JURISDICTION	:	MINING WARDEN
LOCATION	:	WARDENS COURT, KALGOORLIE
CITATION	:	KEAN and OTHERS v GOLDEN PIG ENTERPRISES PTY LTD [2019] WAMW
CORAM	:	WARDEN A.D HILLS-WRIGHT
HEARD	:	7 February 2018
DELIVERED	:	29 March 2019
BETWEEN	:	**Steven Lionel Kean** (P28/1306-S) **Peter John Crocker** (P28/1307-S) **Nicholas Paul Cukela** (P28/1308-S) **Brendan Gabriel Connor** (P28/1309-S) **Gerard Victor Brewer** (P28/1310-S) (Applicants) AND **Golden Pig Enterprises Pty Ltd** (Objector)

Catchwords: *Special Prospecting Licence – Whether existence of primary tenement is a prerequisite to a valid application – The proper construction of s70(1) and s70(9a) of the Mining Act – Non-compliance with directions in Form 12 surrender – Validity of administrative act of Department in registering surrender*

Legislation:

- *Mining Act 1978 (WA)*, s8, 18, 41, 42, 70, 95, 103C, 103D, 103G, 104, 105, 105A, 132
- *Mining Regulations 1981*, r43, r63, r64, r84B, r90
- *Interpretation Act 1984* s19, 56(2), 74
- *Corporations Act 2001 s127*

Cases referred to:

- ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355;
- ***Selby v Pennings***, unreported; SCt of WA; Library No.980480;26 August 1998
- ***Boddington v British Transport Police*** (1998) 2 WLR 639;
- ***Ousley v R*** (1997) 148 ALR 510
- ***Optimum Resources Pty Ltd v Peko Gold Ltd and Delta Gold NL*** (1991) 10 AMPLA Bull 125
- ***Hot Holdings Pty Ltd and Eon Metals NL***; unreported, Perth Wardens Court, 15 February 1991
- ***Napier & Ors v Samantha Mining & Exploration Pty Ltd*** (1994) Unreported Vol 10 Folio 22, 19 October 1994
- ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd*** (2010) WAR 134

- ***IW Applicant v City of Perth*** (1997) 191 CLR 1
- ***Tortola Pty Ltd v Saladar Pty Ltd*** [1985] WAR 195
- ***Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*** [2012] 43 WAR 91
- ***Forrest & Forrest Pty Ltd v Wilson*** (2017) 346 ALR
- ***Mohammadi v Bethune*** [2018] WASCA 98
- ***Shannon Realties v Ville de St Michel*** (1924) AC 185
- ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153
- ***Global Doctor Ltd v Hodgkinson & Anor*** [2003] WASCA 119

Result:

1. Applications refused

Representation:

Counsel:

Applicants Kean, Crocker & Cukela	:	Ms K Samiotis
Applicants Connor & Brewer	:	Mr G H Lawton
Objector	:	Mr L Warnick

Solicitors:

Applicants Kean, Crocker & Cukela	:	McKenzie & McKenzie
Applicants Connor & Brewer	:	Lawton Lawyers
Objector	:	Bennett & Co

Background

1 On 8 and 9 October 2016 the five applicants marked out separate areas over which they intended to apply for Special Prospecting Licences (**SPL's**).

2 The marking out occurred on land the subject of an Exploration Licence E28/1634 (**the primary tenement**) held by Gel Resources Pty Ltd and Renaissance WA Pty Ltd (**G&R**). The primary tenement was due to expire on 18 October 2016.[1]

3 Each of the applicants subsequently lodged their SPL applications on 17 October 2016.

4 However, at 2:40pm on 12 October 2016, therefore between the marking out of the SPL's on 8 and 9 October 2016 and lodgement of the SPL applications on 17 October 2016, G&R lodged a Form 12 surrender of the primary tenement. Six minutes later the Objector, Golden Pig Enterprises Pty Ltd, lodged an application for an exploration licence over the same land the subject of the primary tenement.

5 Due to an apparent defect in the Form 12 surrender lodged by G&R, an authorised officer of the Department accepted the surrender for provisional lodgement and then wrote to G&R directing that the defect be corrected.

6 On 18 October 2016 an authorised officer of the Department, apparently satisfied from information provided by G&R either that the defect had been corrected or that there was no defect, amended the provisional status of the surrender and registered the instrument as effective from 12 October 2016 at 2.40 pm, being the date and time when the Form 12 surrender was initially lodged.

7 This snapshot of events reveals that whilst the applicants marked out the SPL's when the primary tenement was live, when they lodged their applications on 17 October 2016 the primary tenement was not live due to the effect of the

[1] Affidavit of Dalitso Banda, annexure 'DXB-3'

'backdating' of the registration of the surrender deemed effective from its initial lodgement date of 12 October 2016.

Chronology of Events

8 The essential facts are not in dispute.

9 Attached to these reasons at Annexure A is a more fulsome chronology setting out the dates and times of a number of relevant events.

10 Of particular relevance are the events highlighted at 1-7 and at 12-20.

Summary of the Parties' Arguments

11 The parties disagree on several issues, including the proper construction of s70(1) and s70(9a) of the *Mining Act* 1978 ("the Act").

12 As the applicant's arguments themselves differ, for convenience I will refer to Messrs Kean, Crocker and Cukela as the 1st applicants and Messrs Connor and Brewer as the 2nd applicants.

13 The 1st applicants argue:

(a) This Court should direct the Department to deem the surrender lodged by G&R invalid and to update the register accordingly. The direction given by the authorised officer gave notice in writing to G&R requiring them to ensure that the defect in the instrument was corrected. The defect in the instrument wasn't corrected but rather information was provided on behalf of G&R to the Department by way of email which the Department apparently accepted. In the circumstances, pursuant to r84B(5)(b), the surrender should have been rejected. This Court's power to direct the Department to deem the surrender invalid is said to be found in s132(1)(b) of the Act;

(b) Neither Gel Resources Pty Ltd nor Renaissance WA Pty Ltd procured a witness to the execution of the surrender document. Whilst the

Department did not give a direction pursuant to r84B(4) that the error or defect be corrected, nevertheless the Form 12 surrender was not executed in the form of Form 12 as it was not executed in the presence of witnesses. Accordingly the Department was bound to reject the surrender;

(c) If the Department was bound to reject the surrender for either reason set out at paragraph (a) or (b) above, and this Court has power to direct that the register be amended accordingly, then the SPL applications should be granted as the primary tenement was live when the applications were lodged on 17 October 2016;

(d) In written submissions filed prior to the hearing the 1st applicants accept that the acts of marking out and lodging the applications had to occur when the primary tenement was live.[2] In oral submissions counsel took a different view and adopted the argument of counsel for the 2nd applicants to the effect that, as a matter of statutory construction, s70(1) should not be read so as to require as a precondition to the grant of an SPL that lodgement of the application occur when the primary tenement is live;

(e) Alternatively, s70(9a) is enlivened because when the SPL applications were lodged on 17 October 2016 the primary tenement remained live as the surrender was provisional only. As at that date, pursuant to r84B(6), the instrument was taken not to have been registered. The argument is that in these particular circumstances the backdating of the registration of the surrender to 12 October 2016 pursuant to r84B(7) operates to the disadvantage of the applicants who had a statutory right to lodge their SPL applications. To deny the applications due to the backdating of the surrender would be contrary to the intention of the Act, unjust, inequitable and contrary to natural justice.

