JURISDICTION : MINING WARDEN

TITLE OF COURT : OPEN COURT

LOCATION : PERTH

CITATION : GOLDHOUR PTY LTD -v- WESTNET STANDARD GAUGE PTY LTD & ORS [2004] WAMW 20

CORAM : CALDER SM

HEARD : 1 OCTOBER 2004

DELIVERED : 29 OCTOBER 2004

FILE NO/S : APPLICATION FOR MINING LEASE 70/1146 & MISCELLANEOUS LICENCE 70/76

TENEMENT NO/S : MINING LEASE 70/1146 MISCELLANEOUS LICENCE 70/76

BETWEEN : GOLDHOUR PTY LTD
(Applicant)

AND

WESTNET STANDARD GAUGE PTY LTD & WESTNET NARROW GAUGE PTY LTD
(Objectors)

WEST AUSTRALIAN RIFLE ASSOCIATION INC
(Objector)

JOY PERRY
(Objector)
Catchwords:
APPLICATION - For tenement - Land open for mining - Land leased to Commonwealth
LAND OPEN FOR MINING - Land leased to Commonwealth
OBJECTION - To grant of tenement - Land open for mining - Land leased to Commonwealth

Legislation:
Mining Act 1978 (WA), s 18

Result: Application for Mining Lease 70/1146 recommended for refusal. Application for Miscellaneous Licence 70/76 refused.

Representation:

Counsel:
Applicant : Mr G H Lawton
Objectors (Westnet) : Ms E McCloskey
Objectors (WARA & J Parry) : nil

Solicitors:
Applicant : Lawton Gillon
Objectors (Westnet) : Tottle Partners
Objectors (WARA & J Parry) : nil

Case(s) referred to in judgment(s):
The Commonwealth of Australia v The State of Western Australia & Ors (1999) 196 CLR 392

Case(s) also cited:
Nil
THE PROCEEDINGS

1 Goldhour Pty Ltd ("the applicant") has applied for the grant of mining lease 70/1146 ("M70/1146") and miscellaneous licence 70/76 ("L70/76"). The West Australian Rifle Association Inc ("WARA"), Joy Perry, Westnet Standard Gauge Pty Ltd and Westnet Narrow Gauge Pty Ltd (together, "Westnet") have all objected to the grant of M70/1146. WARA and Perry have also objected to the grant of L70/76. After amendment, both of the objections of WARA, Perry's objection to M70/1146 and Westnet's objection to M70/1146 include as a ground for objection that the land the subject of the application for the tenement is not land that is open for mining under the Mining Act 1978 (WA) ("the Act").

2 The factual basis for that added ground of objection is that the land the subject of the applications is land that has been leased by the State of Western Australia to the Commonwealth. The primary legal basis for the ground of objection comes from the decision of the High Court of Australia in The Commonwealth of Australia v The State of Western Australia & Ors (1999) 196 CLR 392. That was a case in which the High Court held that land that is the subject of a lease to the Commonwealth from the State is not land that is open for mining under the Act. One of the reasons why Gleason CJ and Gaudron, Gummow, Kirby and Hayne JJ arrived at that conclusion was that the common law presumption that the Crown is not bound by a statute unless the statute expressly says so had application and that there was no such express statement within the Mining Act.

3 There has been no amendment to the Act since the date of lodgment of the tenement application which the High Court dealt with that has changed the application and effect of that common law presumption to which their Honours referred. Mr Lawton conceded that if the land the subject of the applications was also land in respect of which the Commonwealth held an interest in the form of a lease, then the ground was not open for mining at the time when the applications were made and is not open at the present time. I proceed upon the basis that that is the law.

4 At the request of all parties I agreed to hear submissions as to whether or not the land was open for mining at any relevant time. I conducted a hearing in respect of that preliminary issue at which Mr Lawton, on behalf of the applicant, and Ms McCloskey, on behalf of Westnet, presented written and oral submissions. The objectors WARA
and Perry did not appear, having sought to be excused from the hearing and having indicated that they were content to rely upon the submissions made on behalf of Westnet and did not wish to make any other submissions.

