JURISDICTION	:	MINING WARDEN
LOCATION	:	PERTH
CITATION	:	PAVLOVIC v SUREFIRE RESOURCES NL [2021] WAMW 3
CORAM	:	WARDEN J O'SULLIVAN
HEARD	:	23 June 2020
DELIVERED	:	19 February 2021
FILE NO/S	:	Application for Mining Lease 08/523G
TENEMENT NO/S	:	Exploration Licence 08/2373
BETWEEN	:	**TONY PAVLOVIC** (Applicant) AND **SUREFIRE RESOURCES** (Objector)

Catchwords: *Conversion of Special Prospecting Licence to Mining Lease; section 117 of the Mining Act 1978 (WA); extension of time to lodge late mining proposal.*

Legislation:

- *Mining Act 1978* (WA) ss 18, 40, 56, 70, 74, 74A, 75 & 162B
- *Mining Regulations (1981)* (WA) reg 25AA
- *Interpretation Act 1984* (WA)

Cases referred to:

- ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6
- ***Cazaly Iron Pty Ltd v Hamersley Resources*** [2008] WAMW 9
- ***FMG Chichester Pty Ltd v Rhinehart*** [2010] WAMW 7
- ***FMG Pilbara Pty Ltd v Minister for Mines and Petroleum*** [2020] WASC 8
- ***Forrest & Forrest v Wilson*** (2017) 262 CLR 510
- ***Jones v Dunkel*** (1959) 101 CLR 298
- ***Levy and Low v Bronze Wing Gold NL*** (1999) AMPLJ 217
- ***Mineralogy v The Honourable Warden K Tavener*** [2014] WASC 42
- ***Quinn v Herald Resources & others*** [2002] WAMW 14
- ***Re Roberts; Ex parte Western Reefs Ltd v Eastern Goldfields Mining Company Pty Ltd*** (1990) 2 WAR 546
- ***Re Ward and Heaney; Ex parte Serpentine-Jarrahdale Ratepayers and Residents' Association*** (1997) 18 WAR 320
- ***Westralian Sands Ltd v Shire of Waroona*** (unreported, Perth Wardens Court, 30 January 1990), noted 9 AMPLA Bull 60
- ***Yarri Mining P/L v Forrest & Forrest P/L*** [2012] WAMW 37

Result:

Application recommended for grant

Representation:

Counsel:

Applicant	:	Mr T J Kavenagh
Objector	:	Mr G H Lawton

Solicitors:

Applicant	:	Ellery Brookman
Objector	:	Lawton Lawyers

INTRODUCTION

1. Special Prospecting Licence 08/676-S (P08/676-S) was granted to Tony Pavlovic on 19 December 2014 for a term of 48 months (4 years). At the time P08/676-S was granted, the primary tenement (Exploration Licence 08/2373 ('E08/2373')) on which P08/676-S was located was held by Ilmenite Resources Pty Ltd ('Ilmenite').

2. In 2018, Surefire Resources NL ('Surefire') acquired E08/2373 from Illmenite.

3. On 19 October 2018 (prior to the expiry of P08/676-S on 19 December 2018), Mr Pavlovic lodged application for Mining Lease for Gold 08/523G ('the Application') which covered substantially the same ground as P08/676-S.[1]

4. On 1 November 2018, Mr Pavlovic lodged a mining proposal ('MP1') so as to comply with s 74(1)(ca) of the *Mining Act 1978* (WA) ('*Mining Act*').

5. On 16 November 2018, Surefire lodged an objection to the Application.

6. MP1 was rejected by the Department of Mines, Industry Regulation and Safety ('the Department') at some time before 18 April 2019.

7. On 18 April 2019, Mr Pavlovic lodged a new mining proposal ('MP2') to accompany the Application. MP2 was lodged out of time and the Department granted Mr Pavlovic's extension of time application.

8. On 19 August 2019 a compulsory partial surrender occurred which reduced the size of E08/2373 from 22 blocks to 13 blocks. E08/2373 now has an area of 4075.19 Ha.[2] The Application comprises an area of 8.9 Ha.[3]

9. Surefire objects to the granting of a mining lease on the following grounds as summarised in its Outline of Submissions:

[1] Applicant's Outline of Submissions dated 3 April 2020 Item 3.
[2] Letter G H Lawton; 23 June 2020.
[3] Supplementary Statement of Tony Pavlovic; 14 February 2020; [5].

> *"To the extent that the application for Special Mining Lease 08/523 applied for by Tony Pavlovic on the 19 October 2018 encroaches upon land the subject to Exploration Licence 08/2373 to Surefire Resources NL, the grant of the application would likely to:*
>
> *(a) Unduly prejudice or interfere with the current or proposed activities and rights of the Objector in Exploration Licence 08/2373 and;*
>
> *(b) Injuriously affect, hinder or obstruct the rights held by the Objector in Exploration Licence 08/2373.*
>
> *Further or in the alternative, the application does not comply with the Mining Act 1978 (WA) and/or Mining Regulations 1981 (WA).*

10. Surefire says further as an alternate ground that P08/676-S had expired at the time a compliant mining application had been received by the Department, making it an invalid application.

