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Material change in circumstances

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The recent Land Court decision of *Henry v ERO Georgetown Gold Operations Pty Ltd* [2015] QLC 13 provides useful guidance as to the meaning of 'material change in circumstances' under the land access provisions of the *Mineral Resources Act 1989* (Qld) (**MRA**).

Under the MRA, either party to a Conduct and Compensation Agreement (**CCA**) may apply to the Land Court for a review of the compensation under the agreement. In order to make an application, there must have been a 'material change in circumstances' since the agreement was entered into.

An analogous review right exists in respect of petroleum and gas operations under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (**P&G Act**). Whilst there has been no real judicial consideration of these provisions in the P&G Act, the Land Court and its predecessors have considered the comparable provisions under the MRA, most recently in *Henry v ERO*.

The facts

ERO holds a mining lease over a large pastoral holding owned by Mr Henry (**landholder**), known as Flat Creek Station. A formed and maintained council road traverses Flat Creek Station, known as Flat Creek Road. In October 2013, ERO fenced Flat Creek Road to prevent access, purportedly pursuant to obligations imposed on it by the

Mining and Quarrying Safety and Health Act 1999 (Qld). Essentially, ERO planned on mining the road and the area within its immediate proximity.

In May 2014, the former Minister for Natural Resources and Mines granted ERO renewal of the underlying mining lease, on the condition that access to Flat Creek Road be reinstated. ERO applied for judicial review of this decision, but the application was refused in *ERO Georgetown Gold Operations Pty Ltd v Cripps, Minister for Natural Resources & Mines & Anor* [2015] QSC 1.

During the same period, the landholder applied to the Land Court for, *inter alia*, a review of compensation under the existing CCA, alleging that ERO's actions in denying access to Flat Creek Road constituted a material change of circumstances.

Legal status of Flat Creek Road

The evidence suggested that there had been some form of track on Flat Creek Station between MacDonald Town and Georgetown for some 120 years. The road had been originally surveyed in 1919. Whilst the Land Court found that Flat Creek Road has meandered off the original surveyed route over the past century, the existing road derives from the original road surveyed in 1919.



Accordingly, the Land Court found that Flat Creek Road is a road for the purposes of the *Local Government Act 2009* (Qld). As a result, ERO was not authorised to obstruct or interfere with public access to the road without Ministerial approval.

In making these findings, the Land Court rejected ERO's submissions that the existing road was a miners' access track. The Land Court agreed that the road had been largely graded and maintained by miners in the 1980s. However, the Land Court observed that the original track had been used intermittently by miners and pastoralists over the past 120 years. Moreover, since the 1990s, the road had been maintained for public use by the local authority.

Material change in circumstances

The Land Court endorsed the approach to the assessment of whether there has been a material change in circumstances, set out by the Land and Resources Tribunal in *Hicks v Graham & Anor* [2004] QLRT 47. The inquiry involved a two step approach, which firstly required that there be an existing CCA or earlier land court determination of compensation.

Next, in assessing the requisite materiality of the change in circumstances, the tribunal found that the change must be pertinent, and not merely of substantial import, to what compensation should be awarded.

If a pertinent change has occurred, the court then has *'the opportunity to consider whether it is of such significance that any amendment to the original compensation is justified'*.¹ Indeed, even where there has been a finding of a material change in circumstances, it does not necessarily follow that the compensation will be reduced or increased.²

In *Hicks v Graham*, the tribunal found that a change in conditions regarding the area of disturbance of mining operations could constitute a material change in circumstances.³ In this respect, it is noted that the MRA

itself provides an example in s 283B of a material change in circumstances, namely *'a different mining method that changes the impact of mining operations under the lease'*.

However, it may be the case that the relevant CCA adequately took into account the potential for intensified activities or varying methods in the original offer of compensation, in which case the Land Court might be unlikely to find a material change in circumstances.

In the present case, the Land Court found that both parties had somewhat missed the mark in their submissions regarding the issue, which largely focussed on the legal status of the road. Interestingly, the evidence suggested that the landholder was likely aware of ERO's intention to mine the road at the time of entering into the relevant CCA in 2012.

In any case, the Land Court found that ERO's failure to provide an alternative right of access for the landholder and the public when it fenced Flat Creek Road, constituted a material change in circumstances. Accordingly, the Land Court awarded \$37,907.10 compensation from the date that access was denied until the date of judgment. The court also awarded ongoing monthly compensation of \$3,954.62 until access was restored.

Conclusion

Whilst there is still finite judicial consideration of the application of the compensation review provisions under the MRA and P&G Act, the slowly growing body of case law does provide a meaningful level of guidance. However, each case will be dependent on its own facts and in particular, on the provisions of the relevant CCA.

¹ *Hicks v Graham & Anor* [2004] QLRT 47, 36.


² *Hicks v Graham & Anor* [2004] QLRT 47, 38, *Slater & Anor v Appleton & Anor* (No. 2) [2013] QLC 13, 11.

³ *Hicks v Graham & Anor* [2004] QLRT 47, 38.

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