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Cazaly: Good Mark or Hospital Hand-Pass?

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SUMMARY

This paper provides an overview of the dispute between Rio Tinto Ltd and Cazaly Iron Pty Ltd over the Shovelanna iron ore resource in Western Australia that has raged on since mid-2005. The dispute has provoked many different viewpoints about the procedures for resolving disputes over non-renewed tenements in Western Australia. The dispute resolution process for restoration disputes under the Mining Act 1978 (WA) is examined with the recent decision of the Western Australian Court of Appeal in Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd. This is made timely by Cazaly's announcement that it will apply for special leave to appeal to the High Court of Australia. The article will also look at a number of broader public policy questions that arise from the Shovelanna dispute.

INTRODUCTION

For the past two years the dispute between Cazaly Iron Pty Ltd[1] and Rio Tinto Limited[2] over the Shovelanna iron ore site in Western Australia has been one of the most public exercises in Australian mining law.[3] It has been temporarily concluded by the decision of the Western Australian Court of Appeal in *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd,*[4] although an application for special leave to appeal to the High Court of Australia has been made by Cazaly. The case has

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1 Hereafter referred to as "Cazaly".

2 Hereafter referred to as "Rio" or "Rio Tinto".

3 The dispute has received enormous coverage in the press. A search of the electronic media database "Factiva" revealed more than 1500 articles, abstracts, media releases and bulletins in recognised Australian newspapers, magazines and financial information sources.

4 [2007] WASCA 175.

aroused many different viewpoints about the procedures for resolving disputes over non-renewed tenements in Western Australia under the *Mining Act 1978* (WA).[5]

This paper focuses particularly on the Shovelanna dispute. In the second part the present Western Australian law for restoration disputes is explained. In the third part the Shovelanna dispute is described and the Court of Appeal's decision analysed, before some of the major questions that arise from this dispute are discussed in part four. Some conclusions are then drawn.

RESTORATION LAWS IN WESTERN AUSTRALIA

Forfeiture of a tenement in Western Australia generally occurs by way of a successful application[6] by any person to the Warden to have the tenement held by another forfeited on account of failure to comply with the expenditure conditions of the tenement or by way of forfeiture by the Minister for breach of conditions attaching to the tenement.[7] This article is not concerned with "forfeiture", in its technical sense in the Act.[8] This article is concerned with "non-renewal", being failure to renew a tenement in accordance with the provisions for renewal in the *Mining Act 1978* (WA). In these situations, the tenement simply lapses because the term of the tenement is limited. The ground thereafter becomes vacant Crown land.

Once a tenement has expired the vacant Crown land that is open for mining can be pegged by any person with a view to making an application for a licence or lease.[9] What will ordinarily occur is the non-renewal of a tenement by one party who later seeks to restore their ownership of it and a parallel attempt by another party to acquire the same ground for itself by way of a new tenement application.

Section 111A of the *Mining Act 1978* (WA) provides:

> "(1) The Minister may –
>
> (a) by notice served on the mining registrar or the warden, as the case requires, terminate an application for a mining tenement before the mining registrar or the warden has determined, or

[5] Hereafter referred to as the "*Mining Act*" or "the Act".

[6] The application was formerly called a "plaint for forfeiture", but is now called an "application for forfeiture" (see *Mining Regulations 1981* (WA), reg 190).

[7] Such conditions include expenditure and reporting requirements as well as fees on the licences or leases: *Mining Act 1978* (WA), s 96.

[8] It is a means of "self-regulation" created in the *Mining Act 1978* (WA), whereby the general public will keep tenement holders accountable in so far as expenditure conditions are concerned: "Not only does the Act provide for a system designed to ensure certainty of title, but by providing a system of applications for forfeiture with consequent advantages for successful plaintiffs, Parliament has cunningly co-opted the general public as an enforcement agency for the conditions imposed upon by the Act" (cited in *Brosnan v Flint & Sorna Pty Ltd* [2003] WAMW 16 at 6 per Richardson SM).

[9] The type of licences and leases available in the Western Australian mining regime include prospecting licences, and mining leases which need to be pegged and exploration licences which can be applied for without pegging.

made a recommendation in respect of, the application; or

(b) refuse an application for a mining tenement,

if in respect of the whole or any part of the land to which the application relates –

(c) the Minister is satisfied on reasonable grounds in the public interest that –

(i) the land should not be disturbed; or

(ii) the application should not be granted;

or

(d) a person who in relation to the land was formerly the lessee of a mining lease the term of which has expired, or is a person deriving title through such a former lessee, has subsequently made a late renewal application and the Minister, being satisfied that the requirements of that expired mining lease and of this Act in relation to that lease had been substantially observed (other than as to the timing of an application for renewal) and that the person has continued to observe those requirements as if the term of the lease had not expired, determines that the renewal application should be approved and grants that renewal.

(2) In subsection (1)(d) **late renewal application** means an application made in the manner prescribed for the purposes of section 78 (except that it was not made during the final year of the term of the lease) for the renewal of the lease with effect from the expiry of the term of the lease.

(3) Notwithstanding anything in this Act, an application to which a notice referred to in subsection (1)(a) applies ceases to have any effect for the purposes of this Act when that notice is served.

(4) The powers conferred by subsection (1) are in addition to any other powers of the Minister under this Act."

With these restoration disputes the previous tenement holder, in an effort to effectively restore their tenement, makes an application for a new licence or lease (depending on the type of tenement involved).[10] At the same time they also apply to the Minister to cancel any competing application made by a new applicant under s 111A(1)(c).

There is one slight difference for this process if a *mining lease* is involved. A mining lease is the highest status of tenement and will usually involve a working mine producing minerals. Because the Parliament has been concerned[11] about people with living, working mines losing them by accidental slip or omission to renew, a special provision exists (s 111A(1)(d)) through which a late renewal application can be made for *mining leases.* Other tenement types such as prospecting and exploration licences, can not take the benefit of this provision, however, and must rely upon the public interest discretion in s 111A(1)(c).

[10] Ibid.

[11] See the Parliamentary debates and second reading speeches quoted in *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* [2007] WASCA 175 at [113]-[114] by Buss JA.

THE SHOVELANNA (RIO TINTO-CAZALY) CASE

Background to the Dispute

Rio Tinto is a member, through its subsidiary Hammersely Resources Ltd, of the Rhodes Ridge Joint Venture,[12] which owned the exploration licence "E46/209" on the Shovelanna site. The Shovelanna site lies approximately 25 kilometres east of Mt Newman, adjacent to BHP Billiton's Orebody 18 North deposit. Prior to the grant of E46/209, the licence was held by RRJV as a previous exploration licence "E46/8". Prior to that, it was also held by the RRJV under the *Mining Act 1904* (WA) (now repealed).

