
An examination of the heads of compensation available under the Mineral Resources Act 1989

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This article examines s 281 of the Mineral Resources Act 1989 (Qld) and the way that section has been interpreted in the context of assessing compensation for landowners affected by the grant of a mining lease over their land. Section 281 of the Mineral Resources Act 1989 (Qld) is unique in that the heads of compensation as interpreted by the Queensland Courts are focussed on permitting a land owner to recover losses peculiar to the owner. The focus is not on the “loss” of the land but of diminution of its value (both market and non-market based) to the landowner.

INTRODUCTION

Compensation for land subject to the grant of a mining lease is regulated by s 281 of the *Mineral Resources Act 1989* (Qld). As noted by Virtue J in *Konowalow v Minister for Works* (1960) 8 LGRA 75 at 77 in the context of resumption, “the right to claim compensation and the heads under which it can be claimed depend exclusively upon the terms of the relevant statutory provisions ... it is purely a question of construction of the particular statute, and consequently judicial decisions on statutes in different terms are only of limited application”. In this way the legislation operates so as to order compensation be paid to the landowner for losses sustained which are peculiar to the landowner. Importantly in the context of compensation with respect to a grant of a mining lease is that the landowner does not lose title to their land.¹ This is in contrast to a resumption action where the landowner is evicted from the land in return for the payment of compensation.² Section 281 of the *Mineral Resources Act 1989* (Qld) is therefore unique in terms of the heads of compensation allowed for landowners as the focus of the compensation is not for the “loss” of the land but for its diminution in value relative to the landowner.³ The article examines the heads of compensation available to[k1] landowners under s 281 of the *Mineral Resources Act 1989* (Qld) as those heads of compensation have been subject to judicial interpretation.

OVERVIEW OF THE RELEVANT LEGISLATION

The predecessor legislation to the *Mineral Resources Act 1989* (Qld) was the *Mining Act 1968* (Qld).⁴ Compensation was available to lessees⁵ where a mining lease was granted over private land. The heads of compensation provided in the 1971 reprint of the Act were detailed in s 128(2) of the Act and provided that:

compensation is payable under this Part in respect of:

- a) deprivation of the possession of the surface of the private land or of any part thereof;
- b) damage caused to the surface of the private land or of any part thereof or to any improvements thereon by the carrying on of mining operations thereon or thereunder;

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¹ See Brown D, *Land Acquisition* (6th ed, LexisNexis Butterworth, Sydney, 2009) p 6.

² As Douglas Brown has commented “[t]he critical difference [from resumption and grant of a mining lease] is that the owner is not wholly disposed and the access is, in most instances, not permanent”. Brown, n 1, p 6.

³ By comparison consider s 20 of the *Acquisition of Land Act 1967*. The Act was amended by the *Acquisition of Land Act and Other Legislation Amendment Act 2009* (Qld) so as to broaden provisions for assessing compensation under that Act. A particular amendment was to expand and define the costs recoverable attributable to disturbance.

⁴ An analysis of the *Mining Act 1968* (Qld) is conducted by Yarrow D, “Mining Leases in Queensland and Their Impact on Native Title” (1996) 8(1) Bond LR 1.

⁵ Section 128 of the *Mining Act 1968* (Qld).

- c) severance of any part of the private land from other parts thereof;
- d) surface rights of way;
- e) all damage that arises as a consequence of any matter referred to in paragraph (a), (b), (c) or (d) of this subsection.

(3) In no case shall any allowance be made, in the assessment of compensation payable under this Part, for any minerals that are or may be on or under the private land concerned.

