HFW

AUSTRALIAN MINING BULLETIN
SEPTEMBER 2024

Welcome to the September edition of the HFW Australian Mining Bulletin.

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

- climate change litigation in the mining industry;
- contract disputes that may prompt one last read of your next contract before execution;
- clarity regarding priority in respect of special prospecting licenses for gold; and
- other recent developments of note.

IT'S ALL IN THE NUMBERS: UNSUCCESSFUL CHALLENGE TO COAL MINE EXTENSION APPROVALS ON ENVIRONMENTAL GROUNDS

The decision in *Environment Council of Central Queensland Inc v Minister for the Environment and Water* [2024] FCAFC 56 is an example of climate change activism in New South Wales mining industry. Two substantial extensions of coal mines in New South Wales, which had been approved by the Minister, were unsuccessfully challenged by the Environment Council of Central Queensland by way of judicial review.

The Minister's Decisions

The Minister considered and approved the proposals to extend the mines pursuant to the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**). In granting the approvals, the Minister determined that the extension of the mines were *"controlled actions"* (actions which may significantly impact matters of national environmental significance). However, the Minister determined that the controlled actions did not have *"relevant impacts"* (likely or definitive impacts) upon *"matters of environmental significance"* (**MNES**), as defined by the Act. Accordingly, the Minister approved the extension of the coal mines (**First Decision**).

Following the First Decision, the Environment Council of Central Queensland Inc (**ECCQ**) ECCQ sought to reopen the decision making process by providing the Minister with what it contended was *"substantial new information"* about the impact, or likely impact, of extending the coal mines. In particular, the new information sought to highlight the resultant greenhouse gas (**GHG**) emissions which would be produced by the additional combustion of coal if the two mines were extended and the detrimental effect, which the ECCQ argued would be *"significant"*, of those emissions (**ECCQ Information**). ECCQ contended the ECCQ Information triggered the Minister's powers (pursuant to section 78(1) of the EPBC Act) to vary a prior decision or substitute a new decision in its place.

Having considered the ECCQ Information, the Minister determined that the ECCQ Information was, indeed, *"new information"* as required by the EPBC Act. However, the Minister determined that the mine extensions were not a substantial cause of the stated physical effects of climate change in the relevant area (**Second Decision**). The Minister therefore decided not to revoke the First Decision and, instead, confirmed the extension approvals.

Judicial Review of the Decisions

The Minister's Second Decision prompted the ECCQ to seek judicial review of the Decisions.

The Minister argued that she made the Second Decision on a reasoned basis because:

1. the ECCQ Information did not show that the mine extensions would cause any net increase in global GHG emissions and global average temperature. In addition, the Minister formed the view that, if the coal was not supplied by the extended coal mines, it would likely be supplied by another party; and
2. even if it could be demonstrated that the extended mines would cause a net increase in global GHG emissions, any contribution would be too small to determine it *"a substantial cause of the physical effect of climate change on the world heritage values of declared World Heritage properties"*, as required by the EPBC Act. In coming to this decision, the Minister had calculated that the extension of the coal mines would result in a net increase in global GHG emissions and in global average temperature of 0.00024 degrees Celsius.

By close of argument on appeal, ECCQ maintained four main grounds for review, principally attacking the Minister's decision-making process and her determination that the mine extensions were not a **substantial** cause of the stated physical effects of climate change on world heritage values of declared World Heritage properties, a finding which was required in order for the Minister to exercise her power to vary or substitute a new decision.

ECCQ contended that:

1. the Minister had misdirected herself by limiting the statutory concept of *"substantial"* to a numerical analysis;
2. the Minister was required *"on all the material before her to reason across a very broad spectrum of scenarios in which the proposed action is taken, but failed to do so"*;
3. in light of the ECCQ Information, the Minister's decision was irrational because her reasoning involved scenarios about which probabilistic reasoning was not rationally possible, due to *"the sheer volume of complex interconnected variables on a global scale over decades"*; and
4. The Minister's analysis proceeded on the basis that GHG emissions would occur anyway, which was faulty reasoning. The EPBC Act required the Minister to consider the proposed action itself, not what might happen if the proposed action did not occur.

The Western Australia Court of Appeal (**Court of Appeal**) rejected each of ECCQ's grounds, determining that the Minister's numerical analysis and consideration of the proportion of the contribution of GHG emissions and temperature increase on a global scale was a reasonable application of the cause and effect analysis and that it was for the Minister to evaluate the aspects of the information before her that she found most persuasive about any causal link between the extended operation of the mines and indirect adverse consequences on MNES. The Court of Appeal said that ECCQ failed to understand that, in coming to her decision, the Minister had to prepare reasoning which met the standard of *"satisfaction"*, being conclusions based on more than sheer speculation, or guesswork, even if it involved a predictive exercise.

