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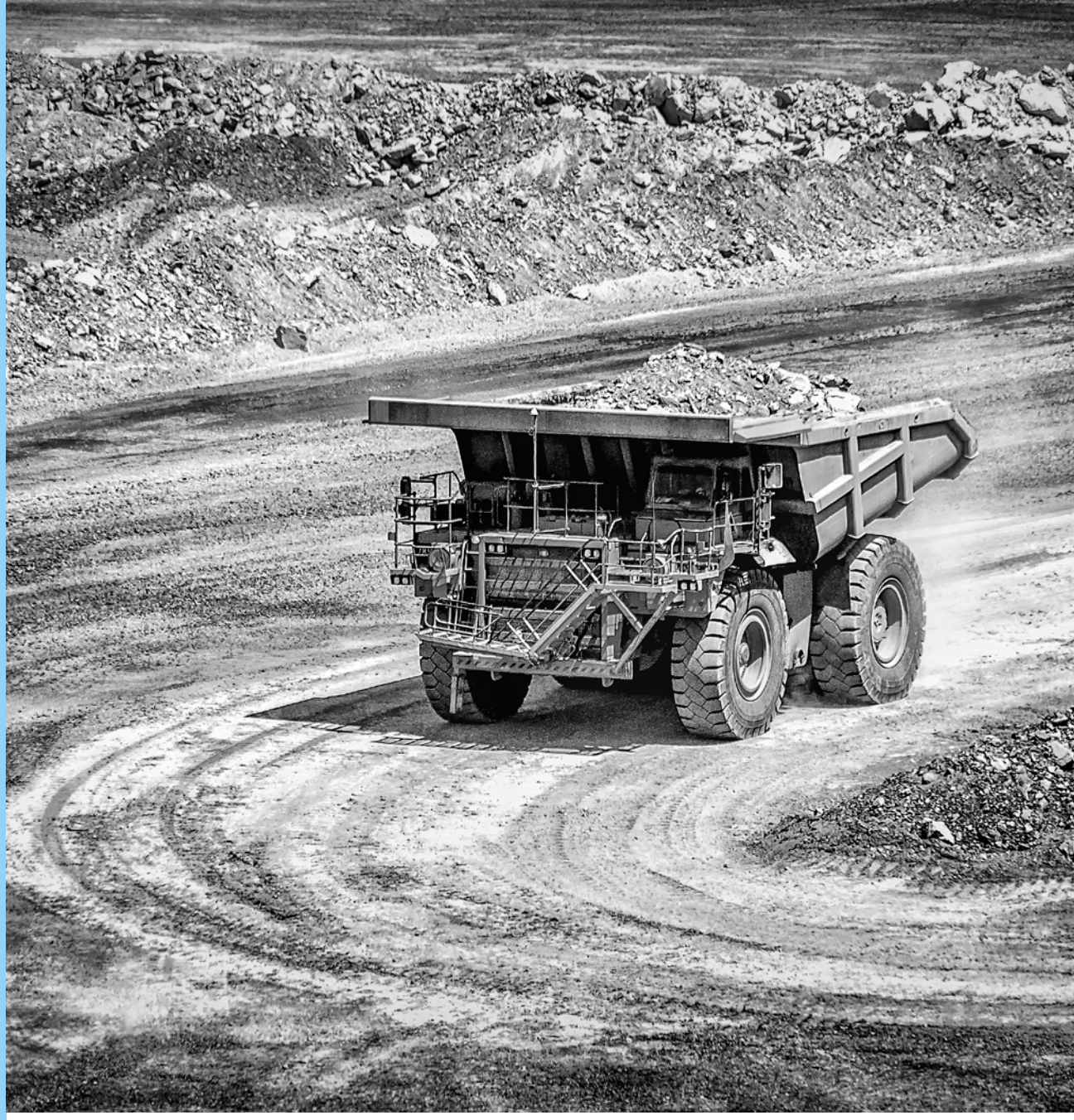


Welcome to the December edition of the HFW Australian Mining Bulletin.

