APPLICATION — Miscellaneous Licence — Objection — Private land — Section 27(1) Mining Act — Mining tenement granted over private land — Application for summary determination — No basis for objection

Legislation:

s. 27(1), s. 29(2)(5) and (6), s. 33, s.41, s. 42, s. 49(1), s. 57, s. 67(1), s. 70L(1), s. 75(7), s. 91, s. 92, s. 103F, s. 136, s. 161 Mining Act 1978 (WA)
r. 68, r. 152 Mining Regulations 1981 (WA)
Cases cited:

*Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (Northern Territory) [2009] HCA 41; (2009) 239 CLR 27*

*Project Blue Sky v. Australian Broadcasting Authority [1998] HCA 28*

Result:

1. *Applications L70/166 and L70/169 be adjourned to a date to be fixed pending confirmation by Department of Mines and Petroleum that the applications are fully compliant.*

Representation:

*Counsel:*

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Mr A Papamatheos</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objector</td>
<td>Mr Healey</td>
</tr>
</tbody>
</table>

*Solicitors:*

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Price Sierakowski Corporate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objector</td>
<td>Bailiwick Legal</td>
</tr>
</tbody>
</table>

**Introduction**

1. These are applications for Miscellaneous Licences dated 5 June 2014 by Australian Garnet Pty Ltd ("AGPL") in respect of areas referred to as L70/166 and L70/169 ("the applications").

2. Honora Mary Hose, Robert James Hose and William Hose ("objectors") are the owners of land over which the applications fall, who lodged objections to the applications on 9 July 2014.

3. The basis of the objections is pursuant to s. 29(2) *Mining Act 1978* ("Act"): 
The land the subject of this application is private land governed by the provisions of Division 3 of Part III of the Act.

The undersigned are owners of the land.

The owners do not consent to the application.

The land falls within the provisions of section 29(2)(a) of the Act in that the land is in bona fide and regular use as a yard and stockyard and is land under cultivation.

The applications fall within an exploration license that was granted to AGPL in 2005 ("E70/2509"). An exploration licence is a mining tenement within the meaning of the Act (s. 8).

AGPL applies for summary determination of the applications on the basis s. 29(2) does not apply and does not offer the objectors the grounds for objection, therefore they have no arguable case. It says, pursuant to s. 27(1), because a mining tenement had already been granted over the land, the land was no longer “private land” for the purposes of s. 29(2) and the objectors could not rely on that section.

The objectors say s. 27(1) should be read subject to the whole of the Act, in particular the provisions surrounding the grant of exploration licences, and does not mean the land in this case was no longer “private land”. They maintain they can still rely on s. 29(2) to form the basis for an objection. However, the objectors concede if I find s. 29(2) does not apply, the applications can be determined without the need for further evidence.

It was not in issue I have the ability to determine the applications summarily; s. 136 of the Act or r. 152 of the Mining Regulations 1981 ("Regulations") would both provide for that to occur. However, the objectors submit they should be given a further opportunity to explore the circumstances of the grant of E70/2509.

**Background and Law**

The Act requires the Director General of Mines to compile and maintain a register relating to all mining tenements and applications for mining tenements (s. 103F). Section 161 of the Act provides:

“(3)In any proceedings a document purporting to be certified by a person authorised for that purpose by the Director General of Mines as a correct copy of an extract from a register kept under this
A copy of the register relating to E70/2509, signed by the Executive Director, was annexed to the Affidavit of Blake Myles dated 19 December 2014.

9. AGPL was granted E70/2509 on 27 July 2005. The register contains a description of the grant. Under the heading “Description of Land NOT included in the grant of the Licence” is the following entry:

"Any Private land referred to in s. 29(2) of the Mining Act 1978 except that below 30 metres from the natural surface of the land."

Under the heading “Endorsement/Conditions”, numbered 4 and dated 18 January 2008 is the following entry:

"By approval the grant of this license is amended to include Victoria Lots 1 and 2 on Diagram 91564, .....to a depth of 30 metres from the natural surface."

A further similar entry numbered 5, referring to a different area and dated 24 January 2008, appears below.