The RRJV had invested around $590,000 in exploration work on the land the subject of the E46/209 prior to August 2005. This work revealed an "inferred resource" of approximately 120M tonnes of high phosphorus brockman iron ore. As Buss JA mentioned in his decision, however, Rio did not conduct any drilling during the life of the exploration licence E46/209, as the Shovelanna resource had been identified long before that time.

E46/209 was granted to Rio on 27 August 1989. Between 27 August 1989 and 26 August 2005, Rio had applied for and was granted a partial exemption on 10 occasions from the annual prescribed expenditure conditions relating to E46/209 (s 62), exemption on two occasions from the compulsory surrender requirements relating to the licence (s 65), and on 11 occasions an extension of the term of the licence for one year (s 61(2)).

On 26 August 2005, Rio Tinto had its exploration licences due to expire for the Shovelanna site. Earlier, on 28 July 2005, Rio Tinto had provided the Head Office of the Department of Industry and Resources with the appropriate prepayment of rent for the following year of the tenement. But the renewal application had to be sent to the Mining Registrar of the mining field being the area where the tenement is located.[13] The renewal application was sent to the Marble Bar Registrar by overnight courier leaving Perth on 19 August 2005.[14]

The courier took longer than a night to make the delivery, but the application arrived in Marble Bar on 26 August 2005, being the final day on which the documents were due. The courier left the documents at Lenny Lever's Discount Store, a local shop in Marble Bar.[15] The package was collected by the Registrar five days later on 31 August 2005.[16] In the meantime Cazaly had since lodged its exploration licence application on 29 August 2005. Rio's applications for *mining leases*[17] over the area were made on 5 September 2005. Later, other parties lodged applications for exploration licences.[18]

[12] Referred to in [2007] WASCA 175 as "RRJV". For the purposes of this paper, however, the author refers to "Rio" and not the joint venture which also includes Hancock Prospecting Pty Ltd and Wright Prospecting Pty Ltd.

[13] This was required by *Mining Act 1978* (WA), s 61(3) and *Mining Regulations 1981* (WA), reg 23A(1) (but following amendments by the *Mining Amendment Regulations (No 2) 2006* (WA), any Department Office can now receive the documents).

[14] [2007] WASCA 175 at [38] per Buss JA.

Around this time also a private meeting was held between then Minister for Resources Alan Carpenter and Rio CEO Leigh Clifford in London.

From here the *Mining Act* provided only one avenue to resolve the looming dispute. As Rio had *exploration licences*, the only proper course was simply to rely upon s 111A(1)(c), as the reinstatement ground in s 111A(1)(d) only applied to *mining leases*. Rio had also lodged a formal objection[19] to Cazaly's application for a tenement on the basis that Cazaly's application was not in the public interest.[20]

The Minister took written submissions from Cazaly and Rio on his exercise of the s 111A discretion. Four submissions were received from each party between 21 September 2005 and 27 March 2006. While it is not necessary to look at the detailed arguments in each of the submissions, it is enough to say that a "Statement of Principles", being an agreement between Rio and the State, was referred to in one of Rio's earlier submissions but never disclosed to Cazaly and was not publicly available. Cazaly's lawyers requested the Statement of Principles from the Department of Industry and Resources but they were never disclosed to Cazaly, so as to afford it an opportunity to comment upon them, prior to the Minister's decision being made.[21] A document referred to by Rio as a "Policy" of the Government's, in relation to special treatment of large companies with iron ore interests, in its third submission of 12 January 2006 was eventually disclosed to Cazaly pursuant to an application under the *Freedom of Information Act 1992* (WA). Cazaly had an opportunity to comment upon this in its submissions but chose not to do so.[22]

On 21 April 2006 the Minister duly agreed with Rio Tinto and cancelled Cazaly's application for an exploration licence (E46/678), without giving any reasons.[23] Six days later he succumbed to pressure and gave public reasons for his decision by way of "Media Statement".[24] The Minister's reasons were as follows:[25]

[15] Mark Drummond "How a Marble Bar store ended up in a mine row" *The West Australian* (29 April 2006); Mark Mentiplay "Shovelanna battle destined for court" *WA Business News* (4 May 2006). Although, the Court of Appeal did not make findings in this regard: [2007] WASCA 175 at [4] per Pullin JA and at [38] per Buss JA.

[16] [2007] WASCA 175 at [40] per Buss JA.

[17] The reason Rio now sought mining leases was to avoid a three month moratorium under the *Mining Act 1978* (WA), s 69(1). Under that section, Rio could not re-apply for an exploration licence for a period of three months after the expiry of its previous exploration licence.

[18] FMG Pilbara Pty Ltd, BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy of Australia Pty Ltd and Mitsui Itochu Iron Pty Ltd made applications in October: [2007] WASCA 175 at [44]-[45].

[19] Pursuant to *Mining Act 1978* (WA), s 59(1).

[20] *Hamersley Resources v Cazaly Iron Pty Ltd* [2006] WAMW 18 at [3] per Warden Calder.

[21] [2007] WASCA 175 at [292] per Buss JA.

[22] [2007] WASCA 175 at [345]-[346] per Buss JA.

[23] One alternative decision for the Minister would have been to decide against Rio and determine that he would await the hearing of Cazaly's application and Rio's objection by the Warden's Court, and have the benefit of the Warden's recommendation to make the decision at a later point.

"Each of the three reasons I will elaborate upon was sufficient on its own for me to be satisfied that the public interest was best served by terminating [Cazaly's] application.

The State's Iron Ore Policy

Amongst the materials provided to me by the Department of Industry and Resources (DoIR) was the following advice:

> '... Parliament intended that Iron is a mineral for which special treatment be accorded under the Act...Parliament wanted the Minister to be in a position to exercise a much broader discretion in relation to iron tenements...this would have the effect of encouraging exploration for iron ore. ...and the life of these mining operations can last for decades, and in fact may need to last for decades to make the capital investment economically feasible...there is logical support for a special provision that allows an exploration licence for iron to be held on less onerous terms than licences for other minerals...'

The policy recognises the need for long term tenure to underpin long-term contracts. Iron ore mining in the volumes developed in the Pilbara can only be carried out with extensive infrastructure such as rail and ports. In order to invest in such extensive capital infrastructure, companies need the security of long-term contracts supported by secure tenement holdings.

Implicit in this long-standing policy is the certainty that some tenements containing iron ore deposits will not be mined for a lengthy period of time from the time of discovery.

This policy has been maintained by successive governments for many decades and it is my view that it has been a significant reason for the Pilbara region being the world's most prolific exporter of iron ore.

Any company mining iron ore in Western Australia needs to have access to long-term reserves in order to secure their future viability. For example, a company that has access to known reserves can more quickly respond to increases in demand.

Whilst this policy is under review, I am of the view that to arbitrarily deviate from its objectives and present method of implementation would be detrimental to the state's sovereign risk profile and therefore contrary to the public interest.

On reviewing the material I concluded that the objectives of the State's iron ore policy and therefore the public interest were best achieved by terminating [Cazaly's] application.