Section 130 of the Act provided that a mining lease could not be granted until compensation had been paid to the landowner and compensation was either agreed between the parties or assessed by the Warden's Court on application.⁶ The *Mining Act 1968* (Qld) was administered by Mining Registrars with matters relating to compensation heard by the Warden in the Wardens Court.⁷

In 1982 the *Mining Act 1968* (Qld) was amended by the *Mining Act and Other Acts Amendment Act 1982* (Qld). Under amendments made to the legislation the compensation provisions of the Act were amended. Section 43IA(5) was inserted into the Act and provided that in an assessment of compensation the following heads of compensation should be considered:

- a) deprivation of possession of the surface of the land or any part thereof;
- b) diminution of the value of the lands of the lessee or any improvements thereon;
- c) diminution of the use made or which may be made of the lands of the lessee or any improvements thereon;
- d) damage caused or likely to be caused to any improvements thereon or there under;
- e) severance of any part of the land from other parts thereof or from other lands of the lessee;
- f) surface rights of way;
- g) all damage, loss or expense that arises or is likely to arise as a consequence of any matter referred to in provision (a), (b), (c), (d), (e) or (f); and
- h) if the court is satisfied that it will be necessary for the lessee or owner to obtain replacement land of a similar nature and area or to resettle himself or relocate his improvements, livestock or other chattels on other parts of his land or on the replacement land, all reasonable costs (including legal costs) likely to be incurred by the lessee or owner in obtaining replacement land and his resettlement or relocation of improvements, livestock or other chattels as at the date of the court's determination.

The amendments to the legislation also made appeals available from the Wardens Court to the Land Court.⁸ In 1989 the *Mining Act 1968* (Qld) was repealed and replaced by the *Mineral Resources Act 1989* (Qld). The *Mineral Resources Act 1989* (Qld) represented a major rewrite and reorganisation of the Act. In the context of assessment of compensation the principles for assessing compensation were amended and significant changes were made to the heads of compensation available for consideration.

As with prior legislation, the *Mineral Resources Act 1989* (Qld) requires the issue of compensation to be settled between the person seeking the mining lease and the land owner before the mining lease can be granted.⁹ The Act permits the parties to come to an agreement with respect to the issue of compensation.¹⁰ However, where there is no agreement the assessment of compensation is to be determined by the Land Court¹¹ with an avenue of appeal to the Land Appeal Court.¹² The heads of compensation in the Act are listed in s 281(3) and provide:

⁶ Section 129 of the *Mining Act 1968* (Qld). Section 130 provided that the mining lease could not be granted until compensation had been paid to the land owner.

⁷ Section 164 of the *Mining Act 1968* (Qld).

⁸ Section 43JA of the *Mineral Resources Act 1989* (Qld).

⁹ Sections 279 and 280 of the *Mineral Resources Act 1989* (Qld).

¹⁰ Sections 279 and 280 of the *Mineral Resources Act 1989* (Qld).

¹¹ Section 281 of the *Mineral Resources Act 1989* (Qld).

¹² Section 282 of the *Mineral Resources Act 1989* (Qld). Appeals from the Land Court are to the Land Appeal Court, constituted by two Land Court Members and a Judge of the Supreme Court.

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;as a consequence of the grant or renewal of the mining lease.

The focus on compensating the landowner for losses peculiar to the landowner is emphasised in the Act as s 284(4) of the Act provides that:

- (4) In assessing the amount of compensation payable under [s 281(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 lodgment 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).¹³

To highlight the uniqueness of the heads of compensation available under the *Mineral Resources Act 1989* (Qld) in the recovery of losses peculiar to the owner consider, by way of contrast, the compensation provisions of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld). The heads of compensation are not as expansive.¹⁴ Section 531(2) of that Act provides that:

- (2) The holder of each petroleum authority is liable to compensate each owner or occupier of private or public land that is in the area of, or is access land for, the petroleum authority (an eligible claimant) for:
 - (a) any compensatable effect the eligible claimant suffers that are caused by:
 - (i) authorised activities for the petroleum authority carried out by, or for, the authority holder; and

¹³ Importantly these provisions are relevant for determining compensation where surface area is included within in the mining lease: see s 280(1) of the *Mineral Resources Act 1989* (Qld) where no part of the surface area of the land is included in the mining lease, but there is risk of damage to the surface of the land within the mining lease due to construction and operation of the underground mining project.

¹⁴ The extent of the heads of compensation under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) are yet to be fully considered by the courts. The suggestion by the authors is that the heads of compensation under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) as not as expansive as those under the *Mineral Resources Act 1989* (Qld) unless the "losses" are able to be considered under s 531(5)(e) of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) are interpreted as being able to comprise losses peculiar to the owner given the loss of the value of the land to the owner.

