JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	BEFORE THE WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	ZANTHUS RESOURCES P/L & ors v MINERALOGY P/L [2014] WAMW 20
CORAM	**:**	WILSON M
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	30 OCTOBER 2014
FILE NO/S	**:**	INTERLOCULTORY APPLICATIONS 33139, 39655, 41305 & 41887 OBJECTIONS KR 88/101, KR 93/101, KR 97/101 & 412606
TENEMENT NO/S	**:**	APPLICATION FOR MISCELLANEOUS LICENCE 08/58
BETWEEN	**:**	Zanthus Resources Pty Ltd (Applicant Interlocutory Application 39655) (Objection KR 88/101) & API Management Pty Ltd Aquila Steel Pty Ltd AMCI (IO) Pty Ltd (Applicant Interlocutory Application 33139) (Objection KR 97/101) & FMG Pilbara Pty Ltd (Applicant Interlocutory Application 41887) (Objection KR 93/101) & The Kuruma Marthudunera Native Title Claimant Group (Applicant Interlocutory Application 41305) (Objection 412606) v Mineralogy Pty Ltd

(Respondent to Interlocutory Applications 33139, 39655, 41305 & 41887)
(Applicant for L 08/58)

Catchwords:

Application – Miscellaneous Licence – Objections – Interlocutory Applications to dismiss application for L – Permit to Enter – Native Title Land – Procedural Rights – Future Act – Private Land Rights – Rights of Freehold Land Holder

Legislation:

Native Title Act 1993 (Cth): s. 3, s. 24KA, s. 24MB, s. 24MD(6A), s. 26A, s. 26B, s.26C, s. 223, s. 226, s. 228, s. 233, s. 253, s. 277
Mining Act 1978 (WA): s. 8, s. 28, s. 30, s. 91, s. 104(3), s. 154
Mining Regulations 1981 (WA): r. 152(1)(l), r. 152(1)(k)
Land Administration Act 1997 (WA): s. 178(1)(b)(ii) and (c)
Aboriginal Heritage Act 1972 (WA): s. 17

Result:

Application for Miscellaneous Licence 08/58 is summarily refused

Representation:

Counsel:

Zanthus Resources	: Price Sierakowski Corporate
API & ors	: DLA Piper Australia
FMG Pilbara	: Lawton Lawyers
Kuruma Marthudunera	: Yamatji Marlpa Aboriginal Corporation
Mineralogy	: M Dunham, Legal Counsel

Case(s) referred to in judgment(s):

Mineralogy v Kuruma [2001] WAMW 29

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

BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2005] WAMW 12

Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants [2008] WAMW 3

FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation [2010] WAMW 15

Case(s) also cited:

API Management P/L & ors v Mineralogy P/L [2013] WAMW 14

Bell v Cribb [2013] WASC 32

Baxter v Serpentine Jarrahdale Ratepayers and Residents Association (unreported, Perth Warden's Court, 8 July 1999)

Forrest & Forrest Pty Ltd v Yarri Mining Pty Ltd [2012] WAMW 37

Maxwell v Murphy (1957) 96 CLR 261
Quartz Water Leonora Pty Ltd v Ashwin (Unreported, Perth Warden's Court, Warden Calder, 14 October 1999, Vol 14 Folio 8

Bromley v Mussellbrook Coal Co Pty Ltd (1973) 129 CLR 342

Payne v Major (Unreported, Warden's Court at Southern Cross, Warden Calder, 30 October 1986, Volume 2 Folio 38)

Pilbara Iron Pty Ltd v BHP Billiton Minerals Pty Ltd [2005] WAMW 25

Mineralogy Pty Ltd v Kuruma (No 2) [2002] WAMW 3

Mineralogy Pty Ltd v Applicants for the Kurama Native Title Claim [2003] WAMW 35

Dodsley Pty Ltd v Applicants for the Thudgari Native Title Claim [2003] WAMW 14
Lardel v Queensland (2001) 108 FCR 453

Hamersley Iron Pty Ltd v Puutu Kurnti Kurrama Pinkura Native Title Claimants [2006] WAMW 7

Striker Resources NL v Benmara Pty Ltd & ors (No 2) [2001] WAMW 20

Apache Northwest Pty Ltd v Pel Iron Ore Pty Ltd [2009] WAMW 2

Background

1. Mineralogy Pty Ltd ("Mineralogy") is the applicant for Miscellaneous Licence 08/58 ("the L"). According to the application for the L the datum is situated at 'MGA94 Zone 50 coordinates 415249.455 E 765293S.254 N' ("the Datum Coordinates") and was marked out on 7 September 2010.
2. According to Mr David Gibbs ("Mr Gibbs"), the project manager for Mineralogy, the datum post for the L ("Datum Post") was erected on the road reserve of the North West Coastal Highway ("NWCH") determined from coordinates (datum MGA94 Zone 50). The location of the Datum Post was calculated to be approximately 44 metres inside the road reserve of the NWCH in respect to the western most boundary of the NWCH.
3. The Kuruma Marthudunera Native Title Claimant Group ("Kuruma NTC") were registered as the native title claimants (WC 99/12, WAD60690/98) on 24 June 1999 over the land

upon which Mineralogy makes application for the L. Kuruma NTC objects to the grant of the L because of the proposed activities by Mineralogy impact upon their aboriginal heritage rights and the native flora and fauna in the area and Mineralogy has not complied with the provisions of the Mining Act 1978 (WA) ("the Act") and Mining Regulations 1981 (WA) ("the Regulations") when making the applications for the L.