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

- NSW Court finds environmental impacts of transmission lines a mandatory consideration for mining development
- Tenement transferees rejoice: High Court rejects challenge to s 116(2) protection
- Timing is everything: Warden's Court considers competing Prospecting License Applications
- Warden rejects objections to wind turbine infrastructure applications
- Northern Territory judgment gives green light for further gas exploration in the Beetaloo Basin
- Federal Court finds earlier right to mine valid
- Failure to mark out proves fatal to application for Special Prospecting Licence
- Warden finds sufficient connection to mining tenements in deed for costs incurred during project development

NSW COURT FINDS ENVIRONMENTAL IMPACTS OF TRANSMISSION LINES A MANDATORY CONSIDERATION FOR MINING DEVELOPMENT

In *Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd* [2024] NSWCA 205 (the Proceedings) the New South Wales Court of Appeal (the Court) heard a matter which considered:

a. whether a power transmission line required for a mine was part of a 'single proposed development' under section 4.38(4) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the Act**); and

b. whether the environmental impact of that transmission line was a mandatory consideration for the Independent Planning Commission (**'IPC'**) when granting development consent.

Background

On 14 May 2020, Bowdens Silver Pty Ltd (**Respondent**) lodged a development application and Environmental Impact Statement (EIS) with the IPC for the State significant development of an open cut silver, lead and zinc mine. At this time the Respondent submitted that a 132kV power transmission line was required but would be the subject of a separate Part 5 application.

In June 2021, RW Corkery & Co Pty Ltd submitted a report on behalf of the Respondent in response to public submissions on the EIS which reiterated the intention to prepare a Part 5 application for power supply via a 66kV powerline and submitted that the precise alignment of the powerline had not be decided and was subject to ongoing consultation with landholders (**June 2021 Submissions**).

In December 2022 the NSW Department of Planning and Environment provided its 'State Significant Development Assessment Report' to the IPC (**Department's Report**). The Department's Report restated the Respondent's June 2021 Submissions and acknowledged public concerns raised about the potential impacts of the powerline on biodiversity, but stated the impacts would be separately considered as part of any application to develop the powerline.

The Proceedings

Bingman Catchment Landcare Group applied for judicial review of the IPC's development consent which had been granted without considering the likely effects of the electrical supply line, specifically the environmental impact of the electricity transmission line required to supply power to the mine. The primary judge dismissed the application as the lack of certainty regarding the route of the transmission line meant its 'likely impacts' could not be a mandatory relevant consideration for the IPC when granting development consent.

On appeal, the Court thought the June 2021 Submissions exhibited a degree of confusion as, if the proposed transmission line was part of a single proposed development along with the mine, then development consent from the IPC would be required. Part 5 of the Act does not provide a process for "approval" of a power line, as it excludes anything which requires development consent under Part 4 of the Act.

Relevantly, s 2.46(1)(ii) of the *State Environmental Planning Policy (Transport and Infrastructure) 2021* (NSW) provides that development of the installation or upgrading of electricity lines at a voltage of 66kV or less is an 'exempt development'. An 'exempt development' does not ordinarily require development consent under Part 4 of the Act.

The IPC's assessment report did not consider any environmental impact of the transmission line, and did not consider whether any environmental impact of a transmission line was too remote from its consideration. The Court suggested this was misguided as the 66kV transmission line was 'exempt development' and "approval" was not required.

The Court concluded that the IPC erred in law by not considering the offsite impacts of the mine, including the possible routes of a transmission line, and that this error could not be excused because the Respondent chose not to provide the necessary information and, therefore, for the impacts to not be assessed.

Further, the primary judge was found to have erred in concluding that the only purpose of s 4.38(4) of the Act was to facilitate determination of whether development should be granted, when in fact its purpose is to require the IPC to be the consent authority for development that would not otherwise require development consent.

The Court also considered the primary judge erred in concluding that the 66kV power line was not part of a single proposed development that is 'state significant development' within the meaning of s 4.38(4) of the Act and, as a result, the likely environmental impacts were not directly captured under s4.15(1)(b) of the Act.

The Court found that, as the proposed mine required electrical power to be delivered through an off-site transmission line, the likely impacts of that transmission line were a mandatory consideration for the IPC.

The Court further considered that, while declaring the development consent void would reopen the development application for further consideration, this was not onerous enough to decline making such a declaration. The Court found this consistent with the objects of the Act, the purpose of s4.15(1), and consequential of the Respondents decision to proceed on the basis that consent to the transmission line would not be required from the IPC but be subject to Part 5 approval.

In dissent regarding appropriate orders to be made, Price AJA considered that, as the Respondent may make further applications to the IPC, the development consent should be suspended to allow the IPC to consider the impacts of the power line.