**THE EVIDENCE**

5 At the commencement of the hearing Mr Lawton tendered, without objection from Ms McCloskey, three items of correspondence. Ms McCloskey agreed, only for purposes of the hearing on the preliminary issue, that those documents could be received as evidence of the truth of their contents. The first of the three items tendered by Mr Lawton was a letter dated 31 March 1999 from KFPW Pty Limited addressed to "Mr Mark Costello, Government Land Services, DOLA". I set out the text of that letter in full:

"Dear Sir,

**RE: RIFLE RANGES**

We refer to our earlier discussions in respect to the rationalisation of Department of Defence Rifle Ranges and the hand-back of Rifle Ranges to the West Australian Rifle Association (WARA).

Please find enclosed a schedule outlining the Rifle Ranges that are no longer required by the Department of Defence. These ranges are all leased by the Department of Defence from DOLA, with the rental and requirement to maintain these ranges falling to the WARA.

In order to simplify the present arrangement approval is hereby granted for DOLA to vest these Rifle Ranges directly with the WARA.

If you should have any queries in respect to this or any other matter please do not hesitate to contact the undersigned on (08) 9238-5276.

Yours faithfully

KFPW Pty Limited."

6 Attached to the letter of 31 March 1999 is a list which contains two columns headed "Range Name" and "Lease Number". Included in the
names and lease numbers listed thereunder is "Merridin" [sic] 333/557. Included in the list headed "Range Name" are 24 other Western Australia country towns. Underneath that list of names and numbers the following appears:

"These Rifle Ranges subject to lease between DOLA and Dept. of Defense [sic] WARA pays lease fee and maintains Range. No longer required by Defens [sic]. Approval for transfer to lease to WARA to remove Dept. of Defens [sic] from tenure relationship."

7 The second item of correspondence produced by Mr Lawton is a copy of a letter dated 31 March 2000. It is addressed to KFPW Pty Limited. Its heading contains a reference to Rifle Range Reserve 23357, Shire of Merredin. It says:

"I refer to your letter of 31 March 1999 regarding the rationalisation of the Department of Defence Rifle Ranges.

A statutory declaration is required from either yourselves or the Department of Defence with regard to the above reserves. The WARA has agreed to accept the management of the ranges on these reserves. I have enclosed a sample Statutory Declaration to assist you in this matter.

Yours faithfully

(Signature)

for GORDON RIDDLE
Assistant Project Officer
South-East Region
Land Administration Services Branch
31 March 2000".

8 On the letter from KFPW dated 31 March 1999 there is a reference "sp/defence.gen/let1803". On the letter dated 31 March 2000 to KFPW "Your Ref," appears the same. No sample statutory declaration is attached to the copy of the letter that was produced by Mr Lawton.

9 The third item produced on behalf of the applicant is a letter dated 29 September 2004 on the letterhead of Department for Planning and Infrastructure Government of Western Australia addressed to Lawton
Gillon. It is headed "Application for Mining Lease 70/1146 by Goldhour Pty Ltd". Where relevant, it says:

"Following conversation with our accounts section, I am able to advise that rental of $1 was paid on 5 August 2004 and is accordingly paid up until the next due date of 31 January 2005. I confirm that the customer details held by Accounting Services in relation to these premises are Department of Defence, c/-WARA Inc, PO Box 238, Claremont, WA 6010. There is nothing on file to indicate when, if at all, these customer details have changed.

I hope this is of assistance to you. I confirm that no appearance by an officer of DPI is required for the purpose of proceedings in the Perth Warden's Court on 1 October 2004.

Yours faithfully

Julia Pallot
Legal Officer
Legislative and Legal"

10 The letter referred to a letter from Lawton Gillon dated 28 September 2004 and to a telephone conversation on 29 September 2004.

11 Mr Lawton also tendered in evidence a copy of the Fourth Schedule to the Land Act 1933 (WA). The Schedule is a form of lease for purposes of Pt III of the Land Act.