Promoting Investment in Western Australia

[24] Robert Taylor "Bowler explains Cazaly ruling" *The West Australian* (28 April 2006). Providing public reasons about s 111A decisions is very rare and there is no established practice for it. See the article Carolyn Hayward "Section 111A of the Mining Act" (1995) 14(2) AMPLA Bulletin 113, which lists a good number of s 111A cases in the past 20 years (at 122 (Table 1)) and mentions the difficulty of obtaining past decisions by the Minister (at 124 (fn 51)).

[25] Relevant extracts from the decision of Buss JA in *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* [2007] WASCA 175 at [50].

I consider that the public interest is best served by policies and decisions that promote investment.

Investment in the resources industry is promoted when explorers can be confident that their ownership of resources they have discovered is not jeopardised, with consequences disproportionate to minor oversights or actions. This is particularly true where a tenement holder has clearly signalled their intentions to government by, for example, paying rent in advance.

I concluded that goals of promoting investment in Western Australia and therefore the public interest were best served by terminating [Cazaly's] application.

Fairness

The effective administration of Ministerial discretion under the Western Australia Mining Act requires that the outcomes be consistent.

In considering this matter I was particularly focused on ensuring the answer I came to would be the same were the circumstances of the parties to be reversed. I have no doubt that this would be the case.

In other words, if the roles of [RRJV] and [Cazaly] were to be reversed, I would have found in favour of [Cazaly].

Accordingly I am satisfied that the public interest was best served by terminating [Cazaly's] application."

Cazaly had thereby been stripped of its claim to the tenement applied for.

Cazaly then sought a legal opinion as to the Minister's conduct. It checked whether the Minister could lawfully deny them the licence in this way. They hired the services of a leading commercial barrister in Western Australia, then Mr Wayne Martin QC and now Chief Justice of the Supreme Court of Western Australia. Mr Martin said that the Minister had acted contrary to law and the decision would be set aside by a court reviewing it. Cazaly took an unprecedented step of placing Mr Martin's opinion in full on the Cazaly's website[26] and waiving legal professional privilege to it.

Before looking to the Supreme Court challenge that commenced in August 2006, it is worth noting the Warden's Court proceedings from September and October 2006. Cazaly sought to amend its objection to Rio's application for an exploration licence on Shovelanna by way of an application to the Warden. Cazaly also argued that the matter should be adjourned until after the Supreme Court challenge to the Minister's decision. On 5 October 2006, Warden Calder handed down his reasons in *Hamersley Resources v Cazaly Iron Pty Ltd*,[27] allowing the amendments and adjourning the hearing of the matter until after the Supreme Court challenge to the Minister's s 111A decision.[28] This was presented to the public as a win for Cazaly.[29]

[26] Nathan McMahon and Clive Jones "Cazaly Legal Opinion: Shovelanna" ASX Release on 1 August 2006 (http://www.cazalyresources.com.au/files/grabdoc.php?type=doc&id=141&cid=44 (Viewed on 1 October 2007)).

[27] [2006] WAMW 18.

The Court of Appeal Hearings

On 4 August 2006, Cazaly filed a notice of originating motion for an order that the Minister show cause before the Supreme Court of Western Australia why a writ of certiorari should not issue to quash the Minister's decision and, in the alternative, declaratory relief. The Western Australian Court of Appeal was to review the Minister's conduct in cancelling Cazaly's application for the Shovelanna resource. The review would occur by way of prerogative writ. Cazaly's lawyers filed for a writ of certiorari against the decision of the then resources Minister, Mr John Bowler. On 11 August 2006, Justice Templeman of the Supreme Court of Western Australia, on hearing parts of the application in a preliminary judicial review hearing,[30] agreed that it was a review sought that was not misguided or trivial.[31] The matter was set down to be fully argued before the Court of Appeal in March 2007.[32] Around this time it was reported that Mr Nathan MacMahon, head of Cazaly, rejected any proposal for a joint Cazaly-Rio deal on the Shovelanna site.[33]

At interlocutory hearings in November and December 2006 and February 2007, prior to the hearing on the prerogative writ, various orders as to discovery, affidavits and the subpoenae were made. On 15 November 2006 and 6 December 2006, Cazaly argued its application for general discovery to be provided by the Minister (First Respondent) and Rio (as an indirect Second Respondent), as well as leave to amend their grounds of judicial review. On 22 December 2006, Buss JA gave his decision in *Cazaly Iron Pty Ltd v The Hon John Bowler MLA, Minister for Resources,*[34] holding that general discovery would not be permitted, specific supplementary discovery would be ordered and certain of the amendments were allowed.[35]

During November and December 2006, the material placed in the public domain prior to the hearing of the case by the Court of Appeal gave some indications as to the diversity and number of Cazaly's grounds to challenge the Minister's decision. It was reported that "Cazaly claims the Minister relied on

[28] For a full commentary see: Robert Edel and Alex Jones "Application to stay proceedings before the Warden and amend objections" (2007) 26 *Australian Resources and Energy Law Journal* 38.

[29] John Phaceas "Cazaly claims a win in Shovelanna tenement row" *The West Australian* (30 September 2006).

[30] On the first return of the order nisi under Western Australia's old prerogative writ system for judicial review of administrative action.

[31] John Phaceas "Cazaly clears first hurdle" *The West Australian* (12 August 2006).

[32] Elizabeth Gosch "Cazaly rejects peace talks with Rio over Shovelanna" *The Australian* (30 November 2006).

[33] "Cazaly managing director Nathan McMahon told shareholders today there would be no peace talks with Rio Tinto ahead of a West Australian Supreme Court hearing on March 17 next year." ("Cazaly To Continue Fight To West Iron Ore Tenement From Rio Tinto" *Asia Pulse* (29 November 2006). See also Elizabeth Gosch "Cazaly rejects peace talks with Rio over Shovelanna" *The Australian* (30 November 2006).

[34] [2006] WASCA 282.

[35] A commentary of this decision is provided by R Edel and A Pullinger "Prerogative writs: Application to amend order nisi and discovery" (2007) 26 ARELJ 32.

incorrect advice and an unwritten iron ore policy that was out of step with WA's mining laws"[36] and that failure to disclose Rio's submissions to the Minister has denied it procedural fairness.[37] Mr MacMahon was also reported as having said:[38]

> "If the process had been open and transparent, it is without a shadow of a doubt that we would have been awarded the tenement. Mining projects should be according to legislation, not private arrangements."