14 The 2nd applicants argue:

[2] At paragraphs 42 and 66 of the 1st applicants' written submissions

(a) That when the SPL applications were lodged on 17 October 2016 the primary tenement was still live due to the effect of r84B(6), albeit that the surrender was then marked provisional (or 'pending') on the register;

(b) That in any event, on a proper construction of s70(1), it is not an essential precondition to the existence of a power to grant an SPL that the primary tenement is live when the application is lodged;

(c) Allied to the above proposition, s70(9a) converts their SPL applications to prospecting licence applications. On a proper construction of s70(9a) it matters not that the primary tenement expires, is surrendered or forfeited after marking out of the SPL applications but before lodgement of the applications. The subsection ought not be interpreted so as to confine its remedial effect to situations where the expiry, surrender or forfeiture of the primary tenement occurs only after the SPL applications have been lodged;

(d) In the alternative, pursuant to a common law principle that an act purported to be done under one statutory power may be supported by another statutory power, the Court could treat the marking out of the SPL applications in reliance on the permissive scope of s70(1) in support of a grant pursuant to s41 where, for reasons beyond the control of the applicants, the SPL applications cannot be supported pursuant to s70(1);

(e) Further in the alternative, this Court has an overall discretion, notwithstanding any non-compliance, to grant a prospecting licence to the applicants. This discretion ought be exercised in favour of the applicants in circumstances where the SPL's were marked out in accordance with s70(1), the applicants had a statutory right to then lodge applications for SPL's within a prescribed period, and where, due to the intervening event of surrender of the primary tenement after marking out but prior to lodgement, s70(1) read together with s70(9a) has not operated with ameliorating effect, to the detriment of the applicants.

15 The objector argues:

(a) When the SPL applications were lodged the primary tenement was dead. On a proper construction of the Act and Regulations the surrender was taken to have been registered from 12 October 2016, 5 days before the SPL applications were lodged. The power to 'backdate' the surrender pursuant to r84B(7) does not conflict with s70(1), and it is in the nature of an overriding provision to r84B(6). There was nothing improper with the Department's acceptance of the surrender. In any event there is provision in s103G to apply for an amendment to the register. To seek an order by way of declaration that the surrender was invalid and that the register should be amended accordingly, in the context of the current proceedings, is outside of this Court's power and is a collateral challenge;

(b) It is accepted there was no witness to the execution of the instrument of surrender, however the manner in which a document is executed is mandated by the *Corporations Act*;

(c) If it is accepted that the primary tenement was dead when the SPL applications were lodged then, on a proper construction of s70(1), the applications must be refused because an essential precondition to the existence of a power to grant the SPL is that the application is lodged when the primary tenement is still live. Section 70(9a) does not aid the applicants by conversion of the applications to prospecting licence applications because that subsection only operates on an extant application. Put another way, the right under s70(9a) does not arise until one gets through the gate of s70(1);

(d) If it is accepted that the primary tenement was dead when the SPL applications were lodged, and that the existence of the primary tenement is an essential precondition to the existence of a power to grant, the applications cannot then be supported as direct applications pursuant to section 41. The Act sets up a regime for the marking out of and

application for mining tenements which must comply with s18, s104 and s105 of the Act. The SPL application has its own special statutory regime set out in s70. Section 70 sets out a self-contained, separate regime in which there are no clear words which create an exception to the general marking out provisions. It would not give effect to the text of the Act to use the permissive marking out regime in s70 to support an application for a mining tenement pursuant to another section of the Act;

(e) This Court has no discretion to grant prospecting licence applications in circumstances where the marking out occurred when the land was not open for mining. Any exercise of discretion in favour of a grant would be contrary to the text of the Act, particularly where that text mandates compliance with the marking out requirements as being essential to a valid grant.

Principles of Statutory Construction

16 The High Court has stated on many occasions that the task of statutory construction must begin and end with a consideration of the statutory text without adoption of a pre-conceived view of its meaning. The context and purpose of a provision are important to its proper construction. The language which has actually been employed in the statute is the surest guide to legislative intention.

17 In ***Mohammadi v Bethune***[3] the Court of Appeal summarised the principles of statutory construction:

> *"The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context. Statutory construction, like any process of construction of an instrument, has regard to context. As Kiefel CJ, Nettle and Gordon JJ recently explained in* ***SZTAL****:*
>
> > *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same*

[3] [2018] WASCA 98 at [31]-[35]

> *time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*
>
> *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.*
>
> *The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.*
>
> *Discernment of statutory purpose is particularly significant in cases, commonly encountered, where the constructional choice presented is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural'. In such a case, the choice 'turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies'.*
>
> *Thus, the material provisions of the Act must be understood, if possible, as parts of a coherent whole."*
>
> *(footnotes omitted)"*

18 Adopting a particular meaning in order to avoid an unreasonable result is only permissible where the alternative construction is reasonably open[4].

19 The court may have regard to extrinsic material in circumstances of ambiguity or absurdity but that extrinsic material cannot be used to alter the statutory text.[5] Where only one meaning is reasonably open on the language of a provision, the court must adopt that meaning. Even if a drafting error is suspected or the literal

[4] ***CIC Insurance Ltd v Bankstown Football Club Ltd*** (1997) 187 CLR 384
[5] ***Commissioner of Taxation v Consolidated Media Holdings Ltd*** (2012) 250 CLR 503 [39]

meaning gives rise to absurdity, that meaning must prevail unless an alternative interpretation is reasonably open on the language in fact used by the legislature[6].

20 Where more than one meaning is reasonably open, the court may adopt that meaning which best achieves the purpose or object of the statutory provision. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. 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.[7]

21 As Lord Shaw of Dunfermline observed in ***Shannon Realties v Ville de St Michel:***[8]

> *"Where the words of a statute are clear they must of course, be followed; but, in their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and the alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."*

22 As to the objects of the Act, in ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum***[9] the Court of Appeal, referring to ***Nova Resources,*** summarised the objects of the *Mining Act*:

> *"One of the recognised primary objects of the Mining Act is to ensure, as far as practicable, that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration subject to reasonably stringent conditions. However, that is not its only object. Other objects or purposes identified by the courts include:*
>
> *1 identifying circumstances in which a tenement holder will be allowed to hold a mining tenement without mining or giving it up for others who may wish to actively mine the land;*
>
> *2 protecting tenement holders who have defaulted in compliance with the Act in some minor respect, or because of some*

[6] ***Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation*** (1981) 147 CLR 297 at 320
[7] ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27 at [47]
[8] [1924] AC 185 at 192-193
[9] [2017] WASCA 153 at [96]

circumstances beyond the control of the tenement holder, against loss of the tenement.

3 providing that, in general, the holder of a mining tenement should carry out the relevant mining activity on the tenement".

(footnotes omitted)"

The Legislative Framework

23 Generally speaking, land that is the subject of a mining tenement is not available to be marked out and made the subject of an application for another mining tenement.

24 Section 18 of the Act deals with land which is open for mining:

"18. Crown land open for mining

All Crown land, not being Crown land that is the subject of a mining tenement, is open for mining and as such is land —

(a) where any person may set up pegs or otherwise mark out the land pursuant to section 104 in connection with an application for a mining tenement; and

(b) where the holder of a miner's right may do the things authorised by section 40D; and

(c) which may be made the subject of an application for a mining tenement,

subject to and in accordance with this Act."