11. Mr Pavlovic contends that I should not consider this alternate ground of objection because it was not included in Surefire's grounds of objection nor its particulars. Ultimately, I have concluded that I should deal with this ground as it raises an important question of law recently addressed by the Supreme Court.

OBJECTORS ALTERNATE GROUND: EXTENSION OF TIME CANNOT REVIVE SPECIAL PROSPECTING LICENCE

12. Surefire says that an application for mining lease requires submission of a compliant mining proposal in the prescribed time.[4]

13. There is no dispute that MP1was lodged within the prescribed time. However, it was subsequently rejected by the Department.

14. Surefire says that because MP1 was rejected, the Application was invalid. Critical to Surefire's argument is that when this rejection occurred, P08/676-S had expired. Therefore, later lodgement of a compliant mining proposal which would "perfect" the Application would not change the fact that P08/676-S had already expired.

[4] ***Forrest & Forrest v Wilson*** (2017) 262 CLR 510; 2017 HCA 30.

15. In oral submissions, Surefire clarified that it does not seek to contest the Department's decision to grant an extension of time ('EoT').[5]

16. Rather, Surefire submits the Department's decision to extend time did not change the fact that a valid mining lease application must be lodged while the SPL is still live as required by s 49(2) of the *Mining Act*. Once MP1 was rejected there was no longer a valid mining lease application on foot that preserved P08/676-S which by then had expired. Counsel for Surefire, Mr Lawton, said in oral submissions:

> *...we say that application has to be a valid application. This was not a valid application because an important aspect of it was, in fact, rejected.*[6]
>
> *...our argument is that there was an actual rejection. So at the time of rejection, there was no valid application, so there was nothing to stop the special prospecting licence from dying.*[7]
>
> *We say that at the time that time was extended, it couldn't affect the special prospecting licence because it had died upon the rejection of the application – upon the mining proposal.*[8]

17. Surefire says that only a valid mining lease application enables a special prospecting licence ('SPL ') that would otherwise have expired to remain live pending the determination of the mining lease application. Upon the expiry of the SPL without a valid application for a mining lease being on foot, the SPL reverts to the underlying tenement holder: (s 70(6a)(b)).

The Statutory Framework

18. Part IV of the *Mining Act* deals with mining tenements. Division 1 of this Part addresses prospecting licences (ss 40-56B), Division 2 addresses exploration licences (ss 56C-70) and Division 3 addresses mining leases (ss 70O-85B).

19. Where the primary tenement is the subject of an exploration licence, a person can apply for an SPL in accordance with s 70:

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[5] ts; 23 June 2020; p39.
[6] ts; 23/6/2020 p3.
[7] ts; 23/6/2020 p15.
[8] ts; 23/6/2020 p16.

70. Special prospecting licence on an exploration licence

*(1) Where any land is the subject of an exploration licence (in this section called the **primary tenement**) then, notwithstanding section 117, a person may at any time after the expiry of 12 months from —*

(a) in the case of land which was the subject of a mineral claim or dredging claim granted under the repealed Act that by the operation of the transitional provisions set forth in the Second Schedule Division 1 became subject to the primary tenement, the date of approval of the claim; and

(b) in any other case, unless subsection (1aa) applies, the date on which the primary tenement was granted,

*mark out and, in accordance with section 41, apply for a prospecting licence for gold (in this section called a **special prospecting licence**) in respect of any part of the land the subject of the primary tenement.*

20. Section 70(5) relevantly provides that after hearing the objection of the primary tenement holder, the warden may refuse the application for an SPL on the ground that prospecting for gold on the land to which the application relates would result in undue detriment to the exploration being carried on by the holder of the primary tenement.

21. Section 70(8), which will be referred to in more detail later in these reasons, enables the holder of an SPL granted for a period of 4 years to make application for a mining lease for gold in respect of land or any part thereof which is the subject of the SPL.

22. Section 70(8aa) provides that ss74, 74A and 75 (the provisions that relate to applications for a mining lease) apply to an application for a mining lease under subsection (8).

23. Section 70(9) provides that subject to this section, those provisions relating to prospecting licences apply to an SPL.

24. It follows, therefore, that where there is an application to convert an SPL to a mining lease, it is subject to the operation of s 49(2) which says:

> *Where an application for a mining or a general purpose lease is made by the holder of a prospecting licence in respect of any land and the term of the prospecting licence would but for this sub-section expire, that licence shall continue in force in respect of the land the subject of the application until the application for a lease is determined*

25. Section 74 outlines what is required in an application for a mining lease. Section 74(1)(ca)(i) of the *Mining Act* relevantly provides that an application for a mining lease shall be accompanied by a mining proposal. The mining proposal does not need to be submitted at the time of lodging the application. Rather, s 74(1AA) affords some flexibility by allowing the mining proposal to be lodged within the prescribed time.

26. Regulation 25AA of the *Mining Regulations 1981* (WA) ('*Mining Regulations*') provides that the prescribed time is 14 days after the application for mining lease is lodged.