- (ii) the carrying out of an activity by a person authorised by the holder if the holder has represented that the activity is an authorised activity for the authority; and
- (b) consequential damages the eligible claimant incurs because of a compensatable effect caused by authorised activities for the authority.

“Compensatable Effect” is defined in s 531(5) as meaning:

all or any of the following in relation to the eligible claimant’s land:

- (a) deprivation of possession of its surface;
- (b) diminution of its value;
- (c) diminution of the use made, or that may be made, of the land or any improvement on it;
- (d) severance of any part of the land from other parts of the land or from other land that the eligible claimant owns;
- (e) any cost or loss arising from the carrying out of activities under the petroleum authority on the land.

There are no grounds for recovering losses peculiar to the owner as contained in the *Mineral Resources Act 1989* (Qld) unless they can be argued under s 531(5)(e) above. The importance of the heads of compensation prescribed by s 281(3) of the *Mineral Resources Act 1989* (Qld) are that they contain the matters for consideration and establish the parameters for determining compensation relative to the market value of the land of the owner by extending compensation to the value of the land to the owner (emphasis added) given the combined effect of s 281(3)(a) and s 281(4)(c). The framework of the *Mineral Resources Act 1989* (Qld) in being focused on losses peculiar to the owner is evident in the cases in which the heads of compensation have been considered.

In determining compensation under the *Mineral Resources Act 1989* (Qld) two critical factors arise for initial consideration. One factor is that the Act does not require each clause of s 281(3) to be separately assessed, or the total amount to be apportioned across the heads of compensation on completion of the assessment.¹⁵ The other factor is that the Act does not prescribe a method of valuation.¹⁶

METHOD OF VALUATION

The issue over the valuation method to be used in considering the assessment of compensation with respect to the granting of a mining lease was resolved in an early judgment of the Land Court (constituted by Mr White, Member) of *Smith v Cameron* (1986) 11 QLCR 64. In the *Smith v Cameron case*, the Land Court was exercising its jurisdiction under the amended provisions of the *Mining Act 1968* (Qld).

In the decision of *Smith v Cameron*, Mr and Mrs Smith brought an appeal against the amount of compensation awarded to them by the Warden. The land in question was an area of 1,235 ha and was about 24 km northwest of Clermont, Central Queensland. The block was used for the grazing of beef cattle, for stud cattle purposes and for the growing of crops. The land was described as consisting of “open downs country interspersed with areas of Brigalow scrub, box and ironbark rises and with areas suitable for cultivation”.¹⁷ The land was to be subject to two mining leases both leases being 103 ha each. In assessing compensation the Warden ordered compensation to be paid to Mr and Mrs Smith in the amount of \$2,117 each year for a period of 21 years from the date of the commencement of the leases.

In terms of assessing the “value”¹⁸ or amount of compensation to be awarded The Land Court indicated that the valuation methods of “before and after” or “summation” were open as the Act did

¹⁵ *Smith v Cameron* (1986) 11 QLCR 64 and *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297.

¹⁶ *Smith v Cameron* (1986) 11 QLCR 64 and *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297.

¹⁷ *Smith v Cameron* (1986) 11 QLCR 64 at 71.

¹⁸ For a discussion of the meaning of the term “value” see, Brown, n 1, Chapter 6. In particular he comments that “[i]n resumption the key question to be determined in respect of a claim for compensation is: what is the ‘value’ of the land resumed? The word ‘value’ is both a noun and a verb. In resumption law the task is ‘to value’ the resumed land. The result is ‘the value’ of the land.” Brown, n 1, p 209.

“not prescribe a method of valuation”.¹⁹ As Mr White commented:

It is well recognised that where damage by way of severance or injurious affection is involved the assessment of compensation may be made on a “before” and “after” method of valuation of the property in which the cumulative effect is reflected in the “after” valuation or alternatively by the summation or piecemeal assessment of all relevant effects.²⁰

Indeed, the valuer involved the valuation used both methods. As noted by Mr White:

Mr Todd in the hearing before the Wardens Court adopted the “before” and “after” method on the assumption that the whole of the surface of the leased land would be required for exploration and mining purposes and would be fenced out of the selection thereby creating a severance. For the purposes of these proceedings he has adopted the summation method as he was under the impression that he should strictly follow the provisions of the Act although he was still unclear as to the extent and nature of the work that would be carried out upon the leased lands. 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.²¹