4. Zanthus Resources Pty Ltd ("Zanthus") is the applicant for Exploration Licence 08/1684 ("ELA 1684") and objects to the grant of the L because, inter alia, it encroaches upon ELA 1684.

5. FMG Pilbara Pty Ltd ("FMG") is the applicant for Exploration Licence 08/2088 ("ELA 2088") and objects to the grant of the L because, inter alia, it encroaches upon ELA 2088.

6. API Management Pty Ltd, Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd ("API & ors") are applicant for Exploration Licence 08/2089 ("ELA 2089") and objects to the grant of the L because, inter alia, it encroaches upon ELA 2089.

7. API & ors, FMG, Kuruma NTC and Zanthus have all lodged Interlocutory Applications seeking the summary refusal of the application for the L by Mineralogy ("the Interlocutory Applications") because they say Mineralogy in marking out the land the subject of the L did not have a permit to enter private land ("Permit to Enter") under s. 30 of the Act and therefore could not mark out the land by reason of s. 104(3) of the Act.

8. API & ors, FMG, Kuruma NTC and Zanthus all submit that by force of the provisions of the Native Title Act 1993 (Cth) ("NTA"), s. 30 of the Act applied to the land the subject of the application by Mineralogy for the L because that land was to be treated as private land when there is a registered native title claim with respect to the land. In those circumstances, it is argued that Mineralogy should not have entered upon the land that forms part of the land of the Kuruma NTC to mark out the L without a Permit to Enter and as such the L should be summarily refused.

9. Mineralogy argues it entered the road reserve of the NWCH to mark out the L by placing the Datum Post in the ground. Further, Mineralogy argues the native title claim did not extend to include the road reserve of the NWCH. In those circumstances, Mineralogy submits it was not required to have a Permit to Enter the land the subject of the native title claim by Kuruma NTC or the road reserve of the NWCH.

10. API & ors, FMG, Kuruma NTC and Zanthus respond to the above submission by Mineralogy and claim the specific part of the road reserve of the NWCH upon which the Datum Post is located was expanded in 2004 ("the 2004 NWCH Expansion") and still forms part of the native title claim by Kuruma NTC. At the time of the 2004 NWCH Expansion the registered native title claims were not extinguished but preserved within the Taking Order. Further, native title claims against existing public roads, including the NWCH, were not included in the native title claim registered by the Kuruma NTC in 1999.

11. It is further argued by API & ors, FMG, Kuruma NTC and Zanthus that the non-extinguishment principle in s. 24KA of the NTA and the express exception of native title rights and interests in the Taking Order to acquire the land for the 2004 NWCH Expansion

and the 2004 NWCH Expansion did not extinguish or affect the native title claim registered by the Kuruma NTC in 1999.

Question to be Determined and Procedure

12. It was determined on 1 March 2013, the Interlocutory Applications by API & ors, FMG, Kuruma NTC and Zanthus in respect to the application for the L were to proceed by way of a summary judgement application and not a preliminary issues hearing.

13. The question to be determined on the Interlocutory Applications by API & ors, FMG, Kuruma NTC and Zanthus is as follows:

    'Whether application for L 08/58 should be summarily dismissed by reason that Mineralogy Pty Ltd failed to obtain a permit to enter private land under s. 30 of the Mining Act 978 (WA) prior to marking out L 08/58.'

14. The Interlocutory Applications originally encompassed the same question to be asked in application for L 08/53 by Mineralogy but that application was dismissed on 12 July 2013 following the decision in ***API Management P/L & ors v Mineralogy P/L [2013] WAMW 14.***

Warden's power to summarily refuse an application and the exercise of discretion

15. The Warden has the power pursuant to r. 152(1)(l) & (k) of the Regulations to summarily refuse an application for a mining tenement.

16. Further, the Warden may exercise his power of summary refusal of an application:

    a. with caution and in the clearest of cases (***Bell v Cribb [2013] WASC 32)*** at [49]), but paying due regard to the fact that an applicant is not barred by the Act from re-applying for another miscellaneous licence;

    b. where there is no serious question that the applicant has failed to comply with the usual requirements of the Act, the Regulations and NTA, and where such non-compliance would be fatal to the application; and

    c. where to allow the application to proceed to a substantive hearing can be wasteful of the limited hearing time of the Warden and be productive of increased costs by the parties.

Evidence before the Warden and procedure to be followed

17. All parties agreed the Interlocutory Applications should be dealt with on the papers.

18. The following evidence by way of affidavit material was placed before the Warden by the respective parties:

    a. affidavit of Brett Maloney dated 16 November 2012 ("Maloney Affidavit");

    b. affidavit of Dorrie Wally dated 16 August 2012;

    c. affidavit of Neil Finlay dated 16 August 2012;

    d. affidavit of Graham O'Dell dated 28 August 2012 ("O'Dell Affidavit");

    e. affidavit of Penelope Meucke dated 16 November 2012;

f. affidavit of Anna Claire Hedgcock dated 28 November 2012;

g. affidavit of Christopher Spielvogel dated 30 November 2012 ("Spielvogel Affidavit");

h. affidavit of David James Gibb dated 14 March 2013 ("Gibb Affidavit");

i. supplementary affidavit of Brett Maloney dated 8 May 2013 ("Maloney Supplemental Affidavit");

j. affidavit of Phillip Richards dated 21 May 2013 ("Richards Affidavit"); and

k. affidavit of Bridget Lorato Ralebala dated 24 May 2013 ("Ralebala Affidavit").

19. The application for the L by Mineralogy and its statement of particulars of application dated 11 July 2012 were also be for the Warden.