12 Mr Lawton consented to Ms McCloskey tendering a certified plan. The plan certified, pursuant to 65 of the Evidence Act 1984 (WA), that the map was a true extract taken on 27 September 2004 from a database held by the Department of Land Information. The map shows large areas of reserved land and shows an area of "lease" over a reserve, the lease covering what can be taken to be the area of the Merredin Rifle Range. Written within that lease area is "R22357" and "L333/567".

13 No copy of any lease between the State and the Commonwealth in respect of the land covered by the Merredin Rifle Range was produced in evidence by either party. Mr Lawton suggested that it would have been in the form of the Fourth Schedule to the Land Act. The certified plan produced by Ms McCloskey shows that within the reserved area there is leased land. By far the largest area depicted as leased is that marked L333/557. Attached to each Form 21 application for the tenements the
subject of these proceedings is a Tengraph map. The Tengraph map depicts an area that appears to be the same area shown on the certified plan produced by Ms McCloskey as "R23357" and "L333/557". Within that area on the Tengraph map appear the words and numbers: "23357, 27281, Rifle Range, 333, 557" (commas added). Within that area on each Tengraph map is depicted the area the subject of application M70/1146 and also part of the area the subject of application L70/76.

Ms McCloskey attached some documents to her written submissions. Mr Lawton did not object to my receiving those documents and taking them into account. The first document is a copy of Government Gazette of Western Australia No 122 of Friday, 14 December 1951. In the Gazette, at page 3404, there appears, under the heading "RESERVES STOCK Department of Lands and Surveys, Perth, 10 December 1951", recording that the Governor and Executive Council has set apart as a Public Reserve land described as: "AVON - No 22357 (Rifle Range), Location No 27281 (about 533A) ...". Also published in the Government Gazette of 14 December 1951, at page 3403, is an Order in Council under the **Land Act 1933** which says that Reserve No 23357 (Avon Location 27281) is to be leased for a term of one year and thereafter from year to year to the Commonwealth to be held in trust for the purpose of a Rifle Range.

Ms McCloskey also produced a photocopy of a certified copy of the Lease Register Book kept by the Minister for Lands in respect of leases issued under the **Land Act**. That document shows that on 21 August 1952 lease application number 557 by the Commonwealth of Australia was approved. It shows that the lease was in Avon on reserve number 23357 and that it was for a rifle range.

**SUBMISSIONS**

**The Applicant**

Mr Lawton conceded that the land in question had been the subject of a lease to the Commonwealth by the State for purposes of a rifle range as evidenced by the Government Gazette of 14 December 1951. He agreed that the land the subject of that lease was also the subject of a reserve created in December 1951, as evidenced by the same Gazette. Mr Lawton conceded that if the land is still leased to the Commonwealth, then it is not land which is open for mining for purposes of the **Mining Act 1978** (WA) and that, therefore, both applications for the tenements must necessarily fail. He accepted that such an outcome was a consequence of the decision of the High Court in **The Commonwealth of Australia v**
State of Western Australia & Ors (supra). The position of the applicant, however, is that there is no longer a lease to the Commonwealth over the land in question and that, at the time of marking out of both tenements, namely, in May 2003, there was no such lease and the land was therefore open for mining subject, nevertheless, to the provisions of the Mining Act concerning the making of applications for and the grant of mining tenements over reserved land.

In support of his client's position Mr Lawton placed great weight upon the meaning and the effect of the three letters that were tendered in evidence. He said the letters demonstrated that, by its conduct at least, the Commonwealth had relinquished its leasehold interest over the land in question and that WARA had entered into a subsequent lease with the State, with the Commonwealth having no further interest in the land. That is to say, there was evidence that the land was leased by the State but that the lessee was no longer the Commonwealth and, therefore, the land was no longer land that was not open for mining.

It is submitted that the relinquishment by the Commonwealth of its interest in the land through the lease is clearly expressed in the letters that were tendered and that the acceptance by the State of that relinquishment is unequivocally demonstrated in those letters. He submitted that the lease, as expressed in the Government Gazette, was a periodic tenancy from one year to the next and that, as such, it was assignable and that what could be assigned was the remainder of the term of the lease for the year in which the assignment occurred. He argued that where there was such an assignment, then at the end of the rental period within which the assignment took place the assignee, if the assignee chose to continue with the lease, effectively entered into a new lease at the commencement of the following year. That, he said, is what happened in the present case and the evidence of that is contained in the three letters which were tendered in evidence.

