[2014] WAMW 6

JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	BEFORE THE WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	YARRI & ORS v FORREST & FORREST P/L [2014] WAMW 6
CORAM	**:**	WILSON M
HEARD	**:**	10 & 11 DECEMBER 2012
DELIVERED	**:**	31 JANUARY 2014
FILE NO/S	**:**	OBJECTIONS KR 172 to KR/174/112 AND KR 261 & 262/112
TENEMENT NO/S	**:**	APPLICATIONS FOR MINING LEASES 08/478 to 479 & 08/489 APPLICATION FOR MISCELLANEOUS LICENCE 08/70 APPLICATIONS FOR GENERAL PURPOSE LEASE 08/78
BETWEEN	**:**	**Application for Mining Lease 08/478** **Application for General Purpose Lease 08/78** Yarri Mining Pty Ltd (Applicant) and Forrest & Forrest Pty Ltd (Objector) **Applications for Mining Lease 08/489** **Application for Miscellaneous Licence 08/70** Quarry Park Pty Ltd (Applicant) and Forrest & Forrest Pty Ltd (Objector) **Applications for Mining Leases 08/479** Onslow Resources Ltd (Applicant) and Forrest & Forrest Pty Ltd

(Objector)

Catchwords:

Application – Objections – Interference with Pastoral Operations – Environmental Issues – Public Interest – Non-compliance with Act & Regulations – Grant of Conditions

Legislation:

Mining Act (1978) WA*: s. 42(3) s. 59(6), s. 67(1), s. 74(1)(ca)(i) & (ii), s. 74A, s. 74(7), s. 75(1), s. 75(2), s. 75(3), s. 75(2a), s. 75(4), s. 75(4a), s. 75(5),s. 75(6), s. 75(7), s. 75(8), s. 75(9), s. 84, s. 84C(c), s. 86(3), s. 86(5), s. 87, s. 91(1), s. 91(6), s. 118.*

Mining Regulations (1981) WA*: r. 25C, r. 37(3), r. 42B, r. 146*

Result:

Recommend to the Hon. Minister that applications by Yarri, Onslow and Quarry for M 478, M 479 & M 489 be granted subject to the imposition of the conditions contained within Annexure 1, attached, and subject to the imposition by the Hon. Minister of any other conditions deemed appropriate pursuant to s. 84 of the Act.

Recommend to the Hon. Minister that application for G 78 by Yarri be granted subject to the following:

a. the imposition of the conditions contained within Annexure 1, attached, and the imposition by the Hon. Minister of any other conditions deemed appropriate pursuant to s. 84 of the Act,
b. the area of the grant not exceeding 10 hectares,
c. Yarri identifying the precise area it intends to develop and utilise within the 10 hectares, and,
d. the area of G 78 being used only for the purposes prescribed by s. 87(1) of the Act.

Subject to the grant by the Hon. Minister of application by Quarry for M 489, grant to Quarry, for the purposes of a road and pipeline, application for L 70 comprising of the land described within the Form 21 lodged by Quarry with the Mining Registrar at Karratha on 16 November 2011 and subject to the imposition of the conditions contained within Annexure 1, attached.

Representation:

Counsel:

Applicants	:	Mr N Gentilli
Objector	:	Mr S Davies SC & Mr A Papamatheos

Solicitors:

Applicants	:	Jackson McDonald
Objector	:	Mizen & Mizen

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

Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2011] WASCA 21

Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (2010) 41 WAR 134

Case(s) also cited:

David Grant & Co Pty Ltd (Receiver Appointed) v Westpac Banking Corporation (1995) 184 CLR 265

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

Australian Crime Commission v Marrapodi [2012] WASCA 103

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597

Jadwan Pty Ltd v Secretary, Department of Health & Aged Care (2003) 145 FCR 1

Australian Pesticides and Veterinary Medicines Authority v Administrative Appeals Tribunal (2008) 250 ALR 448

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Bearing - Bore GM v Horizon Mining Ltd [2002] WAMW 17

Gilchrist v Pattison (7 April 1988) 7 AMPLA Bull 147

Baxter & ors v Serpentine – Jarrahdale Ratepayers and Residents Association, (Perth Wardens Court on 8 July 1999, Vol 14 No 2)

Darling Range South Pty Ltd v Ferrell & ors [2012] WAMW 12

Background

1. Yarri Mining Pty Ltd ("Yarri"), Quarry Park Pty Ltd ("Quarry") and Onslow Resources Limited ("Onslow") are related entities. Yarri makes application for Mining Lease 08/478 ("M 478") and General Purpose Lease 08/78 ("G 78"). Quarry makes application for Miscellaneous Licence 08/70 ("L 70") and Mining Leases 08/ 489 ("M 489"). Onslow makes application for Mining Lease 08/479 ("M 479"). The applications for the mining tenements by Yarri, Quarry and Onslow are to commence sand mining operations and to provide supporting infrastructure.
2. The applications by Onslow and Quarry for M 479 and M 489 are located within Exploration Licence 08/1728 ("E 1728") & Exploration Licence 08/2329 ("E 2329") respectively and are commonly referred to as a conversion application pursuant to s. 67(1) and s. 75(7) of the Mining Act ("Act"). E 1728 is held by Onslow and E 2329 is held by Quarry.
3. The application by Quarry for L 70 is also located within E 2329. The purpose of the application for L 70 is to provide a road linking the Urala Station Road to M

489 and Mining Lease 08/487 that is then connected to another Miscellaneous Licence 08/71 that connects to the Old Onslow Road and also to install a pipeline.

4. The application by Yarri for M 478 is located within Exploration Licence 08/1991 ("E 1991") and is also a conversion application pursuant to s. s. 67(1) and s. 75(7) of the Act. Yarri is the holder of E 1991. the application by Yarri for G 78 is within E 1991. The size of the area applied for in G 78 is 128 hectares.

5. The purpose of G 78 is described in the application by Yarri as for *"the stockpiling of quarry materials, storage of plant and equipment, workshop, storm shelters, precast manufacturing of concrete products, drilling equipment, mining plant storage, truck transport depot, camp facilities, water storage dam, lay down hard stand for mining equipment and storage of piping".*

6. The application for G 78 was noted by Yarri to be connected with mining operations of Yarri, Quarry, Onslow Resources Ltd and A W Slater and mining leases held by those respective persons both granted and subject to grant.

7. All of the mining tenements applied for by Yarri, Quarry and Onslow are located within the boundaries of the pastoral lease known as Minderoo ("Minderoo") located in the area surrounding the town of Onslow.

8. Forrest & Forrest Pty Ltd ("Forrest") is the holder of the pastoral lease that comprises Minderoo and objects ("the Objections") to all of the applications by Yarri, Quarry and Onslow.

9. The Ashburton River is a significant geographical feature on Minderoo and runs through the entire pastoral lease effectively dividing it in half. The applications by Quarry and Onslow for M 479 and M 489 are made by over parts of the Ashburton River for the purposes of mining the river sand from its riverbed during the dry season. Forrest regards the Ashburton River to be significant to its pastoral operations on Minderoo as a source of water and from the overall benefits it brings to all aspects of the surrounding environment.

10. The grounds of the Objections by Forrest are all in the same terms and can be summarised as follows:

    a. The Applications do not comply with the provisions of the Mining Act ("Act") and/or Mining Regulations ("Regulations"),

    b. The Applications will affect parts of the Ashburton River and pastoral improvements and infrastructure on Minderoo.

    c. The Application, if granted, will impact upon the future activities on Minderoo by:

        i. Depriving Forrest of use of land,

        ii. Adversely affecting pastoral operations, improvements and revenue derived from Minderoo,

        iii. Injuriously affect the viability of the pastoral business conducted on Minderoo by Forrest.

iv. Sterilise and degrade the land on Minderoo.

v. Cause environmental damage on Minderoo including to and/or the vicinity of the Ashburton River.

d. The Applications are not appropriate as Yarri and Quarry do not have a valid mining target or strategy on Minderoo.

e. It is not in the public interest to grant the Applications because of the grounds of the Objections.

11. In addition to the grounds of the Objections, Forrest submits the jurisdiction of the Warden to hear the applications for M 478, M 479 and M 489 have not been established by Yarri, Quarry and Onslow. Therefore, Forrest submits no report can be provided by the Warden to the Hon. Minister in respect to the applications for M 478, M 479 and M 489 pursuant to s. 75(5) of the Act.