Accordingly, the Minister's numerical analysis was appropriate.

Regarding the attacks upon the Minister's analysis that the emissions were still likely to occur via alternative means if the coal mines were not extended, the Court of Appeal pointed out that this was only one of the Minister's two limbs of analysis, and the second limb determined independently that the GHG emissions which would result from the extended mines were not a substantial cause of of the stated physical effects of climate change on world heritage values of declared World Heritage properties.

Like the earlier judicial review proceedings, ECCQ's appeal was unsuccessful. The Court of Appeal determined that the Minister had complied with the EPBC Act and dismissed the ECCQ's appeals, noting that the EPBC Act is ill-suited to the assessment of environmental threats, such as climate change and global warming, and their impact on MNES in Australia.

Commentary

This case is a timely reminder that we are operating in an era of sophisticated climate change activism. *"Green litigation"* is pursued by a variety of parties, including (but not limited to) public interest groups, charities, local communities and Indigenous Peoples and, as stated in the *Global Litigation Report: 2023 Status Review* published by the United Nations Environment Programme in July 2023[1], these litigants *"are taking a prominent role in bringing these cases and driving climate change governance reform in more and more countries around the world"* and *"climate change litigation is increasing and broadening in geographical reach"*. The risk of climate change litigation in the mining industry is, perhaps, higher than in other fields. Given that green litigation is increasing year on year and that the number of climate change disputes in Australia is particularly high[2] it is important to be mindful of the environmental impact, and potential risk of *"green litigation"*, in any project or proposal.

Given the Court of Appeal's comments on the EPBC Act's ability to respond to climate change litigation, and Australia's domestic climate change targets and international obligations, it may be that legislative reform will be necessary in future.

1 A copy of which you can find at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3.

2 See pages 27-29 of the *2023 Status Review* for more information. As at 31 December 2022, the highest number of climate change cases filed outside America (1,522) were pursued in Australia (127), followed by the UK (79) and the EU (62).

MARK IT ESSENTIAL – FAILURE TO MEET MINIMUM EXPENDITURE REQUIREMENTS INSUFFICENT FOR RIGHT TO TERMINATE

The Western Australia Court of Appeal has found that a tenement manager's failure to meet contractual expenditure requirements did not constitute breach of a material term of the contract and that, as a result, the other parties to the contract were unable to terminate the agreement on the basis of the tenement manager's breach of contract.

Background

Cougar Metals NL (Subject to DOCA) v Richore Pty Ltd [2024] WASCA 36 concerns a dispute regarding an option agreement between Cougar Metals NL (**Cougar**) and Pyke Hill Resources Pty Ltd (**Pyke Hill**) dated 30 April 2004 (Option Agreement). Under the Option Agreement, Pyke Hill granted Cougar an option to acquire the rights to explore for and mine lateritic nickel and cobalt on a mining lease held by Pyke Hill (**Tenement**). On 24 November 2008, *Richore Pty Ltd* (**Richore**), acquired a 50% registered interest in the Tenement.

The terms of the Option Agreement obliged Cougar to manage the Tenement, including by attending to all proper administration in respect of the Tenement and to maintain the Tenement in good standing, including payment of all statutory minimum annual expenditure commitments in respect of the Tenement.

In late 2005, Cougar exercised its option and acquired the nickel and cobalt mining rights.

The Disputed Right to Terminate

In July 2021, Pyke Hill issued a notice terminating the Option Agreement, alleging that Cougar was in breach because it did not ensure that the statutory minimum annual expenditure requirements were met for the year ending 29 August 2020.

Pyke Hill and Richore commenced proceedings in the Warden's Court seeking a declaration that the Option Agreement was validly terminated. The Warden dismissed the proceedings on the basis that Cougar's failure to comply with its minimum expenditure obligations was not a breach of an *"essential promise"* (i.e. an essential term) of the Option Agreement, and therefore didn't warrant termination.

On appeal to the General Division of the Supreme Court of Western Australia (the **Court**), Justice Archer held that the failure to meet expenditure requirements was, indeed, a breach of an essential term of the Option Agreement.