Commentary

Although the independent planning committee process may vary from state to state, it is important to remember that the onus is on the applicant to provide the relevant State Department and IPC with all necessary information to make their decision, It is also incumbent on the applicant to ensure all parties are updated as developments occur to mandatory considerations in the approval process.

TENEMENT TRANSFEREES REJOICE: HIGH COURT REJECTS CHALLENGE TO S 116(2) PROTECTION

In *Wyloo Metals Pty Ltd v Quarry Park Pty Ltd* [2024] WASCA 38, the WA Court of Appeal found that the purchaser of a mining lease (who did not itself apply for the lease) which was invalidly granted because of non-compliance in the tenement application process is protected by section 116(2) of the *Mining Act 1978* (WA) from challenges to the validity of the grant.

The High Court has denied Wyloo Metals leave to appeal that decision. The Court found Wyloo's application did not 'give rise to any question of general importance about the effect of this Court's reasoning in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 262 CLR 510 sufficient to warrant a grant of special leave to appeal'.

For more details, see our May update on the Court of Appeal's decision here[1].

1 https://www.hfw.com/insights/australian-mining-bulletin-may-2024/

TIMING IS EVERYTHING: WARDEN'S COURT CONSIDERS COMPETING PROSPECTING LICENSE APPLICATIONS

In Devin William McLevie v Robert Peter Teune and Phoebe Zara Unkovich for one part and Vernon Welsey Strange for the other [2024] WAMW 38 (Proceedings), the Warden's Court (Court) considered a number of competing applications for prospecting licences over the same or similar ground. All the ground in question was previously held by a third party, not involved in the Proceedings, in a number of tenements (First Tenements).

Mr McLevie asserted a statutory priority over the other applications, relying on his view of the proper construction of section 96(3a) of the Mining Act 1978 (WA) (**Act**). However, his assertion failed

Background

The Proceedings concerned the priority of the following competing applications for prospecting licences:

- On 6 September 2021 and 24 January 2022, Mr McLevie made an application for forfeiture in respect of the First Tenements (**Forfeiture Applications**).
- On 27 September 2022, Mr Teune and Ms Unkovich made an application for a Special Prospecting Licence over a portion of the ground covered by the First Tenements (**Teune Application**).
- On 12 October 2022, Mr Strange made several applications over other portions of the ground covered by the First Tenements (**Strange Applications**).
- On 17 October 2022, the First Tenements were surrendered in the face of the Forfeiture Applications, with the surrender encapsulated in a Deed of Settlement and Release dated 28 September 2022 between Mr McLevie and the prior holder of the First Tenements (**Settlement Deed**).
- On 18 and 27 October 2022, after the surrender of the First Tenements, Mr McLevie made applications over portions of the ground covered by the First Tenements (**McLevie Applications**).

The Strange Applications and McLevie Applications were in conflict. The McLevie Applications and Teune Application were in conflict. The Teune Application and Strange Application were not in conflict.

Basis of the dispute

Mr McLevie asserted a statutory priority over the other applications, relying on his view of the proper construction of section 96(3a) of the *Mining Act 1978* (**Act**).

Mr Teune and Mr Strange argued that:

1. Section 96(3a) of the Act did not afford Mr McLevie any priority over their applications as the Teune Application and Strange Applications had been marked out in accordance with Act and made prior to the surrender of the First Tenements pursuant to the Settlement Deed.

> **"Applicants for a mining tenement over land surrendered following their application for forfeiture should be mindful of the limited priority period they are afforded."**

2. Alternatively, the McLevie Applications ought to have jurisdiction denied or refused as Mr McLevie had an interest in the First Tenements for the purposes of section 45(2) of the Act, as a result of the Settlement Deed, at the time of making the McLevie Applications

Issues for determination

The Court considered the following issues:

1. The proper construction of section 96(3a) of the Act, and whether the extent to which the priority referred to therein reaches to prevail over applications for a special prospecting licence marked out and lodged prior to the surrender of the First Tenements.
2. Whether Mr McLevie had an 'interest' in the First Tenements prior to the surrender, for the purposes of section 45(2) of the Act.
3. If the answer to the above question was yes, the proper construction of section 45(2) of the Act, and whether a breach of that provision creates a jurisdictional difficulty for the McLevie Applications.
4. Subject to the priority issue (issue 1) and the jurisdiction issue (issues 2 and 3), what should occur to the McLevie Applications.