27. Section 162B of the *Mining Act* provides for an extension of time to be granted by the Minister or warden in relation to something to be done within a prescribed period:

> **162B. Extension of prescribed period or time**
>
> *(1) If this Act provides for something to be done within a prescribed period or a prescribed time, the Minister or a warden may, in a particular case, extend the period or the time for doing the thing.*
>
> *(2) The power in subsection (1) may be exercised whether or not the prescribed period has ended or the prescribed time has passed.*

Does the grant of the Extension of Time application keep the SPL alive?

28. The key question underpinning this ground of objection is whether the granting of the EoT application to lodge MP2 late, enabled the SPL, which had by then expired, to remain live. Section 70(8) provides that the holder of an SPL may apply for a mining lease. As I understand the argument, if the SPL has already expired by the time a valid application for a mining lease is lodged, Mr Pavlovic would no longer have been 'the holder of an SPL'.

29. Mr Pavlovic lodged an application for a mining lease on 19 October 2018.

30. As I have already explained section 70(8aa) of the *Mining Act* requires the applicant to follow the process for an application for a mining lease set out in ss 74, 74A and 75.

31. There is no dispute that Mr Pavlovic lodged the application for a mining lease before P08/676-S expired and submitted a mining proposal (MP1) within the prescribed time. MP1 was dated 1 November 2018 but was rejected by the Department. The exact date the Department rejected MP1 is unclear but it was before 18 April 2019.

32. On 18 December 2018, P08/676-S expired.

33. It is not in dispute that MP2 was submitted to the Department on 18 April 2019 and that the Department granted the extension of time application on 24 April 2019. This meant that time was extended to allow MP2 to be lodged on 18 April 2019. Although provided with the opportunity to object to the extension of time application, Surefire did not do so.

34. For present purposes it is important to appreciate that s 162B(2) provides that the power in subsection (1) to extend time may be exercised whether or not the prescribed period has ended or the prescribed time has passed.

35. It follows that s 162B is retrospective in its application. Accordingly, by extending the time to lodge MP2 to 18 April 2019, the mining lease application remained valid because it was accompanied by a mining proposal that was, because of the extension, now lodged within time.

36. The lodgement of MP2 having occurred within the required time (18 April 2019), meant that the requirements of s 74(1)(ca), that a mining application be accompanied by a mining proposal, was also complied with.

37. As the application for M08/523 was lodged before the expiry of P08/676-S and was valid because it was accompanied by a mining proposal (lodged within time), then P08/676-S had not expired due to the operation of s 49(2).

38. Recently, in ***FMG Pilbara Pty Ltd v Minister for Mines and Petroleum***[9] (‘***FMG Pilbara***’), Kenneth Martin J considered the operation of s 162B of the *Mining Act*.

39. There, the tenement holder held an exploration licence, the term of which it sought to extend.[10] The exploration licence was due to expire at midnight on Saturday, 30 March 2019.[11]

40. The tenement holder lodged its application for extension of term electronically.[12] Unfortunately, the tenement holder lodged its application just after 4.30pm on Friday, 29 March 2019 and the application was deemed to have been received by the Department on the following working day being 8.30 am Monday, 1 April 2019, after the expiration of the tenement.[13]

41. The tenement holder applied under s 162B of the *Mining Act* to extend time to lodge the application for an extension of term.[14] The application to extend time was put to the Minister, who declined the request.

42. The argument as originally formulated before K Martin J was that s 162B could be used to revive an expired exploration licence by extending time to lodge the extension of term application. Ultimately, his Honour found that by application of the computation of time provisions in the *Interpretation Act 1984* (WA), time had not in fact expired. K Martin J did, however, address whether s 162B would have saved the exploration licence had it in fact expired:

> *[51] I would observe in passing, since it might one day be relevant to policy arguments concerning the potential ramifications of this decision made on the present application from a wider policy perspective, that the terms of s 162B(2) do not look yet to be the subject of any decided superior court authority. Nevertheless,* ***my prima facie view is that given the deliberately expressed breadth and scope of the s 162B(2) text as is seen used by the legislature, that this clearly remedial provision looks indeed to have***

[9] ***FMG Pilbara Pty Ltd v Minister for Mines and Petroleum*** [2020] WASC 8.
[10] Ibid; [6]-[7].
[11] Ibid; [6], [26].
[12] Ibid; [28].
[13] Ibid; [42].
[14] Ibid; [47].

> ***otherwise been directly applicable to present circumstances, and so providing power to the Minister to extend under the circumstances where the prescribed time by reg 59B(3) (namely, before 4.30pm on a working day) had already passed.*** *Given that it is ultimately agreed that s 162B(2) could not be engaged here, I say no more than that. (emphasis added)*

43. Critical to the present case is whether the EoT application having been granted, operates retrospectively. ***FMG Pilbara*** suggests that it does.

44. The factual matrix of the present case is similar to the initial argument advanced in ***FMG Pilbara***. K Martin J's obiter remarks clarify that s 162B provides power to extend time even when the prescribed time has already passed.[15]

45. Although an application for a mining lease must be made by the holder of an SPL (i.e. the SPL is live), s 49(2) deems that an SPL remains in force whilst a mining application is on foot. Section 162B having operated to ensure the application for a mining lease (lodged while the SPL was live) remained on foot, means P08/676-5 had not expired.

