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Welcome to the May 2024 edition of the HFW Australian Mining Bulletin.

In this edition, we cover recent case law developments of interest to the Australian mining industry, including:

- security of tenure protections for tenement-holders arising from the *Wyloo* appeal;
- the rateability of miscellaneous licences; and
- guidance on recording expenditure and resolving objections over Western Australian (**WA**) tenements.

TAKE THE TENEMENT AND RUN: WA COURT OF APPEAL CONFIRMS TENEMENT PURCHASERS PROTECTED FROM APPLICANT'S FAILURE TO COMPLY WITH THE MINING ACT

In *Wyloo Metals Pty Ltd v Quarry Park Pty Ltd* [2024] WASCA 38, the WA Court of Appeal confirmed that section 116(2) of the *Mining Act 1978 (WA)* protects the purchaser of a mining tenement against a challenge brought on the basis that the original grant was invalid. Cauldron Energy Limited, which had a binding agreement to purchase the tenement from Quarry Park Pty Ltd, was protected despite the seller's failure to lodge the required mineralisation report(s) with its application for a mining lease.

In April 2013, Quarry Park Pty Ltd (**Quarry Park**) was granted a mining lease over crown land in the Pilbara (**the Lease**). In December 2020, Quarry Park entered an agreement to sell the tenement to Cauldron Energy Limited (**Cauldron Energy**).

On 11 January 2021, Wyloo Metals Pty Ltd (**Wyloo**) applied for a prospecting licence over land which was the subject of the Lease.

On 22 January 2021, Wyloo applied to the WA Supreme Court (**Supreme Court**) for a declaration that the Lease was invalid, and therefore the land was open for mining (which would facilitate the grant of Wyloo's prospecting licence application). Wyloo contended the Lease was invalid on the ground that Quarry Park's application for the Lease was not accompanied by a mineralisation report which complied with s 74(1)(ca)(ii) of *the Mining Act 1978 (WA)* (the **Act**) nor a mining operations statement complying with section 74(1a) of the Act.

In the Supreme Court, Tottle J held:

1. the original grant of the Lease was invalid because Quarry Park's Lease application was not accompanied by a compliant mineralisation report;
2. by entering into the sale and purchase agreement, Cauldron Energy dealt with Quarry Park for the purposes of s 116(2) of the Act, attracting the protection of the second clause of s 116(2);
3. that protection placed Cauldron Energy in the same position as if the Lease was valid; and
4. had it been necessary, His Honour would have declined to grant Wyloo's declaration application because of the delay between the grant of the Lease and commencement of proceedings.

The WA Court of Appeal (COA) , by a majority, dismissed Wyloo's appeal. In doing so, the COA determined that:

- the invalidity of the Lease was not cured by the first clause of section 116(2), which provides that:

  "except in the case of fraud, a mining tenement granted or renewed under this Act shall not be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the grant or renewal of that tenement."

The Court determined that the lack of jurisdiction (of the Acting Mining Registrar to recommend granting, and the Minister to grant the Lease) was not an 'informality', nor 'irregularity' within the meaning of s 116(2).

- the first part of the second clause of section 116(2) protects a party dealing with the registered holder of an invalidly granted tenement, providing that:

  "except in cases of fraud... no person dealing with a registered holder of a mining tenement shall be required or in any way concerned to inquire into or ascertain the circumstances under which the registered holder or any previous holder was registered".

The COA held that Cauldron Energy, upon entering the tenement sale and purchase agreement, dealt with Quarry Park in the manner specified in section 116(2) and, as such, obtained the benefit of this protection.

However, the COA did not agree with the court at first instance in relation to delay. Although it was unnecessary for the purposes of determining Wyloo's appeal, the COA confirmed that it would **not** have declined to grant Wyloo's application due to delay, because Wyloo had brought the proceedings promptly after applying for its prospecting licence.

Commentary

Subject to any High Court appeal, this decision provides tenement-holders with welcome security of tenure and certainty that they will not lose their valuable tenements because of the sins of their predecessors.

As was stated in *Forrest & Forrest v Wilson* (2017) 262 CLR 510, tenement-applicants must continue to strictly comply with the Act, as an invalid tenement will remain at risk in the hands of the original applicant.

The Act, as interpreted by the COA, protects innocent parties who acquire tenements, while ensuring those seeking to profit from the State's natural resources diligently comply with the requirements set by parliament.