He submitted that it should be taken that the form of lease entered into between the Commonwealth and the State in 1951 was that contained in the Fourth Schedule to the Land Act. He said that there is nothing in that standard lease agreement in the Fourth Schedule and nothing in the Land Act that sets out how a lease may be surrendered or relinquished and nothing about assignment of leases that had been entered into in accordance with the Fourth Schedule. Concerning the gazettal of the lease and the recording of the lease in the register of leases, the applicant submits that, although those documents are in evidence as proof of their contents, nevertheless, they prove nothing more than at the time of
publication of those notices there was a lease. It is submitted that the production of those documents is not sufficient to establish that at the present time the lease still exists, particularly in the light of the evidence in the form of the three letters that were tendered.

Addressing certain aspects of the three letters, Mr Lawton agreed that the mere fact that WARA may be paying the rent to the State for the lease of the Rifle Range is not of itself determinative of the question of who is the lessee. He says, however, that it is significant that in the annexure to letter of 31 March 1999 from KFPW to DOLA it is said that WARA "pays" the lease fee and that it does not say that WARA "reimburses" the Commonwealth for the lease fee that the Commonwealth has paid. He denies that in any of the letters DOLA, on behalf of the State, is equivocal about acceptance by the State of the position of the Commonwealth which, it is said, amounts to an expression of intention to relinquish the lease and, further, amounts to a relinquishment of its rights under the lease in respect of the Rifle Range.

The Objector Westnett

Ms McCloskey, on behalf of the objector Westnet, submits that the onus is on the applicant to satisfy the Warden and the Minister respectively that the land the subject of the tenement applications is open for mining. The applicant, she says, has failed to discharge that onus. It is submitted that the evidence that has been produced by the applicant is not sufficiently clear to do so and that very clear and unequivocal evidence would need to be presented before it could be said that the Commonwealth no longer has any interest in the subject land, its lease having coming to an end prior to the time of marking out.

With regard to the three letters upon which the applicant relies, counsel notes that in the letter of 31 March 1999 it is clearly stated that the land the subject of the Rifle Range is "... leased by the Department of Defence from DOLA with the rental and requirement to maintain ... falling to the WARA". It is said that the third paragraph in that letter is a clear indication that the author, purportedly on behalf of the Commonwealth, acknowledges that, after the letter of 31 March 1999 was received by DOLA, some further action was required to be completed in order to divest the Commonwealth of its interest in the land under the 1951 lease. She submits that the notion that there is something further which needs to be done before there is an effective surrender or relinquishment of the land in question is evidenced by the second paragraph of the letter from DOLA to KFPW dated 13 March 2000. In
the second paragraph of the letter says that a statutory declaration is required from either KFPW or the Department of Defence.

23 In respect of the third letter, that from the Department for Planning and Infrastructure to Lawton Gillon dated 29 September 2004, the author simply notes that WARA is paying the rent and that the rent is up to date. It does not, she submits, acknowledge or state that there is no longer any lease to the Commonwealth over the subject land.

24 Counsel submitted that in order to establish that there has been a surrender and, thus, a termination of a tenancy by conduct it is necessary to establish that the conduct relied upon is unequivocally directed at and intended at achieving a termination of the tenancy, that the intention of both parties to that effect is unequivocal and that there has been an unequivocal acceptance of the intention and of the outcome by both parties to the tenancy agreement. She conceded that the letters contained some evidence of an intention to bring the lease agreement to an end. She says, however, that the conduct of the parties in that regard, insofar as it is evidenced by the letters, cannot be said to be unequivocal and, in any event, neither the register of leases nor the plan that she tendered are consistent with such an unequivocal course of conduct having been put into effect. It is further submitted that there is no evidence that both parties to the agreement have accepted that at present or have accepted as at the date of marking out that the lease had come to an end.