25 An exception to the general prohibition referred to in paragraph 23 above is found in s70 which concerns special prospecting licences over an exploration licence. Section 56A contains similar provisions concerning special prospecting licences over an existing prospecting licence and section 85B contains similar provisions concerning special prospecting licences over an existing mining lease.

26 Section 70 states, relevantly:

"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.*

…

(1a) A special prospecting licence may only be applied for by, granted to or held by a natural person.

…

(4) Where such an objection is lodged by the holder of the primary tenement the warden shall obtain a report from the Director, Geological Survey in respect of the exploration carried on by the holder of the primary tenement on the land to which the application relates.

…

(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).

…

(6) Subject to this section the mining registrar or Minister may grant the application on such terms and conditions as he thinks fit but a special prospecting licence granted pursuant to this section —

(a) shall not exceed 10 ha in area; and

(b) shall authorise the holder to prospect only for gold; and

(c) shall not unless the Minister otherwise directs, prevent the holder of the primary tenement from exploring for minerals other than gold in or on the land the subject of the special prospecting licence and the primary tenement; and

(d) does not authorise the holder thereof to excavate, extract or remove during the period for which the tenement remains in force a total amount of earth, soil, rock, stone, fluid or mineral bearing substances in excess of 500 t, except in so far as the prior written approval of the Minister may otherwise permit; and

(e) does not authorise mining to be carried out in any portion of the land that is —

(i) below a depth specified in the terms and conditions of the special prospecting licence, and any depth so specified shall be less than 50 m below the lowest part of the natural surface of the land the subject of the special prospecting licence; or

(ii) if a depth is not so specified, 50 m or more below the lowest part of the natural surface of the land the subject of the special prospecting licence, except in so far as both the prior written consent of the holder of the primary tenement and the prior written approval of the Minister may otherwise permit.

(6aa) A special prospecting licence may be granted for a period of 3 months or for any period which is a multiple of 3 months but which does not exceed 4 years.

…

(9a) Where, before the determination of an application for a special prospecting licence in respect of land, the primary tenement is surrendered or forfeited or expires, the application is, by virtue of this subsection, converted into an application for a prospecting licence in respect of that land and the provisions of this Act relating to such applications apply accordingly.

(10) On the surrender, forfeiture or expiry of the primary tenement, a special prospecting licence in respect of any land the subject of the primary tenement immediately before the date of its surrender, forfeiture or expiry is, by virtue of this subsection, converted into a prospecting licence in respect of that land and, subject to subsection (11), the provisions of this Act relating to prospecting licences apply accordingly.

…"

27 Section 95 of the Act deals with the surrender of mining tenements:

"**95. Surrender of mining tenement**

(1) Subject to this Act, the holder of a mining tenement may surrender the tenement in whole or in part by lodging a surrender for registration.

[(2), (3) deleted]

…

(6) Notwithstanding anything to the contrary in this Act other than section 26A(3) and (4), where a mining tenement is surrendered, whether under this section or under section 26A or 65, in whole or in part, every right, title and interest held under the mining tenement in respect of —

(a) the whole of the land the subject of that tenement; or

(b) that part of that land which is being surrendered,

as the case requires, absolutely ceases and determines in the case of —

(c) a conditional surrender, on the date on which the surrender becomes absolute;

(d) a surrender other than a conditional surrender or a surrender under section 26A(2) or 65, on the date the surrender is registered;

(e) a surrender under section 26A(2), on the expiry of the period referred to in section 26A(1);

(f) a surrender under section 65, on the date on which the surrender becomes effective under that section."

28 Therefore where a mining tenement is surrendered every right, title and interest held under the mining tenement in respect of the whole of the land the subject of that tenement absolutely ceases and determines on the date the surrender is registered.

29 Part IVA of the Act sets out provisions in relation to the registration of instruments and the register. By virtue of s103C(1)(d), s103C applies to a surrender instrument under s95.

30 Section 103C states:

"103C. Registration

(1) This section applies to the following instruments-

…

(d) a surrender under section 26A, 65 or 95

…

(2) An instrument to which this section applies is to be –

(a) lodged for registration in the prescribed manner and prescribed form; and

(b) accompanied by the fee (if any) prescribed in respect of the instrument.

…

(5) Subject to section 122D(1), an authorised officer is, unless section 103D applies or the regulations otherwise provide, to enter in the register the time and date of the lodgement of an instrument as the time and date of registration.

…

(7) The acceptance of an instrument for registration does not give to it any priority (other than in so far as registration may be taken to be constructive notice), force, effect or validity that it would not have had if this section had not been enacted."

31 Section 103D deals with provisional lodgement:

"**103D. Provisional lodgement**

(1) If an authorised officer is of the opinion that an instrument lodged for registration contains an error or defect, the authorised officer is —

(a) if satisfied that the error or defect can be corrected, to accept the instrument for provisional lodgement; or

(b) in any other case, to reject the instrument and endorse the register accordingly.

(2) The regulations may provide for the effect to be given to an instrument accepted for provisional lodgement."

32 Section 162(1) creates the power for the Governor to make such regulations as are contemplated by the Act or deemed necessary or expedient for the purposes of the Act and that any such regulations may confer upon a prescribed person or body specified in the regulations a discretionary authority. Section 162(2) sets out a non-exhaustive list of matters that the regulations may prescribe, provide for or regulate, such as to prescribe any forms for the purposes of the Act and the manner in which any of those forms are to be executed (section 162(2)(c)), provide for the time at which a mining tenement document is to be taken to have been lodged (section 162(2)(eb)), and provide for any matter relating to any register to be kept by a warden, a mining registrar or other prescribed persons (section 162(2)(l)).

33 The *Mining Regulations* 1981 ("Regulations") provide for a number of forms in Schedule 1, including a Form 12 Surrender.

34 Regulation 43 deals with the surrender of tenements and states:

"43. Surrender of tenement (Act s. 95)

(1) The holder of a mining tenement wishing to surrender in whole such tenement shall execute a surrender in the form of Form 12 and shall lodge the surrender with the instrument of lease or licence (if issued)."

35 Regulation 90 states:

"90. Forms to be completed in accordance with directions

A form prescribed by these regulations shall be completed in accordance with such directions as are specified in the form as so prescribed."

36 Division 4A of the Regulations deals with the lodgement of instruments and the register.

37 Regulation 84B deals with provisional lodgement and states:

"84B. Provisional lodgement

(1) In this regulation —

***allowed period** means —*

(a) the period referred to in subregulation (4); or

(b) if an extension of that period is granted under subregulation (8), the extended period.

(2) This regulation applies to the following instruments —

(a) an instrument accepted for provisional lodgement under section 103D(1); and

(b) a caveat accepted for provisional lodgement under section 122B(1).

(3) The time and date of lodgement of the instrument shall be entered in the register as the time and date at which registration was effected but the word "provisional" shall be entered in the register next to the entry specifying that time and date.

(4) An authorised officer shall, by notice in writing to the person who lodged the instrument, direct the person to ensure that the error or defect in the instrument is corrected within the period specified in the notice.

(5) Where a direction is given under subregulation (4) in relation to an instrument —

(a) if the direction is complied with within the allowed period, the word "provisional" shall be deleted from the register; or

(b) if the direction is not complied with within the allowed period, the instrument shall be taken to have been rejected and the register shall be so endorsed.

(6) If the word "provisional" is entered in the register next to an entry specifying a time and date in relation to a time and date of lodgement of an instrument, the instrument shall be taken not to have been registered.

