

NATIVE TITLE BASED OBJECTIONS UNDER THE *MINING ACT*^{*}

***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants & Ors* [2004] WAMW 22**

Application for miscellaneous licences and mining leases – objections by native title claimants – treated as if held freehold – section 24MD (6A) Native Title Act

A recent decision of Warden Calder in *BHP Billiton Pty Ltd v Karriyarra Native Title Claimants & Ors* [2004] WAMW 22 addressed some of the issues associated with objections made under the *Mining Act* 1978 (WA) ('Mining Act') on native title grounds. The decision, if correct, could have major implications for applicants for tenements over land that is the subject of a native title claim.

The decision was made on limited preliminary issues put to the Warden. It related to applications made by BHP Billiton Iron Ore Pty Ltd (Applicant) for 11 miscellaneous licences and 5 mining leases. A further hearing was held in December 2004 in relation to the substantive issues. However, at the time of writing, a final decision on the substantive issues is yet to be made by the Warden.

Objections

The objections were made by five registered native title claim groups (Objectors) on grounds that are often raised by native title claimants relating to:

- the impact of activities authorised by the applications (if granted) upon the Objectors' asserted native title rights, cultural heritage, lifestyle and impacts on the Objectors through impacts on the environment;
- the failure of the Applicant to obtain an entry permit for the purposes of marking out land the subject of a registered native title claim;
- compliance with the Mining Act, the *Native Title Act* 1993 (Cth) (NTA) and the *Racial Discrimination Act* 1975 (Cth) (RDA).

Issues considered by the warden

The Warden was asked to consider the following issues:

- Whether the Warden has the jurisdiction to refuse to determine the grant of the miscellaneous licences on any of the four substantive grounds (i.e native title, Aboriginal heritage, lifestyle and environment) of objection.
- Whether the Warden has the jurisdiction to refuse to determine the grant of the mining leases on any of the four substantive grounds of objection.

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- If the Warden has the jurisdiction to consider the substantive grounds of objection, should the Warden in exercising that jurisdiction, decline to hear the grounds of objection as particularised.
- Should land the subject of a native title claim be treated as private land (and the Objectors as private land holders) for the purposes of the Mining Act by virtue of the NTA or the RDA.
- If land the subject of a native title claim should be treated as private land, was the Applicant required to obtain a permit to enter or obtain the Objectors' consent in accordance with section 29(2) of the Mining Act.

Does the Warden have jurisdiction to hear the objections?

Warden Calder held that the jurisdiction of the Warden extends to all of the substantive grounds of objections in relation to both mining leases and miscellaneous licences. Warden Calder also found that in the circumstances, he ought not decline to hear the objections as particularised or any of them.

In determining the scope of his jurisdiction, the Warden held that:

- The jurisdiction of a Warden in relation to miscellaneous licences extends to grounds relating to the public interest. In finding this the Warden decided that there is no real distinction between the way that section 111A of the Mining Act treats miscellaneous licences and mining leases.¹
- The jurisdiction of a Warden in relation to both miscellaneous licences and mining leases extends to grounds based on native title despite the existence of the regime established under the NTA to confer procedural rights on native title claimants.

The Warden also expressed views about the interaction between the NTA process for the grant of miscellaneous licences under section 24MD(6A) and the right to object under the Mining Act and section 24MD(6B) of the NTA (commonly referred to as the 'infrastructure facility' or the 'right to consult' process).

Does the RDA or the NTA require the objectors to be treated as private landholders?

The Objectors argued that they were entitled to be treated as private land holders for the purposes of the Mining Act by virtue of:

- section 24MD(6A) of the NTA which confers on registered native title claimants equivalent 'procedural rights... in relation to the act' assuming they instead held ordinary title to the land; or

¹ The operation of s 111A of the *Mining Act* in relation to mining leases and the public interest has been considered by the Supreme Court in *Re Warden French* (1994) 11 WAR 315 and *Re Warden Calder* (1998) 20 WAR 343. The Supreme Court has not considered the question with respect to miscellaneous licences.

- the RDA on the basis that not affording the same rights to native title claimants as to private land holders (under the Mining Act) would be discriminatory and therefore contrary to section 10 of the RDA.

Warden Calder rejected the argument that the RDA requires that land the subject of a native title claim be treated as private land and the relevant native title claimants as private land holders.