Mr White in assessing the amount of compensation adopted both valuers’ “before and after” process. He suggested that the “before and after” process required a consideration of the following:

In considering the value of the block in the “after” exercise one has to visualise the occupation of the surface area and the activities ... These I think would have far less impact on the property than is put forward by Mr Todd ... The disturbance in my opinion will not be of such magnitude as to warrant the leased areas being fenced out and I think that a prudent person would avail himself of the opportunity to graze and work the areas. Nevertheless whilst that may not involve a severance in the physical sense I can appreciate that in the prudent management of the property some adjustment may be necessary so as to ensure that the grazing and stud operations are utilised as best as may be.²²

Traditionally compensation assessed by the “before and after” method is based upon a consideration of where substantial losses occur in the market value of the property. In the context of the *Mineral Resources Act 1989* (Qld) the “before and after” method of valuation quantifies losses arising due to the loss of surface area, together with losses due to severance and injurious affection to the balance lands of the owner.²³ This use of the “before and after” valuation method for the assessment of compensation under s 281(3)(a) of the *Mineral Resources Act 1989* (Qld) was confirmed by the Court in *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297. The facts of that case were that Mr Wills owned property known as “Lexington” which he cultivated for grain production and carried out breeding and fattening of beef cattle both on improved pastures and on crop stubble. The property was a combination of freehold and leasehold land. An application was made by Minerva Coal Pty Ltd for a mining lease over Mr Wills’ land for the purpose of conducting an open-cut mine. The lease was for a term of 30 years and would cover 930.75 ha of Mr Wills’ land.

The case was of one of the first to consider the “new” heads of compensation enacted in s 281 of the *Mineral Resources Act 1989* (Qld). Member Scott was asked to consider the extent to which he needed to take into consideration the way by which the compensation provisions of the *Acquisition of Land Act 1967* (Qld) had been interpreted in assessing compensation under the *Mineral Resources Act 1989* (Qld). Member Scott undertook an analysis of the similarities and differences between the heads of compensation²⁴ however ultimately decided that s 281 of the *Mineral Resources Act 1989* (Qld) needed to be considered “afresh”²⁵ on the basis that:

¹⁹ *Smith v Cameron* (1986) 11 QLCR 64 at 74.

²⁰ *Smith v Cameron* (1986) 11 QLCR 64 at 75.

²¹ *Smith v Cameron* (1986) 11 QLCR 64 at 74-75.

²² *Smith v Cameron* (1986) 11 QLCR 64 at 80.

²³ See *Smith v Cameron* (1986) 11 QLCR 64 at 73 where Member White considered that “the use of land for mining purposes [can be likened] to a compulsory acquisition of land for a limited period”.

²⁴ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 308-315.

²⁵ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 313.

Notwithstanding the differences that I have set out above, and noting that I have not attempted to be exhaustive in selecting these, this is not to say that in forming an understanding of s 281 [of the *Mineral Resources Act 1989* (Qld)] and in considering its application regard may not be had to the way in which similar issues have been dealt with in other relevant areas of law. I must proceed on the basis that the statute in question is the expression of Parliament and that any connection that does exist between two bodies of law generated by statutory provisions recognises the relevant statute as the primary source.

In “starting afresh” Member Scott considered which method of valuation best suited the heads of compensation within s 281 of the Act. As Member Scott noted:

Since the language of s 281(3)(a)(ii) does not refer exclusively to the value of the land over which the mining lease is to be granted, but to the “diminution in value”, it therefore invites the use of the “before and after” method of valuation if practicable, or at least a method of valuation which recognizes that compensation to be assessed under s 281(3)(a)(ii) is the measure of the difference between the value of the owner’s land before the grant of the mining lease and the value after the grant. Such an approach to valuation will draw into it the aspect of the encumbrance of the mining lease per se and any “severance” and “injurious affection”.²⁶