Issue 1

In summary, section 96(3a) of the Act states that where a mining tenement that is the subject of an application for forfeiture is surrendered before the application is dealt with by a warden, the applicant for forfeiture has for 14 days a right in priority to any other person to mark out or apply for a mining tenement upon the whole or part of the land that was the subject of the surrendered mining tenement.

Mr McLevie submitted that this provision created a priority in his favour as a result of the Application for Forfeiture which resulted in the surrender of the First Tenements. He said this elevated the McLevie Applications above the Strange Applications and Teune Application.

The Court found that the priority created is a priority to mark out or lodge an application. There was no dispute that Mr Teune and Mr Strange had validly marked out and lodged their applications prior to the surrender of the First Tenements and prior to lodgement of the McLevie Applications. Accordingly, section 96(3a) of the Act did not apply.

Issue 2

Section 45(2)(b) of the Act provides that, when a prospecting licence is surrendered, the land the subject of the prospecting licence or any part of it shall not be marked out or applied for as a prospecting licence or exploration licence by any person who had an interest in the prospecting licence immediately prior to that date within 3 months from and including that date.

Mr McLevie had the right under the Settlement Deed to determine and action the date of surrender of the First Tenements, which the Court considered created an 'interest' for the purposes of section 45(2)(b) of the Act.

In the circumstances, the Court found the McLevie Applications were made in breach of section 45 of the Act in that they were made within the moratorium by a person with an interest in the demised First Tenements.

Issue 3

There was no jurisdictional fault with the McLevie Applications, however they were made in breach of section 45 of the Act, which prohibits a narrow class of persons (a former holder) from making an application for a prospecting or exploration licence for a limited period.

Issue 4

Mr McLevie applied for prospecting licences within 10 days of the surrender of the First Tenements pursuant to the Settlement Deed. Therefore, the balance of the McLevie Applications, being the parts that did not intersect with the Strange Applications and Teune Application (which have priority as they were made prior to the McLevie Applications) were also refused as a result of Mr McLevie's substantive non-compliance with section 45 of the Act.

Commentary

This case highlights the importance of strict compliance with the timing requirements set out in the Act, particularly section 45.

Applicants for a mining tenement over land surrendered following their application for forfeiture should be mindful of the limited priority period they are afforded.

WARDEN REJECTS OBJECTIONS TO WIND TURBINE INFRASTRUCTURE APPLICATIONS

In *Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd* [2024] WAMW 30 Warden McPhee declined to grant a series of applications for an extension of time by Alinta Energy Clean Energy Development Pty Ltd (Alinta) to object to Pilbara Energy Pty Ltd's (Pilbara Energy) applications for Miscellaneous Licences.

Background

Alinta sought to contest Pilbara Energy's licence applications for wind turbine infrastructure development on the basis that the proximity of Pilbara's turbines would reduce Alinta's wind energy production capabilities. Alinta requested a 7-day extension to submit their objections.

Warden McPhee found that the following 4 issues required determination :

1. Whether a party with an incomplete tenement application can assert injurious affection under s 117(2) of the *Mining Act 1978* (WA) (**Act**)in respect of another party's incomplete tenement application.
2. Whether Alinta's applications were sufficiently connected to mining for purposes of s91(6) of that Act, to enable them to be considered a possible source of rights and interests, so as to ground an objection on statutory injurious affection or other detriment.
3. What the relevant factors for considering Extension Applications are; and
4. In the circumstances, whether the Extension Applications are reasonable.

Issue 1

The Court determined that the protection afforded by s117 of the Act is restricted to the holders of mining tenements which are valid and operational at the relevant point in time. As Alinta did not meet these requirements, it could not object based on s117 of the Act.

Issue 2

The Warden determined that s91(6) requires an evidentiary basis to establish the purpose of the grant is directly connected to mining. The Court referred to *Mineralogy Pty Ltd v the Honourable Warden K Tavener* [2014] WASC 420, where the Court explained that S91(6) does not require that the holder of the miscellaneous licence be itself directly involved in mining or mining operations.

Further, the Warden did not accept Pilbara Energy's argument that "directly connected to mining" can only be proved by reference to established identified binding contractual obligations. The Warden explained that the existence of binding contractual obligations may make it easier to establish direct involvement in mining operations, but it is not the only way the connection may be proved.