(7) If the word "provisional" is deleted from the register under subregulation (5)(a), the instrument shall be taken to have been registered from and including the time and date specified in the register under subregulation (3).

(8) An authorised officer —

(a) may, for reasonable cause, extend the period specified in the notice for the correction of any error or defect provided the request to extend is made, in writing by or on behalf of the person who lodged the instrument, before the expiry of that period; and

(b) shall, by notice in writing to the person who requested the extension, advise whether an extension has been granted."

Was the Department 'bound to reject the surrender'?

38 The 1st Applicants' argument is that the instrument of surrender was defective and should not have been registered by an authorised officer of the Department.

39 It is clear from the language of s103D that, for the purposes of the section, whether an instrument lodged for registration contains an error or defect is a matter of the subjective opinion of the authorised officer. If the authorised officer is satisfied the error or defect is capable of correction then that person is to accept the instrument for provisional lodgement. In any other case the authorised officer must reject the instrument.

40 Pursuant to s103D(2) the Act explicitly sets out that regulations may provide for the effect to be given to an instrument accepted for provisional lodgement. Regulation 84B(2) confirms that the regulation applies to instruments accepted for provisional lodgement pursuant to s103D(1).

41 Having formed the opinion that there was an error or defect in the instrument of surrender that was capable of correction an authorised officer of the Department, by notice in writing pursuant to r84B(4), advised G&R that ***"the positions or authority the signatories hold within the company are required to be endorsed upon the executed document. The original form is required to be corrected, initialled by all signatories and submitted with a copy of this letter and a written confirmation within 14 days from the date of this notice"***. The notice set out the reason for the instrument being provisionally accepted for registration as being ***"the document does not appear to have been completed under section 127(1) of the Corporation Law. It appears that only one director who has (sic) signed for Gel Resources Pty Ltd"***.[10]

42 Section 127 of the *Corporations Act 2001* states:

> **"127 Execution of documents (including deeds) by the company itself**
>
> *(1) A company may execute a document without using a common seal if the document is signed by:*
>
> *(a) 2 directors of the company; or*
>
> *(b) a director and a company secretary of the company; or*
>
> *(c) for a proprietary company that has a sole director who is also the sole company secretary—that director."*

43 Section 127(1) makes no reference to witnesses. Section 127(2) concerns the execution of a document by a company with a common seal fixed to the document providing the fixing of the seal is witnessed by certain office holders of that company.

44 Section 129(5) states:

> *"A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their*

[10] Letter of Compliance Tenure Officer Mineral Titles Division dated 13 October 2016; Affidavit of Steven Lionel Kean annexure "SK5"

> *signature that they are the sole director and sole company secretary of the company occupies both offices."*

45 In response to the Department's notice a Senior Tenement Consultant acting as agent for Renaissance WA Pty Ltd forwarded an email to the authorised officer whom sent the notice, dated 17 October 2016, attaching an ASIC extract of the company revealing that Gel Resources Pty Ltd has one director who is also the company secretary, and suggesting that the execution was compliant with s127(1) of the *Corporations Act*. A letter addressed to the Department dated 17 October 2016 under the hand of the Senior Tenement Consultant, and in substantially the same terms as the email, requested that the surrender form be accepted and registered "on this basis".[11]

46 The relevant Form 12 instrument of surrender[12] contains an execution panel. Relevantly, on the left hand margin are the words;

"Executed by Gel Resources Pty Ltd

in accordance with section 127(1) of the

Corporations Act 2001;

…… DIRECTOR (SIGNATURE)

…….. DIRECTOR (SIGNATURE)

…….. DIRECTOR (PRINT NAME)

…… DIRECTOR/COMPANY SECRETARY (PRINT NAME)

47 The name and signature of the relevant office holder for Gel Resources appears on the right side data fields of the execution panel, as above. It is apparent that the signatory had not added the word "sole" to identify that he is both the sole director and sole company secretary.

[11] Affidavit of Steven Lionel Kean at annexure "SK6" and "SK7"

[12] Affidavit of Steven Lionel Kean at annexure "SK4"

48 It is not in dispute that the signatory is the sole director and sole company secretary and was authorised pursuant to the *Corporations Act* to execute a document on behalf of the company without using a common seal.

49 Had the word "sole" been present, arguably an authorised officer of the Department would have been entitled to assume that the surrender was duly executed in accordance with the *Corporations Act*, however it is apparent from the contents of the notice that the authorised officer was of the view that the document did "not appear" to comply with the section as only one director had signed.

50 The issue is not whether the subjective opinion of the authorised officer that there was a defect in the instrument was correct or not. The 1st applicants submit that the authorised officer's letter was a direction that the original surrender be corrected and as this did not occur the direction wasn't complied with and the instrument should have been taken to have been rejected pursuant to r84B(5)(b).

51 Arguably the 'direction' was not complied with. The instrument itself was not corrected as per the 'direction' that it be so. Apparently, or at least arguably, the authorised officer was satisfied that the surrender was properly executed, having regard to the Form 12 itself together with the information provided via the ASIC extract that the signatory was the sole director and company secretary.

52 There was no witness to the holder's signature. The Form 12 surrender within Schedule 1 of the Regulations contains a field for the signature, full name and address of a witness to the holder's signature at paragraph (f). Regulation 43 prescribes that a surrender shall be executed in the form of Form 12 and r90 prescribes that a form shall be completed with such directions specified on the form.

53 In light of these regulations it could not be determinative of compliance that the *Corporations Act* itself sets out how a document is to be executed and does not require a witness.

54 The real issue is whether it was a purpose of the legislation that an act done (the registering of the surrender) in breach of these provisions invalidates the statutory process and the result of it.

55 The *Interpretation Act* 1984 s56(2) states that:

> *"Where in a written law the word 'shall' is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed".*

56 The 1st applicants argue that the authorised officer was bound to reject the surrender and this Court should now direct the Department to reject it.

57 A further issue arises as to whether this Court has the power to direct the Department to reject the surrender and to direct the Department to update the register accordingly.

58 The current proceedings are administrative proceedings under Part IV of the Act. There is a distinction between a warden sitting in open court and the Warden's Court. In the former case a warden is exercising an administrative function, in the latter a judicial function. These are not proceedings commenced by plaint. In my view the jurisdiction and powers of the Warden's Court as set out in Part VIII of the Act, relevantly at s132(1)(b) and s134(5), are not exercisable in administrative proceedings.[13] Even if it were appropriate to do so, in my view I do not have the power in these proceedings to recommend or order, by direction or declaration, that the Department's Registers be amended to reflect a rejection of the instrument of surrender.

59 The issue remains whether the act of the Department in registering the surrender despite non-compliance with their direction, and where there was no witness to the respective signatories, was invalid.

[13] ***Global Doctor Ltd v Hodgkinson & Anor*** [2003] WASCA 119

60 A further issue is whether it is open to challenge the validity of the surrender in these proceedings or whether, as the Objector argues, it is an inappropriate collateral attack.