In relation section 24MD(6A) of the NTA, Warden Calder held this provision has the effect of including in the procedures set out in the Mining Act for the grant of a miscellaneous licence (section 24MD(6A) does not apply to mining leases) a requirement that registered native title claimants be treated as if they held a freehold estate in land the subject of their native title claim.

The net result is that Warden Calder held that native title claimants have to be treated as if they are holders of private land in respect of applications for miscellaneous licences (where the 'infrastructure' process in sections 24MD (6A) and (6B) of the NTA applies) but **not** in respect of applications for mining leases (where the 'right to negotiate' applies).

Was the Applicant obliged to obtain a permit to enter and the objectors' consent under section 29(2) of the Mining Act?

On the basis of the Warden's conclusion about the effect of section 24MD(6A) of the NTA referred to above, the Warden held that in relation to miscellaneous licences (but not mining leases), section 24MD(6A) of the NTA has the effect of requiring an Applicant who marks out over land the subject of a registered native title claim to obtain a permit to enter. The Warden also concluded that section 24MD(6A) of the NTA requires an applicant for a miscellaneous licence to obtain the consent of the registered native title claimants for an application that affects any of the matters referred to in section 29(2) of the Mining Act.

In reaching this conclusion, the Warden took a broad view of the meaning of 'procedural rights' under section 24MD(6A) of the NTA. The Warden also proceeded on the basis that, *prima facie*, the registered native title rights and interests of the Objectors exist.

The Warden was not asked to consider as a preliminary issue the consequence of an applicant for a miscellaneous licence not possessing a permit to enter over land the subject of a native title claim. However, the Warden went on to conclude that if an Applicant does not hold a permit to enter then the application has not been validly made and such an application would need to be refused. This question may need to be addressed by the Warden when he makes his final decision.

Implications

The issues were only determined on a preliminary basis and by the Warden in an administrative capacity. A number of other Wardens have also reached different conclusions in relation to similar legal issues.² However, if upheld in the substantive hearing the reasoning could have potentially

² For example, *Dodsley Pty Ltd v Thudgari Native Title Claimants* [2003] WAMW 14 and *Mineralogy Pty Ltd v Kuruma Native Title Claimants* [2003] WAMW 35 cf (for example) *Kuruma Marthudunera Native Title Claimants v Mineralogy Pty Ltd* [2001] WAMW 29 and *Quartz Water Leonora Pty Ltd v Raymond William Ashwin* [1999] WAMW 14 No.8

far reaching implications for industry, particularly in relation to the manner in which miscellaneous licences are applied for and processed. Among other things, the Warden will need to consider by what power a permit to enter 'native title land' may be given in light of the lack of any express power in the Mining Act or Regulations.

OBJECTION TO APPLICATION FOR MISCELLANEOUS LICENCE*

Robe River Iron Associates v Fortescue Metals Group Limited; Robe River Iron Associates v Fortescue Metals Group Ltd and FMG Pilbara Pty Ltd ([2004] WAMW 16, Warden Temby SM, Karratha Warden's Court, 26 August 2004)

Mining Act 1978 – Applications for Miscellaneous Licences – Area subject of Miscellaneous Licences encroaching on area subject of Exploration Licences applied for by other parties – Objections to Applications on the basis that Applicant's proposed activities on Miscellaneous Licences may unduly interfere with activities of holders of Exploration Licences

Applicants for miscellaneous licences

Robe River Iron Associates ('RRIA') applied for two Miscellaneous Licences:

- (a) L47/128, which was to be one of several miscellaneous licences running adjacent to the Hamersley Iron railway from Tunkawanna Creek to Rosella Siding and upon which a duplicate rail line was to be built to transport ore from RRIA's West Angelas mine; and
- (b) L47/127, upon which a temporary construction camp and an access track associated with the rail duplication project were to be located.

Objections by applicants for exploration licences

Parts of the land the subject of these applications were also the subject of two applications for exploration licences by Fortescue Metals Group Ltd (*FMG*) and one by FMG Pilbara Pty Ltd (*FMG Pilbara*). FMG lodged objections to the grant of applications L47/127 and L47/128 as the applicant for E47/1333 and E47/1303 respectively, while FMG Pilbara lodged an objection to application L47/128 as the applicant for E47/1353. The reasons for all three objections were:

- (a) the application for the relevant miscellaneous licence encroached upon the relevant exploration licence;
- (b) the activities undertaken on the relevant miscellaneous licence might unduly interfere with the objector's activities on the relevant exploration licence; and

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