The Court determined Alinta had provided evidence to show a sufficiently direct connection to mining for purposes of s 91(6) of the Act. In turn, Alinta was entitled to rely on any general detriment established by evidence, to object to the applications.

Issues 3 and 4

Alinta's evidence was provided by an affidavit from Mr. Rogers, a solicitor, which claimed that the proximity of Pilbara Energys wind turbines would disrupt Alinta's wind energy production capabilities.

The Warden found that the affidavit consisted of *"opinions and predictions"* rather than factual statements, emphasizing that Mr. Rogers lacked the necessary expertise to determine the detrimental impact of Pilbara Energy's activities on Alinta's infrastructure. Consequently, the Warden declined to accept Mr. Rogers' testimony on technical matters.

As a result, the Warden concluded that no arguable ground of objection was raised. In turn, it could not be established that the application for an extension of time was reasonable, as there was no evidence that Alinta had any rights affected by the grounds it sought to utilize.

Commentary

The case provides clarification regarding the requirements to rely upon s117 and s91(6) of the Act. The protection in s117 of the Act is limited to the holders of mining tenements which are valid and operational at the relevant point in time and s91(6) of the Act requires only a sufficiently direct connection to mining for purposes of the Act.

NORTHERN TERRITORY JUDGMENT GIVES GREEN LIGHT FOR FURTHER GAS EXPLORATION IN THE BEETALOO BASIN

In *Central Australian Frack Free Alliance Inc v Minister for Environment & Anor* [2024] NTSC 75 (Judgment), the Supreme Court of the Northern Territory rejected Central Australia Frack Free Alliance's (Plaintiff) application to quash the decision of the Minister of the Environment (Minister) to approve the Environment Management Plan (EMP) for Tamboran Resources' application to permit 12 additional exploratory wells in the Beetaloo Basin (project). The plaintiff also sought, but failed, to obtain an order to restrain Tamboran Resources from proceeding with any activity in reliance on the EMP or the Minister's decision.

Background

The Plaintiff, an environmental group, argued that the approval of Tamboran's exploration permit was invalid because the environmental impacts and environmental risks of the project were not adequately considered.

Central to the Plaintiff's case, was that, in approving the exploratory works, the Minister ought to have considered long term environmental impacts and climate risks, including the risk of "unsustainable" greenhouse gas emissions, arising out of any future gas production that might eventuate, subsequent to the exploration activities.

The Court rejected the Plaintiff's application and found for the Minister and Tamboran Resources (**the Defendants**) on each of the four grounds of review.

The judgment: Grounds of Review

Ground 1

The Plaintiff asserted that, when assessing the EMP, the Minister misconstrued the phrase 'environmental impacts and environmental risks' in reg 9(1)(c) and Sch 1, cl 3(1)(a) of the *Petroleum (Environment) Regulations 2016* (NT) (**Regulations**) by failing to consider events and circumstances arising from any future production activities relating to gas resources identified in exploration.

The Court found that the Regulations require an EMP to address the environment impacts and risks associated with the "regulated activity". The "regulated activity" is defined by reference to the technical works programme at issue, and the significance of environmental impacts or environmental risks to be considered are only those associated with that particular activity.

The Court highlighted that at the time of the EMP assessment at issue, no production activities were authorised under any approval process and the potential for any future production activities was dependant on exploration phase outcomes. Accordingly, any future production activities would require a production licence and the application for this licence would necessitate a further EMP, containing details of any environmental impacts and risks specific to the proposed production activities, at that later stage.

Ground 2

The Plaintiff argued that the Minister could not lawfully have been satisfied that the EMP included details of all environmental impacts and risks as required by the Regulations, where the EMP did not adequately detail impacts or risks associated with "unsustainable" greenhouse gas emissions.

The EMP had attested that there would "be no significant impact on air quality and no excess greenhouse gas emissions as a result of [the] exploration activities". In finding for the Defendants on this ground, the Court held that it would be "impossible" to estimate the potential contribution of the regulated activity to any particular impact on global

“Most significantly for the mining and resources industry, the judgment provides some clarity about both the assessment procedure, and approval requirements, for EMPs relating to exploratory activities.”

temperatures and “not possible” to identify the required causal relationship between the regulated activity and any increase in extreme weather or global temperatures.