12. Forrest submits if it is successful in arguing the jurisdictional issue of the Warden to hear the applications for M 478, M 479 and M 489 the Warden would be unable to make a recommendation to the Honourable Minister for Mines ("Hon. Minister") for the grant of G 78 and it would follow the Warden would be unable to grant application for L 70.

13. In any event, if unsuccessful in its argument on the jurisdiction of the Warden to hear M 478, M 479 and M 489, Forrest seeks the Warden or the Hon. Minister, as the case requires, refuses each of the Applications. In the alternate, if the Applications are granted, Forrest seeks appropriate conditions be imposed.

Jurisdictional Issue

Submission by Forrest

14. The issue of the enlivenment of the jurisdiction of the Warden to hear the application for M 478, M 479 and M 489 were not raised as a specific issue in these proceedings until the opening submissions were lodged on 29 November 2012 and then specifically particularised in closing submissions lodged 25 February 2013.

15. Forrest submits Yarri, Quarry and Onslow had not established that the Warden has jurisdiction to hear applications for M 478, M 479 and M 489 because they have not made out the necessary jurisdictional facts that are a pre-requisite to the Warden conducting the hearing.

16. To understand this submission by Forrest is necessary to note the provisions of s. 74(1) of the Act which states as follows:

> *"**74. Application for mining lease***
>
> (1) An application for a mining lease —
>
> (a) shall be in the prescribed form; and
>
> (b) shall be accompanied by the amount of the prescribed rent for the first year of the term of the lease or portion thereof as prescribed; and

(c) shall be accompanied by the prescribed application fee; and

(ca) shall be accompanied by —

(i) a mining proposal; or

(ii) a statement in accordance with subsection (1a) and a mineralisation report prepared by a qualified person; or

(iii) a statement in accordance with subsection (1a) and a resource report; and

(d) shall be lodged in the prescribed manner."

17. According to Forrest, there are two routes, pursuant to s. 74(1) of the Act, an applicant may take in making an application for a mining lease they being either in accordance with:

a. s. 74(1)(ca)(i) of the Act, or;

b. s. 74(1)(ca)(ii) of the Act.

18. Forrest submits Yarri, Quarry and Onslow in applying for M 478, M 479 and M 489 relied upon the provisions of s. 74(1)(ca)(ii) of the Act and were obliged to have ensured the applications were accompanied by:

a. a statement in accordance with subsection (1a), and;

b. a mineralisation report prepared by a qualified person ("Mineralisation Report").

19. Yarri, Quarry and Onslow have failed to enliven the jurisdiction of the Warden submits Forrest because:

a. the documents referred to in s. 74(1)(ca)(ii) of the Act did not **accompany** the applications for M 478, M 479 and M 489, and;

b. the Warden must have received a copy of a s. 74A of the Act Report that states there is a significant mineralisation in, or under the land to which the applications for M 478, M 479 and M 489 relates.

20. Forrest submits these requirements are mandatory preconditions because the words condition the statutory function of the decision maker on the existence of the relevant facts. In support of that proposition Forrest refers to the decisions of ***David Grant & Co Pty Ltd (Receiver Appointed) v Westpac Banking Corporation (1995) 184 CLR 265*** at 279 and ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (2010) 41 WAR 134*** at [29].

Documents required by s. 74(1)(ca)(ii) did not Accompany the Applications

21. Forrest submits the first precondition to enliven the jurisdiction of the Warden requires the documents pursuant to s. 74(1)(ca)(ii) of the Act must accompany the applications for the M 478, M 479 and M 489. The word accompany submits Forrest means contemporaneously and at the same time. (see: ***Yarri Mining Ltd v Forrest & Forrest Pty Ltd [2012] WAMW 37*** at [32].)

22. This preconditions submits Forrest is reinforced by the provisions of s. 74(1AA) of the Act that allows a mining proposal to be lodged within a prescribed time (14

days) if it did not accompany the application for a mining lease. There is no such allowance, says Forrest, for an application for a mining lease that proceeds by way of s. 74(1)(ca)(ii) of the Act.

23. This requirement, submits Forrest, reflects the legislative intent that applications for mining leases that proceed by way of s. 74(1)(ca)(ii) of the Act should not be made until the information required for the purposes of the application is available to be lodged.

24. In those circumstances, Forrest submits there should be a determination by the Warden that he has no jurisdiction to hear the applications for M 478, M 479 and M 489.

Report from Director Geological Survey – s. 74A

25. Forrest submits if an application for a mining lease is accompanied by the documents referred to in s. 74(1)(ca)(ii) of the Act the Director, Geological Survey, shall give to the Minister a report prescribed by s. 74A of the Act ("s. 74A Report").

26. Accordingly, a s. 74A Report is only capable of being given by the Director, Geological Survey if an application for a mining lease is accompanied by the documents referred to in s. 74(1)(ca)(ii) of the Act.

27. This is, submits Forrest, a mandatory precondition because the words condition the statutory function of the person performing the relevant act (in this case the Director, Geological Survey) on the existence of compliant documentation. It follows submits Forrest, that any report given by the Director, Geological Survey reportedly in compliance with the provisions of s. 74A(1) of the Act is a nullity and cannot be relied upon. (see: ***Australian Crime Commission v Marrapodi [2012] WASCA 103*** at [136] – [137].)

28. Relevant to these proceedings, Forrest submits there is no s. 74A Report in existence to any of the applications for M 478, M 479 and M 489. Therefore, the Warden has not received a copy of any s. 74A Report and thus the jurisdiction of the Warden to hear the applications for M 478, M 479 and M 489 has not been enliven pursuant to s. 75(4a) of the Act.

29. In those circumstances, Forrest submits the Warden should make a determination that Yarri, Quarry and Onslow have not established the Warden had jurisdiction to hear applications for M 478, M 479 and M 489.

30. Further, Forrest submits Yarri, Quarry and Onslow are not assisted by the provisions of s. 75(6)(b) of the Act because that provision applies to the Hon. Minister on receipt of a report from the Warden. Forrest submits the Warden has no jurisdiction to conduct a hearing and therefore there can be no report by the Warden to the Hon. Minister.

Other issues with Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act

31. Forrest submits there are other issues other than the failure of the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act to accompany the applications for M 478, M 479 and M 489 being:

    a. Mr Slater was never a qualified person to prepare a Mineralisation Report for M 478 & M 479 as required by s. 74(1)(ca)(ii) of the Act.

    b. There is no evidence as to when the Mineralisation Report for M 478 & M 479 as required by s. 74(1)(ca)(ii) of the Act were lodged with the Department of Mines and Petroleum ("DMP"). The only evidence is the Mineralisation Report for M 478 & M 479 as required by s. 74(1)(ca)(ii) of the Act did not accompany the applications. There is no clear evidence that a statement of the kind required by s. 74(1)(ca)(ii) of the Act accompanied the applications for M 478 & M 479.

    c. The Mineralisation Report for M 489 was not lodged by Quarry until 30 July 2012 when the application for M 489 was lodged on 21 November 2011.

32. Forrest further maintains that even if the Mineralisation Report had accompanied the applications for M 478, M 479 & M 489 there is no evidence they were prepared by a qualified person because:

    a. The Mineralisation Reports for M 478 & M 479 were asserted to be prepared by Mr Alan Dyer,

    b. At the time of signing the Mineralisation Reports for M 478 & M 479, believed to be 28 July 2011) Mr Dyer did not claim to be a member of any of the bodies which a person preparing a mineralisation report must be a member (see: s. 74(1)(ca)(ii) & s. 74(7) of the Act and r. 25C of the Regulations).

    c. The authorisation of the Mineralisation Reports for M 478 & M 479 by Mr Herdman, who is a 'qualified person' is not the same as preparing the Mineralisation Reports as required by s. 74(1)(ca) of the Act.

    d. Mr Dyer in signing the Mineralisation Report for M 489 on 21 November 2011 asserts he is a qualified person as a member of a prescribed body. It suggests that Mr Dyer became qualified some time between 28 July 2011 and 21 November 2011.