Under the heading “Dealings” are two entries relating to “Inclusion of Private Land” with information and dates consistent with the above entries.

10. These entries are consistent with the provisions governing applications for mining tenements over private land in Part III Division 3 of the Act. Section 27 provides:

"27. Private land open for mining

(1) Subject to this Act, a mining tenement may be applied for in respect of any private land (which for the purposes of this Division does not include private land that is the subject of a mining tenement, other than in relation to mining for gold pursuant to a special prospecting licence or mining lease under section 56A, 70 or 85B in which case the land which is the subject of the application for that licence or lease is to be dealt with as private land) and such land is open for mining in accordance with this Act."

And further at s. 29:
“29. Granting of mining tenements in respect of private land

(1) Subject to this Act, but notwithstanding any other Act or law, a mining tenement may be granted in respect of an area that consists of private land only or partly of private land and partly of any other land and the authority conferred thereby on the holder thereof may be exercised by that holder in respect of any such land.

(2) Except with the consent in writing of the owner and the occupier of the private land concerned, a mining tenement shall not be granted in respect of private land —

(a) which is in bona fide and regular use as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation or is land under cultivation; or

(b) which is the site of a cemetery or burial ground; or

(c) which is the site of a dam, bore, well or spring; or

(d) on which there is erected a substantial improvement; or

(e) which is situated within 100 m of any private land referred to in paragraph (a), (b), (c) or (d); or

(f) which is a separate parcel of land and has an area of 2 000 m² or less,

unless the mining tenement is granted only in respect of that part of that private land which is not less than 30 m below the lowest part of the natural surface of that private land.”

These provisions make clear a mining tenement may be applied for and granted in respect of private land. It may be granted in respect of subsurface rights only (not less than 30m below the surface) unless either the owner consents in writing or the land does not fall into one the categories listed in subparagraphs (a) to (f). If an owner consents to the land less than 30 metres below the surface (surface rights) being included, s. 29(5) and (6) outline the process to be followed:

“(5) The holder of a mining tenement which —

(a) has been granted wholly or partly in respect of private land referred to in subsection (2)(a), (b), (c), (d), (e) or (f); but

(b) has not been granted in respect of that portion of the private land referred to in paragraph (a) that is less than 30 m below the lowest part of the natural surface of that private land because the consents referred to in subsection (2) have not been given,

may apply to the Minister for that mining tenement to be amended by granting it in respect of the portion referred to in paragraph (b) as well as in respect of the land in respect of which that mining tenement is already granted and that portion, whilst the right so to apply subsists, is not open for mining to any other person.
On receiving an application made under subsection (5), the Minister may, if he is satisfied that both the owner and the occupier of the private land referred to in paragraph (a) of that subsection have consented in writing to the grant of the mining tenement concerned in respect of the portion referred to in paragraph (b) of that subsection, grant that application.

On 13 December 2007 the objectors entered into a Compensation Agreement ("Agreement") with Tyson Resources Pty Ltd, which was the subject of a Deed of Assignment and Assumption to AGPL on 29 October 2008. Both agreements were signed by the objectors (the Owners under the Agreement). In the Agreement, Application is defined as:

"an application under s. 29(5) of the Act for the mining tenement to be amended by granting it in respect of that portion of the Land that is less than 30 metres below the lowest part of the natural surface of the Land as well as in respect of the land in respect of which the tenement is already granted."

At clause 3 of the Agreement under the heading “Grant of Rights” is the following:

"3.1 Consent
The Owners consent to the granting of the Application."

Two further clauses follow concerning access to the tenement and the term of the Agreement (5 years). The Agreement goes on to deal with compensation payable to the Owners.

Again, the entries in the register are consistent with the Agreement acting as the consent in writing required under s. 29(6), which resulted in the initial grant in 2005 of subsurface rights being amended by the Minister in 2008 to include surface rights.