OBJECTORS PRIMARY GROUND: UNDUE PREJUDICE AND INJURIOUS AFFECTION

46. Surefire's submissions gave rise to questions as to whether:

    (a) there is a right to convert an SPL into a mining lease;

    (b) section 117 protects Surefire's exploration licence from injurious affection; and

    (c) the relevant provisions relating to the grant of a mining lease picked up by s 70(8aa) includes the right to object?

47. Surefire says further that in exercising its right to object, it has established that the application for a mining lease should be refused because it will injuriously affect the primary tenement and/or cause undue detriment to the exploration it is carrying out on the primary tenement.

[15] Ibid; [51].

Is there a right of conversion?

48. Surefire argues:

> *7. This is not a "conversion" as is provided for in section 49 of the Act (Prospecting Licence to Mining Lease) so the SPL holder does not have a right to apply for a Mining Lease."*

49. Section 49 states:

> **49. Holder of prospecting licence to have priority for grant of mining leases or general purpose leases**
>
> *(1) The holder of a prospecting licence has —*
>
> *(a) subject to this Act and to any conditions to which the prospecting licence is subject; and*
>
> *(b) while the prospecting licence continues in force,*
>
> ***the right to apply for, and subject to section 75(9) to have granted pursuant to section 75(7), 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 prospecting licence.*
>
> *(emphasis added)*

50. By contrast, s 70(8) relevantly provides:

> *(8)* ***The holder of a special prospecting licence granted for a period of 4 years may make an application for a mining lease for gold*** *in respect of the land or any part thereof which is the subject of the special prospecting licence, and on an application being made* ***the Minister may, subject to subsection (7b), grant the application*** *for a lease in respect to that portion of the land to which the special prospecting licence relates that is less than a depth of 50 m, or such greater depth as the Minister approves with the prior written consent of the holder of the primary tenement, below the lowest part of the natural surface of the land and on such terms and conditions as the Minister thinks fit, and thereupon the area of land in respect of which the mining lease is granted shall be excised from the primary tenement (whether or not the primary tenement has in the meantime been converted into a retention licence or a mining lease).* *(emphasis added)*

51. In my view, notwithstanding s 70(9)(a) which provides that those provisions of the *Mining Act* relating to prospecting licences apply also to an SPL, s 49(1) does not apply. This is because s 70(9) is prefaced with the word 'subject to this

section'. As s 70(4) deals expressly with the conversion of an SPL to a mining lease, the operation of s 49(1) is excluded.

52. Section 49(1) refers to 'the right to apply for and … to have granted … one or more mining leases'. No such right appears in s 70(8).

53. The recent decisions of ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd***[16] and ***Yarri Mining P/L v Forrest & Forrest P/L***[17] have considered the "right" afforded by ss 49 and 75(7). Both cases concerned conversion of an exploration licence to a mining lease and held that the "right" was viewed as close to, but not quite, absolute.

54. It would appear that the difference in the language used in s 49(1) to that in s 70(8) relevantly reflects the fact that an SPL is granted over an existing exploration licence whereas a prospecting licence is not. For present purposes that is the only material difference between an SPL and a prospecting licence.

55. It follows that the legislature must have taken the view that no right of conversion should exist for an SPL because of the existence of the primary tenement.

56. This is unsurprising given the conversion of an SPL to a mining lease has significant implications for the holder of the primary tenement. The first thing to notice is that an SPL has a life span of 4 years after which the land the subject of the SPL reverts to the primary tenement holder, whereas a mining lease is for an initial term of 21 years with the possibility of renewal for a further 21 years as of right.[18] Importantly, when an SPL is converted to a mining lease, the land is excised from the primary tenement.[19]

57. An SPL is subject to a number of restrictions that are not applicable to mining leases.[20] This includes that an SPL shall not exceed 10ha and is confined to

[16] ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6.
[17] ***Yarri Mining P/L v Forrest & Forrest P/L*** [2012] WAMW 37.
[18] s78(1) *Mining Act.*
[19] See s 70(8) *Mining Act.*
[20] See s70(6) *Mining Act.*

prospecting for gold. The holder of an SPL is not to excavate, extract or remove a total amount of earth, soil, rock, stone, fluid or mineral bearing substances in excess of 500t.

58. A mining lease, on the other hand, enables the holder to extract at up to 750t in any year unless otherwise provided. A mining lease is also not confined to extracting gold as it 'has effect in relation to gold and any minerals occurring in conjunction with that gold'.[21]

59. An SPL does not prevent the holder of the primary tenement from exploring for minerals other than gold on the land the subject of the SPL unless the Minister directs otherwise.[22] The primary tenement holder has no such right upon the SPL being converted to a mining lease, the latter being excised from the primary tenement.

Does s 117 protect Surefire's underlying exploration licence?