Forrest Submissions on the Legal Principles relevant to Jurisdictional Issues

33. Forrest submits the legal principles to the establishment of jurisdictional facts as a static criterion that must be satisfied in order to enliven the statutory power in question is found in the decision of Her Honour Justice McLure in ***Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2011] WASCA 21*** at [10] – [12].

34. Further, in the context of applications for mining tenements under the Act, Forrest submits if a precondition to the exercise of the power to grant an exploration licence is not in existence or not satisfied then the grant of the exploration licence

will be invalid. (see: ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (supra)*** at [17]).

35. To that extent, Forrest refers to the decisions of Her Honour Justice McLure in ***Perrinepod Pty Ltd v Georgiou Building Pty Ltd*** **(supra)** and ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (supra)*** in which it was said that a statutory precondition to the exercise of the power to grant a tenement is not met and that a jurisdictional fact has not been satisfied which conditions the exercise of the statutory power are one and the same thing.

36. Finally, Forrest submits that if the precondition or jurisdictional fact is not satisfied, there is no jurisdiction and will (except in exceptional circumstances not presently relevant) lead to a any decision made in reliance on purported jurisdiction being treated as void, a nullity and of no legal effect. (see: ***Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597*** at [51], [63] and [152]–[153], ***Jadwan Pty Ltd v Secretary, Department of Health and Aged Care (2003) 145 FCR 1*** at [30]–[41] and [66] and ***Australian Pesticides and Veterinary Medicines Authority v Administrative Appeals Tribunal (2008) 250 ALR 448*** at [43]).

Conclusion of Jurisdictional Issue

37. In my opinion, the Warden has the necessary jurisdiction to hear the applications for M 478, M 479 and M 489 by Yarri, Quarry and Onslow.

38. Many of the preliminary issues on jurisdiction raised by Forrest where considered by Her Honour Justice McLure in ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (supra)*** in the context of the provisions of s. 69 of the Act. The principles established by McLure J in ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (supra)*** are applicable to these proceedings although in a slightly different statutory context. Before consideration of the legal principles applicable to the issue of jurisdiction it is necessary to consider the scheme of the Act applicable to the application for M 478, M 479 and M 489 by Yarri, Quarry and Onslow.

39. Section 67 of the Act provides the holder of an exploration licence, subject to the Act and to any condition to which exploration licence is subject and while the exploration licence continues in force, has the right to apply for and subject to s. 75(9) of the Act to have granted pursuant to s. 75(7) of the Act one or more mining leases or one or more general purpose leases or both in respect of any part or parts of the land the subject of the exploration licence.

40. It is not in dispute that applications for M 478, M 479 and M 489 by Yarri, Onslow and Quarry respectively are located on E 1919, E 2329 and E 1728. The applications for M 478, M 479 and M 489 are made as of right pursuant to s. 67 and s. 74 of the Act by Yarri, Onslow and Quarry.

41. Section 75(1) of the Act provides a person who wishes to object to the grant of an application for a mining lease is required to lodge a notice of objection within the

prescribed time in the prescribed manner as provided by r. 146 of the Regulations.

42. Section 75(2) of the Act is subject to the provisions of s. 75(2a) of the Act and provides in the event that no objection is lodged within the prescribed time or in the event that an objection lodged is withdrawn, the Mining Registrar shall forward to the Hon. Minister a report which recommends a grant or refusal of the mining lease and sets out the reasons for that recommendation. The provisions of s. 75(2a) of the Act prohibits the Mining Registrar from forwarding their report pursuant to s. 75(2) of the Act where the application to the mining lease is accompanied by documentation referred to in s. 74(1)(ca)(ii) of the Act unless the Mining Registrar has received a copy of the s. 74A Report stating there is a significant mineralisation in, on or under land to which the application relates. The Mining Registrar shall in their report recommend the grant of the mining lease is satisfied the applicant has complied in all respects with the provisions of the Act, or recommend the refusal of the mining lease if not so satisfied.

43. If an objection is lodged to an application for a mining lease the Mining Registrar has no power to make any report to the Hon. Minister pursuant to s. 75(2) or s. 75(2a) of the Act, unless the objection has been withdrawn.

44. Subject to the provisions of s. 75(4a) of the Act, a Warden has the power pursuant to s. 75(4) of the Act to hear an objection to an application for a mining lease lodged pursuant to s. 75(1) of the Act. Section 75(4a) of the Act provides that Warden shall not hear the application for the mining lease that has been accompanied by the documentation referred to in s. 74(1)(ca)(ii) of the Act unless the Warden has received a copy of the s. 74A Report stating there is a significant mineralisation in, on or under land to which the application relates. The Warden upon receipt of the s. 74A Report shall conduct a hearing of the proceeding and report to the Hon. Minister pursuant to s. 75(5) of the Act recommending the grant or refusal of the application for the mining lease.

45. The Hon. Minister has wide discretionary power pursuant to s. 75(6) of the Act to grant or refuse an application for a mining lease after receipt of reports from the Mining Registrar, pursuant to s. 75(2) of the Act and the Warden pursuant to s. 75(5) of the Act. Section 75(6) of the Act provides:

> "(6) On receipt of a report under subsection (2) or (5), the Minister may, subject to subsection (7), grant or refuse the mining lease as the Minister thinks fit, and irrespective of whether —
>
> (a) the report recommends the grant or refusal of the mining lease; and
>
> (b) the applicant has or has not complied in all respects with the provisions of this Act."

46. Section 75(7) of the Act make special provision in respect to applications for mining leases made by the holder of various mining tenements, but particularly

relevant to these proceedings the holder exploration licences pursuant to s. 67(1) of the Act. Section 75(7) of the Act provides:

> **"**(7) In the case of an application for a mining lease made by the holder of —
>
> (a) a prospecting licence under section 49; or
>
> (b) an exploration licence under section 67; or
>
> (c) a retention licence under section 70L,
>
> the Minister shall, subject to subsection (8) and the other provisions of this Act, grant to that holder one or more mining leases —
>
> (d) in respect of any part or parts of the land the subject of the prospecting licence, exploration licence or retention licence, as the case requires; and
>
> (e) on such terms and conditions as the Minister considers reasonable."

47. Restriction on the Hon. Minister to grant an application for a mining lease accompanied by documentation referred to in s. 74(1)(ca)(ii) of the Act is contained within s. 75(8) of the Act and provides if the s. 74A Report states there is no significant mineralisation in, on or under the land to which the application for the mining lease relates then the Hon. Minister is required to refuse the application for the mining lease.

Legal principles on Enlivening Jurisdiction

48. In ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (supra)*** at [28] – [62] Her Honour Justice McLure distinguished between a precondition to the existence of a power and a condition regulating the exercise of a power. In that regard at [28] – [29] McLure J said the follwing:

> **"***28. It is necessary to distinguish between a precondition to the existence of a power and a condition regulating the exercise of a power. The former is an essential preliminary or condition precedent to the exercise of the jurisdiction, authority or power to act; in this case, to grant an exploration licence. The failure to comply with a precondition to the existence of a power will invalidate an act done in purported exercise of that power.*
>
> *29. Eaglefield and Narnoo conceded that if an application in compliance with s 69 is a precondition to the existence of the power to grant an exploration licence under s 57(1) of the Act, the grant of an exploration licence pursuant to an application prohibited by s 69(1) will be outside the scope of s 59(6) and s 116(2) of the Act and be invalid. These concessions are in line with authority:* ***David Grant & Co Pty Ltd (Receiver Appointed) v Westpac Banking Corporation*** *(1995) 184 CLR 265, 279. Accordingly, the failure to comply with a precondition to the existence of a power under the Act must always result in invalidity. On the other hand, the failure to comply with a statutory requirement that is not a precondition to the existence of a power may (in the absence of any statutory provision to the contrary), but not must, result in invalidity."*

49. Her Honour Justice McLure went on to adopt at [37] the test for establishing the purpose of the legislation referred to the decision of ***Project Blue Sky Inc v***

Australian Broadcasting Authority (1998) 194 CLR 355 at [93] that said the following:

> *"A better test for determining the issue of validity is to asked whether it was a purpose of the legislation that an act done in breach of the provision should be invalid …in determining the question of purpose, regard must be had to 'the language of the relevant provision in the scope and object of the whole statute.'*

50. It is also relevant to note Her Honour Justice McLure in ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (supra)*** at [51] considered the provisions of s. 57(1) of the Act which is a provision in almost identical terms to that contained in s. 71 of the Act relating to applications for mining leases. Her Honour Justice McLure said the words 'on the application of any person' does not mean an application in accordance with the Act as it is inconsistent with the provisions of s. 59(6)(b) of the Act in relation to applications for exploration licences and the equivalent provision contained in s. 75(6)(b) of the Act in relation to applications for mining leases and the first limb of s. 116(2) of the Act. As noted by McLure J an application that does not comply with all the requirements of s. 58(1) of the Act in respect to an application for an exploration licence and in the case of an application for a mining lease s. 74(1) of the Act would remain an application for the purposes of the condition.