Non-Contentious Facts

20. It is not in dispute between the parties that Kuruma NTC was registered as native title claimants on 24 June 1999.

21. It is not in dispute between the parties the land upon which the application for the L by Mineralogy is made is subject to a claim pursuant to the provisions of the NTA by the Kuruma NTC.

22. It is not in dispute between the parties the land that comprises application for the L was marked out on behalf of Mineralogy on 7 September 2010.

23. It is not in dispute between the parties the Datum Coordinates is the location of the Datum Post for the application for the L by Mineralogy.

24. It is not in dispute between the parties that no Permit to Enter was obtained by Mineralogy before the marking out of the application for the L occurred by the placing of the Datum Post at the location of the Datum Coordinates described in the application lodged for the L with the Mining Registrar.

25. To place the issue beyond doubt, I find, upon the Maloney Affidavit, the Maloney Supplemental Affidavit and the O'Dell Affidavit, that no Permit to Enter pursuant to s. 30 of the Act has been found or presented in evidence in the course of the application for the L by Mineralogy or in the course of the Interlocutory Application by any of the other parties or by Mineralogy.

26. Accordingly, I am satisfied and find no Permit to Enter was obtained by Mineralogy pertaining to the application for the L.

Evidence of Marking Out and Location of Datum Post for application for the L

27. The evidence relied upon by Mineralogy as to the location of the Datum Post is contained within the Gibb Affidavit in which the deponent states:

> *'5. When planning L 08/58 I suggested that the surveyor use the North West Coastal Highway to access a position where the Datum Post could be erected and marked. I have since the plot of the coordinates supplied by the surveyor who erected the Datum Post and spoken with that surveyor. The surveyor has confirmed that he used the North West Coastal Highway for access.*

> 6. *I have recently re-plotted the coordinates for L 08/58 and the plot confirms that the Datum Post was erected on the North West Coastal Highway reserve. A copy of that plot is attached and marked as 'DJG 2". The boundaries of the North West Coastal Highway were determined from coordinates (datum MGA94 Zone 50) sourced from Landgate's Spatial Cadastral Database (SCDB). The location of the Datum Peg was calculated to be approximately 44 metres inside the road reserve in respect to the western most boundary of the road reserve.'*

28. Attached to the Gibb Affidavit is a map showing the location of the Datum Post within the road reserve of the NWCH and in the middle of one of the sides of the L.

29. Zanthus produced evidence in the Maloney Supplemental Affidavit that demonstrates the 2004 NWCH Expansion widened the NWCH by 50 metres on each side of the existing highway reserve pursuant to a Taking Order and a Road Dedication. The terms of the Taking Order preserved any existing native title rights and other interests. A map plotted by the National Native Title Tribunal of Australia showing the location of the Datum Coordinates placed those coordinates outside the original road reserve of the NWCH and within the widened area of the 2004 NWCH Expansion that being within Lot 660 on Deposited Plan 30489 ("Lot 660").

30. Further, Zanthus produced evidence in the Richards Affidavit from Mr Richards, who is an experienced and well qualified surveyor, that the Datum Post for the L had been erected in the portion of the land that forms the 2004 NWCH Expansion. Further, the Datum Post is positioned 6 metres to the west of (and outside) the original road reserve boundary of the NWCH (prior to widening in 2004). The Datum Coordinates extracted are accurate to approximately 3 metres, meaning that even in the most extreme case, the Datum Post would still be west of (and outside) the original road reserve boundary of the NWCH.

31. Mr Richards concluded the Datum Post for the L plots to be inside the area of the 2004 NWCH Expansion being within Lot 660 which was taken for the purposes of road widening in 2004) and 6 metres west of the original road reserve of the NWCH (prior to widening in 2004).

32. Zanthus also produced evidence in the Ralebala Affidavit in which Ms Ralebala confirmed the plotting's of Mr Richards of the location of the Datum Post for the L.

33. I accept the evidence produced by Zanthus of the location and plotting of the Datum Post and find the location of the Datum Post is within the area of the 2004 NWCH Expansion that was taken for widening in 2004. I also find the location of the Datum Post for the application for the L by Mineralogy is located within Lot 660 being land within the Taking Order and Road Dedication in 2004 which preserved existing native title rights to the Kuruma NTC.

34. I also find the distance the Datum Post is located from the original road reserve for the NWCH is approximately 6 metres and it would not be possible for it to be placed in the position that it was by Mineralogy, or its agent, without entering upon the land the subject of the Kuruma NTC under the provisions of the NTA.

Permit to Enter Required Prior to Entry for Marking Out

Changes to Marking Out Legislation for L's

35. Zanthus noted and submits the marking out provisions of the Act and Regulations changed in February 2013 prior to the hearing of the Interlocutory Applications. The provisions of the Act and the Regulations that applied at the time of the marking out and the making of the application for the L apply. (see: ***Baxter v Serpentine Jarrahdale Ratepayers and Residents Association (unreported, Perth Warden's Court, 8 July 1999)*** and ***Forrest & Forrest Pty Ltd v Yarri Mining Pty Ltd [2012] WAMW 37*** at [49]).

36. Further, Zanthus submits the changes to the Act and Regulations are not retrospective to validate otherwise invalid marking out and application for the L unless there is some clear indication to the contrary. (see: ***Maxwell v Murphy (1957) 96 CLR 261***).

37. I accept both of these submissions from Zanthus. API & ors, Kuruma and FMG all adopt and support the submissions by Zanthus.

Interaction of the NTA and the Act

38. Zanthus made submissions on the interaction of the NTA and the Act on the need to obtain a Permit to Enter the land the subject of a native title claim for the purposes of marking out an application for a mining tenement, particularly the L. Reference was also made by Zanthus to decisions in the Warden's Court that have considered and addressed this issue in the past.