Of course, the interlocutory decision on amending the grounds of review in Cazaly's originating motion provided some indication of the grounds of review.[39] Other material was put in the public arena, including accounts that Rio had not drilled on the site in 20 years.[40] Mr McMahon is attributed to having said that "Rio Tinto have had the tenement for 20 years and haven't done much" and "I don't see that they have shown their bona fides to develop this project",[41] as well as saying, when referring to Rio's non-development of the Shovelanna: "If you go any slower than that you are going to go backwards."[42]

On 27 and 28 February 2007, Buss JA heard applications by Cazaly to adduce oral evidence from the Premier, the Hon Alan Carpenter MLA, the Hon John Bowler MLA, Mr Neil Roberts (Departmental adviser), Mr Sam Walsh (Rio) and Mr Leigh Clifford (Rio) on return of the order nisi (at the judicial review hearing). On 15 March 2007, his Honour published reasons in *Cazaly Iron Pty Ltd v Minister for Resources,*[43] setting aside the subpoenae issued by Cazaly against the Premier, Minister and Rio Executives, but ordered that Minister Bowler give an affidavit as to specific matters concerning the Statement of Principles as well as various negotiations with Rio and the State. His Honour also confirmed that there was no evidence of anything more than a mention of E46/678 in a private meeting between the Premier and Mr Clifford in September 2005 in London.[44]

On 27 February 2007, Buss JA also heard applications by Cazaly to have orders as to confidential documents discovered by the Minister varied so that Cazaly directors could view them. On 15 March 2007, His Honour handed down his

[36] John Phaceas "Cazaly serves it up to Rio" *The West Australian* (6 November 2006).

[37] "Cazaly's lawyer, Richard Price, said the company had been denied "procedural fairness" by the Government's refusal to hand over the "Statement of Principles" document." (John Phaceas "Cazaly acts to release Pilbara ore documents" *The West Australian* (16 November 2006).

[38] Carrie Ho "Cazaly's Shovelanna case granted stay in Warden's Court" *Metal Bulletin News Alert Service* (4 October 2006).

[39] [2006] WASCA 282 at [4] per Buss JA.

[40] "Rio argued it was in the public interest that it have the project, despite doing no drilling in the last 20 years that it held the asset." (Rebecca Keenan "Cazaly flags more to front court over Shovelanna" *The West Australian* (30 November 2006)); "…which has not been drilled since 1986 despite being alongside BHP Billiton's lucrative Orebody 18". (Elizabeth Gosch "Cazaly rejects peace talks with Rio over Shovelanna" *The Australian* (30 November 2006)).

[41] Colin Jacoby "Transparency the focus in legal fight: Cazaly AGM" *WA Business News* (29 November 2006).

[42] Liza Kappelle "Cazaly 'to keep fighting for Shovelanna'" *AAP Bulletins* (29 November 2006).

[43] [2007] WASCA 58

[44] [2007] WASCA 58 at [21]-[22].

decision in *Cazaly Iron Pty Ltd v Minister for Resources*[45] and dismissed the application. While this is not of great relevance to the main issues in the dispute, a noteworthy aspect of Buss JA's decision is his finding (relevant to commercial confidentiality orders) that Cazaly could be a competitor of Rio if it succeeded in these proceedings. This is because competition would develop in the supply of iron ore between them[46] and it is conceivable that the State may enter a State Agreement with Cazaly and this kind of disclosure would reveal the manner in which the State may be willing to negotiate such an Agreement.[47]

The Court of Appeal, constituted by their Honours Justices of Appeal Wheeler, Pullin and Buss, heard the matter on 19 and 20 March 2007. During the hearing, it was reported that "[s]peaking outside the court, Cazaly managing director Nathan McMahon said he was glad the matter was finally being tested in open court. 'I have always had major concerns about Rio Tinto and the Government not being overly transparent so it is a good opportunity,' he said, [and later] 'I was in Canada about two to three weeks ago and the word "Zimbabwe" came up every time this case was mentioned.'"[48]

Prior to the Court of Appeal's decision, Cazaly's Nathan McMahon had said publicly of Mr Bowler's decision: "[it] goes against the very values that underpin the WA Mining Act, which is held up by the industry and all its stakeholders to be pro-development, transparent in its actions and most of all fair."[49]

The Court of Appeal's Decision in Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd[50]

On 28 August 2007, the Court of Appeal discharged the order nisi and refused the application for declaratory relief in its decision: *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd.*[51] Cazaly had lost its challenge. The lead judgment was that of Buss JA, with whom Wheeler and Pullin JJA agreed. Pullin JA provided some additional comments on particular issues.

The prerogative and equitable remedies were sought and refused on the following grounds:[52]

Ground (a): By s 111A(1)(c)(ii) of the *Mining Act*, the Minister, in deciding whether he or she is satisfied on reasonable grounds in the public interest that an application for a mining tenement should not be granted, must have regard only to

[45] [2007] WASCA 60.
[46] [2007] WASCA 60 at [14].
[47] [2007] WASCA 60 at [15].
[48] John Phaceas "Cazaly attacks Bowler ruling" *The West Australian* (20 March 2007).
[49] Kevin Andrusiak "Cazaly in trade halt as ruling looms" *The Australian* (25 August 2007).
[50] [2007] WASCA 175.
[51] Ibid.
[52] While the grounds were extracted from Cazaly's originating motion and numbered in a different fashion, Buss JA summarised them to six specific types of administrative law error. The author adopts the summary of grounds used by Buss JA in his decision ([2007] WASCA 175 at [54]).

the application itself, and not to matters, facts or circumstances extraneous to that application, such as the private interests of third parties. Cazaly submitted that public interest should not include reference to third parties, on account of:

(i) the language of s 111A(1)(c),
(ii) the authorities relating to s 111A(1)(c),
(iii) the relationship between s 111A and s 105,
(iv) the evident object of Parliament in enacting s 111A in its current form, and
(v) the primary object of the *Mining Act*.

Court of Appeal's refusal of Ground (a): A construction of s 111A(1)(c) which is adverse to Cazaly is reconcilable with the object of the Act.[53] With respect to (i)-(v) above, the following was said:

(i) An application for a tenement which the Minister is considering terminating, with a competing third party application involved, can give rise to a public interest question and that the ejusdem generis rule could not apply to limit consideration of private interests to only applications made under the other limb (s 111A(1)(d)).[54]
(ii) Cazaly's argument failed as in the previous authorities of *Sinclair v Mining Warden at Maryborough*[55] and *Re Warden Heaney; Ex parte Serpentine-Jarrahdale Ratepayers' and Residents' Association (Inc)*[56] the objection under consideration by the courts were not confined to matters pertaining to the application itself.[57]
(iii) The intention of Parliament in making the priority rules for tenements in s 105A was reflected in making it "Subject to s 111A". A discretionary power exists to abrogate the 'right in priority' which would otherwise arise under s 105A. So in exercising the s 111A discretion, the Minister could consider the decision's effect on priorities between applicants and Cazaly's submission was inconsistent with the relationship between s 105A and s 111A.[58]
(iv) Cazaly's contention was said to be inconsistent with the evident object of the Parliament in enacting s 111A. When quoting the second reading speeches, Buss JA did not explain what the object of Parliament was. It seems that his Honour relied upon the speeches in so far as they say s 111A allows a Minister to "meet problems as they arise".[59] The discretion is that broad.
(v) This aspect of Buss JA's decision was difficult to understand. His Honour seems to be saying that the broad object of the *Mining Act* is to encourage mining or exploration, but the exemptions from the expenditure regime contained in the Act show circumstances where immediate exploration is not the primary concern and object of the Act.[60]

Ground (b): The State's iron ore policy (the Policy) is inconsistent with the *Mining Act*. By the Act, the Minister was prohibited from having regard to the

[53] [2007] WASCA 175 at [124].
[54] [2007] WASCA 175 at [90]-[96].
[55] (1975) 132 CLR 473.
[56] (1997) 18 WAR 320,
[57] [2007] WASCA 175 at [97]-[104].
[58] [2007] WASCA 175 at [105]-[108].
[59] [2007] WASCA 175 at [109]-[117].