51. The relevance of this aspect of the decision by McLure J will be applied later.

Application of Legal Principles Enlivening Jurisdiction of Warden

52. In my opinion, the jurisdiction of the Warden to hear the applications for M 478, M 479 and M 489 by Yarri, Onslow and Quarry is enlivened upon the following:

    a. the lodging by Yarri, Onslow and Quarry of applications for M 478, M 479 and M 489,

    b. the lodging by Forrest of the Objections to the application for M 478, M 479 and M 489 by Yarri, Onslow and Quarry, and

    c. the receipt by the Warden of s. 74A Report from the Director, Geological Survey stating there is a significant mineralisation in, on or under the land to which the applications for M 478, M 479 and M 489 by Yarri, Onslow and Quarry relate.

53. The applications for M 478, M 479 and M 489 by Yarri, Onslow and Quarry should be seen in context in which they are made that being they are made pursuant to s. 67(1) of the Act that grants to Yarri, Onslow and Quarry the right in priority to make application for M 478, M 479 and M 489 because the underlying exploration licences are current and held by Yarri, Onslow and Quarry. In other words, no other person is entitled to apply for or be granted a mining lease over the exploration licences held by Yarri, Onslow and Quarry whilst the exploration licences remain current.

54. In applying the principles established by McLure J in ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd (supra)*** at [51] an application by any person for a

mining lease pursuant to s. 71 of the Act does not mean an application for a mining lease *in accordance with the Act*. If that was to be so then that construction would be inconsistent with the provisions of s. 75(6) of the Act and the first limb of s. 116(2) of the Act.

55. An application for a mining lease that does not comply with all the requirements of s. 74(1) of the Act remains, in my opinion, an application for a mining lease but cannot be advanced for consideration either by the Mining Registrar or, in the event of an objection being lodged, heard by the Warden until a Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act is lodged and a s. 74A Report that states there is significant mineralisation in, on or under the land to which the application for the mining lease relates.

56. I do not accept the Director, Geological Survey is without power to prepare a s. 74A Report because the mineralisation report pursuant to s. 74(1)(ca)(ii) of the Act did not accompany the application for the mining lease when it was lodged.

57. In my opinion, the precondition for the exercise of the power by the Director, Geological Survey to prepare a s. 74A Report **is not when** the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act is lodged but **that it is lodged** despite any non-compliance with the requirement of the Act. The requirement for the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act to "accompany" the application for the mining lease is, in my opinion, a condition that regulates the exercise of the power. The failure to comply with that statutory requirement does not amount to a precondition to the existence of the power by the Director, Geological Survey and, in the absence of any statutory provisions, may result in invalidity.

58. The provisions of s. 75(6)(b) of the Act gives the Hon. Minister the power to grant or refuse an application for a mining lease where a Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act has been lodged contrary to the provision of the Act not withstanding any recommendation by the Warden or the Mining Registrar and notwithstanding the applicant has not complied in all respects with the provisions of the Act. The power of the Hon. Minister to grant the application for a mining lease is dependent upon the land applied for being open for mining, an application by any person for the grant of a mining lease, the s. 74A Report confirming mineralisation, and receipt of a report from the Warden or the Mining Registrar.

59. In my opinion, the failure for the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act to accompany the application for a mining lease is an irregularity in the making of the application itself and not a breach of a precondition for the exercise of a power by either the Director, Geological Survey, the Warden or the Mining Registrar as the case dictates.

60. In my opinion, the wide discretion of the Hon. Minister pursuant to s. 75(6)(b) of the Act indicates a failure to comply with the provisions of the Act may be overlooked by the Hon. Minister in making his or her decision to grant or refuse

an application for a mining lease provided the Director, Geological Survey in the s. 74A Report states there is a mineralisation in or on the ground the subject of the application and the s. 74A Report has been obtained after the applicant has lodged the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act and the Warden or the Mining Registrar then exercising their respective powers under the Act.

61. It is noted there is an obligation on a Mining Registrar pursuant to s. 75(3) of the Act when reporting to the Hon. Minister to recommend refusal of an application for a mining lease if the application has not complied in all respects the provision of the Act. No such similar provision exists pursuant to s. 75(5) of the Act where the Warden hears an objection to an application for a mining lease.

62. In my opinion, the failure to comply in the lodging of the application for the mining lease and associated documents may have less influence upon the decision of the Hon. Minister whether to grant or refuse the application pursuant to s. 75(6) of the Act given the provisions of s. 75(7) of the Act where an application for a mining lease is made pursuant to s. 67(1) of the Act by the holder of an exploration licence who has a right in priority for the grant of a mining lease or general purpose lease.

63. Accordingly, for those reasons I am of the opinion the power of the Director, Geological Survey was enlivened by receipt from of the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act and the issue of the s. 74A Report stating there is significant mineralisation in or on the ground the subject of application for M 478, M 479 and M 489 by Yarri, Onslow and Quarry and the Warden's power was then enlivened to hear the applications for M 478, M 479 and M 489. That the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act did not accompany the applications for M 478, M 479 and M 489 when they were lodged is a matter for the Warden to report to the Hon. Minister with the recommendation from hearing. I do not accept the power of the Warden or that of the Director, Geological Survey is conditional upon whether the applications for M 478, M 479 and M 489 are accompanied at the same time as the documents prescribed by s. 74(1)(ca) of the Act provided those documents are lodged.

64. It follows the noncompliance by Yarri, Onslow and Quarry to ensure the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act accompanied the applications for M 478, M 479 and M 489 is a matter that should be reported to the Hon. Minister.

65. Forrest submits there is no evidence to suggest the DMP ever received from Yarri, Onslow and Quarry the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act in support of the applications for M 478, M 479 and M 489. I do not accept that proposition. Exhibit 10 being an e-mail dated 14 August 2012 from Mr Don Flint the acting Director, Geological Survey confirms he received documents in compliance with to s. 74(1)(ca)(ii) of the Act in support of the applications for M 478, M 479 and M 489. Mr Flint also provides in the same e-mail the s. 74A Report stating there is a mineralisation in or on the ground the

subject of the applications for M 478, M 479 and M 489 by Yarri, Onslow and Quarry. That same e-mail from Mr Flint was also forwarded to the then Warden's Court Officer on or about 14 August 2012. I do not accept the Warden was without power pursuant to s. 75(4a) of the Act to hear applications for M 478, M 479 and M 489 by Yarri, Onslow and Quarry.

66. Further, I do not accept the submission by Forrest that Mr Darren Herdman is not qualified person described by s. 75(1)(ca)(ii) of the Act simply because he is noted on the document control as having authorised the work although he has signed it as a co-author. The word prepare is not defined by the Act and it should therefore be ascribed its normal meaning. The *Australian Oxford Paperback Dictionary 3rd Edition* defines "prepare" as "make or get ready." I am satisfied that Mr Hardman by authorising and signing as a co-author of the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act, prepared that report. Whatever deficiencies may exist in respect to Mr Dyer being a "qualified person" pursuant to s. 75(1)(ca)(ii) of the Act for the preparation of the Mineralisation Reports is cured, in my opinion, by the involvement of Mr Herdman in the preparation of the reports.

Grounds of Objection

Non-Compliance with the Act

67. Forrest submits 5 instances of non-compliance with the requirements of the Act by Yarri, Onslow and Quarry in respect to applications for M 478, M 479 and M 489, 4 instances of non-compliance with the requirements of the Act by Yarri in respect to application for G 78 and 3 instances of non-compliance with the requirements of the Act by Quarry in respect to L 70. Some of the instances of non-compliance with the Act are similar in nature and others have been dealt with in respect to the jurisdictional issue.

