

LAND COURT OF QUEENSLAND

CITATION: *Century Mining Limited v Department of Environment and Science* [2021] QLC 3

PARTIES: **Century Mining Limited**
ACN 006 670 300
(appellant)

v

Department of Environment and Science
(respondent)

FILE NO: EPA032-20

PROCEEDING: Appeal against internal review decision under the *Environmental Protection Act 1994*

DELIVERED ON: 2 February 2021

DELIVERED AT: Brisbane

HEARD ON: Submissions closed 22 January 2021

HEARD AT: Heard on the papers

PRESIDENT: FY Kingham

ORDERS:

- 1. The appeal is allowed.**
- 2. Pursuant to sections 530(1)(b) and 300 of the *Environmental Protection Act 1994* (Qld), the Respondent's decision dated 28 January 2020 that the estimated rehabilitation cost (ERC) for environmental authority EPML00888813 (EA) is \$230,465,718 (excluding GST) for the ERC period of 28 January 2020 to 27 January 2023 is set aside and substituted with the following decision:**
 - a. the required amount of ERC for the EA is \$183,916,150.06 (excluding GST); and**

**b. the ERC period for the EA is 28 January 2020
to 27 January 2023.**

CATCHWORDS: ENERGY AND RESOURCES – MINERALS – ENVIRONMENTAL PROTECTION LEGISLATION – where the miner appealed the estimated rehabilitation cost fixed under s 300 the *Environmental Protection Act 1994* – where the Department of Environment and Science (and the Court on appeal) must have regard to the guideline issued under s 550 of the *Environmental Protection Act 1994* when calculating the estimated rehabilitation cost – where the guideline provides an approved calculation methodology – where the agreed ERC amount does not adopt the approved calculation methodology in all respects – whether an ERC amount not calculated strictly in accordance with the approved calculation methodology complies with the guideline – where the Court found that it did – where the Court allowed the appeal and made the orders proposed by the parties

Environmental Protection Act 1994 s 298, s 300, s 524, s 527, s 528, s 530, s 550

Department of Environment and Science, *Guideline ESR/2018/4425: Estimated rehabilitation cost under the Environmental Protection Act 1994* (Version 2, 2018) 1.

Citigold Corporation Limited v Chief Executive, Department of Environment and Heritage Protection (No. 5) [2016] QLC 62, cited
Origin Energy Electricity Ltd v Queensland Competition Authority [2014] 1 Qd R 216, applied
Rathborne v Abel (1964) 38 ALJR 293, applied

APPEARANCES: Not applicable

- [1] Miners in Queensland must provide security for mine rehabilitation by paying an amount determined by the Department of Environment and Science as the estimated rehabilitation cost (ERC) to fulfill their obligations.¹
- [2] Century Mine is an open cut zinc and lead mine in North-West Queensland. Mining in the pit ceased in 2015. Since 2018, Century Mining Limited has been re-processing tailings to recover zinc.

¹ *Environmental Protection Act 1994* Ch 5 Part 14 ('EPA').

- [3] DES decided the amount of the ERC for Century Mining’s activity was \$230,465,718, a decision it confirmed after internal review on 28 February 2020. Century Mining contended the ERC should be \$173,271,205.71 and appealed the review decision to this Court.²
- [4] The appeal is by way of rehearing, unaffected by the review decision.³ In exercising this jurisdiction, the Court has the same powers as DES,⁴ and may confirm the review decision, set it aside and substitute another decision, or set it aside and return the matter to DES, with any directions the Court considers appropriate.⁵
- [5] The parties have proposed consent orders which set aside the review decision and substitute another decision for a different agreed amount. The Court stands in the shoes of DES in this appeal and must consider whether to make the proposed ERC decision.
- [6] Early in the appeal, the parties settled a list of matters on which they agreed and the real and substantial issues in dispute. This clarified and defined the dispute. During the pre-hearing steps, a number of issues were resolved and only two key issues remained.
- [7] The first key issue relates to the design of the covers for the waste rock dump and the tailings storage facility. The covers are required to prevent environmental harm caused by seepage of potentially acid forming material contained in the waste rock dumps and tailings storage facilities. Century Mining proposed a design for the covers that, initially, DES did not accept.
- [8] To assist the Court to resolve the issue about the design of the covers, the parties proposed to call evidence from expert witnesses. I directed the appeal to Court Managed Expert Evidence.⁶ The expert witnesses provided a Joint Expert Report for the Court. In the JER they agreed that Century Mining’s cover design would meet the company’s environmental obligations, provided it met certain design requirements.

² Ibid s 524.

³ Ibid s 527.

⁴ Ibid s 528.

⁵ Ibid s 530.

⁶ Then governed by Practice Direction 3 of 2018 (since repealed and replaced by Practice Direction 6 of 2020).

- [9] The second key issue is about the calculation of the ERC amount. In making the ERC decision, DES must have regard to the guideline issued under s 550 of the *Environmental Protection Act 1994*.⁷ So must the Court in making the decision on appeal.
- [10] DES has published an ERC Guideline which “...describes the arrangements for estimated rehabilitation cost under the Environmental Protection Act 1994.”⁸ Amongst other things, the guideline states an approved calculation methodology. That is relevant because, in applying for an ERC decision, the applicant must state the amount they consider to be an estimate of the total cost, for the ERC period, of its rehabilitation and environmental obligations, “worked out in compliance with the methodology decided by the chief executive.”⁹
- [11] Relevantly for this appeal, the guideline contains the following statement in the approved calculation methodology about estimates for facilities containing potentially acid forming material:¹⁰

Criteria for calculating ERC—Calculate 100% rehabilitation liability

The total rehabilitation liability reflects the total potential costs to rehabilitate *significantly disturbed land*, to achieve compliance with environmental conditions of the EA and the EP Act. The total rehabilitation liability must:

...