Policy, and the objectives on which it is based, in deciding to terminate Cazaly's Application. Cazaly submitted that the Policy was contrary to the *Mining Act* and unlawful for the following reasons:[61]

(i) A policy affording special treatment to the holders of exploration licences who are authorised to explore for iron in connection with applications for extensions of the term of their licences, by treating confirmation of an inferred iron ore resource as an "exceptional circumstance", within s 61(2)(b)[62] as it stood at the time of expiry of Rio's licence was contrary to the Act.

(ii) A policy which allows holders of exploration licences who are authorised to explore for iron to use the licence as "a holding title for inferred resources of iron ore" is contrary to the Act.

(iii) The assertion in the Department's Minute, which the Minister relied upon and restated in his reasons, that "Parliament wanted the Minister to be in a position to exercise a much broader discretion in relation to iron tenements" is not based upon or supported by any provisions of the Act.

(iv) Even if (contrary to Cazaly's submission) there is a valid basis for inferring that "Parliament wanted the Minister to be in a position to exercise a much broader discretion in relation to iron tenements", that inference could arise only in relation to an application under s 102A itself, and it has no relevance to an application to the Minister to exercise his power under s 111A.

Court of Appeal's refusal of Ground (b): With respect to the grounds advanced above, Buss JA said:

(i) The Policy is consistent with the special provision made for exploration and mining of iron ore in the *Mining Act*.[63] Section 111[64] of the Act, alongside other sections, has the effect of singling out iron ore as a very special resource. It was reasonably open for the Minister to decide that under s 61(2)(b) where first, an exploration licence authorised the holder to explore for iron (which the Act contemplates as "exceptional" in itself); second, the holder had discovered a substantial inferred deposit; and third, it was not feasible for immediate mining, those circumstances were "exceptional".[65]

[60] [2007] WASCA 175 at [118]-[123].

[61] These have been directly copied from [2007] WASCA 175 at [132].

[62] The provision which deals with renewal applications.

[63] [2007] WASCA 175 at [143] and [149].

[64] Section 111 provides that:

"**111. Power of Minister to exclude mining for iron from mining tenements**

Notwithstanding the provisions of sections 48, 66, 70J and 85 –

(a) a prospecting licence does not authorise the holder thereof to prospect for iron on the land the subject of the prospecting licence;

(b) an exploration licence does not authorise the holder thereof to explore for iron on the land the subject of the exploration licence;

(ba) a retention licence does not authorise the holder thereof to explore for iron on the land the subject of the retention licence;

(c) a mining lease does not authorise the holder thereof to work and mine the land in respect of which the lease was granted for iron,

unless the Minister, by instrument in writing under his hand, authorises such holder so to do and endorses the prospecting licence, exploration licence, retention licence or mining lease, as the case requires, accordingly."

(ii) The special regime of exemptions from expenditure requirements showed a policy of the Act consistent with creating a "holding title".[66]

(iii) The Minister recognised that the Policy was the basis for exemptions of expenditure and extensions, but did not decide that it was "about or relating to s 111A(1)(c)".[67] He simply referred to its objectives in his consideration of the public interest question in that section, as other parts of the court's reasons say he is entitled to. This disposed of Cazaly's argument (iv).

Ground (c): By the *Mining Act*, the Minister was prohibited from having regard to:

(i) the circumstances in which the Expired Licence expired following the late arrival of the Extension Application; and

(ii) the consequence that the termination of Cazaly's Application would give first priority to the Mining Lease Applications,

in deciding to terminate Cazaly's Application.

Court of Appeal's Refusal of Ground (c): Cazaly's challenge to the Minister taking into account: (a) the circumstances in which Rio failed to renew the exploration licence,[68] (b) exceptional circumstances justifying the grant of an extension of the term of the licence if the extension application had been lodged in time,[69] (c) enabling Rio to "regain" the subject ground by way of the grant of the mining lease applications,[70] (d) "fairness" and "consistency of outcomes",[71] and (e) the relative expenditure of Cazaly and Rio on the site,[72] all relied upon its construction of s 111A(1)(c) concerning public and private interests and third party considerations, which Buss JA rejected earlier. For this reason, all of these grounds failed. His Honour also looked to some of the grounds and found other specific problems with them.

Ground (d): The Minister regarded his discretion under s 111A(1)(c)(ii) as being fettered by the Policy. It was further said that "the Minister erred in law in the exercise of his jurisdiction under s 111A(1)(c)(ii) of the *Mining Act* in that, in adopting and applying the Policy, and concluding that a departure from the Policy would be arbitrary even though the Policy was under review, he failed independently to exercise his discretion following a proper (or any) consideration of the merits of Cazaly's Application".[73]

Court of Appeal's Refusal of Ground (d): The Minister demonstrated that he had read all of the submissions of the parties and considered them[74] and was aware that he was not bound by the Policy.[75] The Minister "identified and took into account the objectives of the Policy and did not merely apply the Policy without regard to the merits of the particular case before him".[76]

65 [2007] WASCA 175 at [165].
66 [2007] WASCA 175 at [159].
67 [2007] WASCA 175 at [184].
68 [2007] WASCA 175 at [193]-[195].
69 [2007] WASCA 175 at [196]-[197].
70 [2007] WASCA 175 at [201]-[204].
71 [2007] WASCA 175 at [207]-[210].
72 [2007] WASCA 175 at [212]-[217].
73 [2007] WASCA 175 at [222].

Ground (e): There were no reasonable grounds for the Minister to be satisfied in the public interest that Cazaly's Application should not be granted, and, further, the Minister's decision was unreasonable in the *Wednesbury* sense. These allegations of unreasonableness focused on many of the considerations said to be irrelevant factors for earlier grounds, above.

Court of Appeal's Refusal of Ground (e): His Honour undertook a comprehensive analysis of the *Wednesbury* authorities and looked at each of the grounds alleged to be bases for unreasonableness. His Honour made it clear that the court's role was not to determine what assessment of the public interest it preferred and that the issue for the court was whether there were reasonable grounds for the Minister's satisfaction that it was in the public interest that Cazaly's Application should not be granted.[77] Without looking to each specific allegation it is enough to say that as a result of Buss JA's findings that many of the considerations for the public interest were relevant (above), the reliance placed upon this group of considerations could not be called manifestly unreasonable.