Given that the “before and after” method allows a number of matters to be taken into consideration in a holistic manner, that is, value before the mining and value after the mining lease, the Act does not require each subsection of s 281(3)(a) to be separately assessed, or the total amount to be apportioned to the five heads of compensation, on completion of the assessment. As Member Scott highlighted:

with regard to s 281(3)(a)(i) to (v) inclusive indicates that it is the compensation concepts referred to in these provisions overall that are to be taken into account in determining compensation, not a figure accumulated by amounts arrived at following the separate and discrete treatment of each of the items (i) to (v) inclusive as if each comprised a separate head of compensation. To hold otherwise would be to attribute the concept of compensation a meaning not yet encountered in any other body of law and a meaning not clearly intended by the legislature.²⁷

Notwithstanding that the compensation is to be considered holistically the heads of compensation have been considered in the context of what matters are relevant for compensation to be available under that particular head of compensation.

THE HEADS OF COMPENSATION

The courts have espoused some relevant concepts that are encompassed by the heads of compensation listed in s 281(3)(a). These relevant factors include first, that diminution in value of the land of the owner requires consideration of the effect of the mining lease on “all of the lands of the owner”, not just the title affected by the mining lease. Second, that the “special value” of the land to the owner can be considered which incorporates analysis of the current “status and use” of the land. These concepts are not explicitly referred to in s 281(3)(a) but have been found to be implicit within the heads of compensation.

For example, any joining or adjacent lands where run in conjunction with the affected lands are to be regarded as the “balance lands of the owner”.²⁸ In the case of *Smith v Cameron* of particular relevance was the issue of severance. The issue required a consideration of the degree to which Mr and Mrs Smith were being deprived of possession of the surface of their land²⁹ and how that deprivation and use of the land required for the mining lease might diminish the value³⁰ of their other lands³¹ by causing severance and injurious affection losses. In terms of compensation for severance and deprivation of the surface of their land Member White considered that:

²⁶ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 318-319.

²⁷ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 320.

²⁸ Section 281(3)(a)(ii) and (iii) of the *Mineral Resources Act 1989* (Qld).

²⁹ Section 281(3)(a)(i) of the *Mineral Resources Act 1989* (Qld).

³⁰ Referred to as “severance” and “injurious affection”.

³¹ *Smith v Cameron* (1986) 11 QLCR 64 at 74.

The whole of the surface area of the leases will not be required for mining purposes; that [Mr and Mrs Smith] will continue to have throughout the terms of the leases the right to graze land not physically occupied in the working of the area; that rights of way both within the leases and external thereto are involved together with the question of practical severance and the frequency and magnitude of the disturbance likely to result as a consequence of the operations to [Mr and Mrs Smith's] proprietary rights all of which may best be measured in terms of the attitude of the hypothetical prudent purchaser.

This deprivation together with consequential severance and injurious affection losses is able to be taken into consideration as part of the "after" valuation exercise of the whole of the land to the landowners. A further example of the need to consider the effect of the granting of a mining lease on the "balance lands of the owner" is the case of *Gold Coast City Council v Suntown Pty Ltd* (1979) 6 QLCR 196. In this case the court considered injurious affection losses arising from the severance of the land of the owners. Land owned by Suntown Pty Ltd had been resumed but the company "retained ownership of a large parcel of approximately 185 hectares ... which is situated immediately south of the resumed land, but separated therefrom by Government Road". The valuer for the Gold Coast City Council had not considered the issue of injurious affection to the company's retained land due to the resumption because the lands were separated by a road. The valuer did not regard the retained land as being severed from the company's other lands.

The Land Appeal Court (Stable SPJ, Members Smith and Barry) disagreed. The court regarded that losses assessed under s 281(3)(a) encompassed the concept of injurious affection to the balance lands of the owner. In support of that statement the Land Appeal Court held:

Severance damage arises from the separation or division of the claimant's land as a result of the resumption. The severance may be by way of a division of the retained land into two parts, for example, by way of a resumption for an intersecting road. It may also occur where a part only of the claimant's land is taken leaving a compact parcel. Severance damage is depreciation in the value of the retained land resulting from its division into two or more parts, or its reduction in area and consequent loss of value for some current or higher (potential) use.³²

In considering this interpretation of severance and its effect on the balance lands of the owner the Land Appeal Court found that:

