputy President Kingham of the Land and Resources Tribunal (as her Honour then was) in *Salmon v Armstrong* [20] where her Honour had this to say:

> "[25] …It could also be inferred from s. 403(1) that the holder has the right to exclude the landowner from the lease area. Relevantly, that section provides that it is an offence to enter, use or occupy the surface area of a mining lease. It is a defence if the person is the owner or is authorised by the owner and the person has the consent of the holder of the mining lease.
>
> [26] Whilst it is unnecessary for me to determine this issue in order to determine compensation, it is my view that this section does not confer exclusive rights to possession upon the holder of the mining lease. Section 403(1) has to be interpreted in the light of the purpose of the Act and of other relevant provisions, including s. 235. I do not accept that s. 403 confers on the holder of the mining lease unfettered power to withhold consent.
>
> [27] Nevertheless, I consider a hypothetical prudent purchaser would regard the lease as effectively depriving the landowners of possession of the surface of the land, even though their stock may from time to time graze on that area." [21] (citations omitted)

[53] In the relatively recent case of *Carabella Resources Limited v Goodwin* [22] I made the following observations:

> "[33] By s 235, the lessee is entitled to go on the mining lease for purposes connected with mining. The holder of the mining lease does not have a right of exclusive possession. The impact of the mining lease does not necessarily

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19 *Barrett v Weir and Gregcarbil Pty Ltd* [2009] QLC 182, [25] and [26].
20 [2002] QLRT 54.
21 *Salmon v Armstrong* [2002] QLRT 54, [25] - [27].
22 [2016] QLC 32.

> deprive the owner of the use of the whole of the lease area for the term of the lease." [23] (citations omitted)

[54] The law as regards ss 235 and 403 of the MRA is in my mind clear. A ML does not grant a miner a right of exclusive possession. The landholder has a continuing right to access the land covered by the ML, provided they have the consent of the miner. The miner is not able to unreasonably withhold consent.

[55] Of course, the outcome in each case will depend on it's own facts. Some mining activities will encompass the entirety of a ML, and in those circumstances the MLs are often fenced at the boundary. In such cases, stock obviously could not wander over part of the mining lease and it may well be appropriate (for workplace health and safety reasons if none other) for the miner to refuse a landholder request for entry. That, however, is far from the case here.

[56] MLA 100020 will, on the evidence, not be fenced at the boundary. Fencing, if any, would at most be of areas of active mining. A total maximum area of 10 ha will be disturbed at any one time. Put another way, 46.02 ha of surface area will not be disturbed. The respondent's cattle will be able to graze on that area of land, and the miner will not be able to reasonably refuse, in my view, giving consent to the landholder to go on that undisturbed area.

[57] Applying the clear statutory and case law to the present facts, the respondent will not have the extent of disruption to his activities on the land as claimed. He will not suffer a total loss of grazing to the area of MLA 100020. He will not lose access to his bore, which is not situated on MLA 100020. It will, in my view, not be lawful for the applicant to deny the respondent access to the bulk of the area of the ML.

[58] The respondent should be compensated for the 'blot on title' and some nuisance of the total area of MLA 100020 once granted on his property, but that is a separate and distinct matter compared to the impacts on his landowner activities, which will only suffer significant direct disruption at any one time to under 20 % of the MLA area.

[59] Curiously, the applicant submits that compensation should be awarded at the rate of $11.45 per ha for 56.14 ha per annum (plus 10%) once mining commences.[24] That is,

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[23] *Carabella Resources Limited v Goodwin* [2016] QLC 32, [33].

[24] Applicant's Response to the respondent's Compensation Statement filed 13 October 2017 p12.

despite her submissions to the contrary,[25] the applicant concedes that that level of compensation should be paid over the entirety of the surface area of MLA 100020 once mining commences. I can only take it that the applicant accepts that the nuisance of the mining activities; the diminution in value to the land; the blot on title; etc. warrant such an award over the entire surface area.

Reliance by the Court on previous material and decisions relating to MRA compensation on Flat Creek Station

[60] At paragraph 11 of her submissions, the applicant submits as follows:

> "11. While the applicant is well aware that case law often refers to particulars adjudicated to in other matters in relation to evidence provided and in those cases where evidence has not been supplied, (for example *North Queensland Mining Pty Ltd v Struber & Anor [2016] QLC 4*) [sic] it has been a practice of the land court to award similar compensation to previous cases. That is not the situation in to [sic] this case as information and evidence has been provided for the determination of compensation for ML 100020."[26]

[61] The applicant is correct in her assertion that the Land Court often takes advantage of other nearby decisions in circumstances where the parties to a MRA compensation matter choose to place no or little material before the Court. That practice allows for at least some degree of consistency in decisions despite the lack of evidence. As the applicant points out, there is evidence before the Court in this matter. The crucial point though that the applicant has missed is that the valuation reports of Mr Harrison for the respondent, from previous cases before this Court relating to ML 6782 [27] and ML 30122,[28] form part of the compensation statement filed material in the present proceedings and therefore are evidence before this Court. That however is only part of the picture.