Ground (f): The procedure adopted by the Minister for determining whether or not he should exercise his discretion under s 111A(1)(c)(ii) was unfair, and the Minister failed to accord procedural fairness to Cazaly. Specific grounds were alleged but are too voluminous to reproduce. Each is dealt with below.

Court of Appeal's Refusal of Ground (f): The procedural fairness grounds were rejected on the following bases:

(i) Cazaly was not denied procedural fairness because Rio did not place reliance upon the allegedly secret Statement of Principles,[78] Cazaly did not require the Statement of Principles to respond to Rio's submission in which it was mentioned[79] and there was no implied submission by Rio of coverage of the Shovelanna site by the Statement of Principles.[80]

(ii) The submission as to the Minister's actual or imputed knowledge of the Statement of Principles, which he might of taken into account without hearing from Cazaly, failed because there was no evidence that Minister Bowler administered those agreements,[81] negotiated those agreements,[82] his Department did not send him any information about those agreements when he made the decision,[83] and no discussions took place between senior staff and the Minister about this.[84] His Honour stressed that discovery had been ordered of the Minister and his affidavit had been ordered. In this regard, there was no reason to doubt the evidence given by the Minister on oath.[85] There was also no duty

74 [2007] WASCA 175 at [227].
75 [2007] WASCA 175 at [229].
76 [2007] WASCA 175 at [230].
77 [2007] WASCA 60 at [236].
78 [2007] WASCA 60 at [303].
79 [2007] WASCA 60 at [304].
80 [2007] WASCA 60 at [305].
81 [2007] WASCA 60 at [315].
82 [2007] WASCA 60 at [316].

upon any persons involved to disclose such information[86] and in any event only actual knowledge was relevant to this, not imputed knowledge.[87]

(iii) Other documents said to be before the Minister that he took into account were not proven to have been so before him.[88]

(iv) The Policy was disclosed to Cazaly's lawyers prior to the making of some of its final submissions and so Cazaly was not denied an opportunity to rely upon it, it just chose not.[89]

(v) The Minister's advice from the Department and the State Solicitor's Office were not things that Cazaly had an entitlement to respond and make submissions as to.[90]

(vi) Any information from a "secret" meeting between Rio CEO Leigh Clifford and previous Minister for Resources Alan Carpenter could not be attributed to Minister Bowler, who made the decision.[91] In any event, there was no evidence of any discussion of matters significant to this dispute at the meeting or that anything said at the meeting was credible, relevant or significant to the decision of Minister Bowler.[92]

The Application for Special Leave to Appeal to the High Court of Australia

On 20 September 2007, Cazaly requested a trading halt of its shares on the Australian Stock Exchange. The following day, Cazaly Joint Managing Directors Nathan McMahon and Clive Jones announced to the market that Cazaly had instructed its lawyers to make an application for special leave to appeal to the High Court of Australia. The hearing of this application is to take place after 25 September 2007 and, if successful, will proceed to a full hearing of the appeal by the High Court. Cazaly is yet to release information about its grounds of appeal.

SOME QUESTIONS THAT ARISE FROM THE RIO TINTO-CAZALY DISPUTE

Even though the matter is yet to go before the High Court and it is not proper to express any view one way or the other as to the merits of the appeal, the Shovelanna case gives rise to many questions about the Western Australian restoration dispute resolution *process*. Whatever the result in the High Court,

[83] [2007] WASCA 60 at [316].
[84] [2007] WASCA 60 at [316].
[85] [2007] WASCA 60 at [317]-[319].
[86] [2007] WASCA 60 at [326]-[327].
[87] Buss JA found this as a matter of administrative law: [2007] WASCA 60 at [328].
[88] [2007] WASCA 60 at [338].
[89] [2007] WASCA 60 at [345]-[346].
[90] [2007] WASCA 60 at [356-][357].
[91] [2007] WASCA 60 at [362].
[92] [2007] WASCA 60 at [362]-[363].

some of the more common reactions and questions from the legal and business community are discussed below.

How Does a Minister Consider Sovereign Risk and Resource Security in Coming to a Section 111A Decision?

True it is that the essence of a licence is the exclusion of others and the conditions of use imposed by the owner.[93] But in this case, possibly like all instances of property,[94] the property is not private. The Parliament determines[95] upon what basis a person may use the Crown lands to access minerals. Parliament has determined only that a wide discretion is to be conferred on the Minister of the day.

Two considerations that the Minister may have regard to in exercising that very broad discretion are sovereign risk and resource security. Sovereign risk has been defined as "the risk to a participant in a project that an action of government (whether Federal, State or Territory), for whatever reason, will result in loss to that participant which could not reasonably have been foreseen, and for which no adequate legal remedy is available".[96] With respect to resource security it has been said: "Security presumably means the continuation of an existing regime of rights and obligations while rights are capable of being exercised and obligations enforced".[97]

Practically speaking, one can not forget the real examples of previous Western Australian Governments enacting legislation to deny the apparent rights of midnight peggers[98] and iron ore magnates[99] alike, in the past. These are classic scenarios of sovereign risk increasing and resource security decreasing.

Many issues arise from the Shovelanna dispute about how a Minister should consider sovereign risk and resource security as factors concerning the public interest. What value is placed on this factor by a particular Minister? How will the industry know what change in value is placed on this factor as Governments and Ministers change? How does each successive Minister personally reconcile the objects of the current mining legislation with these concepts? These are all important questions that government and industry face. Low sovereign risk and

[93] J E Penner, *The Idea of Property in Law* (Oxford University Press, 1997) at 77-78.

[94] Kevin Gray "Property in thin air" [1991] 50(2) *Cambridge Law Journal* 252 at 303-304.

[95] That Parliament determines the conditions upon which access to resources is determined, as one of many possible decision makers for this issue, is mentioned in Alex Gardner "Resource Security and Integrated Management of Access to Natural Resources: The Case of Minerals in Western Australia" in Alex Gardner (ed), *The Challenge of Resource Security* (The Federation Press, 1993) at 140.

[96] Dr Nick Seddon "State Instrumentalities and Sovereign Risk" [2005] *AMPLA Yearbook* 29 at 29-30, adopting a definition from D Young, R Brockett and J Smart "Australia – Sovereign Risk and the Petroleum Industry" (2005) *APPEA Journal* 1 at 2.

[97] D E Fisher "The Meaning and Significance of Resource Security" in Alex Gardner (ed), *The Challenge of Resource Security* (The Federation Press, 1993) at 16.