CONCLUSIONS

25 The lease agreement was recorded in the Lease Register Book that was kept by the Minister for Lands in respect of leases issued under the Land Act 1933. As at 14 April 2004, approximately 11 months after the land the subject of the tenement applications was marked out, the Lease Register Book contained no entry or notation to the effect that the lease had come to an end. The page of the Register Book that was produced in evidence does contain a number of "cancelled" stamps against other leases which I take to be an indication that those leases had come to an end. The Department of Land Information (formerly DOLA) map that was produced in evidence by the objector is dated 27 September 2004. It still records the existence of the lease to the Commonwealth. It still records the existence of the reserve. There is nothing in either of those documents that supports the contention of the applicant before me that the lease agreement between the Commonwealth and the State has at any material time come to an end. Each of those documents, on its face, is inconsistent with the applicant's proposition. Having said that, I acknowledge,
however, that may not be the case that the only inference that can properly be drawn from those two documents is that the lease has not come to an end. For example, those documents as they now stand would not be inconsistent with a situation whereby the lease had been lawfully brought to an end and either the relevant State Government Department had not been notified or, having been notified, had not caused the Lease Register Book to be amended or the plan to be amended.

I consider that the contents of the three letters produced by the applicant do not establish, directly or by inference, on the balance probability that the lease agreement between the State and the Commonwealth has ended. There is no indication in the letters as to any terms of the lease or as to the form of the lease agreement other than that, in the broadest sense, there was a lease agreement entered into between the Commonwealth and the State which, as expressed in the Government Gazette of 14 December 1951, was to be for a term of one year and thereafter from year to year to be held in trust for the purpose of a rifle range. There is little room for doubt that there would have been a formal written agreement entered into between the parties pursuant to the Order in Council that was published in that gazette. The lease agreement may or may not have been in the form of the Fourth Schedule to the *Land Act*. I do not consider that it should be inferred that it was.

Even if it should be inferred that the lease between the Commonwealth and the State was in the form of the Fourth Schedule, and even if it is accepted that the lease was a tenancy from year to year and therefore a periodic tenancy which is assignable and that what may be assigned is the residue of the year of the lease in which the assignment is effected, it is my opinion that the evidence before me falls short of establishing that there was a relinquishment by the Commonwealth of the lease in favour of WARA, which relinquishment was accepted by the State and which assignment was accepted by WARA.

Mr Lawton stated from the bar table that KFPW was, in effect, authorised by the Department of Defence to act on its behalf in matters connected with the administration of the lease of the Rifle Range of Merredin. That is consistent with what was said by KFPW in its letter to DOLA of 31 March 1999. One difficulty that I have in giving the necessary weight to that aspect of the contents of the letter is that it could only be by way of inference that a conclusion could be arrived at from the existence of and from contents of the letter that KFPW was authorised by either the Department of Defence as part of the Commonwealth or by some other lawful authority to act on behalf of and to bind the
Commonwealth. There are insufficient proven primary facts to draw such an inference. There is no other evidence of, for example, the incorporation of KFPW, of its business, if any, of its authorisation to act for the Commonwealth in connection with the lease. In any event, the letter acknowledges that the Merredin Rifle Range land is leased from DOLA. It says that the range is leased by the Department of Defence. That is not what the Order in Council that was published in the Government Gazette says. What the order in council says is that the land is leased to the "Commonwealth of Australia". The letter goes on to say that rental and the requirement to maintain the Rifle Range falls to WARA. It does not expressly or impliedly say that that obligation falls on WARA because WARA has become the lessee. To say that would have been inconsistent with the first part of the sentence in which it is said that the Department of Defence leases the range. The letter goes on to say:

"In order to simplify the present arrangement approval is hereby granted for DOLA to vest these rifle ranges directly with the WARA."