60. Section 117 states:

> **117. Mining tenements protected**
>
> *(1)* ***Subject to the provisions of sections 56A, 70 and 85B as regards the special prospecting licences and mining leases therein referred to,*** *no Crown grant, transfer of Crown land in fee simple, or conveyance nor the grant of any mining tenement has the effect of revoking or injuriously affecting any existing mining tenement acquired and held under this or the repealed Act, whether or not any reservation or exception of that existing mining tenement is contained in the Crown grant, transfer of Crown land in fee simple, or conveyance or the grant of the mining tenement.*
>
> *(2) Each such Crown grant, transfer of Crown land in fee simple, or conveyance and each such grant of a mining tenement shall be deemed to contain an express reservation of the rights to which the holder of the existing mining tenement is entitled. (emphasis added)*

61. Section 70(1) also expressly disavows the application of s 117 to an application for an SPL.

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[21] See s70(8a)(a) & (b) *Mining Act.*
[22] s70(6)(c) *Mining Act.*

62. As Allanson J observed in ***Mineralogy Pty Ltd v The Honourable Warden K Tavener***:[23]

> *Where the grant of a miscellaneous licence over an existing general purpose lease or vice versa, produces rights which conflict in the particular circumstances, the Mining Act contains the mechanism in s 117 for resolving the conflict. The grant of a mining tenement does not revoke or injuriously affect existing mining tenements held under the Act and is deemed to contain an express reservation of the rights to which the holder of the existing tenement is entitled.*

63. For present purposes it is important to appreciate that s 117 expressly states that it is 'subject to the provisions of section 56A, 70 and 85B as regards special prospecting licences and mining leases therein referred to'.

64. All of these sections refer to an SPL over a primary tenement and the capacity to convert it to a mining lease.

65. Surefire concedes that the words 'subject to the provisions of sections 56A, 70 and 85B' have the effect of excluding those provisions from the operation of s 117,[24] but says that s 70(8) relating to the conversion of an SPL to a mining lease is not excluded.[25]

66. Mr Lawton, cited the serious nature of a conversion from an SPL to a mining lease compared to the granting of an SPL as the reason for the assertion that s 70(8) is not excluded from the operation of s 117. He says:

> *...section 117, we say, is an overriding consideration that trumps anything else that's in your legislation.*[26]
>
> *...We say a consideration of an SPL application and the excision of the provision relating to that is a matter of a comparatively minor nature, whereas the grant of a mining lease, As Mr Kavanagh says, properly taking away an area of an existing granted tenement is too serious a matter to just be an add-on to the rights you get with an SPL.*[27]

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[23] ***Mineralogy v The Honourable Warden K Tavener*** [2014] WASC 420; [52].
[24] ts; 34.
[25] ts; 35.
[26] ts; 34.
[27] ts; 35.

67. In essence, Surefire's argument is that a mining lease has the effect of excising the area the subject of the mining lease from the primary tenement, whereas an SPL does not. On that basis, the conversion of an SPL to a mining lease is a more serious matter and therefore subsection (8) is not excluded from the operation of s 117.

68. In my view, s 117 does not apply to an application to convert an SPL to a mining lease.

69. Section 70 is expressly excluded from the operation of s 117. In addition, any doubt that s 70(8) is also excluded is negated by the words 'and mining leases therein referred to'. In addition, nothing said by Malcolm CJ when analysing s 117 in ***Re Roberts; Ex parte Western Reefs Ltd v Eastern Goldfields Mining Company Pty Ltd***[28] suggests s 70(8) is subject to s 117.

70. Contrary to Surefire's submission, s 117 acknowledges that an SPL and the mining lease to which it is converted are entirely inconsistent with the rights to which the holder of the primary tenement is entitled. Hence, SPLs and converted mining leases are excluded from the operation of s 117.

71. In my view, it was not Parliament's intention that an SPL not injuriously affect the primary tenement holder's rights. On the contrary, it is acknowledged that an SPL will interfere with the primary tenement holder's right. However, as long as the prospecting for gold does not cause undue detriment to the primary tenement holder's exploration, the SPL is tolerated.

72. While the general rule as expressed in s 18 is that one tenement cannot exist over another, there are two exceptions. A miscellaneous licence can co-exist with an underlying tenement as long as it does not injuriously affect the rights of the underlying tenement holder in accordance with s 117.

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[28] ***Re Roberts; Ex parte Western Reefs Ltd v Eastern Goldfields Mining Company Pty Ltd*** (1990) 2 WAR 546; 551-552

73. The second exception is an SPL which is designed to allow small gold prospectors (i.e. not companies)[29] to use a small piece of a larger tenement as long as prospecting for gold on the land the subject of the SPL would not result in undue detriment to (in this case) the exploration being carried on by the holder of the primary tenement.

74. Parliament has seen fit to try to accommodate small gold prospectors who could potentially be locked out from accessing large tracts of land that are already the subject of mining tenements. By confining an SPL to a relatively small area and imposing other restrictions designed to ensure the primary tenement holder's interests are not disproportionately disadvantaged, a mechanism exists for the two tenements to co-exist.

75. Clearly, if prospecting for gold on a small part of an exploration licence can be undertaken without causing undue detriment to the exploration being carried on by the holder of the primary tenement, the primary object of the *Mining Act* is being advanced.