Ground 3

The Plaintiff contended that the Minister erred in law in finding that the EMP contained the matter set out at Sch 1 cl 3(2)(a)(ii) of the Regulations, as it contained an assessment of procedures to be followed in any possible emergency situation, rather than an assessment of the environmental impacts arising directly or indirectly from an emergency situation.

The Court reasoned that determination that the EMP satisfied the statutory requirement “cannot be said to be unavailable on the material or otherwise illogical”, and while the EMP could have taken a more detailed approach to this analysis, it could not be that any EMP that fails to include that level of detail automatically fails to satisfy the Regulations.

Ground 4

The Plaintiff argued that the Minister was precluded from approving the EMP as the regulated activity had the potential to have a significant impact on the environment, where none of the exceptions provided in reg (9)(a)to (c) applied and therefore necessitated referral to the Northern Territory Environment Protection Agency (**NT EPA**) under s48(a) of the Environment Protection Act 2019 (NT) (**Act**).

The Court found that, under this provision, if the Minister forms a view that an application should be referred to the NT EPA, the Minister:

a. may refuse to consider the application until the referral is made and determined;

b. must encourage the proponent to refer the action; and

c. may refer the action to the NT EPA herself or himself.

Accordingly, the Court confirmed that the Act “does not cast any obligation” on the Minster to either a) refuse to consider the application until a referral is made, or b) personally refer the proposed action.

In accordance with the Regulations, the Minister may consider an application and grant authorisation, even if the proposed action has the potential to have a significant impact on the environment. The Minister is allowed to grant a valid authorisation even where the proponent is required to refer the proposed action to the NT EPA and has not – this does not invalidate the Minister’s authorisation. It is only in circumstances where a referral has been made and determination remains pending, that the Minister is precluded from granting authorisation.

The judgment also clarified that once a referral has been made to the NT EPA, a statutory decision-maker must not grant authorisation until the NT EPA has determined whether an environmental impact assessment is required and, if so, then not until the approval process is complete. Upon conclusion of this process, the statutory authorisation “springs back into effect”. Here, in the absence of a referral and determination from the NT EPA, the Minister was permitted to approve the EMP.

Relevantly, in circumstances where the proponent does not refer a proposed action where the NT EPA considers there is potential for a significant environmental impact, the NT EPA may issue a notice pursuant to s53(1) of the Act requiring that the proponent refer the action and, where the proponent is obliged to make the referral, a failure to do so attracts criminal sanction.

Further, the Court confirmed, “The NT EPA’s view is determinate of the issue within the confines of the statutory scheme, in the sense that it may compel a proponent to refer a proposed action and, once a proposed action has been referred, that it must determine whether it has the potential to have a significant impact on the environment.”

Commentary

Most significantly for the mining and resources industry, the judgment provides some clarity about both the assessment procedure, and approval requirements, for EMPs relating to exploratory activities. The judgment confirms that the Minister is not legally required to consider potential long term environmental or climate impacts or risks arising from future production-phase activities, when considering exploratory activity EMPs.

Further, in the absence of a referral and a determination that an environmental impact assessment is required for a proposed action from the NT EPA, the Minister is permitted to approve an EMP. The judgment also serves as an important reminder that, in circumstances where the NT EPA issues a notice to refer a proposed action, compliance is paramount to avoid criminal sanction.

FEDERAL COURT FINDS EARLIER RIGHT TO MINE VALID

In *Forrest on behalf of the Nangaanya-ku Native Title Claim Group (Part B) v State of Western Australia (No 2)* [2024] FCA 729 (the Proceedings), the Federal Court (the Court) considered, as a separate question, whether *the grant of M39/1096 was an act consisting of the creation of a right to mine to which [the right to negotiate in] s 26D(1) of the Native Title Act 1993 (Cth) applied* (separate question).

This was material because if the answer to the Separate Question was yes, the result would be that the right to negotiate did not apply when the previous leases were replaced with M39/1096, so there would be no dispute that the grant of the tenement was valid. However, if the answer to the separate question was no, the right to negotiate would have applied when the previous leases were replaced with M39/1096, meaning the grant of the tenement would be invalid to the extent that it affects native title.

The Court held that the replacement of the earlier mining leases by mining lease M39/1096 fell within the definition of 'the re-making of' those earlier leases. Accordingly, the right to negotiate did not apply.