61 In project ***Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at [91]-[93] the majority said;

> *"91 An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.*
>
> *92 Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory. In Pearse v Morrice, Taunton J said "a clause is directory where the provisions contain mere matter of direction and nothing more". In R v Loxdale, Lord Mansfield CJ said "[t]here is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory". As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity. However, statements can be found in the cases to support the proposition that, even if the condition is classified as directory, invalidity will result from non-compliance unless there has been "substantial compliance" with the provisions governing the exercise of the power. But it is impossible to reconcile these statements with the many cases which have held an act valid where there has been no substantial compliance with the provision authorising the act in question. Indeed in many of these cases, substantial compliance was not an issue simply because, as Dawson*

> *J pointed out in Hunter Resources Ltd v Melville when discussing the statutory provision in that case:*
>
> > *'substantial compliance with the relevant statutory requirement was not possible. Either there was compliance or there was not.'*
>
> *93 In our opinion, the Court of Appeal of New South Wales was correct in Tasker v Fullwood in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision.* ***A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.*** *This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".*
>
> (Footnotes omitted)

62 Whether a collateral attack can be made on the validity of administrative acts in courts of inferior jurisdiction was dealt with by the Full Court in ***Selby v Pennings***, unreported; SCT of WA; Library No. 980480; 26 August 1998. In the context of a prosecution under the *Conversation and Land Management Act (WA*) ("CALM Act") the Court dealt with the question whether the appellant was entitled to challenge the validity of the notice in the proceedings before the Magistrates Court, the notice being issued pursuant to the CALM Act. Having considered several authorities, Ipp J concluded there was nothing in the principles expressed which precluded a collateral challenge to subordinate legislation. There were sound reasons of policy for this, including those

expressed ***in Boddington v British Transport Police*** (1998) 2 WLR 639 where Lord Steyn said at 664;

> *"There is no good reason why a defendant in a criminal case should be precluded from arguing that a by-law is invalid where that could afford him with a defence. Sometimes his challenge may be defeated by special statutory provisions on analogy with the decision in* ***Reg v Wicks*** *(1998) AC 92. The defence may fail because the relevant statutory provisions are held to be directory rather than mandatory. It may be held that substantial compliance is sufficient. But, if an issue as to the procedural validity of a by-law is raised, the trial court must rule on it".*

63 Ipp J referred to the distinction between collateral challenge made to warrants on grounds that involve the adjudication of the sufficiency of the warrant, as opposed to collateral review of the validity of the warrant on its face. Reference was made to the High Court decision in ***Ousley v R*** (1997) 148 ALR 510 in which Gaudron J said at [520]-[521];

> *"Once it is accepted, as it must be, that, even though issued by the Supreme Court, a warrant under s4A(1) of the Act is not a judicial order but an instrument made in the discharge of an administrative function, it follows that its validity may be challenged in collateral proceedings, no matter the court in which those proceedings are heard. It is to be remembered, however, that enquiry as to the validity of a warrant is a limited enquiry. Validity depends upon the warrant having being regularly issued, not on the sufficiency of the materials supporting the application for its issue."*

64 Referring to ***Ousley v R***, Ipp J said at page 29;

> *"Thus, Her Honour emphasised that, generally speaking, the validity of an instrument made in the discharge of an administrative function 'may be challenged in collateral proceedings, no matter the court in which those proceedings are heard'.... However, the limitations on collateral challenges to such warrants have no application to the principles applicable to collateral challenges to other forms of administrative acts."*

65 Albeit in the context of a criminal prosecution pursuant to the *Forest Management Regulations 1993*, I can see no reason why the reasoning in ***Selby v Pennings*** is not applicable to a challenge to the validity of the administrative act of the Department in registering the surrender. That there is also a mechanism via s103G of the Act for a person who 'has an interest' in a mining tenement or an application for a mining tenement to apply to amend particulars in the register

(via a Form 30 application to amend) does not deprive a person from challenging the validity of the administrative act.

66 Nevertheless, in my view it was not a purpose of the legislation that an act done in breach of the relevant provisions (the registration of the surrender by the Department in these particular circumstances) should be invalid.

67 Whether an instrument contains an error or defect is a matter for the subjective opinion of the authorised officer. That opinion may be correct or incorrect. The purpose of the provisional lodgement provisions is to afford a person lodging the instrument the opportunity to correct it. Regulation 84B(4) does not itself prescribe how the error or defect is to be corrected. It does prescribe the authorised officer give notice in writing directing the person to ensure the error or defect in the instrument is corrected. It was the Department's notice or letter that then sets out how the direction was to be complied with.

68 The fact that the preliminary question whether an instrument contains an error or defect is based on the subjective opinion of an authorised officer is, in my view, a supplemental indicator that it was not a purpose of the legislation that an act done in breach of r84B(5)(a) or (b) should nullify or invalidate the statutory process and the result of it. The opinion of the authorised officer may be wrong. The instrument may in fact be completed in accordance with the directions specified in the form. The consequences of holding void acts done in breach of r84B(5), even when no error exists in a form or where there is substantial compliance with directions specified in a form, could cause inconvenience, including to those not responsible for any non-compliance.

69 I am also of the view that the Department's act of registering the Form 12 surrender when there was no witness to the holder's signature does not invalidate the statutory process and resultant surrender. A surrender must be executed 'in the form of Form 12'. Whilst not determinative, there is no requirement under the *Corporations Act* that a company can only execute a document signed by 2

directors, or a sole director and sole company secretary, when those signatures are witnessed.

70 Section 74 of the *Interpretation Act* 1984 states that where a form is prescribed or specified under a written law, deviations therefrom not materially affecting the substance nor likely to mislead shall not invalidate the form used. Reliance on this provision would however be subject to a contrary intention within the Act or Regulations that a more strict form of compliance was necessary.

71 The relevant instrument of surrender does not contain a mis-description of the primary tenement being surrendered or a mis-description of the holder of the tenement, or otherwise create uncertainty or contain ambiguity as to the purpose or provenance of the instrument. Whilst the spectre of an unauthorised person executing a surrender, or a challenge as to whether an authorised person did in fact execute a surrender, are sound policy reasons for the requirement of a witness, I cannot discern a legislative purpose to invalidate the Department's act of registering the surrender in breach of the requirements of r43 and r90.

72 Section 103D(2) of the Act makes provision for regulations to give effect to instruments accepted for provisional lodgement. The deletion of the pending or provisional status of the surrender activated r84B(7) with the effect that the instrument was taken to have been registered from the time and date specified when the instrument was first lodged. The regulation is not inconsistent with, nor does it override the Act. The Act specifically caters for it. The retrospective effect contemplated by r84B(7) is not inconsistent with the right of an applicant to lodge an SPL application. The regulation deems a 'corrected' instrument to have taken effect when it was first lodged. Had the surrender not been the subject of provisional lodgement but rather had it been registered with immediate effect upon lodgement pursuant to s103C(5) of the Act, then the primary tenement was dead as at 14:40 on 12 October 2016. As I have concluded below, the SPL applications could not have succeeded in that event. That is a consequence of the text of the Act. The fact that the retrospective effect of r84B(7) applies to an

instrument when the word provisional is deleted from the register has arguably operated to the disadvantage of these applicants, however that is a consequence of the operation of these provisions.

The proper construction of s70(1) and s70(9a)

73 Having regard to the competing arguments, on balance I favour the construction advanced by the Objectors to the effect that the existence of a live primary tenement is a pre-condition to the ability of an applicant to apply for an SPL under s70(1).