76. The term 'undue detriment' is not defined in the *Mining Act*. According to the Macquarie Dictionary 'undue' means 'unwarranted, excessive or too great' and 'detriment' means loss, damage or injury'.

77. An SPL should not be refused merely because it causes some detriment to the exploration being carried on the by the primary tenement holder. Having regard to the circumstances of the particular case, the detriment must be excessive or too great to justify its refusal.

Do the provisions that govern applications for mining leases enable the primary tenement holder to object?

78. Surefire points out that '[t]here is no criteria in the Act or Regulations as to how an objection of this nature should be determined.'

[29] See also ss 70(7) & 70(7b) of the *Mining Act*.

79. Accordingly, Surefire objects to the Application under s 75(1) on the basis of severe detriment to its activities. In essence, Surefire says that the grant of the mining lease will excise ground in the centre of its project that is highly prospective for future exploration. Surefire says the central location of M08/523-G would adversely impact the economic viability of its project. Surefire also says exploration conducted in this area amongst other things showed quantities of lead and silver.

80. Mr Pavlovic says that the opportunity for assessment of undue detriment was at the time of application for P08/676-S. Once an SPL is granted, the application for a mining lease is to be determined in accordance with the mining application process set out in ss 74-75: (see s 70(8)), which does not provide for consideration of undue detriment:

> *20. When one applies for a special prospecting licence the warden may refuse the application on the ground that prospecting for gold on the land to which the application relates would result in undue detriment to the exploration being carried on by the holder of the exploration licence: s 70(5). In contrast an application for a mining lease on a conversion for a special prospecting licence is to be determined the same way as a normal mining lease under ss74, 74A and 75: s70(8aa). None of those sections say anything about "undue detriment".*
>
> *21. If the Parliament had intended that "undue detriment" could be taken into account the Parliament could easily have said so. Moreover, in the same section, in sub-section 70(5), the Parliament had set this criteria in relation to applications for special prospecting licences.*

81. Mr Pavlovic further says, that undue detriment is not to be taken into account because a mining lease granted under s 70(8) to a determined depth will not co-exist with the underlying exploration licence because the land the subject of the mining lease is excised from the exploration licence:

82. Although I have found that an SPL is not subject to a right of conversion to a mining lease and that s 117 does not apply to an SPL or a conversion, a question remains as to on what basis, if any, a primary tenement holder can object to a conversion.

83. The resolution of this question is not assisted by a number of somewhat inconsistent principles emanating from the statutory language.

84. First, as I have explained, the only material difference between a prospecting licence and an SPL is that the latter is granted over an existing tenement.

85. That being the case, the only reason that an SPL is not subject to a right of conversion is because of the existence of the primary tenement. This would strongly suggest that the primary tenement holder's interests are to be considered in determining the application to convert.

86. Unlike a prospecting licence, an SPL is situated over a primary tenement. Accordingly, if the SPL is converted into a mining lease, it has significant implications for the primary tenement holder as the land the subject of the SPL is excised from the primary tenement.

87. Second, the absence of a right of conversion, has the potential to discourage applications for an SPL given there is no presumption that an SPL can be converted into a mining lease in the event the land the subject of the SPL is prospective for gold.

88. Third, s 70(5) expressly enables the primary tenement holder to object to an SPL on the basis that prospecting for gold on the land to which the SPL relates would result in undue detriment to the exploration being carried on by the holder of the primary tenement holder.

89. As Mr Pavlovic points out, had the legislature intended that any undue detriment to the primary tenement holder should also be considered upon there being an application to convert the SPL to a mining lease, it could readily have said so.

90. Fourth, the provisions relating to applications for mining leases that are picked up by s 70(8aa) do not expressly limit the basis on which an objection can be made nor does s 70 expressly confine the broadly expressed right to object in s 75(4).

91. In my view, the telling feature of the legislative scheme is the fact that there is no right of conversion from an SPL to a mining lease. Had the legislature concluded that once the SPL is granted, there is to be no further consideration of any undue detriment to the primary tenement holder, then why not make an SPL subject to a right of conversion? If the interests of the primary tenement holder are to be largely ignored after the SPL is granted, then there is no reason in principle why the conversion of an SPL to a mining lease should be treated any differently to the conversion of a prospecting licence.

92. It follows that the only reason the holder of an SPL (unlike the holder of a prospecting licence) does not enjoy a right of conversion to a mining lease must be because of the existence of the primary tenement.

93. Thus, it follows that the legislature did not see fit to extend to the holder of an SPL a right of conversion because the interests of the underlying tenement holder are to be taken into account.

94. As I have already pointed out, there are other features of the legislative scheme that could be construed as inconsistent with this construction. This includes the absence of any express reference to undue detriment as a basis for the underlying tenement holder to object to the conversion.

95. Notwithstanding these inconsistencies, I remain of the view that the absence of a right of conversion is the clearest indication that the underlying tenement holder can object.