It is impossible to know whether or not any such approval is something which was required or permitted by or from the Commonwealth pursuant to the lease agreement. It is impossible to know what is meant by the suggestion that DOLA may "vest" the ranges with WARA. That could properly be taken to be an indication that it is the intention of the author of the letter that beyond the time of any such vesting the Commonwealth would no longer have an interest in the land and that the lease to the Commonwealth would from that time be at an end. As counsel for the objectors says, however, it does suggest that the author of the letter contemplated that in order to bring the lease to an end something more was required to be done by DOLA on behalf of the other party to the agreement, namely, the State of Western Australia. The annexure to the letter of 31 March 1999 says:

"These Rifle Ranges subject to lease between DOLA and Dept of Defense [sic]

WARA pays lease fee and maintains Range. No longer required by Defens [sic].

Approval for transfer to lease to WARA to remove Dept of Defens [sic] from tenure relationship."
It is not clear what the purpose or the meaning of those words is. I take it that the document is the "schedule outlining the rifle ranges that are no longer required by the Department of Defence" which is referred to in the second paragraph of the letter. Those words at the bottom of the schedule that I just quoted cannot, however, be taken as proof of any previous assignment of the lease to WARA even though that may have been contemplated by whoever wrote those words on the schedule.

31 The letter of 31 March 2000 from what I take is DOLA to KFPW does not indicate that the response of DOLA or the State Government to KFPW's letter of 31 March 1999 is an acceptance of the termination by relinquishment or otherwise of the lease agreement between the Commonwealth and the State. Rather, it evidences the contrary. That is to say, the only inference that can be properly drawn from it is that the State, as at 31 March 2000, has not accepted either that the lease to the Commonwealth has terminated or that the State has accepted that there has been an assignment of the lease to the WARA or that the WARA has become the lessee. Whether it is the case that the statutory declaration mentioned in the letter is a lawful requirement or not is not relevant. What is relevant in the context of assessing the conduct of the respective parties to the lease in respect of any relinquishment or purported relinquishment by the Commonwealth is that the State does not consider that there has been a relinquishment, by way of assignment or otherwise, by the Commonwealth as at 31 March 2000.

32 The third letter, dated 29 September 2004, is from the Department for Planning and Infrastructure to Lawton Gillon. It refers expressly to application M70/1146. In my opinion, it says nothing more of relevance other than that the "customer details" held by the Department are to the effect that the Department of Defence is the customer. It indicates the address of the customer is care of WARA. It expressly says that there is nothing on the file to indicate when, if at all, the customer details have changed. That appears to me to be consistent with the contents of the Lease Register Book and the map dated 27 September 2004. In my opinion, it does not, even by way of inference, acknowledge or demonstrate that the lease between the Commonwealth and the State has ever come to an end.

33 A material part of the background in which the above facts have emerged is that there is no direct evidence from either the Commonwealth or the State from witnesses with the relevant knowledge and with access to the relevant documents that provides direct evidence as to the form of the lease, any termination of the lease at a material time or as to the
authority of KFPW to act on behalf of the Commonwealth in negotiating with the State and agreeing with the State to a termination of the lease. The three letters could only be described, in the context of the nature of the agreement between the State and the Commonwealth, as being very informal in nature and as being very deficient in relevant content. The authority of the writers of the letters to bind the State or the Commonwealth in the context of a legally binding lease agreement is not self-evident.

34 It is also of some significance that in neither its original or its amended objection has the objector WARA claimed to be a lessee of the land in question from the State by way of assignment from the Commonwealth or otherwise. It is merely said that it uses the range on a regular basis and has done so for over 50 years. It also expressly says that the land is leased from the State to the Commonwealth. That is inconsistent with the submission of the defendant that the WARA is now the lessee and is inconsistent with the inferences which the applicant suggests may be drawn from the three letters that were tendered in evidence. I also take into account that there is no evidence before me that the Commonwealth was served with a copy of the application.

THE APPLICATION FOR MISCELLANEOUS LICENCE 70/76

35 As I am not satisfied that the Commonwealth lease over the subject land is at an end or was at an end at the date when the ground applied for was marked out, the application for grant of miscellaneous licence 70/76 must be refused

THE APPLICATION FOR MINING LEASE 70/1146

36 For similar reasons, I can only recommend that application for Mining Lease 70/1146 be refused.