Being dissatisfied with the Court's decision, Cougar appealed to the Western Australia Court of Appeal (**Court of Appeal**) on two grounds, the second ground being that:

> *"having regard to the breadth of the obligations… in the Option Agreement, the objectively discerned intention of the parties to the Option Agreement could not be that any breach of those obligations, however minor, would entitle Pyke Hill to terminate the Option Agreement".*

Although the Court of Appeal found that Cougar's failure to meet the minimum payment obligations was a breach of the Option Agreement, it agreed with Cougar's analysis and held that the term breached was not an essential term of the parties' contract and, accordingly, Pyke Hill was not entitled to terminate the Option Agreement.

Commentary

The decision serves as a reminder that, if you wish to have a clear right to terminate a contract in the event that a particular term is breached, you should seek to ensure that this is expressly stated in the agreement.

Careful drafting can, in many cases, prevent disputes from arising which, given the time, costs and reputational damage that are associated with litigation, should always be at the forefront of contracting parties' minds. We recommend seeking expert, legal advice when entering into (or varying) any contracts and would be happy to discuss should you wish to review your contractual arrangements.

"The judgment is an important reminder to ensure your joint venture agreements are drafted to ensure you that you get what you bargained for and that you understand the effect of the agreement as a whole".

NOT ALL OR NOTHING: WA COURT OF APPEAL CONFIRMS JOINT VENTURE INTEREST EARNED BY DEEMED CONTRIBUTION

The Western Australia Court of Appeal grappled with questions of contractual interpretation in *Vango Mining Limited v Zuleika Gold Limited formerly known as Dampier Gold Ltd* [2024] WASCA 54, which concerned Zuleika Gold Limited's right to earn interest in a joint venture, based on its contribution to capital expenditure.

Background

Vango Mining Limited (**Vango**) and Zuleika Gold Limited (**Zuleika**) entered into a 'binding terms sheet' (BTS Agreement) which provided for the creation of an unincorporated joint venture.

The parties agreed that:

- Zuleika could earn joint venture interest based upon its **Contribution** of *"up to"* AUD$3,000,000, or 50% of the 'capital cost estimate for the development of the mine on the Tenement' (**CAPEX**) for, among other things, exploration and development of a mine (**Expenditure**);
- the sum of AUD$245,239.78, which was owed to Zuleika by Vango and Dampier Plutonic (together, the **DPPL Parties**), formed part of Zuleika's Contribution to Expenditure;
- Zuleika would earn an interest equal to its Contribution to Expenditure within the first two years of the venture, which interest was capped at 50%;
- Zuleika's Contribution to Expenditure and joint venture interest would be calculated at the expiration of an **Earn In Period** (initially two years, later extended by agreement to 30 months after commencement).

Zuleika did not contribute any sums towards Expenditure in addition to the AUD$245,239.78 debt.

Zuleika argued that it was it was entitled to a 4.1% interest in the joint venture in respect of its Contribution.

The DPPL Parties argued that Zuleika had not earned any joint venture interest because it had failed to contribute AUD$3,000,000 (or 50% of CAPEX) to Expenditure, submitting that, the parties had agreed that Zuleika's Contribution was 'all or nothing': Zuleika either contributed AUD$3,000,000 and earned a 50% joint venture interest, or it contributed less and earned nothing. The DPPL Parties' interpretation of the BTS Agreement relied on the fact that Zuleika's Contribution was assessed at the end of the Earn In Period.

The Court's Interpretation of the BTS Agreement

The Western Australia Court of Appeal (**Court of Appeal**) held that the BTS Agreement allowed Zuleika to contribute any amount "up to" AUD$3,000,000, or half of the CAPEX, and that Zuleika was entitled to joint venture interest proportionate to its Contribution to Expenditure. Zuleika's deemed Contribution of AUD$245,239.78 therefore enabled it to earn an interest of 4.1% in the joint venture.

Nevertheless, in his concurring judgment Vaughan JA rejected Zuleika's argument that its position was justified by the 'commercial absurdity' that, it asserted, would result if Zuleika had Contributed a significant sum (such as AUD$2.5m) to Expenditure and received a joint venture interest of 0%, as argued by the DPPL Parties, warning against the use of the notion of 'commercial absurdity' to justify the interpretation of a particular contractual clause in isolation. Rather, the Court's interpretation of the BTS Agreement was based on its interpretation of the contract as a whole.

Commentary

The judgment is an important reminder to ensure your joint venture agreements are drafted to ensure you that you get what you bargained for and that you understand the effect of the agreement as a whole.