74 The opening words of s70(1) state "Where any land that ***is the subject of*** an exploration licence (in this section called the primary tenement)…,". The concluding words of the section "in respect of any part of the land ***the subject of the primary tenement***" return to what the land is the subject of. Plainly the words "***is the subject of***" are present tense. The word "and" where it is stated "mark out ***and***, in accordance with section 41, apply for a prospecting licence for gold" is necessary to reflect the fact that marking out and application are separate events. That they are separate events is clear having regard to r63, for example, which deals with land marked out but not applied for, and s105.

75 The parenthesis "in accordance with section 41" merely explains how an application is to be made. Those words cannot be construed as a parenthetical or 'punctuation firewall' indicating that marking out is subject to the existence of a live primary tenement whereas application is not. On a plain reading the words signify a legislative intention that the primary tenement must exist when an SPL is both marked out and applied for. The placement of the parenthetical words "in accordance with section 41" after the words "mark out and" but before the word "apply" does not signify that the existence of the primary tenement is a pre-condition only to the marking out and not to the application itself. According to the plain words of the section the temporal focus of the acts of marking out and application is when the land is the subject of an exploration licence. There is no warrant in the text to read down that temporal focus as applying to marking

out but not application. To do so would be to assume a purpose which, whilst arguably desirable in any one particular factual scenario, cannot be discerned from what the text actually says.

76 There are other sections within the Act where the legislature has used precise words indicating that a wider temporal focus applies. One example is s57(2e) which deals with land which is unavailable for exploration if that land "***is, or was when the application for the exploration licence was made, the subject of a current mining tenement***". That the legislature has not used such precise language in s70(1) indicating that an SPL can be marked out on land which is the subject of a primary tenement but need not be applied for when that land is the subject of a primary tenement tends to support the construction contended for by the Objectors. The language actually employed is the surest guide to legislative intention.

77 The use of precise language differentiating the temporal focus between the separate acts of marking out and application can be seen in s70(5a) which begins with the words "***If, at the time when an applicant for a special prospecting licence marked out the land to which his application relates…***,". If the legislature had intended that a live primary tenement was a pre-requisite to marking out only one would expect this to be reflected clearly in the text of the section, or for there to have been a separation of the requirements of marking out and application in different subsections.

78 In ***Optimum Resources Pty Ltd v Peko Gold Ltd and Delta Gold NL*** (1991) 10 AMPLA Bull 125 an application for an SPL over a prospecting licence was refused in circumstances where the land was marked out when the primary tenement was live but the SPL application was not lodged until the day after the primary tenement expired. The issue for consideration was whether it was necessary for the primary tenement to be in force at the time the application was lodged. Warden Malone concluded that "clearly the section is expressed in terms

that contemplate that the primary tenement will be current when the application was made"[14].

79 The section being considered was s56A(1) which is a mirror image provision to s70(1). At the time of the decision in ***Optimum Resources*** the Act had not been amended to include what is now s56A(9a) and (10) and its mirror provisions at s70(9a) and (10). Therefore the Warden's observation that the Act was silent as to the real possibility of a primary tenement expiring while the SPL was current (and that the legislation may be defective in that regard) is no longer apposite. But as to the question whether an application for an SPL could be made when the primary tenement had expired the Warden's view was that it could not be. The Warden said similar reasoning could be applied to that referred to in ***Hot Holdings Pty Ltd and Eon Metals NL*** (unreported, Perth Wardens Court, 15 February 1991) where the Warden said in relation to s67 of the Act;

> *It is clear the legislators intended that if the term of the licence was to be extended that it also was necessary to make the application before the term expired so that the public could ascertain before the actual expiry date what ground could be available as at the time of expiry. If this were not the case, there would be a period between the expiry date and date of application in which the status of the land in respect to the application of section 67 would be unknown.*

80 It must be accepted that one consequence of this construction is that the holder of the primary tenement on which a person marks out an SPL could effectively thwart an anticipated application by surrendering the primary tenement on a date between the marking out of the SPL and the date of lodgement of the SPL application.

81 However this construction avoids another potentially graver consequence inconsistent with the objects of the Act. If the construction contended for by the Applicants is accepted it would be open to, and would encourage, individuals to

[14] ***Optimum Resources***, p3

mark out SPL applications over an existing primary tenement the day before expiry of the tenement, for example, with a view to having their applications for SPL's converted to prospecting licences after expiry. The consequence to be avoided is in circumventing s18 of the Act and thereby facilitating individuals obtaining priority over those who wait for the land to become open for mining before marking out the land. An SPL can only be applied for by a natural person, not a corporate entity[15]. The construction contended for by the Applicants is, in my view, apt to enure to the disadvantage of miners in competition for access to the State's resources. Whilst that is in no way to suggest that in the present case the Applicants' motives were ulterior, nevertheless the abuse to be avoided is in the circumvention of s18 of the Act to the disadvantage of other miners awaiting the land to become available in order to exploit available resources.

82 I am not of the view that s70(9a) comes to the aid of the Applicants.

83 As the Warden identified in ***Optimum Resources***, the Act was then silent as to the real possibility of a primary tenement expiring whilst the SPL was current. What was described as a potential defect in the legislation has since been rectified by the insertion of s70(10) which converts an existing SPL to a prospecting licence on the expiry, surrender or forfeiture of the primary tenement.

84 In ***Napier & Ors v Samantha Mining & Exploration Pty Ltd*** (1994) Unreported Vol 10 Folio 22, 19 October 1994, Warden Cullen said;

> *It is in my view essential under the Section that the primary tenancy is on foot at the time the Warden grants an application, Section 56A(6).*

85 Whilst the potential exclusionary effect identified by the Warden in ***Optimum Resources*** was ameliorated by the insertion of s70(10), the potential exclusionary effect of the above interpretation of the Warden in ***Napier*** was ameliorated by the insertion of s70(9a). The former saves an existing SPL when the primary tenement dies by conversion to a prospecting licence. The

[15] s70(1a)

Applicants argue that the latter saves an SPL application, whether lodged or not at the time the primary tenement dies, by conversion to a prospecting licence application.

86 However the opening words of s70(9a) refer to a period "Where, before the determination of an application for a special prospecting licence". Had the legislature intended to ameliorate the factual scenario that arose in ***Optimum Resources***, for example, one would expect the language used would include clear words such as "Where, ***before the lodgement or determination of*** an application for a special prospecting licence…,". Those words do not exist.

87 If an application has not been lodged it is difficult to conclude that it is an application at all for the purposes of the Act.

88 In light of the decision in ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd*** (2010) WAR 134 it would not be a condition precedent that the application for an SPL was compliant or 'in accordance with the Act' before the ameliorating effect of s70(9a) could apply, nevertheless in my view there has to be an extant application for the subsection to operate upon. In order for an application to exist it must first be lodged. It is the lodgement of the application that triggers the requirement of notice to the holder of the primary tenement, for example. In my view it is an harmonious interpretation of sections 70(1) and 70(9a), read together, that the existence of the primary tenement is a pre-requisite to a valid application and that the existence of that application is a pre-requisite to the operation of s70(9a). If there was clear language indicating the contrary, or a separation of reference to the marking out of an SPL on one hand and the application for an SPL on the other, within different subsections, then the construction contended for by the applicants would have more persuasive force.

89 It is clear from the language actually used that the intended effect of s70(9a) is to operate on and so preserve an extant, albeit undetermined, application. The remedial effect of the subsection is in recognition of the very real possibility of considerable delay between the lodgement of the SPL application and its

determination and the equally very real possibility that the primary tenement might expire, be surrendered or be forfeited during that period.