Failure to Send Notices to Forrest in accordance with the Act.

68. Common to all of the applications for M 478, M 479, M 489, G 78 and L 70 is the submission by Forrest that Yarri, Onslow and Quarry failed to comply with the provisions of s. 118 of the Act by serving notice of the applications to Forrest.

69. According to Forrest, notice of applications for M 478, M 479, M 489, G 78 and L 70 were sent by Yarri, Onslow and Quarry to Forrest at "Forrest & Forrest Pty Ltd, PO Box 1285, South Perth WA 6951" and not to the correct address of "42 John Street Cottesloe, Western Australia" being the registered office recorded for the pastoral lease known as Minderoo since 10 September 2009.

70. Despite service of notice of applications for M 478, M 479, M 489, G 78 and L 70 pursuant to s. 118 of the Act occurring at the wrong address it is noted that Forrest lodged the Objections within the time prescribed by the Act and does not appear to have been prejudiced by being unable to participate in or present a wholesome argument in these proceedings.

71. On 11 December 2012, orders were made extending time until 21 December 2012 in which Yarri, Onslow and Quarry were to give notice to Forrest pursuant to s. 118 of the Act. On 12 December 2012 service of applications for M 478, M 479, M 489, G 78 and L 70 were forwarded to Forrest at the correct address.

72. This identical issue was raised and dealt with by me in ***Yarri Mining P/L v Forrest & Forrest [2012] WAMW 37*** at [13] to [16]. The failure to comply with the requirements of the Act will be brought to the attention of the Hon. Minister and noted by the Warden.

Jurisdictional Issue

73. I do not propose to again deal with the issue of jurisdiction the Director, Geological Survey and the warden pertaining to the Mineralisation Report pursuant to s. 74(1)(ca)(ii) of the Act and the s. 74A Report. That issue has already been adequately addressed.

Marking Out

74. Forrest submits applications for M 478, M 479, M 489, G 78 and L 70 by Yarri, Onslow and Quarry were not marked out in accordance with the Act and Regulations. In support of this ground of the Objection, Forrest engaged the services of Mr Phillip Richards ("Mr Richards"), a licensed surveyor, who prepared a report on marks he observed and measurements he took in respect to the pegging of M 478, M 479, M 489, G 78 and L 70 by Yarri, Onslow and Quarry. Mr Richards said he attended at the site of M 478, M 479, M 489, G 78 and L 70 on 27 and 28 June 2012.

75. The report by Mr Richards identifies a number of issues with the marking out of M 478, M 479, M 489, G 78 and L 70 by Yarri, Onslow and Quarry including:

    a. clearly identifiable trenches of leased a 1 metre long from each post not evident as they begin of more than 20 cm from the post,

    b. the trenches are also not in the general direction of the boundaries'

    c. a number of posts are less than 1 metre above the ground.

76. Evidence was given by Mr Slater that he was responsible for the marking out of M 478, M 479, M 489, G 78 and L 70 on behalf of Yarri, Onslow and Quarry. Mr Slater said he was assisted and accompanied by Mr John Wynne ("Mr Wynne") during the marking out. The evidence of Mr Slater was he was compliant with the Act and Regulations. Mr Slater said he marked out M 478 on 18 July 2011 at 4.08 pm, M 479 on 18 July 2011 at 5.25 pm, M 489 on 13 November 2011 at 3.00 pm, G 78 on 18 July 2011 at 11.00 am and L 70 on 12 November 2011 at 6.00 pm.

77. The report of Mr Richards contains a number of photographs that show the issues he has with the marking out by Mr Slater and what he considers does not comply with the marking out the provisions of the Act and Regulations. Those photographs also depict the very issues that draw into question the reliability of the evidence of Mr Richards.

78. It is clear from the photographs that the passage of time from marking out by Mr Slater to the visit of Mr Richards to the location of M 478, M 479, M 489, G 78 and L 70, being some 11 months in respect to M478, 479 & G 78 and some 7 months in respect to M 489 and L 70, that rain has fallen and has filled in or partially filled in trenches, moved the topsoil and caused grass to grow in and around the posts and the trenches. There is also clear evidence that many posts have either fallen over or been knocked over by a man, beast or nature. In my opinion, given the passage of time since marking out and the visit by Mr Richards it is not possible to conclusively find the matters complained of by Forrest were deficiencies in the manner in which Mr Slater marked out M 478, M 479, M 489, G 78 and L 70 on behalf of Yarri, Onslow and Quarry. I regard the evidence of Mr Richards to be "stale" in the sense that it is unreliable given the passage of time from marking out to his visit.

79. The reliability of evidence of defects in marking out has been the subject of comment by myself and others in various cases including ***Yarri Mining P/L v Forrest & Forrest [2012] WAMW 37***, ***Bearing - Bore GM v Horizon Mining Ltd [2002] WAMW 17*** and ***Gilchrist v Pattison (7 April 1988) 7 AMPLA Bull 147***. I reject this ground of the Objections and am satisfied the marking out by Mr Slater for M 478, M 479, M 489, G 78 and L 70 on behalf of Yarri, Onslow and Quarry occurred in accordance with the provisions of the Act and Regulations.

Excessive Area – G 78

80. Forrest objects to the size of the area applied for by Yarri for G 78. Section 86(3) of the Act provides an application for a general purpose lease shall not exceed 10 hectares unless the Hon. Minister is satisfied a larger area is required. The total area applied for by Yarri in application for G 78 is 128 hectares.

81. Section 87(1) of the Act provides for the purposes for which a general purpose lease may be applied for and granted. The purposes that Yarri intends to use G 78 was specified in its application as the following:

> *"…the stockpiling of quarry materials, storage of plant and equipment, workshop, storm shelters, precast manufacturing of concrete products, drilling equipment, mining plant storage, truck transport depot, camp facilities, water storage and, lay down hard stand for mining equipment and storage of piping."*

82. By letter dated 27 July 2011, Yarri provided an expanded list of purposes it intends to use the land with application for G 78 if granted. Those purposes are as follows:

> *"Stockpiling of quarry products, storage of plant and equipment, workshop facilities, hard stand for materials precast products, concrete batching plant, hot mix asphalt plant, transport road trains and workshop facilities, camp accommodation and general storage facilities, large water storage dam for water storage, lay down hard stand for mining equipment, hard stand for pipe storage, precast concrete products facility, cranes and forklift depot, stockpile area for sorting out rocks and armour, crushing and screening plant operations, wash down bay for quarantine purposes."*

83. Yarri in the same letter specified that G 78 will be connected with mining operations conducted by Yarri, Onslow, Quarry Park and Mr Slater on mining tenements granted and others to be granted.

84. Section 86(5) of the Act provides where an applicant for a general purpose lease applies for land in excess of 10 hectares the application shall be accompanied by a statement specifying the reasons why such greater area of land is required. By letter dated 24 July 2011, Yarri specified the reasons why an area in excess of 10 hectares is required. I do not propose to recite the content of that letter save to say it is found as annexure AWS 23 to the affidavit of Mr Slater sworn 24 February 2012 and marked as Exhibit 1 in these proceedings.

85. Forrest submits Yarri has not adequately provided reasons why it needs 128 hectares being approximately 13 times the usual area of a general purpose lease of 10 hectares. Further, Forrest submits Yarri has not stated what area each purpose requires, why 10 hectares will not be enough and has not provided any plan for the proposed operations on G 78 if granted. Forrest further submits such approach by Yarri does not allow an affected person to comment on any likely prejudice or injurious affection that may be suffered and it denies the Minister the capacity to make a considered decision under s. 86(3) of the Act.

86. Forrest submits some of the purposes Yarri seeks the grant of G 78 is to carry out some operations or processes on behalf of others or for others to conduct operations on G 78. Further, Forrest submits Yarri did not produce any diagrammatic displays that described its proposed layout and operations within the area of G 78 until the eve of the hearing.

87. In those circumstances, Forrest submits Yarri has no development proposal for the use of the land contained within G 78 and on its face Yarri intends to establish an industrial precinct to service, generally, the various mining developments that are underway adjacent to Minderoo.