- include the following activities and costs:

(f) estimates determined using the ‘high risk rate’ in the department’s ERC calculator for mine waste structures (such as waste rock/overburden dumps, tailings dams, heap leach pads) that:

- contain Potentially Acid Forming material or
- have observed contaminated seepage that is capable of causing environmental harm

- [12] The original and review decisions included ‘high risk rate’ estimates for the waste rock dumps and tailings storage facilities in accordance with the approved calculation methodology.

⁷ Ibid s 300(5)(b).

⁸ Department of Environment and Science, *Guideline ESR/2018/4425: Estimated rehabilitation cost under the Environmental Protection Act 1994* (Version 2, 2018) 1.

⁹ EPA s 298(2)(c).

¹⁰ Department of Environment and Science, *Guideline ESR/2018/4425: Estimated rehabilitation cost under the Environmental Protection Act 1994* (Version 2, 2018) s 2.3.2.

[13] The ERC amount now agreed by the parties modifies the ERC calculations to replace the ‘high risk rate’ estimate with the agreed estimated cost of implementing the design requirements specified in the JER.

[14] The purpose of a guideline made under s 550 is “to provide guidance”.¹¹ As the Court stands in the shoes of DES in deciding the appeal, I must consider what weight to give to the ERC Guideline, and the approved calculation methodology, in making my decision on the appeal.¹² Considering the application of the guideline to this mine is a fundamental element in making my decision.¹³

[15] On one view, the ERC amount does not comply with the ERC Guideline, because it does not adopt the approved calculation methodology in all respects. However, the purpose of the approved calculation methodology is to guide the applicant in complying with the application requirements of s 298 of the EPA.

[16] The guideline states:¹⁴

All EA holders must use the most recent version of the department’s ERC calculator to calculate their ERC, unless the method or rate to estimate ERC is prescribed in an ERA standard (refer to section 2.3.1 of this guideline).

[17] I could find no statement in the guideline that suggests that DES, in making the ERC decision, must slavishly apply the amount arrived at using the approved calculation methodology. That is not surprising, because to so bind DES would remove any discretion as a decision maker.

[18] That would be inconsistent with the decision-making process provided for in the guideline. It contemplates the ERC decision may be influenced by several considerations. Section 2.5.1 identifies several criteria that “must be considered” in making the ERC decision. One criterion is “any relevant rehabilitation plans, reports, evaluations and assessments”. It follows that a relevant report could affect the ERC amount decided by DES and, on appeal, this Court.

¹¹ EPA s 550(1).

¹² *Rathborne v Abel* (1964) 38 ALJR 293 at 295; *Origin Energy Electricity Ltd v Queensland Competition Authority* [2014] 1 Qd R 216 at [90].

¹³ *Citigold Corporation Limited v Chief Executive, Department of Environment and Heritage Protection (No. 5)* [2016] QLC 62 at [92].

¹⁴ Department of Environment and Science, *Guideline ESR/2018/4425: Estimated rehabilitation cost under the Environmental Protection Act 1994* (Version 2, 2018) at 2.3.2.

- [19] The JER is a site-specific consideration of a proposed method to manage the risk of seepage of potentially acid forming material. As such, it is a relevant report that the Court must consider in making the ERC decision.
- [20] The ERC calculator assumes capping using two capillary breaks.¹⁵ The Century Mine is located in an area with a semi-arid climate. In the JER, the expert witnesses agree that “a single, thicker capillary break would be more effective than two capillary breaks,”¹⁶ given the location of the mine.
- [21] Given the requirement in s 2.5.1 to take a relevant report into account, I consider an ERC amount that is not calculated strictly in accordance with the approved calculation methodology complies with the ERC Guideline. On that view, there is no tension between the guideline and the orders proposed by the parties.
- [22] In any case, if there is, the ERC Guideline, as a statutory instrument, must yield to the Act. The EPA requires DES to decide the amount of the estimated cost of:
- (a) rehabilitating the land on which the resource activity is carried out; and
 - (b) preventing or minimising environmental harm, or rehabilitating or restoring the environment, in relation to the resource activity.¹⁷
- [23] It requires DES to have regard to the guideline in making that decision. It does not require DES to make a decision to adopt the amount arrived at using the approved calculation methodology.
- [24] In making the ERC decision on this appeal, I prefer the unanimous expert assessment of the best method, on this mine, to prevent seepage of the material contained in the waste rock dumps and tailing storage facilities over a default assumption about capping design embedded in a calculator adopted by the Chief Executive to assist an applicant to prepare their application.
- [25] I am satisfied I can make the orders proposed by the parties and that the agreed ERC amount satisfies the requirements of s 300(1).

¹⁵ Joint Expert Report of Dr David Williams, Mr Peter Scott, Mr Andre Kemp and Dr Alan Robertson dated 3 December 2020 (‘JER’), p 20.

¹⁶ JER at 1.1.4 p 37.

¹⁷ EPA s 300(1).

Orders:

- 1. The appeal is allowed.**
- 2. Pursuant to sections 530(1)(b) and 300 of the *Environmental Protection Act 1994* (Qld), the Respondent's decision dated 28 January 2020 that the estimated rehabilitation cost (ERC) for environmental authority EPML00888813 (EA) is \$230,465,718 (excluding GST) for the ERC period of 28 January 2020 to 27 January 2023 is set aside and substituted with the following decision:**
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