AGPL now applies for different types of tenements, miscellaneous licences, over the same ground. In order to determine whether that land is still "private land" for the purposes of Part III Division 3 of the Act, regard must again be had to s. 27(1), in particular the meaning of the following words in emphasis:

"Subject to this Act, a mining tenement may be applied for in respect of any private land (which for the purposes of this Division does not include private land that is the subject of a mining tenement, other than in relation to mining for gold pursuant to a special prospecting licence or mining lease under section 56A, 70 or 85B in which case the land which is the..."
subject of the application for that licence or lease is to be dealt with as private land) and such land is open for mining in accordance with this Act."

14. The proper approach to statutory construction was outlined in *Alcan (NT) Alumina Pty Ltd v. Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27, at 46-47:

"This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

15. It is also necessary to look at consistency of language and purpose within the whole of the statute, the unity of the statutory scheme and to give meaning to every word in the provision: *Project Blue Sky v. Australian Broadcasting Authority* [1998] HCA 28.

**AGPL’s submissions on construction of s. 27(1)**

16. AGPL submits the meaning of s. 27(1) in the context of this case is plain; because a mining tenement (E70/2509) has already been granted over the land the subject of the applications, the land is not private land for the purposes of Part III Division 3 of the Act and the provisions of s. 29 do not arise in respect of the applications. AGPL therefore do not have to obtain consent from the owners even where the purpose of the land falls within those specified and the objectors do not have a right of objection under that section. The applications ought simply be considered in light of the general provisions concerning grant of tenements.

17. AGPL says this is the actual and ordinary meaning of the words used in s. 27(1) and this meaning is supported by the context within and consistency with other provisions. In particular, they point out:

(a) Because of the use of the words “Subject to this Act, a mining tenement may be applied for...” there is still a statutory entitlement for an owner of land to be served with an application for any mining tenement and a process whereby an owner can object and, if necessary, seek compensation. Therefore, to construe s. 27(1) in the
way AGPL suggests is not to deny an owner of land all rights in respect of that land;

(b) The scheme provided by s. 27(1) and s. 29 clearly allows for the grant of tenements over private land to a certain extent in most circumstances; it does not provide for a broad and unregulated power of veto by a landowner and contemplates the protection of the rights of tenement holders even where only subsurface rights are granted;

(c) The purpose of s. 27(1) is to prevent landowners who have consented to the grant of a mining tenement, and allowed a tenement holder to invest time and resources in developing the tenement, to then use the provisions in Part III Division 3 of the Act to obstruct an application for a further mining tenement. This is consistent with the purpose of the Act, to facilitate mining in Western Australia, and with provisions giving a tenement holder a right to convert a prospecting, exploration or retention license to a mining lease (s.s. 49(1), 67(1), 70L(1) and 75(7)); and

(d) There is no power in the Act for a Minister to revoke or amend a tenement granted pursuant to s. 29(6), or to grant it for a limited period of time. This is consistent with the principle of security of title which underpins the Act.

AGPL says the clear meaning of the words in parentheses in s. 27(1), "which for the purposes of this Division does not include private land that is the subject of a mining tenement...", is to prevent the application of Part III Division 3 to any further applications for a mining tenement. It says this meaning is made clear from the words used and is entirely consistent with the context of those provisions and with the intent of the Act as a whole.

The objectors’ submissions on construction of s. 27(1)

The objectors say s. 27(1) must be read as a whole, that the words "Subject to this Act" qualify all of the words that follow, including those in parentheses. They say the reference to a mining tenement that has been granted means a mining tenement granted pursuant to the Act with all the conditions or limitations which may follow.

In the circumstances of this case, the objectors point to s. 57 which provides for the grant of an exploration licence by the Minister upon such
terms or conditions as may be appropriate. They also point to the process of exclusion of private land from such a tenement under s. 29 and s. 33. On that basis, the objectors say I must have regard not simply to the fact a mining tenement was previously granted over the land the subject of the applications, but also to the precise conditions and limitations of that tenement in deciding whether Part III Division 3 still applies to any subsequent application.

21. The objectors say that to do otherwise would be inconsistent with the purpose and intent of the Act, in particular:

(a) The intent of s. 29 that private land be excluded from mining except where certain procedures are complied with;
(b) The important protections and “power of veto” afforded to private landowners under Part III Division 3 for uninterrupted use of their land; and
(c) The possibility a tenement may have previously been granted which excluded private land.