39. In summary, Zanthus submits as follows:

    a. The NTA, in its preamble, acknowledges the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with the laws and customs, to their traditional lands.

    b. Pursuant to s. 3 of the NTA the primary objects provide for recognition and protection of native title and establishes ways in which future dealings affecting native title may proceed. (see: ***Mineralogy v Kuruma [2001] WAMW 29*** at p.17)

    c. Section 24MD(6A) of the NTA provides that native title holders and registered claimants to land have the same 'procedural rights' as they have in relation to the 'act' (namely, any 'future act' by force of s. 24MD(6) of the NTA) on the assumption they instead held 'ordinary title' to any land concerned.

    d. Section 226 of the NTA provides an 'act' includes the grant of a licence (s. 226(2)(b) of the NTA) and the creation of any legal right under legislation (s. 226(2)(d) of the NTA). The 'act' in this case is the grant of a miscellaneous licence pursuant to s. 91 of the Act (see: ***Quartz Water Leonora Pty Ltd v Ashwin*** (***Unreported, Perth Warden's Court, Warden Calder, 14 October 1999, Vol 14 Folio 8*** at 13.5).

    e. "Procedural right" pursuant to s. 253 of the NTA is defined in relation to an "act" to include '*any other right that is available as part of the procedures that are to be followed when it is proposed to do the act*.' In this case, the procedures to be followed for the grant of a miscellaneous licence includes the marking out of an application provided in the Act. (see: ***Mineralogy v Kuruma (supra)*** at 21.8, and

FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation [2010] WAMW 15 at [79]).

f. Section. 28 of the Act provides the important requirement that no person shall enter or remain on private land for the purposes of Division 3 of the Act or to mark out a tenement under s. 104(1) of the Act without a permit to enter. To act otherwise, could amount to an offence pursuant to s. 154 of the Act.

g. A 'procedural right' includes giving the holder of the land notice of entry to the land to mark out a mining tenement under the Act under the NTA.

h. A permit to enter private land, issued in accordance with s. 30 of the Act, is a necessary and in severable precondition to entering land to mark it out for a mining tenement and a failure to obtain a permit means that any entry on the land is unlawful: (see: ***Bromley v Mussellbrook Coal Co Pty Ltd (1973) 129 CLR 342*** at 351, ***Mineralogy v Kuruma [2001] (supra)*** at p 23, and ***FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation (supra)*** at [79]).

i. The requirement to obtain a permit before entering the relevant land is mandatory. (see: ***Payne v Major (Unreported, Warden's Court at Southern Cross, Warden Calder, 30 October 1986, Volume 2 Folio 38***), ***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2004] WAMW 22***, ***Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants [2008] WAMW 3***, ***FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation (supra)*** and ***Pilbara Iron Pty Ltd v BHP Billiton Minerals Pty Ltd [2005] WAMW 25***).

j. Pursuant to s. 233(1)(c) of the NTA, a "*future act*", in relation to land, includes:

   i. An "act" that takes place after 1 January 1994 (s. 233(1)(a) of the NTA) that is not a "past act" (here the grant of a licence or creation of any legal right is not) (s. 233(1)(b) of the NTA); and

   ii. if apart from the NTA, the "act" is to any extent invalid, and would be valid to that extent absent a native title, and if it were valid to that extent, it would 'affect" the native title (s.233(1)(c)(ii) of the NTA)

k. The grant of a miscellaneous licence under the Act over private land is a "future right" because:

   i. The "act" will take place after 1 January 1994 and would not be a past act (see: s. 228 of the NTA); and

   ii. Apart from the NTA, the grant of the miscellaneous licence would be invalid to the extent there was no permit and would be valid if there was a permit absent native title, and if it were valid to that extent, it would "affect" native title.

l. Pursuant to s. 227 of the NTA an "act" affects native title rights and interests if it extinguishes all is inconsistent with the existence, enjoyment or exercise of native title rights and interests (which concept is given meaning by s. 223(1) of the NTA).

m. It must be appreciated that s. 233(1)(c)(ii)(C) of the NTA provides that an "act" is a "future act" if, relevantly, it _would_ affect native title.

n. When the question is whether a registered native title claimant has a "procedural right" with respect to a "future act", the question is not determined on the basis that it would be shown that native title is effected but on the basis that it _would_ or could likely be effected. (The grant of a miscellaneous licence could likely affect native title rights and interests: (see: ***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2004] (supra) at [2] – [3]***) (The proposals on behalf of the applicant are self-evidently long-term).

o. Section 253 of the NTA provides "ordinary title" includes a freehold estate in fee simple.

p. The combined effect of ss. 24MD(6A), 253, 226, 233(1)(c), and 227 of the NTA is that the grant of a miscellaneous licence under any legislation, including the Act, can only be effected by giving to any registered native title claimant the same "procedural rights" as would be available to a person with a freehold estate in fee simple.

q. Section 24MD(6A) of the NTA requires registered native title claimants to be treated as if they held the freehold estate in fee simple when determining whether "procedural rights" apply: (see: ***Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants [2008]*** (supra) at [40]).

r. If land is "private land" held by, amongst others, a person with a freehold estate (see definition under s. 8 of the Act) there is a procedure right, namely, a right to require a permit to be obtained, before the land can be marked out. That procedural step is, by force of the provisions of the NTA, required to be complied with if Crown land is the subject of any registered native title claim.

s. When it is understood that a registered native title claimant is to be treated _as if_ they have ordinary title or freehold title, it must be accepted that they are deemed by force of s. 24MD(6A) of the NTA to have rights as if they held private land under the Act.