The extent of the protection afforded by section 116(2) remains to be seen however. Although this case provides certainty for parties who have become registered tenement-holders or entered binding sale and purchase agreements, the position is less clear for other arrangements, such as farm-in agreements or options.

MATES' RATES: SAT CONFIRMS MISCELLANEOUS LICENCES NOT RATEABLE LAND

In *Atlantic Vanadium Pty Ltd v Shire of Mount Magnet* [2024] WASAT 16, the State Administrative Tribunal (SAT) determined that rates may not be levied upon land which is the subject of miscellaneous licences held for the purpose of supporting mining operations conducted on other tenements.

On 15 June 2023, following a review of its rate record under section 6.36 of the Local Government Act 1995 (WA) (**LGA**), the Shire issued rates notices for the first time to Atlantic Vanadium (**Atlantic**) in respect of six miscellaneous licences held by Atlantic within the Shire. Atlantic applied to the SAT to review the Shire's decision.

The Shire argued that the proper interpretation of section 6.26(2)(a)(ii)(I) of the LGA is that any prospecting licence (not exceeding 10 ha) and any miscellaneous licence held under the Mining Act are only exempt from being rateable land if the land in question is unoccupied.

While noting that the wording of section 6.26(2)(a)(ii)(I) of the LGA is unclear, the SAT accepted Atlantic's argument that the proper interpretation of the provision is that any prospecting licence (not exceeding 10 ha) and any miscellaneous licence held under the Mining Act are not rateable land, and are exempt from the payment of rates under the LGA, whether or not the land in question is occupied.

In its reasoning, the SAT explained that miscellaneous licences and prospecting licences do not grant exclusive possession over land and, in fact, miscellaneous licences only grant ancillary and subsidiary rights. Further, while some of the purposes set out in regulation 42B of the Mining Regulations would involve substantial physical occupation of land, all permitted purposes are only ancillary to mining operations.

Commentary

The SAT's decision is an important development for the mining industry as:

- it has, for current purposes, removed the prospect of rates being levied against miscellaneous licences and prospecting licences, which would have significantly increased the industry's operating costs; and
- it removes the need to determine whether land subject to such licences is "occupied" for the purposes of the LGA, which would have created uncertainty for the industry because the LGA does not define that term.

The Shire has appealed the SAT's decision.

(AP)PORTION CONTROL: WARDEN PROVIDES GUIDANCE ON APPORTIONING EXPENDITURE ACROSS TENEMENTS AND CLAIMING LIABILITIES AS EXPENDITURE

In *Newcam Minerals Pty Ltd v Rise Sunshine Pty Ltd & Anor* [2024] WAMW 3, Warden Cleary confirmed that liabilities incurred, but not yet paid, can be counted towards a tenement-holder's expenditure conditions, while warning against the equal apportionment of expenses across tenements without a proper basis.

Newcam Minerals Pty Ltd (**Newcam**) brought five forfeiture applications regarding four tenements held by Rise Sunshine Pty Ltd and one held by Riseshine Pty Ltd (together, the **tenement-holders**). The tenements are located over pastoral stations in the Mount Magnet area, two on Windsor Station and three on Challa Station, 5km away.

Warden Cleary observed that a tenement-holder is not only obliged by the Act and tenement conditions to meet its minimum expenditure commitments, but to report on that expenditure in its Form 5s, with sufficient detail to determine the activity, the amount expended, the connection between the expenditure and mining, and the connection between the expenditure and the tenements. This requires a detailed description of each activity undertaken by or on behalf of the tenement-holder.

Her Honour found the tenement-holders' evidence was inconsistent, insufficiently detailed and lacking sufficient documentary evidence to establish whether there was expenditure on, or in connection with, mining the tenements (other than rates and rent).

Consistent with the fundamental purpose of the Act, namely that ground be worked or free to be worked, Warden Cleary found that expenditure arises *"when tenement holders (or relevant third parties) make themselves, or become subject to, liability for goods, services or charges that satisfy the relevant nexus to mining"*, provided that the sum and time for payment are ascertainable. However, her Honour disallowed a number of invoices on the basis that they did not constitute expenditure under the Act as they did not constitute a legally binding obligation, as there was no agreement regarding when the invoices would be issued or paid, the value of the equipment purportedly supplied, or what constituted the 'success' of the project, being the point at which, according to the applicant, the invoices would become payable.