96. Moreover, neither is this inconsistency incapable of being reconciled with the construction outlined above. It is conceivable that Parliament intended that s 70(8aa), which adopts the provisions governing applications for mining leases including the opportunity to object, is intended to be used as a means of balancing the interests of the underlying tenement holder with those of the holder of the SPL. Hence, there was no need to expressly refer to 'undue detriment' as a ground of objection.

97. I am not persuaded by Mr Pavlovic's submission that just because undue detriment had been considered as part of the process for granting an SPL (s 70(5))[30] that it should not form part of the considerations for granting an application for a mining lease. The text of s 75(4) is sufficiently broad in terms of providing *any* person objecting an opportunity to be heard.

Balancing the interests of the holder of the SPL and the primary tenement holder

98. In balancing the interests of the holder of an SPL with those of the primary tenement holder, it must be acknowledged that the situation as it existed when the SPL was granted may well have changed in the four years that have followed.

99. Furthermore, the stakes are higher than when the SPL was granted. If the mining lease is granted, the subject land is excised from the primary tenement. On the other hand, the holder of the SPL may well have spent 4 years developing the land the subject of the SPL only to have it revert to the primary tenement holder if the conversion to a mining lease is rejected.

100. Using the principles relevant to the grant of an SPL set down by Warden Calder in ***Levy & Lowe v Bronze Wing Gold NL***[31] as a guide, in my view, although not an exhaustive list, the following factors ought to be considered:

[1] The circumstances under which the SPL was granted;

[2] The exploration work which the primary tenement holder has carried out on and in the vicinity and of the land the subject of the SPL during the term of the SPL;

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[30] (5) After hearing the objection of the holder of the primary tenement the warden may refuse the application for the special prospecting licence on the ground that prospecting for gold on the land to which the application relates would result in undue detriment to the exploration being carried on by the holder of the primary tenement or he may recommend the application to the Minister who may refuse the application or subject to this Act, grant it as provided in subsection (6), but where the warden refuses an application under this subsection, the applicant may within the time and in the manner prescribed appeal to the Minister against such refusal and the Minister may dismiss the appeal or uphold the appeal and grant the application as provided in subsection (6).

[31] ***Levy & Lowe v Bronze Wing Gold NL***; Perth Warden's Court del 20 August 1999; Vol 14 No 4; 13 & 14.

[3] The exploration work which the primary tenement holder intends to carry out on and in the vicinity of the land the subject of the SPL;

[4] The work carried out by the holder of the SPL during the term of the SPL;

[5] The work the holder of the SPL intends to undertake in the event the SPL is converted to a mining lease;

[6] The likelihood and present or future capacity of both the holder of the SPL and the primary tenement holder to carry out their respective proposed operations; and

[7] The proximity of the land the subject of the application to convert to the work done or proposed to be done by the primary holder.

101. I pause to note that even accepting the primary tenement holder can object to protect its interests, it remains unclear as to whether the objection involves a re-run of the ground in s 70(5) ('undue detriment') with appropriate modifications or balancing the interests of both parties with a view to determining which outcome best advances the objects of the *Mining Act*. In my view, the undue detriment test is directed to that purpose in any event.

102. Surefire details in its Outline of Submissions that:

> **9. The uncontradicted evidence of Michael George Povey is as follows:**
>
> *"The grant of the Application would cause severe detriment to Surefire as:*
>
> *a.* *The* grant *would* permanently excise *ground which has been the subject* of *recent desktop studies* by *Surefire and CSA and which is highly* prospective for future explor*ation by Surefire. Previous rock-chip sampling on the Project* indicates *significant lead and* silver mineralisation within the ground *the subject of the* Application. Of the *thirty samples which yielded greater than 20% lead and* 10 samples *greater than 150ppm silver, one of each falls within* the *ground* subject *of the Application. The grant of the Application would permanently excise an exploration target in the centre of the Project.*

b. The excision *of the ground would adversely impact the economic viability of the Project due to the central location of the* M*08/523- G* within EO/*2373.*

c. The Applicant's proposed activities on the ground would interfere with future exploration or mining activities conducted by Surefire due to the location of the Application within Surefire's Project.

103. An important feature of this case is that Surefire acquired E08/2373 in circumstances where it knew or ought to have known that E08/2373 was already subject to P08/676-S.

104. Accordingly, Surefire ought to have known that after the expiration of the 4-year term of the SPL, an application to convert it to a mining lease was possible.

105. In short, Surefire is taken to have known when it acquired E08/2373 that the area the subject of P08/676-S could be the subject of conversion to a mining lease and excised from E08/2373.

106. The evidence on which Surefire relies is set out in the affidavit of Mr Povey dated 19 December 2019.

107. The most important aspects of Mr Povey's evidence are as follows:

[1] E08/2373 is one of two granted tenements which form Surefire's Kooline Project (a project which covers over 40 historical workings). Surefire's studies and exploration to date indicate that the project is protective for lead, silver, copper and gold.

[2] On 29 September 2017, Surefire lodged with [the Department] a program of work ("POW") for approval of its 16 RC drill hole exploration plan in respect of copper, lead and zinc. The POW was approved by [the Department] on 23 October 2017.