88. I do not accept the submissions by Forrest that Yarri did not specify the purpose it intends to use the land that comprises G 78 or the reason or reasons it seeks the grant of 128 hectares being an area greater than the area provided for by the Act. It is noted Yarri believes an area of 46.7 hectares may be taken from the area applied for in G 78 pursuant to a notice of intention to take land.

89. Section 87 of the Act provides three specific purposes for which the land that comprises a General Purpose Lease may be used. The first of the purposes provides for the erecting, placing and operating machinery in connection with mining operations. The second purpose is for depositing or treating thereon minerals or tailings obtained from any land in accordance with the Act. The third purpose specifies the land may be used for any other specified purpose directly connected with mining operations.

90. The Regulations do not prescribe any specific purpose for which a general purpose lease may be granted. That should be contrasted with the provisions of s.

91(1) of the Act and r. 42B of the Regulations relating to applications for miscellaneous licence that prescribe some 24 specific purposes.

91. In my opinion, Parliament in prescribing two different types of mining tenements, being a miscellaneous licence and a general purpose lease, recognised the different purposes each type of mining tenement would play in mining operations.

92. Accordingly, in my opinion, a general purpose lease was intended by Parliament to be used for erecting, placing and operating machinery in connection with mining operations, for depositing or treating minerals or tailings obtained from any land in accordance with the Act and for using it in any specified purpose directly connected with mining operations. In other words, a general purpose lease is intended to be used for the storage and operation of machinery associated with mining operations and generally the depositing or treating minerals or tailings that had been produced as a consequence of mining operations. At this time Parliament has not seen fit to prescribe any other purpose for the grant of a general purpose lease.

93. Further, in my opinion, miscellaneous licence was intended by Parliament to be used for the provision of miscellaneous infrastructure facilities to support mining or mining operations. To remove any doubt as to Parliament's intention of the purpose for which a miscellaneous licence could be applied for and granted it prescribed those purposes in r. 42B of the Regulations.

94. In applying that interpretation to the application for G 78 by Yarri it appears, in my opinion, Yarri labours under a misapprehension as to the type of mining tenement it should have applied for given the proposed purposes it intends to use the land within application for G 78, if granted. That misapprehension also impacts on the veracity of the needs of Yarri for the grant of 128 hectares of land.

95. I do not accept the land the subject of application for G 78 by Yarri can be used for the following purposes:

i. *the stockpiling of quarry materials,*

ii. *storage of plant and equipment,*

iii. *workshop,*

iv. *storm shelters,*

v. *precast manufacturing of concrete products or concrete batching plant,*

vi. *truck transport depot,*

vii. *camp facilities and camp accommodation,*

viii. *water storage, including large water storage dam for water storage,*

ix. *storage of piping or hard stand for storage of pipes,*

x. *hot mix asphalt plant,*

xi. *transport road trains and workshop facilities,*

xii. *general storage facilities, and*

xiii. cranes and forklift depot,

96. Upon the evidence of Mr Slater, I am of the opinion the above purposes may fall within the purposes prescribed by r. 42B of the Regulations specifically mine site accommodation facility, water management facility, storage or transportation facility for minerals or mineral concentrate, mine site accommodation facility and workshop and storage facility. However, having said that it is noted the provisions of s. 91(6) of the Act provides a miscellaneous licence shall not be granted unless the purpose for which it is granted is directly connected with mining operations. Whether the purpose is directly connected with mining operations is a matter of fact to be determined by the Warden or Mining Registrar before grant. As these proceedings concern an application for a general purpose lease it is not necessary that I make any determination of fact under s. 91(6) of the Act.

97. The purposes of lay down hard stand for mining equipment, stockpile area for sorting out rocks and armour rock, crushing and screening plant operations and wash down bay for armour rock and other mined material for quarantine purposes fall, in my opinion, within the prescribed provisions of s. 87 of the Act for which a general purpose lease can be applied for and granted.

98. The purposes of the creation of a hot mix asphalt plant, precast manufacturing of concrete products or concrete batching plant, creation of a depot for cranes and forklift and a transport depot for road trains and associated workshop facilities or a truck transport depot are not associated with mining operations. I do not accept the above purposes Mr Slater says Yarri proposes to establish on G 78, if granted, in concert with business partners falls within the purposes for which either a miscellaneous licence or a general purpose lease may be granted.

99. Forrest submits Yarri seeks to establish an industrial precinct to service various developments in an around Minderoo. The evidence of Mr Slater was that he has been asked to provide land to establish accommodation, lay down areas and other services and facilities for contractors with whom he proposes to enter into a business relationship or has or is in a business relationship including Rocla and Downer EDI. The evidence of Mr Slater was he is the only employee of Quarry Park whilst his other companies including Yarri, and Onslow have no employees.

100. The evidence of Mr Slater does not satisfy me that Yarri is attempting to establish an industrial precinct to service various developments in an around Minderoo. However, I am satisfied that Yarri intends, if G 78 is granted, to use or permit the land within G 78 to be used for purposes outside the provisions of the Act and Regulations.

101. Notwithstanding the above, I am satisfied upon the evidence of Mr Slater that Yarri intends to use at least part of the land within application for G 78 for the purposes prescribed by the Act. I do not accept Yarri requires all the 128 hectares it has applied for in G 78. According to Mr Slater and his hand drawn map, the

northern part of the two bells that comprise G 78 appears to be the area which Yarri intends to use for purposes prescribed by s. 87 of the Act.

102. Notwithstanding any commercial or other pressures that may exist in the accessibility to land for the purposes of the establishment of facilities for industry or accommodation in areas where mining or other activity has created high demand, it is inappropriate the provisions of the Act and Regulations be used to make up any shortfall or circumvent proper planning or other processes that may be required by other Acts of Parliament.

Failure to State Purpose and the nature of the Purpose of Use – L 70

103. Forrest submits application for L 70 by Quarry is a nullity upon being lodged without a purpose stated.

104. In support of that submission, Forrest submits that pursuant to s. 91(1) of the Act an application for a miscellaneous licence is to be for one or more of the purposes and is required to be made, pursuant to s. 91(3)(a) of the Act, on the prescribed form. The purposes for which a miscellaneous licence can be granted are prescribed in r. 42B of the Regulations.

105. Forrest submits that on 17 November 2011, Quarry lodged an application with the Mining Registrar at Karratha to amend application for L 70 using a Form 30 by stating the purpose of the application being "a road and a pipeline." Forrest further submits there is no statutory power pursuant to r. 84E of the Regulations to use a Form 30 to amend or correct the application for L 70.

106. I do not accept application for L 70 by Quarry is a nullity because the purpose of the application is not stated.

107. In my opinion, there is no statutory obligation, pursuant to s. 91(1) of the Act or within the Regulations, including Part V of the Regulations, or within the Form 21 Application for Mining Tenement for an applicant for a Miscellaneous Licence to state the purpose or purposes of the application. Whether the application for a Miscellaneous Licence can be granted is not, in my opinion, dependent upon the categorisation by the applicant of its stated purpose pursuant to r. 42B of the Regulations, but is determined by the Warden or the Mining Registrar after consideration of the content of the r. 37(3) of the Regulations Statement to determine whether what is proposed by the applicant falls within the provisions of r.42B of the Regulations and whether that purpose is directly connected with mining operations pursuant to s. 91(6) of the Act.

108. The assessment and determination of those factors to satisfy the application for a miscellaneous licence is for one or more of the prescribed purposes are a matter for the Mining Registrar and the Warden aided by the powers to request further information from the applicant pursuant to s. 42(3) of the Act.

109. It follows, in my opinion, the application to amend the Register by Quarry was unnecessary because the Director-General of Mines may pursuant to s. 84C(c) of the Act place such particulars relating to an application for a mining tenement as

he or she considers necessary within the Register, that including any particulars from the r. 37(3) of the Regulations Statement or amend the Register pursuant to s. 84C(a)(ii) of the Act following grant to reflect the purpose for which the Warden or Mining Registrar granted the miscellaneous licence.