In the subject case prior to resumption the claimant company had two large parcels of land separated by Government Road. There was thus a proximity of situation and a unity of ownership or control which could ensure that what was done on either would protect, advantage and not depreciate the value of the other. ... Now the owner by virtue of the resumption has lost this unity of control and if what is to be done on the resumed land will depreciate the value of the retained land then we think, as a matter of law, the owner is entitled to injurious affection. There was, in our opinion, sufficient affinity or relationship between the parcels prior to resumption to hold that when one part was resumed it was separated from the other.³³

This precedent has been followed in subsequent cases³⁴ most recently in *Watts v QCoal Pty Ltd* [2007] QLRT 23.³⁵ In that case Mr and Mrs Watts were appealing against the award of compensation for the injurious affection to the balance of their grazing property for the grant of mining leases with respect to an open-cut coal mine. The Land and Resources Tribunal confirmed that "compensation

³² *Gold Coast City Council v Suntown Pty Ltd* (1979) 6 QLCR 196 at 207.

³³ *Gold Coast City Council v Suntown Pty Ltd* (1979) 6 QLCR 196 at 209.

³⁴ See *R v The Land Court, ex parte Kennecott Explorations (Australia) Ltd* [1989] 1 Qd R where at 340 Thomas J (with whom Andrews CJ and de Jersey J agreed) that "... such facts ought to be taken into consideration if they contribute to a diminution of the value of 'the lands of the owner or occupier' which are plainly the whole property (including the balance land)". See also *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 and *Australian Diatomaceous Earth Pty Ltd* [2004] QLRT 49 at [10].

³⁵ Interestingly at footnote 6 of the decision, Presiding Member Koppenol noted, "consequently, the mining referee's decision in *Xstrata Coal Queensland Pty Ltd v Perry* [2006] QLRT 64 should now be regarded as having erroneously denied recovery of section 281(3)(a) compensation for the balance land in that case".

under section 281(3)(a) should have been awarded for the balance land”.³⁶ Therefore, while injurious affection is not specifically mentioned as a head of compensation in the *Mineral Resources Act 1989* (Qld), the reality is that injurious affection is taken into consideration. This is done by recognising that severance and injurious affection losses are quantified with the value of the land lost in the mining lease, by adopting the before and after approach to assess losses under s 281(3)(a).

Another relevant head of compensation which appears in the *Mineral Resources Act 1989* (Qld) is s 281(3)(a)(vi) which encompasses consideration of consequential losses. This subsection was unique in statutory compensation assessment³⁷ and appears to be included as a “catch all” to quantify losses not recoverable on the open market, ie those losses peculiar to the owner extending to losses to the owner due to loss of potential use. This contention is supported by the notion of “statutory special value” which was introduced in the *Wills v Minerva Coal Member Scott* noted:

Nevertheless it seems clear to me that the term “loss” in section 281(3)(a)(vi) suitably covers, amongst other things compensation for the loss in value occasioned by the owner having to yield up the opportunity to put his land or part of it to a particular use which would not sound in the market value of the land but which has a present economic value to him. I will for convenience refer to the combined compensation to which I have described here as arising under section 281(3)(a)(vi) and that arising under section 281(4)(c) as “statutory special value”.³⁸

The concept of special value to the owner is supported by the case of *Pastoral Finance Association Ltd v The Minister* [1914] AC 1983.³⁹ In that case the land subject to resumption had been bought by the landowners about a year before notification of resumption. The land had been bought by the Association with the purpose of transferring their expanding business to the site. At the time the Association was notified of the resumption they had not commenced building on the land or occupying it. The Association sought compensation based upon the loss of profits that they would suffer as a result of not being able to occupy the land for their business. At first instance the court held that the Association was only entitled to the market value of the land as no business was being carried on by the Association.⁴⁰

Lord Moulton delivered the judgment on behalf of the Privy Council and opined that:

Their Lordships have no hesitation in deciding that the principle underlying this decision is erroneous. ... The [Association was] clearly entitled to receive compensation based on the *value of the land to them*. This proposition could not be contested. The land was their property and, on being dispossessed of it, the [Association was] entitled to receive as compensation the value of the land to them whatever that might be. The question whether that value had as yet been developed by the actual erection of the buildings necessary to enable the [Association] to realize the special value they thus possessed was no doubt one of the circumstances which was material for guiding the jury to assess its value in the [Association’s] hands, but it by no means prevented the land having this special value, nor did it interfere with the [Association’s] right to have that special value duly assessed by the jury, as the amount of the compensation due.⁴¹ (emphasis added).