[98] "Mid-night pegging" involves person A waiting until mid-night after the expiry of a tenement belonging to person B (which is due to expire on a particular date and has not been renewed by B, usually as a result of B's carelessness). After mid-night A will peg the ground which was formerly A's tenement, make an application for it the next day when the

high resource security are much like "legal certainty". A person can have differing levels of satisfaction as to the certainty of its legal position.

There are judicial policies in favour of legal certainty, so far as judicial decision making is concerned.[100] It has a range of benefits. While his Honour was speaking in a different context of construing mortgages and securities, a similar underlying argument was made *Pan Foods Company Importers & Distributors Pty Ltd v Australian & New Zealand Banking Group Ltd*[101] by Kirby J:

> " Business is entitled to look to the law to keep people to their commercial promises. In a world of global finances and transborder capital markets, those jurisdictions flourish which do so. *Those jurisdictions which do not soon become known. They pay a price in terms of the availability and costs of capital necessary as a consequence of the uncertainties of the enforcement of agreements in their courts.*" (emphasis added)

There is a need for low sovereign risk, high resource security and certainty in this area of law[102] – when the executive makes decisions – so that those in control of mining tenements can structure their affairs taking into account the costs of capital as well as the legal and commercial risk associated with their ventures. Other related parties such as mining project financiers and joint venturers are equally reliant upon certainty in the law in this regard.

How Does Section 111A Compare to Procedures in Other Jurisdictions? Does Section 111A Need to be Amended?

There does not appear yet to have been a comparative analysis of restoration provisions in all Australian States and Territories, New Zealand, Canada and the United States. Such a study may highlight better systems for dealing with restoration disputes.

The current model for resolution of restoration disputes in Western Australia, as established by the *Mining Act*, has adequate regard to a range of important

district registry opens and, if they survive the Warden's Court litigation that ensues, obtain a new tenement that previously belonged to B. As to the legislation denying a particular pegger see the *Mining (Validation and Amendment) Act 1986* (WA), s 3 and the associated schedule which specifically re-vested a tenement into the hands of Pancontinental Goldmining Areas Pty Ltd. A helpful recent account can be found in Margot Lang "Fast worker was up there like Cazaly" *The West Australian* (29 April 2006). This type of legislative and executive interference with the judiciary would probably be held to be unconstitutional today: Peter Gerangelos "The Separation of Powers and Legislative Interference with Judicial Functions in Pending Cases" (2002) 30(1) *Federal Law Review* 1.

[99] *Nicholas v Western Australia* [1972] WAR 168.

[100] See generally Justice J D Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar Review* 110.

[101] (2000) 170 ALR 579 at [24].

[102] "The notion of security lies at the foundations of the natural resources legal system. If a law is to be effectively enforced, it needs to be certain and predictable" is the opening of D E Fisher "The Meaning and Significance of Resource Security" in Alex Gardner (ed), *The Challenge of Resource Security* (The Federation Press, 1993) at 16.

considerations, but may be able to be helpfully amended. It may be difficult to find the perfect dispute resolution model for solving these specific restoration problems. Following a suitable study, Parliament could, for example, consider a number of possible alternatives for amending the *Mining Act*, including:

- specifying appropriate public interest matters and the criteria necessary to be taken into account by the Minister under s 111A;
- stating a series of specific legal tests that foresee various disputes that may arise (making the law certain and predictable, in the way s 111A(1)(d) does for the specific case of late renewal of a mining lease);
- having a statutory requirement for a formal open and public Department of Industry and Resources policy (with necessary concessions for each mineral type or Mining District) that gives guidance as to how these disputes should be resolved;
- making provision for a statutory requirement of mediation between the parties to the restoration dispute, in the hope that they may settle or conclude some joint venture arrangement;
- amendments to the *Mining Act* to have compulsory adjudication of these restoration disputes by the Warden (as part of their "filtering role"[103]); and/or
- a requirement that the Minister must give reasons for his or her decision.[104]

Is Enterprising Activity what the Western Australian Mining Industry Needs?

Cazaly has taken the benefit of Mr McMahon's experience in finding tenements with owners who have missed renewal dates or with owners who have been tardy in complying with conditions on the tenement (and can therefore be the subject to an application for forfeiture). In the former case, Cazaly has been linked with at least two other similar and recent cases: the Wesfarmers Ltd and Blackham Resources Ltd dispute[105] as well as the Northern Star Resources Ltd dispute.[106] In the case of the latter regarding forfeiture for non-compliance with tenement conditions, a Cazaly related company has been successful in taking a tenement off a non-complying company in at least one case.[107] Like many Western Australian companies and individual prospectors, Cazaly has done well out of keeping a close eye on a register of important tenement dates for other companies, as they are entitled to do.

Some may say that Cazaly has never put itself out to become a "senior" or an "infrastructure body". They would ask: is this seemingly opportunistic approach to tenement acquisition likely to contribute to the State of Western Australia or are

[103] *Re Warden French; Ex parte Serpentine-Jarrahdale Ratepayers and Residents Association* (1994) 11 WAR 315 at 317 per Kennedy J.

[104] Reversing the general public law position that an administrative decision maker need not give reasons for their decision: *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

these types of companies what law and economics theorists might call "rent-seekers"?[108] They would draw support from what the Minister, the Honourable Mr Mensaros, said in the course of his Second Reading Speech, in relation to the Bill that, upon enactment in 1978, became the *Mining Act*:[109]

> "What the Government wants to achieve is legislation which will discourage people from occupying land without trying to prospect or mine it, whichever is the case, and prevent them from merely occupying the land so that other people do not have access to it. Some people do this with the aim of acting as an intermediary between the Crown, to whom the minerals belong in fact, and the people who wish to mine the minerals. They want to be the middle man and say that the general users of minerals have to pay them for it."

It has been said many times in the Warden's Court that the *Mining Act 1978* (WA) is meant to create a system of self-regulation but not an "entrepreneurial battlefield".[110] But there has to be a role for this kind of activity in the Western Australian mining industry because it is consistent with fundamental principles of "first in best dressed" (referring to tenement applications) and "use it or lose it" (referring to tenement use), as well as the statutory promotion of self-regulating conduct.

This means of industry self-regulation involves many individuals and companies like Cazaly keeping others accountable. Majors and minors alike may forget that the primary assets of their operations are the tenements that they exploit, despite that very few people at the company board level ever have to involve themselves in *Mining Act* compliance. Perhaps the mining company director's duty of care and skill may one day include a requirement to take all reasonable steps to safeguard the core assets of the company, being the tenements, from acquisition by others upon non-renewal or possible plaints for forfeiture?

On any view, it is true that Cazaly's attempt to take the Shovelanna site compelled Rio and its joint venture partners to, effectively, upgrade their exploration licence to a mining lease after more than 20 years of sitting on the tenement. Now that Rio has a mining lease, it will be required to undertake some mining activity on the Shovelanna site. Cazaly has given effect, at least in part, to

[105] Julie-Anne Sprague "Use it or lose it – Blackham" *WA Business News* (5 April 2007); Rebecca Keenan "Wesfarmers faces new challenge on Scaddan" *The West Australian* (26 April 2007).