[62] I will turn first to ML 6782. The compensation statement of Mr Harrison is Annexure C to the Compensation Statement of the respondent. Page 25 of Annexure C shows that Mr Harrison assessed compensation for ML 6782 (in December 2014 for the area of the ML of 46.68 ha) in the sum of $85,000, excluding legal and valuation costs. What the Annexures to the respondent's compensation statement go on to show is that, although Mr Harrison's report was prepared for a hearing as to compensation

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25 Applicant's Reply Submissions filed 17 November 2017, para 37; Applicant's Outline of Submissions filed 3 November 2017, p1; Applicant's Hearing Statement filed 28 July 2017, p 2.

26 Applicant's Outline of Submissions filed 3 November 2017, p 6, para 11.

27 Land Court file MRA 122-12 relates to the matter of *Lewis v Henry*.

28 *ERO Georgetown Gold Operations Pty Ltd v Henry* [2015] QLC 22.

payable for ML 6782, that matter never proceeded to hearing. A consent order was made by the Court on 18 August 2015 [29] in which compensation for the renewal of ML 6782 was settled in the sum of $12,500 or, expressed another way, at only approximately 15% of what Mr Harrison assessed.

[63] The position with respect to ML 30122 is quite different. The determination of compensation did proceed to formal hearing, and not only was Mr Harrison's Valuation Report (Annexure J to the respondent's Compensation Statement) an exhibit in that hearing, Mr Harrison gave expert evidence to the Court. Mr Harrison's Valuation Report assessed compensation for the renewal of ML 30122 in the sum of $10,000 plus legal, valuation, and professional fees.

[64] In addition, at the hearing for ML 30122, the miner called an expert valuer, Mr Dickenson, and his Valuation Report also became an exhibit. I delivered the decision with respect to the renewal of ML 30122. As part of the decision process in that case (*ERO v Henry*) [30] I considered the valuation evidence of the two valuers and had this to say:

> "[31] I reject Mr Harrison's approach of stating the sum of $10,000 as a valuation for compensation under s 281 of the MRA but effectively giving no quantification to such sum. The approach taken by Mr Dickenson is, in my view, consistent with the numerous authorities from this Court in determinations of compensation for small mining leases on large properties. The question then remains: what is an appropriate amount per hectare per year to award in this matter?" [31]

[65] In *ERO v Henry*,[32] I assessed compensation for the renewal of ML 30122 in the sum of $1,496 or to again put it another way, yet again at approximately 15% of what Mr Harrison assessed.

[66] In my view, whilst Mr Harrison's Valuation Reports are in evidence before me and must be taken into account, it would be quite improper of me to accept such evidence without also taking into account the outcomes of each case, which are also before me as Annexures I and L of the respondent's Valuation Statements, noting in particular that compensation for each was only determined in an amount of 15% of what Mr Harrison assessed.

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29 Compensation Statement of the Respondent filed 11 September 2017, Annexure L.
30 *ERO Georgetown Gold Operations Pty Ltd v Henry* [2015] QLC 22.
31 *ERO Georgetown Gold Operations Pty Ltd v Henry* [2015] QLC 22, [31].
32 [2015] QLC 22.

Management time

[67] The respondent claims the cost of management time[33] but does not quantify an amount per hour or number of hours per year for that time. What the respondent has done is included management time as a factor in the overall dollar per ha that he is seeking. I understand of course that this may appear consistent with the approach to compensation that I set out earlier in these reasons: arriving at an overall amount under the various heads of compensation to avoid double-up. However, management time is such a specific matter that it needs to be specifically quantified.

[68] My concern is that the management time detailed by the respondent at 22(c)(vi) of the Compensation Statement includes many items that assume a breach by the miner while conducting her mining activities. This Court is to act on the assumption that mining activities will be properly and lawfully conducted. As Judicial Registrar GJ Smith put it in *North Queensland Mining Pty Ltd v Struber & Anor*:[34]

> "Issues associated with alleged non-compliance are not matters that the Court can consider as part of this referral. Concerns held by the landowners may be referred to DNRM or the Department of Environment and Heritage Protections for further action if necessary."[35]

[69] If the activities of the miner in fact cause additional loss to the landholder, such as death of cattle, that is something for which the landholder can separately claim against the miner under the provisions of the MRA. As I said in *Zopponi v Struber & Anor*:[36]

> "[18] The landholder is also concerned that the mining operation will cause death to stock and other damage to the grazing operations carried out on the property. The Land Court is not able, in my view, to make any awards for damages which might arise as part of the mining operations as part of a determination of compensation. The MRA's compensation provisions must be strictly applied.
>
> [19] If any disputes arise in the future between the parties relating to the mining operation, then it is a matter for the party aggrieved to commence an action in this Court pursuant to s.363 of the MRA, or other relevant legislative provision. This includes, of course, actions to recover costs flowing from the death of stock caused by the mining operation. To be abundantly clear, this determination does not incorporate any such losses. Should there be an actual death of stock caused directly by the mining operations, it would be hoped that restitution to the landholders would be made by the miner as a matter of course, without the need to institute additional proceedings."[37]

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33 Also referred to as owner's time.
34 [2016] QLC 4.
35 *North Queensland Mines Pty Ltd v Struber & Anor* [2016] QLC 4, [21].
36 [2010] QLC 67.
37 *Zopponi v Struber & Anor* [2010] QLC 67, [18] – [19].