t. When that is accepted, with respect to land that is the subject of registered native title claims, the procedures applying to private land necessarily apply.

u. Consistently with the above, the authorities make it clear that a permit must be obtained before land is marked out and before application is made for a mining tenement on land the subject of any registered native title claimants.

    i. With a marking out of tenement takes place other than as a lawfully provided by statute, an applicant cannot be rewarded with the grant of a tenement: (see: ***Mineralogy v Kuruma [2001]*** (supra) at page 23).

    ii. Failure to mark out pursuant to a permit to enter private land is a sufficient basis to dismiss an application for a tenement: (see: and ***Pilbara Iron Pty Ltd v BHP Billiton Minerals Pty Ltd*** (supra) at [34]).

iii. Marking out the private land without a permit can lead to a finding that there is no application for a mining tenement: (see: ***Bromley v Mussellbrook Coal Co Pty Ltd*** (supra) at 346*)* and ***Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants [2008]*** (supra) at [154]).

iv. Just because a person already has a mining tenement with respect to private land does not mean that the person need not have a permit to mark out private land: (see: ***Mineralogy Pty Ltd v Kuruma (No 2) [2002] WAMW 3*** at 5.8 - 6.1)

40. Accordingly, for those reasons, Zanthus submits because the land the subject of the application for the L by Mineralogy is subject to a registered native title claim, Mineralogy needed a permit pursuant to s. 30 of the Act before marking out of the land could occur. It is for that reason the application for the L by Mineralogy should be dismissed.

41. In support of that submission, Zanthus refers to a number of previous orders decisions all of which concluded that a permit to enter was required for the purposes of marking out an application for a mining tenement.

Mineralogy Pty Ltd v Kuruma [2001] WAMW 29 (Warden Wilson)

42. Zanthus submits one of the issues in this case determined by the Warden was whether an applicant for a General Purpose Lease had to obtain a permit to enter before marking out by force of s. 24MD(6A) of the NTA. The Warden held a permit to enter was required and, in summary, provided the following reasons:

a. Section 3 of the NTA protected native title and established ways in which the dealings affecting native title may proceed (at page 17).

b. The NTA 'considers different kinds of acts that affect native title and includes 'future acts.' Future acts is defined in s. 233 of the NTA has being, inter-alia, acts which take place after January 1, 1994 and which affect native title in the way set out in s. 233. I am of the opinion that the grant of the GPL application will be a future act as provided by the NTA' (at page 17).

c. Section 24AA(1) of the NTA "acts that do not affect native title are not future acts" (at page 18).

d. The provisions of s. 24LA(1) of the NTA do not apply to the general purpose lease application as the grant of a general purpose lease will result in the conferral of exclusive possession over the relevant land and water (at page 18).

e. Section 24MB of the NTA makes provision for subdivision M to apply to a future act if it passes the freehold test. "In my opinion, the grant of the general purpose lease application is an act to which s. 24MB(1) of the NTA applies. Accordingly, I am of the opinion that, the general purpose lease application passes the freehold test." (at page 18).

f. Subdivision M, and not subdivision P, of the NTA apply to the general purpose lease because no right to mine was sought under the general purpose lease.

Sections 26A, 26B, and 26C of the NTA also did not apply, such that, s. 24MD(6A) applied by reason of s. 26MD(6). (at page 19 to 21).

g. Dealing with s. 24MD(6A) of the NTA and the definition of "procedural rights" in s. 253 of the NTA , "In my opinion, the word 'act' referred to in the definition of procedural rights relates to any future act proposed to be carried out in respect to the land or water the subject of any night native title claim." (at page 21).

h. "Clause (c) of the definition of procedural right means, in my opinion, that any right that is available as part of any procedure that is to be followed before a future act can be carried out must be afforded to the native title claimant or holder." (at page 21).

i. Section 24MD(6A) of the NTA "requires that any land or water that is held by native title holders or is subject to native title claim, is assumed to be land that is freehold estate in fee simple, or 'private land' as defined in s. 8 of the Act. That assumption is to be held notwithstanding the true status of the land at law." (at page 22).

BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2004] WAMW 22 (Warden Calder)

43. In this case, the Warden held that the Warden's Court had jurisdiction to deal with matters arising under the NTA and that, with respect to an application for the grant of a miscellaneous licence which were on land the subject of native title claims, a permit was required to enter the land because the land was to be treated as if it was a freehold estate in fee simple. In summary, Zanthus submits the Warden reasoned as follows:

a. It is not just the Federal Court that has jurisdiction or the obligation to apply s. 24MD(6A) of the NTA. (at [11[, [28], [29], and [31]).

b. The procedural rights referred to in s. 24MD(6A) of the NTA are those afforded to a freehold owner. Those procedural rights include the requirement to obtain a permit to mark out because of ***Bromley v Mussellbrook Coal Co Pty Ltd*** (supra) and despite ***Mineralogy Pty Ltd v Applicants for the Kurama Native Title Claim [2003] WAMW 35.*** (at [14] – [15], [47]).

c. Disagreeing with ***Dodsley Pty Ltd v Applicants for the Thudgari Native Title Claim [2003] WAMW 14***, the need to obtain a permit is a procedural requirement, giving rise to a 'procedural right' under s. 24MD(6A) of the NTA even if it is a separate act to marking out and to the grant of a miscellaneous licence. (at [17]-[21], [24]).

d. Applicants for the grant of a miscellaneous licence are obliged, pursuant to s. 30 of the Act, to obtain a permit to enter before land the subject of a native title claim is entered for the purpose of marking out any part of that land for the purposes of obtaining a grant of a mining tenement. The would-be applicant is duty-bound to obtain a permit. (at [25]).

BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2005] WAMW 12 (Warden Calder)

44. Zanthus submits the Warden determined this proceeding on similar grounds as the decision involving the same parties the year before in ***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2004]*** (supra). The Warden's reasoning included that in ***Lardel v Queensland (2001) 108 FCR 453*** does not support the conclusion that there is no need to obtain a permit on the assumption required by s. 24MD(6A) of the NTA that land the subject of an either title claim is freehold land. The Warden in ***Lardel v Queensland*** (supra) did not consider the issue of the need to comply with procedural requirements *before* the grant of a mining tenement. (at [112] - [121]).

Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants [2008] WAMW 3 (Warden Calder)

45. Zanthus submitted the Warden recommended, in the above case, that the Minister refuse an application for a general purpose lease because no permit had been obtained before the land was marked out when the land was the subject of a native title claim. The Warden's reasoning included the following:

    a. Disagreeing with the decisions ***Dodsley Pty Ltd v Applicants for the Thudgari Native Title Claim*** (supra) and ***Hamersley Iron Pty Ltd v Puutu Kurnti Kurrama Pinkura Native Title Claimants [2006] WAMW 7*** at [141] and [146], and even though it might be convenient shorthand to describe the procedural rights given by s. 24MD(6A) of the NTA has been the same as if native title claimants were 'private land holders', it is not the case that the land must be 'private land' as defined in s. 8 of the Act for procedural rights to apply.

    b. It is important to appreciate that only procedural rights are given by s. 24MD(6A) of the NTA, and otherwise they are *not* treated as freeholders. (at [146])

    c. It is unlawful to enter freehold land without a Permit to Enter and this is not a matter of mere non-compliance with the Act and the Minister is not entitled to grant if unlawful entry is affected. (at [152]). The same procedural rights are given to native title claimants. (at [152]).

    d. The failure to obtain a Permit to Enter meant the application for a general purpose lease could not be granted by the Minister. (at [154]).

FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation [2010] WAMW 15 (Warden Calder)

46. Zanthus submits the Warden held in this decision that a native title claimant had a right to be heard on an application for the grant of a Permit to Enter land the subject of a native title claim. The Warden reasons can be summarised as follows:

    a. In relation to future acts, such as the grant of a mining tenement, it is the intention of the NTA that such future act should only be able to be validly done if the same future act could be done to freehold land. (at [69]).

    b. The grant of a Permit to Enter is a necessary and validating requirement where the application is over private land. (at [77]).

c. The grant of a Permit to Enter private land is an inseparable procedure from the process required to be complied with to obtain a mining tenement where marking out is required. (at [79]).

d. The grant of a Permit to Enter may have significant adverse impacts upon claimed native title rights and interests. (at [81]).

47. I accept the submission by Zanthus the decision in ***Dodsley Pty Ltd v Applicants for the Thudgari Native Title Claim*** (supra) in holding that the act of marking out is not a procedural requirement for the grant of a miscellaneous licence overlooks the reasons referred to above. That same decision overlooks (at [34] – [35]) the question whether native title *would* be affected if the relevant future act were permitted.

48. The provisions of s. 24MD(6A) of the NTA confers procedural rights before the future acts occur, and such procedural rights would be rendered ineffective otherwise. I agree with the submissions by Zanthus a procedural rights were accorded by s. 26MD(6A) of the NTA only if *actual* affectation of native title must be shown as opposed to a *likelihood* of *affection* if the future act (i.e. the grant of the miscellaneous licence in this case) occurs, Parliaments purpose of recording procedural rights would be circumvented. That clearly is not Parliaments intention.

49. I do not accept the submission from Mineralogy that by virtue of some pre-existing mining tenement on the geographical location of the Datum Post at the time of marking out the application for the L a Permit to Enter private land was not required as there was no private land within the meaning of section 28 of the Act.

50. In my opinion, s. 104(3) of the Act provides that a person shall not enter any private land for the purposes of marking out unless they have a Permit to Enter issued under s. 30 of the Act. The Act does not provide any exception to that requirement.

51. Permits to Enter private land exist for good and obvious reasons, that is, that those persons who hold a private land are entitled to expect that no person will trespass upon their land and interfere with their rights to use their private land as they wish, subject to compliance with the law. The entry onto private land and interfering with the rights of the holder of private land for the purposes of conducting an activity associated with exploring for minerals or marking out for a mining tenement application may well be contrary to the use to which the land is currently being used by the holder of the private land. The rights of the private land owner may not be interfered with save with the permission of that person or unless authorised by law, subject to any appropriate conditions, by way of a Permit to Enter that notifies the owner of the private land of the interest that person has in the land.

52. The obligation to obtain a Permit to Enter private land for the purposes of activities authorised under the Act is extended by the provisions of s. 24MD(6A) of the NTA because claimants and holders of native title rights are required to be treated in the same manner *as if they were* the holders of the freehold interest in the land. In those circumstances the claimants and holders of native title rights on land the subject to an application for a mining tenement are entitled to be treated under the Act in the same manner at a private land owner (see*:* ***Mineralogy Pty Ltd v Kuruma (No 2)*** *(supra)* at 5.8 – 6.1)

53. I reject any submission by Mineralogy that it was not obliged or required under the Act to obtain a Permit to Enter before entering upon the land for the purposes of marking out the application for the L that was the subject of the native title claim by the Kuruma NTC.