22. The objectors say the Agreement represents a time-limited consent by the objectors to the inclusion of surface rights in the exploration licence. They say that consent expired after 5 years so I need to look beyond the register, or at least give the objectors the opportunity to do so, to determine whether the grant of the exploration licence might now exclude private land less than 30 metres from the surface. If so, the objectors say that would be relevant to the interpretation of s. 27(1) in determining whether s. 29(2) still applies.

Findings on construction of s. 27(1)

23. To import or infer a construction of s. 27(1) as suggested by the objectors would be to go beyond the ordinary meaning of the words used. The words “Subject to this Act” qualify the words “a mining tenement may be applied for”. The words in parentheses are subject to their own qualification in that they exclude application to specific tenements, such as special prospecting licenses, but offer no other qualification in respect of other types of tenements.

24. To look beyond their plain meaning would only be appropriate where it was inconsistent with other provisions or the intent of the Act, or at odds with the context of the provision generally. I do not accept the objectors’ submissions as to the effect of Part III Division 3 generally and s. 29 specifically in relation to the overarching rights of private landowners.
Section 29 makes clear a tenement may be granted over subsurface rights on private land irrespective of the consent of the owner and the tenement holder then has ongoing rights in respect of the surface land. The “power of veto” by owners is limited, the onus being on the owner to prove the purpose or use of the land falls within specific categories before consent is required.

25. To afford private landowners such overarching rights and to assert that they continue, where the owners have already previously consented to the grant of a mining tenement over the same land, would be to ignore the intent of the Act to facilitate mining and encourage investment and development of tenements in circumstances where tenement holders can rely on security of title.

26. The plain meaning of the words used in s. 27(1) still allows for owners who have consented to the grant of a mining tenement over their land to be notified of and object to subsequent applications and to seek compensation: an appropriate balance of the rights of the tenement holder and the owner still exists.

27. The interpretation of s. 27(1) put forward by AGPL;
   • Is in accordance with the ordinary meaning of the words used,
   • Is appropriate in the context of Part III Division 3, and
   • Is consistent with the objectives and intent of the Act generally.

28. In contrast, the construction put forward by the objectors;
   • Is vague and unclear,
   • Is inconsistent with the context within Part III Division 3, and
   • Is at odds with the intent and objectives of the Act.

29. I accept the construction put forward by AGPL in relation to s. 27(1).

Findings on the applications

30. In 2005, a mining tenement (E70/2509) was granted to AGPL over the same land the subject of the applications. In 2008, that grant was amended pursuant to s. 29(5) and (6) to include surface rights with the consent in writing of the objectors. In accordance with the Act, that grant was not time-limited (although other aspects of the Agreement may have been). The register is entirely consistent with the Agreement and reflects that the process pursuant to s. 29(5) and (6) was followed appropriately. There is
no basis to suggest I should look beyond s. 161 of the Act as to the accuracy of the register and I therefore reject the objectors’ submission they should be allowed more time to present evidence on this issue.

31. Section 27(1) provides that private land which is subject to a mining tenement is not private land for the purposes of Part III Division 3, which includes s. 29(2). Therefore the objectors cannot rely on that provision to raise an objection to the applications. Because the objectors do not rely on any other provision or factors to raise an objection, their objections must fail.

32. The applications relate to construction of an access track, water pipeline, overhead power line, maintenance/monitoring bores and production bores at locations identified on the Form 21 lodged 5 June 2014. I am satisfied AGPL has complied with s. 41 of the Act and that the purpose of the applications is directly connected with mining (Affidavit of Tracy Browning dated 5 December 2014). However, there are other outstanding issues of compliance with respect to the applications (e.g. native title clearance). These issues need to be resolved before I can make orders granting the applications.

Orders

33. I make the following order:

1. Applications L70/166 and L70/169 be adjourned to a date to be fixed pending confirmation by Department of Mines and Petroleum that the applications are fully compliant.

[Signature]
Warden