[106] John Phaceas "Cazaly caught up in lapsed tenement stoush in Kimberley" *The West Australian* (17 September 2007).

[107] *Hayes Mining Pty Ltd v Tantalum Australia NL* [2006] WAMW 9. For a helpful commentary see: Mark van Brakel and Tim Masson "Validity of Departmental Notices and 'Special Circumstances' for Restoration of Tenement" (2006) 25 *Australian Resources and Energy Law Journal* 263.

[108] Richard Posner, *Economic Analysis of Law* (Aspen Law & Business, 1998, 5th ed) at p 41; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing, 2004) at p 73.

[109] See Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 October 1978, 4190-4191.

[110] For example, see *Van Blitterswyck v GME Resources Ltd* [2007] WAMW 6 at [22].

policies underlying the *Mining Act* by ensuring earlier mining of the Shovelanna site and that Rio puts significant investment capital towards building an iron ore mine.

Is the "public interest" Test in Section 111A(1)(c) a Concept Consistent with the Rule of Law?

The public interest test contained in s 111A(1)(c) is probably the widest discretion known to the law. Section 111A(1)(c) does not specify any criteria to be considered by the Minister. It permits changing factors of great diversity to be taken into account and increases the possibility of irrelevant considerations being taken into account. The usual judicial statements about a court reviewing ministerial conduct not being permitted to enter the merits of the dispute were certainly cited in the Court of Appeal's decision.[111] Any decision made under the section has a strong shield from judicial review. As long as the broad discretion can be said to be exercised consistently with factors taken by implication from the subject matter, scope and purpose of the provisions of the Act, the decision is effectively un-reviewable.[112] From a public law point of view, one asks whether this is acceptable? Should the rule of law require that such unfettered powers not exist or that they be at least subject to some worthwhile review?

Many of these criticisms of s 111A seem to have already been made long ago. With respect to discretion in mining legislation generally, Mr E M Franklyn QC (later his Honour Justice Franklyn of the Supreme Court of Western Australia) commented:[113]

> "In my opinion no statute which maintains or expands the right of any Minister to determine serious matters of public concern by an exercise of unfettered discretion should be allowed to go un-remarked. I make the observation – with no reference implied in any way to the present Minister – that absolute discretion is the hall mark of absolute power, and absolute power or even excessive power vested in any one person or body must derogate from the rights of the individual, the concept of justice as we know it and ultimately the stability of free enterprise.
>
> In my view the Mining Act confers on the Minister a far greater degree of discretionary power than is consistent with good government and principles of 'the rule of law'. We must rest assured that any incumbent of the ministerial office for the time being will administer and use his discretion wisely and well, but the fact that the discretion conferred is virtually unfettered makes it

[111] [2007] WASCA 175 at [233] per Buss JA, being *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 81 ALJR 515 at [25] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

[112] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J.

[113] E M Franklyn "Comment on the Mining Act 1978 of Western Australia" (1979) 2 AMPLA Journal 24 and reproduced in M Hunt "Government Policy and Legislation Regarding Mineral and Petroleum Resources (1988) 62 *Australian Law Journal* 841 at 859-860.

> impossible without statutory amendment to apply adequate safeguards for the protection against a less wise and capable administrator of the discretion."

Speaking specifically to an earlier version of s 111A, Ms Carolyn Hayward had remarked:[114]

> "The Department acknowledges that it is a powerful weapon that should not be drawn and fired lightly, but says that it is a credit to the Minister's cautiousness that the power is still available. Although the Minister may collect all information and make a proper evaluation of the claim before he makes his decision, the potential for misuse is always present. It remains to be seen whether the fetters of administrative law principles are adequate safeguards."

Later on, Ms Hayward said with reference to the then newly enacted (and now current) s 111A:[115]

> "It has been noted that these draconian powers of the Minister do not exist in any other Act of Parliament. It is no justification of the existence of the discretion that it is neither rarely or carefully exercised. The substitution of s 111A will do nothing to cure the dangers inherent in such wide-ranging power."

Examples of possible "abuse" of the discretion have been mentioned elsewhere.[116] As a further example, any unlawful decision under s 111A(1)(c) can be cloaked by a suitably ambiguous statement by the Minister. This statement would be taken as correct whether or not the Minister has considered the parties' submissions, been infected with bias, ignored relevant considerations or taken into account irrelevant considerations or committed some other administrative law error. The Western Australian State Solicitor's Office[117] could even have a model answer for the Minister to deliver under s 111A(1)(c) to be used in every case. Suitably adopting the precedent for Rio Tinto it could have been as follows:

> "I gave the parties opportunities to be heard and took their submissions into account. I ignored irrelevant considerations and took into account relevant considerations. I decide that Rio gets its tenement back."

In the Shovelanna dispute it seems that Minister Bowler may have succumbed to pressure (perhaps public or political?) and thereby gave reasons for the decision. But in the future, such a luxury may not be afforded to the losing party.

[114] Hayward , op cit n 24, at 124.

[115] Ibid at 125.

[116] *Mining and Petroleum Legislation Service* (Thomson Law Book Co, Loose-leaf Service, Update 280) at [570.111A.5] under the heading "s 111A Editorial Note" opines that there remains a possibility of s 111A being used to deny an exploration licence holder of an opportunity to obtain a mining lease. Hayward, op cit n 24, at 123 (fn 50) cites a suggestion in an earlier case that s 111A can permit the Minister to intervene at any point in priority disputes and decide the matter.

[117] An adviser that certainly had been wise enough to advise the Minister not to give reasons: "Initial legal advice from State solicitors was not to speak given the prospect of legal action by Cazaly but he had persuaded the lawyers this week that he should offer a public explanation" (Robert Taylor "Bowler explains Cazaly ruling" The West Australian (28 April 2006)).

CONCLUSION

The dispute between Rio Tinto and Cazaly over the Shovelanna project has been a very public exercise. This was not only on the part of Cazaly as Minister Bowler provided his reasons for refusing Cazaly's tenement application by "Media Statement" which is out of the ordinary. As a result, many different views have arisen of the case and Western Australian mining laws. The disputes are likely to give rise to passionate arguments about the merits of the restoration dispute resolution process and partially as to what factors the Minister should have taken into account in determining what is in the public interest.

Will Cazaly be granted special leave to appeal and ultimately succeed in the High Court of Australia? Does the *Mining Act 1978* (WA) need to be amended? Will the Shovelanna dispute seem quite "run of the mill" in another 10-15 years after another half dozen disputes between other companies over restoration of tenements? Does s 111A confer a dangerously wide discretion upon the Minister? This case necessarily raises more questions than answers. Far from being a good mark, the case hand-passes the big issues about the restoration dispute process on to a succession of Ministers and Courts of Appeal.

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