Impact upon Pastoral Operations, the Environment on Minderoo and Public Interest Considerations

110. Forrest called evidence from the station manager at Minderoo, Mr Phillip Clark ("Mr Clark"). Mr Clark has been involved in the pastoral industry almost all of his life. The evidence of Mr Clark outlined the various seasons, seasonal work patterns at Minderoo, the numbers of cattle Minderoo runs and has the capacity to run.

111. Mr Clark expressed concerns regarding the effects mining river sand from the riverbed of the Ashburton River may have upon erosion of the riverbanks not only at the site of mining but at other places along its length, the capacity of the Ashburton River to replenish river sand after sand has been mined from the riverbed, the potential for erosion on and along the banks of the Ashburton River, the effect mining may have upon the capacity of the water table to replenish, the effect mining may have on the availability of sufficient water to enable Minderoo to carry out growing of fodder and pasture and watering of cattle, the effects mining will bring by way of increased traffic flow along roads and tracks causing interference with mustering, creating excessive dust and noise that has the capacity to frighten cattle from watering points and pasture, the effects of increased cattle strike by trucks causing the death of beasts and the effects on tourism at the 3 and 5 mile pool area of the Ashburton River during the dry season.

112. Forrest commissioned reports authored by Dr Mike Bamford ("Dr Bamford") and Dr James Davies (Dr Davies") in support of the Objections regarding the effects mining operations in the riverbed of the Ashburton River may have upon the environment generally including water tables, surrounding woodlands, fauna and flora. Dr Bamford and Dr Davies both gave oral evidence and produced their reports. Further, Forrest tendered into evidence a copy of a report from Pennington Scott regarding the water table and Ashburton River prepared for the Minderoo Irrigation Project.

113. A number of photographs were produced into evidence by both Forrest and Yarri that depict erosion of the riverbanks of the Ashburton River. With respect to those photographs, none of the witnesses who were shown the photographs was able to say what the cause of the erosion and no one was able to say whether the erosion was caused or contributed to by sand mining in the bed of the Ashburton River.

114. The evidence of Dr Davies and Dr Bamford suggest further reports and studies may be necessary to establish the replenishment rates of sand into the bed of the Ashburton River based on, inter alia, local climatic conditions, seasonal and

historic rainfall within the region and historic rates of flow of water down the Ashburton River.

115. Further, the evidence in these proceedings that studies and collection of data concerning sediment and water flows in the Ashburton River has occurred in the past and approval has previously been granted for the mining of river sand closer to the mouth of the Ashburton River and the removal of river sand has occurred from the bed of the Ashburton River for construction purposes on Minderoo.

116. Forrest submits the camp sites at 3 and 5 Mile Pools located near the mouth of the Ashburton River are significant tourism sites and the public interest is not served by allowing mining of river sand in the Ashburton River. In my opinion, any effects that mining may have on the tourist camp sites at 3 and 5 Mile Pools located near the mouth of the Ashburton River is best addressed by a consideration of the impact, if any, that may be created by sand mining in the river bed of the Ashburton River upstream from the camp sites as is proposed.

117. In ***Yarri Mining P/L v Forrest & Forrest P/L [2012] WAMW 27*** at paragraphs [70] to [94] I considered previous decisions on the application of the law applicable to dealing with objections based on impacts of proposed mining on pastoral operations, potential claims for compensation under the Act, and public interest considerations where objections are based on environmental grounds and other public interest considerations. In the above decision at [90] – [91] I adopted the rationale of Warden Calder in ***Baxter & ors v Serpentine – Jarrahdale Ratepayers and Residents Association, (Perth Wardens Court on 8 July 1999, Vol 14 No 2)*** as being the correct approach to be applied in these proceedings. I do not consider there is any reason to adopt a different approach in these proceedings.

118. Forrest submits sufficient expert evidence exists to demonstrate there is a potential environmental impact on the Ashburton River and its surrounds should the applications by Yarri, Quarry and Onslow be recommended for grant or granted. To that extent, Forrest refers to the decision in ***Darling Range South Pty Ltd v Ferrell & ors [2012] WAMW 12*** in which the lack of studies on the potential impact of mining in the area surrounding an application for a mining tenement. That application was recommended for refusal.

119. In my opinion, the factual circumstances in ***Darling Range South Pty Ltd v Ferrell & ors (supra)*** were significantly different to those that exist in these proceedings in that the area applied for was large and covered significant areas of private land, state forest and timber reserves. Different considerations applied to the potential environmental impacts including the economic and social impacts on many people and communities within a populated and economically significant region within the South West of this State. On that basis alone the decision in ***Darling Range South Pty Ltd v Ferrell & ors (supra)*** can be distinguished from the circumstances that prevail in these proceedings.

120. The issues raised by Mr Clark relate to the impact mining may have on pastoral operations on Minderoo. I do not accept that mining and mining operations as proposed by Yarri, Quarry and Onslow cannot co-exist with the pastoral operations on Minderoo provided there is imposed and enforced appropriate conditions upon the grant of the mining tenements. What is proposed to be conducted upon Minderoo by Yarri, Quarry and Onslow covers an area that is relatively small in comparison with the size of Minderoo. That is not to diminish the potential cumulative effects multiple mining operations may one day have upon the ability of Minderoo to effectively conduct its pastoral operations. However, I do not accept that in the circumstances of this proceeding that time has been reached.

121. I do not accept the submissions by Forrest that this is one of the first time the Warden or the Hon. Minister have been asked to approve river mining in Western Australia. Mining of river sand has occurred in rivers in the north of Western Australia for years. The Gascoyne and Ord Rivers are two examples of rivers that have been the subject of the grant of various mining tenements for the mining of river sands from their river beds in the past. I do not accept it is the case that considerations of the effects of mining in riverbeds of seasonal flowing rivers the tropical regions of Western Australia will be new to those officers within DMP charged with the responsibility of assessing and considering such applications to mine.

122. Further, I do not accept upon the evidence presented in these proceedings that a conclusion can be reached the mining proposed by Yarri, Quarry and Onslow within the river bed of the Ashburton River and the associated infrastructure areas to support mining operations will result in significant impact upon the environment including water tables, surrounding woodlands, flora and fauna and erosion of riverbanks.

123. The reports prepared by SLR on behalf of Onslow, Yarri and Quarry in support of the various applications for mining tenements and the reports of Dr Davies, Dr Bamford and Pennington Scott do, in my opinion, provide a significant basis upon which officers of DMP can assess and make determinations or issue requisitions for further information to be supplied by Yarri, Onslow and/or Quarry regarding the impacts that mining may have upon the riverbed of the Ashburton River or the other areas to which these proceedings relate for the purposes of the creation of conditions to protect the environment.

Conclusions

Applications for M 478, M 479 & M 489

124. I am of the opinion applications for M 478, M 479 & M 489 by Yarri, Onslow and Quarry should be recommended to the Hon. Minister for grant subject to the imposition of various conditions.

125. In reaching that opinion, I draw the attention of the Hon. Minister to the failure of Yarri, Onslow and Quarry to serve notices in accordance with s. 74(3) and s. 118

of the Act within the prescribed time. However, I also draw the attention of the Hon. Minister to the fact that Yarri, Onslow and Quarry did obtain an extension of time to serve the required notices and did comply with the terms of the extension of time.

126. I also draw to the attention of the Hon. Minister to the failure of Yarri, Onslow and Quarry to ensure the Mineralisation Reports pursuant to s. 74(1)(ca)(ii) of the Act accompanied the applications for M 478, M 479 & M 489. However, I also draw the attention of the Hon. Minister to the fact that Yarri, Onslow and Quarry lodged the Mineralisation Reports with the Mining Registrar some months after the applications for M 478, M 479 & M 489 were lodged in accordance with requests by various staff at DMP.

127. I do not accept the above failures by Yarri, Onslow and Quarry has caused prejudice to Forrest to such an extent that a recommendation for refusal should be made to the Hon. Minister.

Application for G 78

128. I am of the opinion application for G 78 by Yarri should be recommended to the Hon. Minister for grant subject to the following:

a. the imposition of various conditions,

b. the area of the grant not exceeding 10 hectares,

c. Yarri identifying the precise area it intends to develop and utilise within the 10 hectares, and,

d. the area of G 78 being used only for the purposes prescribed by s. 87(1) of the Act.