90 The s70(9a) amendment was contained in the *Mining Amendment Act 2001*. Clause 15 of the Explanatory Memorandum to the Bill states (emphasis added);

> *Subclause (2) adds new section (9a) to provide that, where the primary tenement (the underlying prospecting licence)*[16] *dies* ***after the application for a special prospecting licence was made but before it has been determined****, that application for a special prospecting licence becomes a "normal" application for a prospecting licence and is dealt with accordingly.*

91 Extrinsic materials cannot displace the meaning of statutory text and an examination of such material is not an end in itself. Although the quoted passage refers to an application 'made' as opposed to one lodged, and bearing in mind that extrinsic material cannot determine the proper construction of a provision, the passage is nevertheless consistent with the construction I find arises from the statutory purpose and from the statutory text itself. In that sense consideration may be given to the extrinsic material to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision.[17]

92 Section 70(9a) is clearly intended to be a remedial provision. It is designed to remedy the injustice that an applicant, who otherwise acted in compliance with s70(1), would suffer if the tenement died before his application was determined.

93 Generally such legislation should be interpreted beneficially. In ***IW Applicant v City of Perth*** (1997) 191 CLR 1 Brennan CJ and McHugh J said at 11:

> *…beneficial and remedial legislation, like the [Equal Opportunity] Act, is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must*

[16] Reference to a prospecting licence is clearly an error given s70 concerns exploration licences)
[17] *Interpretation Act 1984* (WA), s19(1)(a)

> *be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural.*

94 The temporal focus of the subsection is before determination of an application. One interpretation of those words is that the temporal focus is very wide and captures any point prior not only to determination of an application but before an application is even lodged. The difficulty with that interpretation is that the section actually refers to an application. What it does not do is make any mention of a period of time prior to lodgement of an application. It is unlikely to have been overlooked by the legislature that there is a period of 10 days following mark out in which an applicant may lodge an application. During this period of 10 days, as in the period following lodgement of an application, a primary tenement could be forfeited or be surrendered or expire. This potential scenario is obvious as opposed to merely theoretical.

95 In my view it is not too pedantic or narrow an interpretation of the words "before the determination of an application" to conclude that the temporal focus is on the period following lodgement of the application. Conversely, it is too generous an interpretation of those words to conclude that the temporal focus includes the period before the application is even lodged. There is no clear intention or recognition in the text that the potential scenario posed above is to be catered for. There are no clear words indicating that it was intended to save an application not yet lodged. The words themselves indicate an extant application was contemplated.

96 That interpretation is consistent not only with the words of the subsection, but also with the construction I prefer with respect to s70(1), namely, that for an application to be valid in the first place it must be lodged before the primary tenement dies. It is more likely that if the legislature had not intended that it was a pre-requisite that the primary tenement was live at the time of application for an SPL that it would have adopted more precise language in s70(9a) indicating that the subsection would operate on an application that had not even been lodged when the primary tenement died.

97 I accept the Objector's construction that one doesn't get through the gate of s70(1) in order for s70(9a) to operate when there is no application in existence at the time the primary tenement dies.

Can the applications be supported as direct applications pursuant to s41 of the Act?

98 The 2nd Applicants contend, in the alternative, that if the primary tenement must be live when the application is lodged, and s70(9a) cannot apply where the primary tenement dies before the application is lodged, then nevertheless, notwithstanding any non-compliance with the Act, in this Court's discretion the applications can be supported as direct applications pursuant to s41 of the Act.

99 The 2nd Applicants further contend that the applications can be granted pursuant to a recognised common law principle that an act purported to be done under one statutory power (namely the marking out of an SPL on a primary tenement pursuant to s70(1)) may be supported under another statutory power (namely the power to apply for a prospecting licence pursuant to s41).

100 In ***Tortola Pty Ltd v Saladar Pty Ltd*** [1985] WAR 195 at 206 Brinsden J dealt with the question whether, in hearing and determining an application for a prospecting licence, a warden has a discretion to grant or refuse the application. His Honour answered this question in the affirmative, yet with the proviso 'to a limited degree'. His Honour sets out a number of matters that a warden would be entitled to take into account in exercising the discretion, including that a warden must be satisfied that the land to which the application relates is open for mining within the meaning of Part III of the Act and would have to exercise discretion taking into account 'any other express, or by necessary implication, requirements of the Act, concerning the grant of a prospecting licence'.

101 The second applicants submit the discretion to grant should be exercised in their favour given;

(a) they applied in good faith for an SPL within the appropriate time limits;

(b) there is an apparent arrangement between G&R and the Objector given the near concurrent surrender and subsequent application by the Objector for an exploration licence over the same area;

(c) that sections 70(1) and 70(9a) have not operated with the apparent fulsome ameliorating effect it would have been thought these provisions should provide, to the detriment of the Applicants;

(d) the area applied for is significantly smaller than the area that the Objector has applied for.

102 I am not of the view that these applications can be supported as direct applications pursuant to s41.

103 The Act carves out specific exceptions to the otherwise prohibited act of marking out on land the subject of a mining tenement. Section 70(1) is one example. The Act does not provide an exception to the applicability of s18 where an application for a prospecting licence is concerned. According to the plain words of s70(1), marking out over an existing exploration licence is for the purpose of an application for an SPL pursuant to s70(1). That there exists a statutory basis for conversion of an SPL, or an application for an SPL, to a prospecting licence or a prospecting licence application does not support reliance on the permissive marking out regime applying to a direct application pursuant to s41. The legislative regime does not support this scenario.

104 In ***Forrest & Forrest Pty Ltd v Wilson*** (2017) 346 ALR 1 the High Court emphasised that non-observance of the requirements of the regime governing the grant of mining leases was apt to disadvantage both the public interest and individuals in ways that the Act did not intend.[18] Allowing the 'relaxed' marking out regime afforded by s70(1) to be carried over to support a direct application for a prospecting licence, particularly where there is no clear expression within

[18] ***Forrest***, [82]

the Act of that power existing, would be inconsistent with the principles set out in ***Forrest***.

105 It would produce uncertainty and the potential for abuse were it open to those miners who, with the ulterior purpose of having their application dealt with as a prospecting licence, apply for the more limited rights that attach to an SPL by means of utilising the permissive marking out regime afforded by s56A(1), s70(1) and s85B(1) whilst the primary tenement was extant. It would operate to the detriment of those miners who, for example, seek to exploit minerals other than gold and wait for the land to become available for mining before marking out their applications. It would potentially operate to the disadvantage of corporate entities competing with natural persons.

106 Again, that is in no way to suggest that these applicants had an ulterior motive. Their SPL's were marked out on 8 and 9 October 2016 and the primary tenement was not due to expire until 18 October 2016. By virtue of r64 the applicants had 10 days from the date of marking out within which to lodge their applications. The applications were all lodged on 17 October 2016, a day before the primary tenement was due to expire. Whether or not the applicants were of the view that their applications had to be lodged prior to the expiry of the primary tenement in order to be valid, it is apparent that but for the surrender lodged on 12 October 2016 the applicants would have had their applications converted pursuant to s70(9a).

107 The Act clearly prescribes different pathways of application and a different regime depending on the nature of the mining tenement being applied for. As the High Court said in ***Forrest***, when a statute that provides for the disposition of interests in the resources of a State prescribes a mode of exercise of the statutory power, that mode must be followed and observed.[19] To open the gate to use of the permissive marking out regime pursuant to s70(1) as a potential means to bypass s18 and support a direct application pursuant to s41 would

[19] ***Forrest & Forrest Pty Ltd v Wilson*** [2017] 346 ALR 1, [64]

constitute a relaxation of the statutory regime which would be apt to enure to the disadvantage of miners in competition for access to the State's resources.