[3] Prior to commencement of work under the POW, several field reconnaissance trips were undertaken. The samples from those trips indicated a high presence of gold and copper.

[4] After approval of its POW, Surefire commissioned (CSA Global Pty Ltd ("CSA") to undertake a detailed geochemistry analytics and prospectivity review of the Kooline Project ("CSA Study") for the purpose of defining exploration targets with recommendations as to further exploration (targets for the TC drilling POW). The CSA Study was completed on 27 September 2018.

[5] The CSA Study concluded that the Kooline Project is prospective for intracratonic magnetic copper-gold mineral system deposits.

[6] In addition to the CSA Study, Surefire commissioned Southern Geoscience Consultants to prepare a compilation of all geophysical data for E082373 and has itself conducted desktop studies of historical data and digitally mapped the results of previous soil/auger, rock-chip and RC Drill-hole sampling for the purpose of further refining its exploration targeting.

[7] The Application is located practically in the centre project and in the centre of one of the two prospective zones identified by the CSA Study.

[8] Previous rock-chip sampling on the Project indicates significant lead and silver mineralisation within the ground the subject of the Application. Of the thirty samples which yielded greater than 20% lead and ten samples which yielded greater than 150ppm silver, one of each falls within the ground the subject of the Application.

[9] The Applicant's proposed activities on the ground would interfere with future exploration or mining activities conducted by Surefire due to the location of the Application with Surefire's Project'.

108. Surefire also relies on extracts from its June 2018 Annual Report which is annexed to Mr Pavlovic's statement of evidence dated 4 October 2019. The passages of the Annual Report on which Surefire seek to rely are general in nature and do not refer expressly to the area the subject of the Application. Nor do they provide any details as to Surefire's future plans so far as the area the subject of the SPL is concerned or its immediate vicinity.

109. Surefire says that as Mr Povey was not cross-examined, I should accept his evidence. To the extent Mr Povey offers an opinion that undue detriment has been made out, I am not bound to accept it. That is for the Court to determine; although regard can be had to the facts said to support such a conclusion provided in Mr Povey's affidavit.

110. Even accepting the veracity of the evidence provided by Mr Povey, the question that remains is whether it enables me, when considering the evidence as a whole, to conclude that Surefire will suffer undue detriment.

111. The first thing to notice about Mr Povey's affidavit is that it does not include the POW, the CSA Study or any report, if one exists, prepared by Southern Geoscience.

112. There is no specific reference to where the 16 drill holes the subject of the RC drill hole exploration plans are to be located.

113. At best Mr Povey refers to two samples of 40 which are said to fall within the ground the subject of the Application.

114. Apart from what is purportedly in the POW it is unclear what future exploration is to be undertaken by Surefire, when it is likely to occur or whether it will be on or in the vicinity of the ground the subject of the Application.

115. Putting to one side whether the rule in ***Jones v Dunkel***[32] should be invoked, in my view, Mr Povey's evidence is vague and lacking in detail.

116. Turning to Mr Pavlovic's evidence the Proposal Particulars which is Attachment 1 to Mr Pavlovic's Statement dated 4 October 2019 sets out in some detail the research carried out and confirms that Mr Pavlovic has demonstrated he has exceeded the minimum expenditure commitment in each of the 4 years he has held the SPL. The following extracts from his statement of evidence dated 4 October 2019 further elucidate the work he has undertaken:

[1] The Application was lodged because of the likelihood of gold existing in payable quantities on the SPL. This is evidenced by my discovery of elevated gold values within the rock chip samples taken from surface outcrops on the SPL and along with adjacent tenements P08/648 and P08/677. Attachment 1 shows the rock chips results and the results are outlined in Appendix 1. (Assessment of the Potential Gold Resources at the Lewis Prospect – West Ashburton District p23).

[2] The SPL is characterised by low bushland and open flats, with creek tributary areas with flood plain runoff. See map in Attachment 1 which shows the area to be excavated within the tenement.

117. Further, in Mr Pavlovic's supplementary statement dated 14 February 2020, he says:

> *Since working the prospecting licence, I have recorded by Global Positioning System Co-ordinates, the position of the rock chip samples containing gold on both tenements [M08/522]. The rock chip samples are detailed on the attached map, together with the intended mine area across both tenements. The area crosshatched in pink is the proposed mine area of this application. This is a total area of 0.089 hectares.*

118. When consideration is given to the interests of both parties, including:-

(a) the relatively small area the subject of the Application;

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[32] ***Jones v Dunkel*** (1959) 101 CLR 298.

(b) the fact that Surefire acquired E08/2373 notwithstanding it is taken to have known it was subject to an SPL for 4 years that could then be converted into a mining lease; and

(c) the fact that Surefire's evidence as to the work carried out on or around the SPL and its future plans is vague and lacking in detail, particularly when compared to the comprehensive evidence provided by Mr Pavlovic;

on balance I am satisfied that granting the Application would not result in undue detriment to the exploration being carried on by Surefire.

Conclusion

119. For the reasons set out above it is recommended the Minister grant the application for M08/523G.

Warden J O'Sullivan

19 February 2021