Background

Almost a decade prior, in Lake Rason, east of Laverton in Western Australia, the State of Western Australia granted M39/1096 to IGO Ltd (previously known as Independence Group NL) and AngloGold Ashanti Ltd. The grant comprised a consolidation of 31 mining leases previously held by these entities. M39/1096 was granted on the same terms, covering the same total area, for the same duration, and attaching the same rights and obligations.

The State was obliged to give notice to affected parties and the public under s 29 of the *Native Title Act 1993* (Cth) (**Act**) prior to granting M39/1096, which is a required step in the right to negotiate procedure set out in the Act. It was common ground that the State failed to give the required notice under s 29 and, if right to negotiate procedures applied to the grant of M39/1096, they were not followed, and the grant of the tenement was invalid to the extent it affects native title.

Section 26D of the Act sets out circumstances when the right to negotiate, does not apply. The crux of the issue in the Proceedings was whether the requirement to observe the right to negotiate had been excluded.

The relevant exclusion considered by the Court was whether the grant of the tenement was the creation of a right to mine by the renewal, re-grant, or re-making of an earlier right to mine.

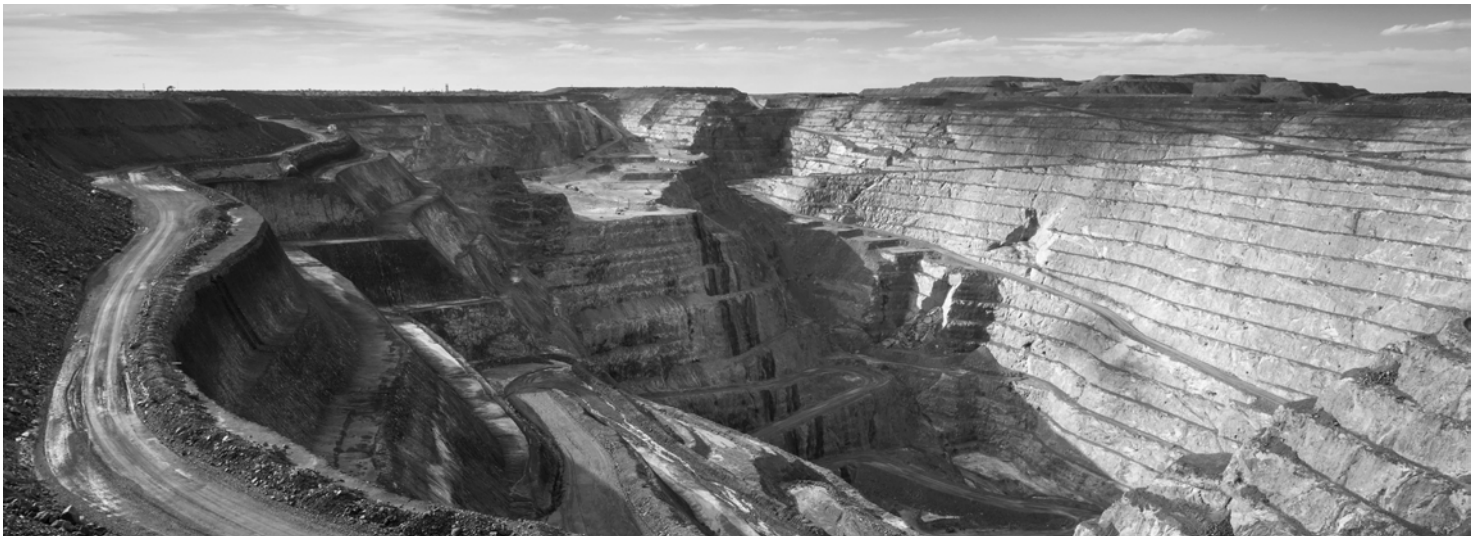
Within the Separate Question, the Court was also required to consider two additional issues, being:

1. Whether the grant of M39/1096 should be characterised as the renewal, re-grant or re-making of an earlier right to mine or rights to mine (including whether right to mine should be read in the plural); and
2. Whether the grant of M39/1096 has the result that the area to which each of the previous mining leases relates has been extended.

The Court held that the replacement of the earlier mining leases by mining lease M39/1096 fell within the ordinary meaning of, the re-making of' those earlier leases. Therefore, the exclusion relating to re-making an earlier right to mine applied and the grant of M39/1096 was not invalid, to the extent that it affected native title.

Commentary

This decision clarifies that if the grant of a tenement occurs because of the renewal, re-grant or extension of the term of an earlier right to mine, right to negotiate requirements are not required to be followed.