129. I draw to the attention of the Hon. Minister that Yarri failed to serve notice in accordance with s. 118 of the Act within the prescribed time. However, I draw the attention of the Hon. Minister that Yarri, did obtain an extension of time to serve the required notice and did comply with the terms of the extension of time.

130. I do not accept the above failure by Yarri to comply with s. 118 of the Act has caused prejudice to Forrest to such an extent that a recommendation for refusal should be made to the Hon. Minister.

131. I also draw the attention of the Hon. Minister to paras [80] to [102] of this decision to establish the reason for my recommendations in b, c & d in para [128] above.

Application for L 70

132. Subject to the grant by the Hon. Minister of application by Quarry for M 489, I grant to Quarry, for the purposes of a road and pipeline, application for L 70 comprising of the land described within the Form 21 lodged by Quarry with the Mining Registrar at Karratha on 16 November 2011 and subject to the imposition of conditions.

133. I note Quarry failed to serve notice upon Forrest pursuant to s. 118 of the Act within the prescribed time. However, I do note an extension of time was granted to Quarry to serve that notice and it was served in compliance with the terms of the extension.

134. I do not accept the above failure by Quarry to comply with s. 118 of the Act has caused prejudice to Forrest to such an extent the L should not be granted.

Conditions

Applications for M 478, M 479 & M 489

135. It is not possible to make final and detail recommendations to the Hon. Minister of all appropriate conditions to be imposed on the grant of applications for M 478, M 479 & M 489 for the reasons expressed above.

136. However, it is possible to recommend to the Hon. Minister a number of conditions that Counsel for Forrest, Yarri, Onslow and Quarry agree and submit should be imposed. Those conditions are contained in Annexure 1, attached. Accordingly, I recommend to the Hon. Minister the conditions contained within Annexure 1 be imposed on the grant of applications for M 478, M 479 & M 489.

137. I agree with Counsel for Forrest the Hon. Minister may, after consideration of the recommendations for applications for M 478 & M 479, seek the imposition pursuant to s. 84 of the Act additional conditions aimed at the prevention or reduction or making good of any injury to the land the subject of the proposed grant. The Hon. Minister may in those circumstances afford to Forrest, Yarri, Onslow and Quarry the opportunity to make submissions in writing on those conditions before they are imposed.

Application for G 78

138. It is also not possible to make final and detail recommendation to the Hon. Minister of all appropriate conditions to be imposed on the grant of application by Yarri for G 78 for the reasons expressed above.

139. It is possible to recommend to the Hon. Minister a number of conditions that Counsel for Forrest and Yarri agree and submit should be imposed. Those conditions are identical to those contained in Annexure 1, attached. Accordingly, I recommend to the Hon. Minister the conditions contained within Annexure 1 be imposed on the grant of application for G 78.

140. I agree with Counsel for Forrest the Hon. Minister may, after consideration of the recommendations for applications for G 78, seek the imposition pursuant to s. 84 of the Act of additional conditions aimed at the prevention or reduction or making good of any injury to the land the subject of the proposed grant. That submission by Forrest has, in my opinion, significant weight given paras [80] to [102] of this decision and the reasons for my recommendations in b, c & d of para [128] above.

141. The Hon. Minister may consider, in those circumstances, to afford both Forrest & Yarri the opportunity to be heard by making submissions in writing on any proposed conditions before they are imposed.

Application for L 70

142. I consider the appropriate conditions to be imposed on the grant of L 70 are those contained within Annexure 1, attached.

Recommendations to Hon. Minister

143. For the above reasons, I recommend to the Hon. Minister that applications by Yarri, Onslow and Quarry for M 478, M 479 & M 489 be granted subject to the imposition of the conditions contained within Annexure 1, attached, and subject to the imposition by the Hon. Minister of any other conditions deemed appropriate pursuant to s. 84 of the Act.

144. Further, for the above reasons I recommend to the Hon. Minister that application for G 78 by Yarri should be granted subject to the following:

a. the imposition of the conditions contained within Annexure 1, attached, and the imposition by the Hon. Minister of any other conditions deemed appropriate pursuant to s. 84 of the Act,

b. the area of the grant not exceeding 10 hectares,

c. Yarri identifying the precise area it intends to develop and utilise within the 10 hectares, and,

d. the area of G 78 being used only for the purposes prescribed by s. 87(1) of the Act.

Grant of L 78

145. Subject to the grant by the Hon. Minister of the application by Quarry for M 489, I grant to Quarry, for the purposes of a road and pipeline, application for L 70 comprising of the land described within the Form 21 lodged by Quarry with the Mining Registrar at Karratha on 16 November 2011 and subject to the imposition of the conditions contained within Annexure 1, attached.

"ANNEXURE 1"

Schedule of Proposed Conditions for Recommendation for the Grant of Applications for M 478, M 479, M 489 & G 78 and for the Grant of Application for L 70

a. Survey;

b. All surface holes drilled for the purpose of exploration are to be, capped, filled or otherwise made safe immediately after completion;

c. All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines and Petroleum (DMP). Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, DMP;

d. All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings is being removed from the mining tenement prior to or at the termination of exploration program;

e. Unless the written approval of the Environmental Officer, DMP is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all top soil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations;

f. The Lessee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs, water carting equipment or other mechanised equipment;

g. The Lessee or transferee, as the case may be, shall within 30 days of receiving written notification of :-

    a. the grant of the Lease; or

    b. registration of a transfer introducing a new Lessee;

    advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer;

h. The Lessee submitting a plan of proposed operations and measures to safeguard the environment to the Director, Environment, DMP for

his assessment and written approval prior to commencing any developmental or productive mining or construction activity;

i. Mining on any road, road verge or road reserve being confined to below a depth of 15 metres from the natural surface;

j. All rubbish and scrap being progressively disposed of in a suitable manner;

k. Any alteration or expansion of operations within the lease boundaries beyond that outlined in the above document(s) not commencing until a plan of operations and a programme to safeguard the environment are submitted to the Executive Director, Environment Division, DMP for his assessment and until his written approval to proceed has been obtained;

l. The development and operation of the project being carried out in such a manner so as to create the minimum practical disturbance to the existing vegetation and natural landform, to the satisfaction of the Executive Director, Environment Division, DMP;

m. At the completion of operations, all buildings and structures being removed from site or demolished and buried to the satisfaction of the Executive Director, Environment Division, DMP;

n. Placement of waste material must be such that the final footprint after rehabilitation will not be impacted upon by pit wall subsidence or be within the zone of instability;

o. On the completion of operations or progressively where possible, all waste dumps, tailings storage facilities, stockpiles or other mining related landforms must be rehabilitated to form safe, stable, non-polluting structures which are integrated with the surrounding landscape and support self-sustaining, functional ecosystems comprising suitable, local provenance species or an alternative agreed outcome to the satisfaction of the Executive Director, Environment Division, DMP;

p. The Lessee submitting to be Executive Director, Environment Division, DMP, a brief annual report outlining the project operations, mine site environmental management and rehabilitation work undertaken in the previous 12 months and the proposed operations, environmental management plans and rehabilitation programs for the next 12 months. This report to be submitted each year within 60 days of the anniversary date of the grant of the Lease;

q. Wherever any part of a road intersects an existing fence, the holder shall where necessary to construct a gate or livestock grid having such dimensions and be constructed of such materials and be of such

standard as agreed with the pastoralists or as determined by the Environmental Officer, DMP;

r. Activities requiring the abstraction of water from any waterway, wetland or drain is prohibited unless the Department of Water has granted an abstraction licence;

s. The Lessee taking all reasonable and practical measures to prevent or minimise the generation of dust from all material handling operations, stockpiles, open areas and transport activities. The type of any water to be used in dust suppression by the Lessee to be approved in writing by the Executive Director, Environment Division, DMP;

t. A Mine Closure Plan is to be submitted in the Annual Environmental Reporting month (as specified in tenement conditions in the year specified below, unless otherwise directed by an Environmental Officer, DMP). The Mine Closure Plan is to be prepared in accordance with the "Guidelines for Preparing Mine Closure Plans, June 2011" available on DMP's website. Year: [20**];

u. The holder shall, as soon as practicable, but within 24 hours either in writing or by telephone as the case requires, report to the holder of the underlying pastoral lease any damage caused by the holder to pastoral improvements on the underlying pastoral lease.