The tenement-holders apportioned certain items of expenditure equally across all of their tenements, on the basis that accounting for the use of the expenditure on a per tenement basis was uncommercial and inconvenient. Her Honour found they had not justified this approach, which she found had arisen from poor recordkeeping. Her Honour found that:

1. drilling costs should be allocated to the tenements on which drilling occurred; and
2. rent for an XRF analyser gun and laboratory sample testing invoices, should have been allocated to the tenements from which the samples came, not equally divided across the tenements.

By contrast, invoices for the bulk purchase of sampling consumables that would be used on all tenements could have been apportioned across the tenements, but on a pro rata basis according to tenement size. As the tenement-holders had apportioned this expenditure equally across the tenements, her Honour disallowed this claimed expenditure entirely, and did not attempt to re-apportion it on a pro rata basis.

Ultimately, her Honour found herself unable to conclude that the minimum expenditure commitments had been met, which constituted a breach of the Act and tenement conditions by the tenement-holders.

Warden Cleary recommended forfeiture of the Windsor Station tenements, having accepted the evidence from residents of Windsor Station that little work was performed on them.

In respect of the Challa Station tenements, her Honour found that the tenement holders had, to a limited extent, fulfilled the objective that the ground be exploited, based on the photographic, video and other evidence of work done on behalf of the tenement-holders, including sampling and drilling and therefore that the tenement-holders' breaches were not of sufficient gravity to justify forfeiture. Warden Cleary therefore imposed fines of between $4,000 and $6,000 for each tenement.

Commentary

This case provides welcome confirmation that properly incurred liabilities can constitute claimable expenditure for tenement-holders, and helpful guidance on the types, and methods, of apportionment that may be acceptable to a Warden. The decision further reinforces the importance of good record-keeping, and tenement-holders' obligation to provide detailed descriptions of the expenditure claimed on their Form 5s.

Tenement-holders wishing to resist future forfeiture applications should review how they apportion expenditure across tenements to ensure it is compliant with the Act and ensure that their record-keeping is up to scratch.

MOP'D UP: WARDEN CLARIFIES APPROPRIATE USE OF MOPDS TO RESOLVE OBJECTION PROCEEDINGS

In *Pilbara Energy Company Pty Ltd v Hamersley Iron Pty Ltd* [2024] WAMW 20, Warden McPhee provided guidance on how parties can validly use the common Minute of Proposed Direction (MOPD) process to resolve objections to the grant of tenements by agreement. His Honour referred to a template MOPD published by the Court and explained the importance of Order 5, which provides:

- For the MOPD and proposed conditions to be provided to the Department of Energy, Mines, Industry, Regulation and Safety Standard Conditions / Endorsements (**DEMIRS**); and
- That, if DEMIRS has any concern regarding the legality of the content or framing of the proposed conditions, it is, within 14 days, to provide the Warden with a Regulation 68 Report.

Hamersley Iron and Pilbara Energy filed an MOPD intending that it would determine Pilbara Energy's application for a Miscellaneous licence, granting the licence subject to agreed conditions. DEMIRS filed a Regulation 68 Report setting out certain concerns regarding the legality of the conditions.

Warden McPhee determined that the matters raised by DEMIRS did not require any change to the Orders agreed by Hamersley Iron and Pilbara Energy, but expressed his appreciation for the Regulation 68 Report and the process that had been followed.

Commentary

MOPDs have become a common instrument for resolving disputes without the need for formal hearing before the Warden. However, their use had become problematic as matters were effectively being managed by Mining Registrars and, in turn, a Warden could be asked to recommend or grant tenure on conditions the Warden may not have meaningfully considered.

This process is inappropriate as, since *Forrest & Forrest v Wilson* (2017) 262 CLR 510, greater attention must be paid to questions of statutory compliance and, upon the filing of an objection, the jurisdiction of the Warden commences and that of the Mining Registrar ends, unless the objection is subsequently dismissed or withdrawn or the Mining Registrar is involved under the guidance of the Wardens.

The process set out by Warden McPhee should achieve an appropriate balance between the importance of the MOPD process (e.g. resolving disputes efficiently, without the need for a full hearing), and ensuring that Wardens properly exercise their powers. The Warden also noted that the Regulation 68 Report mechanism, and its provision to the parties in open Court, ensures transparency in the decision-making process for the grant of tenure.

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