54. The NTA requires the same procedural rights be afforded to native title holders or claimants as private land holders in fee simple. Those procedural rights include the obligation to obtain a Permit to Enter the land, for the purposes of marking out the land for an application for a mining tenement, of claimants or holders of native title rights as would be required to be done as if the land was land held in fee simple for the purposes of marking out a mining tenement or exploring private land for minerals.

55. Accordingly, I am satisfied and find Mineralogy were required to obtain a Permit to Enter the land over which the application for the L was made because it was land to which the Kuruma NTC held native title rights or claims and they were to be afforded the same rights pursuant to the provisions of the NTA as if they were holders of the land in fee simple.

Road Reserve Dispute

56. Zanthus submits the dispute as to the existence of a native title claim over the road reserve for the NWCH in the vicinity of the Datum Post arises because Mineralogy referred to the Department of Mines and Petroleum Quick Appraisal that indicates that little or no encroachment exists (marked as "0.00 ha" and '<0.1%") on the road reserve for the NWCH. The parties were given the opportunity to produce evidence of the location of the Datum Post, the NWCH and the claim for native title by the Kuruma NTC in the vicinity of the L and any impact that may have upon the proceedings. Zanthus produced evidence and further submissions on this issue.

57. In summary, Zanthus produced evidence that indicated on 24 June 1999 when the native title claim was lodged by Kuruma NTC it expressly excluded tenures for any existing public road. As such, by the express wording of the native title claim the land within the road reserve for the NWCH as it existed on 24 June 1999 was excluded. That exclusion can be found in Schedule B1 of the native claim by the Kuruma NTC and states as follows:

> *"To avoid any uncertainty, the applicant is excluded from the claim areas the tenures set out in Schedule B1.*
>
> *Schedule B1*
>
> *………*
>
> *B 1.7 An existing public road or street used by the public or a dedicated road "*

58. I accept the proposition by Zanthus that the wording is clear and captures those tenures upon which the NWCH lay as were in existence on 24 June 1999. I also accept the proposition by Zanthus that clause B 1.7 of Schedule B1 of the native title claim by the Kuruma NTC of 24 June 1999 cannot be read so as to exclude from the native title claim the area of a subsequent road expansion for a road that was smaller in width at the time of registration of the native title claim.

59. In my opinion, the wording of the Kuruma NTC was clear that it excluded *"an existing public road or street used by the public or a dedicated road"* could only mean, on a plain reading of its terms, those public roads or streets that then existed on 24 June 1999. I do not accept it is possible to interpret the intention of Kuruma NTC when lodging its native title claim to mean the excluded area could be expanded at will by the creation of future public roads or streets by the State of Western Australia within its claim area. The word '*existing*' is paramount in the interpretation of this clause as it seeks to limit as of time the extent and nature of what is excluded from the Kuruma NTC native title claim.

60. The Taking Order associated with the 2004 NWCH Expansion expressly excludes native title rights and interests and the Road Dedication also associated with the 2004 NWCH Expansion expressly recognises native title rights and interests. I accept the submission by Zanthus that the consequence of exclusions and recognitions in the Taking Order and the Road Dedication is the State of Western Australia did not seek to '*compulsorily acquire or extinguish the native title rights and interest'* in the area of the 2004 NWCH Expansion.

61. Zanthus contends that it is apparent the following took place in respect to the 2004 NWCH Expansion:

    a. The State of Western Australia compulsorily acquired the land for the road expansion pursuant to s. 178(1)(b)(ii) and (c) of the Land Administration Act 997 (WA).

    b. The future act protections afforded to the registered native title claim as provided for in s. 24KA of the NTA apply to the taking of the land for the purpose of the road.

    c. The 'non-extinguishment' principal applies to future acts under s.24KA of the NTA so that the future act of acquisition of the lands for dedication as a road was not, by reason of the NTA, to extinguish the underlying claimed native title rights and interests.

    d. The State of Western Australia was concerned to ensure that the provisions concerning acquisition of lands for public purposes, which could affect a registered native title claim, would be administered (see Land Administration Act, Part 9, Division 1, Sub-division 2 (which have been in existence since 1998)).

62. I do not accept the submission by Mineralogy that the exclusion of public roads in the extract of the registered native title claim excuses it from the requirement to obtain a permit to enter private land or land the subject of a registered native title claim.

63. I accept the submission by Zanthus that, on a proper reading of the extract of the claim, an understanding of its purpose and consequences, an understanding of how the State of Western Australia conducted the subsequent compulsory acquisition and road dedication and a reading of the Taking Order and the Road Dedication, it is clear the 2004 NWCH Expansion into Lot 660 is not captured by the original exclusion of road tenures on registration of the native title claim by Kuruma NTC on 24 June 1999.

64. Zanthus further deals by way of submission with the provisions of s. 24KA of the NTA and says it is the relevant provision that applied to the State of Western Australia in the 2004 NWCH Expansion. The Road Dedication expression refers to s. 24KA of the NTA. The compulsory acquisition of land by a State instrumentality for dedication as an expansion of a public highway is a 'future act' for the purposes of s. 233(1)(c) of the NTA.

65. Accordingly, Zanthus submits that subdivision K (containing s. 24KA of the NTA) applies because:

    a. The future act relates to an onshore place (s. 24KA(1)(a) of the NTA).

    b. Permits the construction, operation, use and maintenance of a road by the Crown or one of its instrumentalities for use as a highway by the general public (s. 24KA(1)(b)(ii) and s. 24KA(2)(a) of the NTA).

    c. The future act does not prevent native title holders from having reasonable access to such land in the vicinity of the thing, except while:

        i. the thing (the road) is being constructed (s. 24KA(1)(c)(i) of the NTA)

        ii. for reasons of health and safety (which would apply generally to the road (s. 24KA(1)(c)(ii) of the NTA); and

        iii. the law of the State makes provision in relation to the preservation or protection of areas or sites that may be in the area in which the act (the road expansion) is done, as both the protective provisions in the Land Administration Act, Part 9, Division 1, Sub-division 2 and s. 17 of the Aboriginal Heritage Act 1972 (WA) apply (s. 24KA(1)(d) of the NTA).