108 In light of the qualifying factors which ought guide the discretion to grant or refuse, as identified in ***Tortola Pty Ltd,*** it would not be appropriate to exercise the discretion to grant as a direct application pursuant to s41.

109 To apply the principle that an act purporting to be done under one statutory power may be supported by another statutory power, whether in the context of administrative decisions or otherwise, would be inconsistent with the purpose and context of the Act, which explicitly prescribes the pathways available to an applicant and the conditions precedent to a valid application. As Martin CJ stated in ***Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*** [2012] 43 WAR 91 at 81;

> *There are, of course, limits to this principle, as the full court of the Federal Court noted in* ***Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission*** *(1993) 40 FCR 409. For example, if the matters which the decision-maker must take into account, or which can permissibly be taken into account, vary as between the different statutory provisions, error by the decision-maker as to the source of the authority may lead to error in the form of failing to take account of considerations that are required to be taken into account, or by taking account of considerations that are irrelevant to the exercise of the power.*

110 A prospecting licence must be marked out (s41, s105). All Crown land not being the subject of a mining tenement is open for mining and can be marked out subject to and in accordance with the Act (s18). When the land the subject of these applications was marked out the land was the subject of a mining tenement, namely exploration licence E28/1634. Sections 18 and 105 do not apply to the special statutory regime of the SPL application. It is a separate, self-contained regime. The link between the SPL regime and the ordinary prospecting licence regime only exists via the pathway of s70(9a) and s70(10). In the absence of clear words indicating the contrary there is no warrant in the text of the Act

supporting a direct application can be supported using the permissive marking out regime of s70(1). Effect must be given to the text of the Act. It would be inappropriate to apply the principle that an act purported to be done under one statutory power may be supported under another statutory power when the Act in question prescribes modes that must be followed and observed.

111 To the extent there is a discretion to grant or refuse a prospecting licence I would not exercise that discretion in favour of granting these applications.

Warden AD Hills-Wright

31 March 2019

ANNEXURE A

No.	Date	Time	Event
1	**08.10.2016**	**8:35am**	**Mr Kean marks out 10.0 Ha (P28/1306-S)**
2	**08.10.2016**	**8:50am**	**Mr Brewer marks out 10.0 Ha (P28/1310-S)**
3	**08.10.2016**	**11:00am**	**Mr Connor marks out 10.0 Ha (P28/1310-S)**
4	**09.10.2016**	**4:30pm**	**Mr Crocker marks out 9.74 Ha (P28/1307-S)**
5	**09.10.2016**	**5:15pm**	**Mr Crocker marks out on behalf of Mr Cukela 9.74 Ha (P28/1308-S)**
6	**12.10.2016**	**2:40 pm**	**Gel Resources Pty Ltd and Renaissance WA Pty Ltd lodge outright Surrender of tenement E28/1634 (495287)**
7	**12.10.2016**	**2:46pm**	**Golden Pig Enterprises Pty Ltd (by Mr Victor Miasi) lodges a Form 21 Application for an Exploration Licence (E28/2653)**
8	12.10.2016	4:24pm	Mr Brewer lodges an Application for Forfeiture of tenement E28/1634 (495322)
9	13.10.2016	8:38am	Mr Brewer lodges an Application for an Exploration Licence (E28/2654)
10	13.10.2016	8:38am	Mr Kean lodges an Application for an Exploration Licence (E28/2655)
11	13.10.2016	8:38am	Mr Stewart Freeth lodges an Application for an Exploration Licence (E28/2656)
12	**13.10.2016**		**Letter from Department of Mines and Petroleum to Gel Resources Pty Ltd and Renaissance WA Pty asserting that the Surrender of E28/1634 was erroneous or defective because: "the document does not appear to have been completed under Section 127(1) of the Corporations Law. It appears that only one director who [sic] has signed for Gel Resources Pty Ltd. [The letter then quoted part of section 127(1)] Accordingly the positions or authority the**

			signatories hold within the company are required to be endorsed upon the executed document."
13	**17.10.2016**	**12:22pm**	**Mr Kean lodges an Application for a Special Prospecting Licence (P28/1306-S)**
14	**17.10.2016**	**2:08pm**	**Mr Crocker lodges an Application for a Special Prospecting Licence (P28/1307-S)**
15	**17.10.2016**	**2:08pm**	**Mr Cukela lodges an Application for a Special Prospecting Licence (P28/1308-S)**
16	**17.10.2016**	**3:21pm**	**Email from McMahon Mining Title Services to Department of Mines and Petroleum advising Gel Resources is a sole director company and therefore execution of the Surrender by one director only was compliant with section 127(1) of the Corporations Act. A letter is then sent to the Department from McMahon Title Services attaching an ASIC extract (demonstrating that Gel Resources is a sole director company) and respectfully requesting that the surrender form "be accepted and registered on this basis".**
17	**17.10.2016**	**4:09pm**	**Mr Connor lodges an Application for a Special Prospecting Licence (P28/1309-S)**
18	**17.10.2016**	**4:09pm**	**Mr Brewer lodges an Application for a Special Prospecting Licence (P28/1310-S)**
19	**18.10.2016**	**1:53pm**	**Jess Bosio (Department of Mines and Petroleum) registers Surrender of Exploration Licence E28/1634 as effective from 12.10.2016 at 2.40pm**
20	**18.10.2016**		**Notice from Department of Mines and Petroleum to Gel Resources Pty Ltd and Renaissance WA Pty advising that Surrender of E28/1634 was registered on 12.10.2016 at 2.40pm**
21	14.11.2016	4:13pm	Mr Crocker lodges a Form 16 Objection to Golden Pig Enterprises' Application for an Exploration Licence

22	15.11.2016	2:16pm	Mr Brewer lodges a Form 16 Objection to Golden Pig Enterprises' Application for an Exploration Licence
23	16.11.2016	8:36am	Mr Kean lodges a Form 16 Objection to Golden Pig Enterprises' Application for an Exploration Licence

24	16.11.2016	2:34pm	Tisala Pty Ltd (by Lawrence Thomas) lodges a Form 16 Objection to Golden Pig Enterprises' Application for an Exploration Licence (497016)
25	21.11.2016	11:07am	Golden Pig Enterprises Pty Ltd. lodges a Form 16 Objection to Mr Kean's Application for Special Prospecting Licence P28/1306-S (497258)
26	21.11.2016	11:07am	Golden Pig Enterprises Pty Ltd lodges a Form 16 Objection to Mr Crocker's Application for a Special Prospecting Licence P28/1307-S (497259)
27	21.11.2016	11:07am	Golden Pig Enterprises Pty Ltd lodges a Form 16 Objection to Mr Cukela's Application for a Special Prospecting Licence P28/1308-S (497260)
28	21.11.2016	11:07am	Golden Pig Enterprises Pty Ltd lodges a Form 16 Objection to Mr Connor's Application for a Special Prospecting Licence P28/1309-S (497261)
29	21.11.2016	11:07am	Golden Pig Enterprises Pty Ltd lodges a Form 16 Objection to Mr Brewer's Application for a Special Prospecting Licence P28/1310-S (497262)