FAILURE TO MARK OUT PROVES FATAL TO APPLICATION FOR SPECIAL PROSPECTING LICENCE

In *John Thomas Broughton, Charles Henry Broughton and Peter Kovaluns v Bullseye Mining Limited* [2024] WAMW 36 (Proceedings), the Warden's Court determined that it did not have jurisdiction to consider the merits of the applicants' application for a Special Prospecting Licence in the Mount Margaret mineral field (Application), because the tenement the subject of the Application had not been marked out in accordance with the requirements of the Act and Regulations.

Background

Bullseye Mining Limited (**Bullseye**) is the registered holding of Exploration Licence E37/1017 (**Exploration Licence**). Bullseye initially objected to the Application on several grounds, but ultimately pursued only the following objections on the following grounds:

1. John Broughton, Charles Broughton and Peter Kovaluns (**the Applicants**) had not complied with the *Mining Act 1978* (**Act**) or the *Mining Regulations 1981* (**Regulations**). They argued that the tenement was not marked out by the Applicants in accordance with the Act and Regulations such as to enliven the jurisdiction of the Court to determine the Application; and
2. If the Court's jurisdiction was enlivened, the granting of the Special Prospecting Licence the subject of the Application would cause undue detriment to the exploration being carried out by Bullseye.

Outcome

Section 105 of the Act requires that, before an application for a mining tenement, other than an exploration licence, a retention licence or a miscellaneous licence is made, the land in relation to which the mining tenement is sought shall be marked out in the manner required by regulation 59 of the Regulations. Regulation 59 contains a number of strict requirements. Relevant in this case, the land must be marked out by fixing firmly in the ground a post projecting at least one metre above the ground and then fixing firmly to one of the posts as the datum post, notice of marking out in the form of 'Form 20',a notice of marking out that is a prescribed form within the Regulations.

The Court referred to the determination of Justice Tottle in *Forrest & Forrest Pty Ltd v O'Sullivan* [2020] WASC 468 (**Forrest**) and said that it cannot be disputed that 'marking out' is a jurisdictional fact, required to be established as a prerequisite to the exercise of the relevant jurisdiction by a Warden. Although Forrest related to marking out land the subject of a prospecting licence, the Court held there is no reason to doubt the same reasoning must also apply to an application for a mining lease.

Mr Broughton testified that his wife had taken a photograph at 6:06pm and, although there was no paperwork on the datum post at that time, on the ground was an old peg with the paperwork on it and that, within the next 12 minutes, the peg was replaced into the ground with paperwork affixed.

However, there was no evidence that the "paperwork" Mr Broughton referred to in his evidence was a Form 20.

The Court cited the case of *Torrian Resources Ltd v Kalgoorlie Ore Treatment Company Pty Ltd* [2018] WAMW 16 which contained the following passage:

"it is the affixing of the Form 20 to the datum post which is the final act of marking out and which in light of the ratio in Hunter Resources Ltd v Melville (1988) 164 CLR 234 is a matter of strict compliance the absence of which would be fatal to the application".

The Court held that, as a result of Mr Broughton failing to mark out in strict compliance with the Act and Regulations, the Court had no jurisdiction to determine the Application.

Commentary

This case confirms that the requirements of marking out land the subject of a prospecting licence application must be established to enliven the Warden's jurisdiction to hear the application.

WARDEN FINDS SUFFICIENT CONNECTION TO MINING TENEMENTS IN DEED FOR COSTS INCURRED DURING PROJECT DEVELOPMENT

In *Kestel Superannuation Pty Ltd v Kimminco Pty Ltd* [2024] WAWC 2, the Warden's Court addressed several disputes regarding the payment terms of a mining joint venture. Relevantly, the first issue the Court wrestled with was to determine whether the matter in dispute was sufficiently connected to mining tenements to fall within the Warden's Court's jurisdiction.

In keeping with a recent theme, Warden McPhee gave s132 and s134 of the *Mining Act 1978* (WA) (**Act**), which empower the Court to resolve disputes concerning mining tenements, a broad interpretation. The Warden held that, as the Settlement Deed stemmed from costs incurred during the mining project's development, the Settlement Deed was connected to the joint venture's operations over the mining tenements. Accordingly, Warden McPhee held that the dispute fell within the Warden's Court's jurisdiction.

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