[70] Although in my view the owners time component of the respondent's claim is overstated, I am nevertheless satisfied that the very existence of a ML and mining activities warrant observation and checking by the landholder from time to time.

[71] On re-reading my decision in *ERO v Henry*,[38] it would appear that management time claims were not specifically included in the overall rate of $17 per ha which I arrived at for that ML renewal on Flat Creek Station (Lot 2).

[72] Given the overstated nature of some of the management time claims, and the lack of any particularity of an assessment of management time per year, I simply take my findings on the value of management time from *Henry v ERO* [39] where management time was specifically claimed, albeit for a different purpose, as a guide for determination in this case. Consistent with *Henry v ERO*,[40] I am prepared to award the rate of $100 per hour for management time. I allow the nominal amount of two hours inspection time per year.[41] $200 per year (2 hours @ $100 per hour) for the 20 years of the ML equates to $4,000. Absent specific and compelling evidence I am unable to do otherwise.

[73] I am satisfied that the nominal amount of two hours per year does not amount to a doubling up of any other claims.

Determination

[74] It is curious that, despite mounting a strong argument for compensation to be paid over only a limited area of MLA 100020, the applicant submits that compensation should be paid at the rate of $11.45 per ha over 56.14 ha (the surface area of the ML of 56.02 ha plus an access of 0.12 ha) once mining commences.

[75] I will commence by examining the applicant's claim that compensation should only be paid once mining commences. Once granted, the applicant will be able to go on to the ML at any time she desires and undertake low impact activity. Subject to being compliant with her EA, the applicant can also significantly disturb part of the surface

38 [2015] QLC 22.
39 [2015] QLC 13.
40 [2015] QLC 13.
41 Only a nominal amount of inspection time has been allowed due to the lack of particularisation of reasonable, justifiable, and actual inspections that the respondent proposes to undertake each year.

area. Whether the applicant chooses to believe it or not, there is a clear impact on the respondent's land, taking into account the s 281(3) and (4) MRA criteria, as soon as MLA 100020 is granted. The respondent is entitled to compensation from the date of the grant.

[76] Having considered all of the evidence in this matter, I see no reason to depart from the amount of $17 per ha (pre s 281(4)(e) assessment) which I determined in *ERO v Henry* [42] for the area capable of being significantly disturbed (which is 10 ha). The calculations is therefore $17 x 10 ha x 20 years which is 17 x 10 x 20 which equals $3,400.

[77] I now turn to the balance area of the MLA. Although I consider the amount submitted by the applicant to be generous in light of my findings for the area of significant disturbance (given that, and on the basis that, the respondent's cattle will be able to continue to graze on the balance lands of MLA 100020 and other impacts will be significantly less than those on the significantly disturbed land), I am prepared to accept the applicant's submission of $11.45 per ha. The balance surface area is 46.02 ha and access is 0.12 ha [43] so I am prepared to allow that sum over 46.14 ha for 20 years plus s 281(4)(e) assessment. That is 11.45 x 46.14 x 20 = $10,566.06.

[78] But for the submissions of the applicant as to the payment of compensation over the entirety of the MLA surface area, I may have determined a sum less than $11.45 per ha for disturbance to the balance area. There must of course be some amount of compensation for the balance area simply because of the existence of the ML and the manner in which noise and dust and other impacts will be experienced on the balance ML area.

[79] Adding $3,400 for the 10 ha disturbance to $10,566.06 for the balance land results in compensation of $13,966.06 to which is to be added $4,000 for owner's time, making a total of $17,966.06. To that is added an additional amount of 10% pursuant to s 281(4)(e) of the MRA, making the calculation of $17,966.06 + $1,796.61 = $19,762.67 which I will round to $20,000.

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42 [2015] QLC 22.

43 Given the relatively minute area of access, I am prepared to include that area in the overall area of the MLA. Accordingly, no separate award is made for access.

[80] I consider it appropriate that the total compensation be paid in equal yearly instalments of $1,000 for the 20 year term of MLA 100020, with the first instalment being paid within one month of the grant of MLA 100020, and all subsequent instalments yearly thereafter.

ORDERS

1. Compensation is determined for the grant of MLA 100020 in the total sum of Twenty Thousand dollars ($20,000)

2. Ms Valentine is ordered to pay Mr Henry the sum of $20,000 by way of yearly instalments of $1,000, the first instalment to be paid within 1 month of the grant of MLA 100020 and the further instalments yearly thereafter for the 20 year term of the lease.

PA SMITH
MEMBER OF THE LAND COURT