Therefore, it is important in assessing compensation under the *Mineral Resources Act 1989* (Qld) to consider the value of the land *to* the landowner. Such an assessment may require special and additional circumstances to be taken into consideration. As Brown comments of the Pastoral Finance Principle:

The Pastoral Finance test places the emphasis on the hypothetical vendor. The intending purchaser plays a lesser role. The land’s special value to the claimant gives rise to a price which the intending purchaser may not be willing to pay.⁴²

³⁶ *Watts v QCoal Pty Ltd*[2007] QLRT 23 at [19].

³⁷ Until the amendment of the *Acquisition of Land Act 1967* (Qld) in 2009.

³⁸ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 324.

³⁹ Known as the “Pastoral Finance principle”.

⁴⁰ *Pastoral Finance Association Ltd v The Minister* [1914] AC 1983 at 1084.

⁴¹ *Pastoral Finance Association Ltd v The Minister* [1914] AC 1983 at 1087.

⁴² Brown, n 1, p 126.

There is also the interrelationship between ss 281(3)(a) and s 281(4) of the Act which requires consideration. This interrelationship was noted by Member Scott in *Wills v Minerva Coal* in the following way:

What might be called the “charter” provision is s 281(3) whilst the introductory words to subsection (4) indicate that the various items listed in subsection (3) are to be considered having regard to subsection (4) to the extent that what is said there may be relevant. Thus for example, in considering “all loss or expense that arises” (s 281(3)(a)(iv)), s 281(4)(a) relating to costs associated in obtaining replacement land is to be taken into account where there is relevant evidence. Such costs are compensable only to the extent that they are “reasonable” and only where the acquisition of replacement land is “necessary”. The word “all” in s 281(3)(a)(6) is therefore qualified by subsection 4(a) to that extent.⁴³

Where it is considered appropriate to include amounts under s 281(4) compensation is maximised to recover value to the owner as consequential losses can be extended to include costs to acquire replacement land to maintain an existing business and re-establish the business on the replacement property, issues relating to the current status and use of the land and issues relating to losses of profit.

The meaning of the term “status and use” and what it means with respect to assessment of compensation under the *Mineral Resources Act 1989* (Qld) was considered in *Wills v Minerva Coal* and requires apportionment of the status and use amount arising due to current use. In *Wills v Minerva Coal* Member Scott commented that:

section 281(4)(c) is concerned with a current use of certain land and a status of land which, together have an economic consequence which should sound in the addition of a premium to the par or market value.⁴⁴ ... The difficult question to answer with respect to s 281(4)(c) is concerned with what the status of the land adds to the current use considering the effect on value as it is clear that, putting the statute aside, it is possible to find cases where the current use would give rise to an added value to the land. Once thing is clear and that is the question of status must apply to the same land involved in the current use.⁴⁵

Arguably, the market recoverable part would be difficult, if not impossible, to apportion from the loss including severance and injurious affection assessed by the before and after method. As Member Scott noted:

First there is nothing in s 281(4)(c) which requires that any premium assessed under that provision be expressed as a percentage of any figure in s 281(3)(a). It need only be expressed as a percentage for the purpose of considering any interrelationship with s 281(4)(e) that arises. Second, a premium will not be assessable as part of the process employed in the “before and after” valuation method in reliance on market transactions alone. Such a process will reveal diminution in market value only. Equally, it would be wrong in principle to express the premium as being additional to the figure resulting by a process designed to reveal a diminution in market value. Any *statutory special value* will be found in the value of the owner’s land before the grant of the mining lease and the measure of compensation will be found by considering what value the owner’s land has after the grant of the mining lease, including any surviving statutory special value, or to what extent its previous overall value has diminished.⁴⁶

The compensation considered under s 281(4)(c) leads into the analysis of the head of compensation provided under s 281(4)(e) of the Act. Section 281(4)(e) is a unique provision which provides for the payment of a minimum 10%⁴⁷ amount to either recover all unquantifiable losses of the grant of the mining lease⁴⁸ or amounts to a payment of a solatium to the owner whose land is being taken. In terms of applying s 281(4)(e), Member Scott noted in *Wills v Minerva Coal* that:

⁴³ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 317.