Careful drafting can, in many cases, prevent disputes from arising which, given the time, costs and reputational damage that are associated with litigation, should always be at the forefront of contracting parties' minds. We recommend seeking expert, legal advice when entering into (or varying) any contracts and would be happy to discuss should you wish to review your contractual arrangements.

NO GOLD FOR SECOND PLACE: PRIORITY PROVISIONS APPLY TO CONVERSION OF SPECIAL GOLD PROSPECTING LICENCE

In *Anthony Gerald Pilkington v Kurnalpi Gold Pty Ltd* [2024] WAMW 27, an exploration licence holder's "first in time" application for a mining lease was held to have priority over a subsequent application by the holder of a special prospecting licence for gold. This decision provides welcome clarification in respect of special prospecting licences for gold.

Warden Maughan was required to consider competing, and overlapping, applications for mining leases:

1. an application by an exploration licence holder, Kurnalpi Gold Pty Ltd (Kurnalpi); and
2. another seeking a gold mining lease by the holder of a special gold prospecting licence, a Mr Anthony Pilkington (Mr Pilkington).

Mr Pilkington, who filed his application after Kurnalpi, sought to rely on section 70(8) of the Mining Act 1978 (WA) (**MAWA**) and argued that the "first in time" priority provision in section 105A of the MAWA did not apply to applications seeking a "mining lease for gold" which, he argued, are afforded a special status under the MAWA and that, therefore, his application ought to be considered in priority to that filed by Kurnalpi.

Warden Maughan considered the terms of section 105A, and the wider regime set out in the MAWA, and held that the first in time rule applies in the same manner to a mining lease and a "mining lease for gold". As a result, the Warden found that Mr Pilkington's application for a special gold mining lease could not be given priority over Kurnalpi's "first in time" application.

Recent Developments of Note

Government of Western Australia proposes amendments to the Mining Act 1978

The Government of Western Australia has approved amendments to the Mining Act 1978 (WA), which will assist with exploration licences and improve security of tenure for future tenement applicants.

The amendments deal with the decision of the Supreme Court of Western Australia (**Supreme Court**) in *Blue Ribbon Mines v Roy Hill Infrastructure* in which the court held that the current legislation did not allow the Minister to excise areas from an application for an exploration licence and grant the remainder. The amendments will empower the Minister to grant such applications, having reduced the ambit of the licence to exclude certain area(s) of land.

The amendments also aim to prevent a repeat of *Forrest and Forrest v Wilson*, in which the High Court of Western Australia (**High Court**) held that the failure to strictly comply with the Mining Act 1978 (WA) (**MAWA**) invalidated two applications for a mining lease. Forrest concerned applications for mining leases in which the mineralisation reports were submitted months after the applications were filed. The High Court held that the failure to lodge the mineralisation reports with the applications:

- deprived the Warden of jurisdiction to hear the applications; and
- rendered the applications, and the Warden's recommendation to the Minister in respect of them, invalid.

The decision in *Forest* created significant concern within the industry about the security of tenure for existing mining tenements where the tenant failed to strictly comply with the MAWA when applying for their mining lease(s). The Government's approval of the amendments is therefore welcome.

However, the amendments will only apply to new applications and do not address concerns held by existing tenement holders in relation to their security of tenure. So, while the amendments are a step in the right direction, further reform will be needed in order to alleviate the concerns of existing tenants. The Government of Western Australia has been in consultation with the Commonwealth Government regarding potential changes to the *Native Title Act* to facilitate the validation of existing tenements. In short, while the approval of the draft legislation is a step in the right direction, further reform will be needed.

Exploration licence applications in Western Australia: the wait continues in Western Australia

Pending the outcome of judicial review proceedings on the proper interpretation of section 58(1)(b) of the Mining Act 1978 (WA), the Wardens Court continues to defer determination of competing exploration licence applications.

Based on its interpretation of section 58(1)(b) of the MAWA, the Wardens Court requires applicants who seek an exploration licence to detail the work that they propose to carry out in respect of the area where the licence is sought for the entire five year term of the proposed exploration licence. That approach has been challenged and judicial review proceedings are currently before the Supreme Court of Western Australia (**Supreme Court**). That matter was heard by the Supreme Court in June 2024 and the decision is awaited.

Pending determination of the judicial review, the Wardens Court has been adjourning proceedings concerning competing exploration licences and section 58(1)(b) of the MAWA and this trend continues: Warden McPhee adjourned proceedings in a further matter (*In the matter of competing applications for exploration licenses by Amery Holdings Pty Ltd & Another* [2024] WAMW 22) until 20 September 2024. We are monitoring developments and will report on the Supreme Court's decision in due course.

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