66. Upon the undertaking of the future act under s. 24KA of the NTA, Zanthus submits the non-extinguishment principle in s. 238 of the NTA applies (s. 24KA(4) of the NTA). Section 24 also provide its own regime for affording procedural rights for native title holders and registered native title claimants and mandatory consideration of the rights and interests of holders (s. 24KA(7) & (8) of the NTA). The non-extinguishment principle is in s. 238 of the NTA provides a means by which the future act can co-exist with the native title rights and interest to the extent of inconsistency, was always preserving native title (even if the rights and interests are temporarily prevented by a wholly inconsistent act). (s. 238(8) of NTA).

67. Zanthus further submits that it is plain that the non-extinguishment principles do not have the effect of reducing, deleting, or abrogating the title that is the subject of a registered native title claim. This it is submitted, is consistent with the primary objectives of s. 3 of the NTA, including providing for recognition and protection of native title and establishment of ways in which future dealings affecting native title may proceed but without wholly destroying the claim for the underlying native title. (see ***Mineralogy v Kuruma [2001]*** (supra) at page 17).

68. In those circumstances, Zanthus submits the registered native title claim continues over land the subject of a valid future act under s. 24KA of the NTA and may be the subject of another future act, under another provision of the NTA, to be dealt with according to the applicable provisions of the NTA in respect of that further future act. It is for those

reasons, submits Zanthus, why future act provisions in s. 24MD(6A) of the NTA apply to a miscellaneous licence application over a location, which had already been the subject of a future act process in a different provision of the NTA for a different species of future act.

69. Zanthus submits by way of conclusion that Mineralogy entered part of a road reserve to mark out the L which, at the time of entry, was still subject to a registered native title claim so as to make it subject to the procedural requirements of s. 24MD(6A) of the NTA and the Act as it applies to the holders of private land. It is further concluded by Zanthus that the registered native title claim contemplated only tenures for roads in existence upon registration on 24 June 1999 when the Kuruma NTC was registered. The 2004 NWCH Expansion took place by way of the provisions of s. 24KA of the NTA, a Taking Order and a Road Dedication expressed as recognising *and preserving* native title.

70. There is nothing, submits Zanthus, in the creation by the 2004 NWCH Expansion in the creation of Lot 660 that could be taken to have affected an executive expropriation of rights held by the Kuruma NTC under the registered native title claim over the geographical area the subject of the Datum Post for the L. The non-extinguishment principle in s. 238 of the NTA apply by virtue of s. 24KA(4) of the NTA so that the compulsory acquisition of the area for the creation of Lot 660 by the 2004 NWCH Expansion did not interfere with the registered native title claim.

71. I agree wholly with the submissions by the Zanthus in this regard. Further, the submissions by Zanthus are entirely consistent with the decisions in ***Mineralogy Pty Ltd v Kuruma [2001]*** (supra), ***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2004]*** (supra), ***BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2005]*** (supra), ***Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants [2008]*** and ***FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation [2010]*** (supra) that have applied the interaction between the Act and the NTA on the issue of the requirement to obtain a Permit to Enter land the subject of a native title claim.

72. I reject the submission by Mineralogy that the expansion of the road reserve, in which the instrumentalities of the State of Western Australia recognise the pre-existing registered native title claim, provides Mineralogy with a justification for not complying with the procedural requirements of s. 24MD(6A) of the NTA and the private land provisions of the Act.

73. I also accept the proposition by Zanthus that, to the contrary, the State of Western Australia recognise the registered native title claim, preserved it for continued existence and satisfied its obligations to comply with the future act provisions of the NTA in respect of dedicating a public Road.

Consequence of Failure to Comply with Permit to Enter Requirement

74. There is a long list of authorities that establish it is a requirement that an applicant for a miscellaneous licence must comply in all respects with the provisions of the Act and Regulations. Any non-compliance with the provisions of the Act and Regulations is fatal to the application. (see: ***Striker Resources NL v Benmara Pty Ltd & ors (No 2) [2001] WAMW 20*** at [49], ***Pilbara Iron Pty Ltd v BHP Billiton Minerals Pty Ltd*** (supra) at [9],

[32], [34], [45] – [48] and ***Apache Northwest Pty Ltd v Pel Iron Ore Pty Ltd [2009] WAMW 2*** at [23] – [27]).

75. I am satisfied upon the evidence and find the Mineralogy has failed to comply with the requirements of the Act and Regulations by failing to obtain a Permit to Enter the land before marking out the L. The obligation to obtain the Permit to Enter arises from the provisions of the NTA in that the native title claimants, the Kuruma NTC, were denied the same procedural rights as the holder of private land as is their entitlement under the NTA and a Permit to Enter was not obtained under the provisions of the Act

Conclusion

76. I reject the submissions by Mineralogy in relation to be marking out of the L and its interpretation of the effects of the NTA on the 2004 NWCH Expansion and the original claim by the Kuruma NTC on 24 June 1999.

77. For those reasons, I find Mineralogy has failed to comply with the requirements of the Act and Regulations in that it was required to obtain a Permit to Enter before marking out the land the subject of the application for the L and did not do so. The application for the L is fatally flawed and cannot succeed.

78. Accordingly, the application for Miscellaneous Licence 08/58 is summarily refused.