⁴⁴ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 322.

⁴⁵ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 323.

⁴⁶ *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 325.

⁴⁷ Compensation settlements negotiated privately may have included higher percentages based on commercial considerations peculiar to the miner.

⁴⁸ See *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 325-330 for a discussion of the unique nature of this. Of particular significance is that the section specifies a minimum percentage additional amount – no cap is specified.

The first thing to notice concerning s 281(4)(e) is the linkage with 281(4)(c). Therefore the process to be adopted is to determine any premium under s 281(4)(c) and compensation under s 281(3)(a)(i) or (iv) before turning to s 281(4)(e).

In terms of application of s 281(4)(e), Member Scott considered that:

if it is the case that no amount is determined under s 281(4)(c) then s 281(4)(e) operates to allow, at a minimum, an additional amount based on the calculation of 10% of the aggregate amount determined under s 281(3)(a)(i) to (iv). If, however, an amount has been determined under s 281(4)(c) then this amount may need to be taken into account in considering any additional amount to be awarded under s 281(4)(e). Given that any amount determined under s 281(4)(c) is on a proper construction of s 281 part of the assessment of compensation under s 281(3)(a), the percentage figure required to be considered in s 281(4)(e) is calculated by considering first what percentage the premium determined under s 281(4)(c) is of the combined amount under s 281(3)(a) items (i) to (vi) inclusive and s 281(4)(c)

In other words, given the interrelationship between the sections as to the calculation of the statutory additional amount there will be benefit in *minimising* the amount of compensation sought under s 281(4)(c) in order to preserve the minimum 10% additional amount to be applied under subsection (e). Attempts should be made to *maximise* the amount identified due to loss of potential under s 281(3)(a) including current and potential uses in the hands of the owner, only part of which would be reflected in the “before and after” approach.⁴⁹

The final head of compensation to be examined is contained in s 281(4)(d) and concerns loss of profits by comparison of the usage being made of land prior to the grant of a mining lease and the usage that could be made of that land after the grant. It is accepted that this section does not allow landowners to receive compensation for the current market value of the land lost, including severance and injurious affection to balance lands, as well as capitalised loss of profits, to effectively “double up” compensation payable.⁵⁰ In contrast, this clause provides the opportunity for recovering loss of profits from crops planted or stock grazed having to be destroyed or sold prematurely due to loss of land and impact of the mining lease on the property.

CONCLUSION

This article has examined the heads of compensation available under s 281(3)(a) of the *Mineral Resources Act 1989* (Qld) when making an assessment of compensation where a mining lease has been granted. While the heads of compensation are specified in the Act the subsections have been interpreted by various courts and tribunals. Such interpretation has effectively ensured that full recovery of the value of the land to the owner can be effected with any current and potential losses peculiar to the owner able to be quantified and compensated. In this way s 281(3)(a) of the *Mineral Resources Act 1989* (Qld) is a unique form of “resumption” legislation as the focus of the section is upon compensating the owner of the land considering losses which are market-based and those which are peculiar to the owner.

⁴⁹ As Member Scott noted in *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297 at 327 “[i]t seems to me that the legislature has decided, in effect, that an additional amount of 10% will cover all the unquantifiable consequences of the grant of the mining lease for the usual case falling for consideration under s 281 and that adjustments of the resultant figure downwards can only apply if subsection (4)(c) is properly brought into play and upwards if the case is brought into the category of being demonstrably different from the usual case. ... If it is the case that there is no evidence of inconvenience out of the ordinary, then it may be safely assumed that the base 10% figure takes inconvenience sufficiently into account.”

⁵⁰ See *McDowall v Reynolds* [2003] QLRT 170 and *Re Delminco Pty Ltd & Harbron Pty Ltd* [2005] QLRT 95 where claims for loss of profits were not accepted.