
JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	TRUE FELLA PTY LTD V PANTORO SOUTH PTY LTD [2022] WAMW 19
CORAM	**:**	WARDEN GM CLEARY
HEARD	**:**	On the papers
DELIVERED	**:**	18 August 2022
FILE NO/S	**:**	Application for E63/2149 and Objection 636195
TENEMENT NO/S	**:**	E63/2149
BETWEEN	**:**	True Fella Pty Ltd (Applicant) AND Pantoro South Pty Ltd (Objector)

Catchwords: Application for Exploration Licence; s 58(1) statement; compliance and initial compliance; priority

Legislation:

- *Mining Act 1981* (WA) sections 58(1), 58(3) and 105A
- *Mining Regulations 1981* (WA) regulation 59A

Result: Application E63/2149 is not compliant

Representation:

Counsel:

Applicant	:	J Loveland
Respondent	:	E Rogers

Solicitors:

Applicant	:	Lawton MacMaster
Respondent	:	Austwide Legal Pty Ltd

Cases referred to:

Ex Parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy & Others Supreme Court of WA Library No: 960568; (1996) 16 WAR 428.

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

Golden Pig Enterprises Pty Ltd v O'Sullivan [2021] WASC 396.

In the matter of Applications for Exploration Licences by Central Pilbara Iron Ore P/L & Ors [2012] WAMW 1.

In the matter of competing applications for Exploration Licences by Hammersley Iron P/L & Brockman Exploration P/L [2012] WAMW 22.

Mineralogy P/L v FMG Pilbara P/L [2010] WAMW 20.

Onslow Resources Ltd v The Hon William Joseph Johnston MLA in capacity as Minister for Mines and Petroleum [2021] WASCA 151.

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355.

South Western Sydney Local Health District v Gould [2-18] NSWCA 69; (2018) 97 NSWLR 513.

Will v Broughton [2020] NSWCA 355; (2020) 104 NSWLR 170.

Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd & Ors [2010] WASCA 132.

Introduction

1 The following facts are taken from the submissions filed by both parties and the parties' particulars. They are uncontentious.

2 On 15 October at 3:57:20 pm two graticular blocks in the Dundas mineral field became open for mining pursuant to an outright surrender lodged by Polar Metals Pty Ltd (**Polar**). At 4:08:22 pm on that same day True Fella Pty Ltd (**True Fella**) applied for E63/2149 over the blocks. At 4:17:38pm on that same day, Pantoro South Pty Ltd (**Pantoro**) and Central Norseman Gold Corporation Pty Ltd together applied for E63/2150 over the blocks. This decision deals with the application of True Fella.

3 True Fella's application was on the prescribed form, accompanied by the amount of the prescribed rent for the first year of the term and application fee and lodged at a mining registrar's office. The required notifications and subsequent lodging of security were made.[1]

4 The application was accompanied by a statement in purported compliance with s 58 (1)(b) of the Act. It is that statement which has drawn the contention of the objector, Pantoro.

5 Each party has since lodged objections over the other's application. The objections are, in their nature, the same: each says that the other has failed to comply with the requirements of the *Mining Act 1978* (WA) (**the Act**) and *Mining Regulations 1981* (WA) (**The Regulations**) in their application, and that the other party in lodging their application was acting by or on behalf of Polar or someone else who had an interest in the exploration licence, thus breaching section 69 of the Act.

6 An interlocutory application was originally before the court as an application for consolidation of applications E63/2149 and E63/2150 and the objections thereto, however the parties informed the court at a mentions hearing that they were content for a determination on actual compliance in E63/2149 to be determined before anything else.

7 The parties agreed that the question of compliance of application E63/2149 should be dealt with first on the papers. I have received from the parties:

[1] Affidavit of Linda Maree Skender, affirmed 1 June 2022.

i. Applicant's Submissions opposing consolidation, 30 March 2022;

ii. Objector's Submissions supporting consolidation, 15 April 2022;

iii. Applicant's responsive submissions opposing consolidation, 28 April 2022.

8 I have also had regard to the application for E63/2149 and the accompanying statement pursuant to section 58(1), particulars of each parties' case filed in relation to application E63/2149 and Objection 636195 and the Affidavit of Linda Maree Skender, affirmed 1 June 2022. Pursuant to reg 154(1)(d) of the Regulations, I have also had regard to the Application for Mining Tenement E63/2150 (Form 21) and Objection 636615 thereto, and the Guidelines for Applicants – 'Section 58(1)(b) Statement to Accompany applications for exploration licences' published by the Department of Mines, which I shall address later in these reasons.

Legislation

Exploration licences

9 By s 57 of the Act, the Minister may, on the application of any person, and after receiving a recommendation of the mining registrar or the warden in accordance with s 59, grant to that person a licence to be known as an exploration licence.

10 By s 57(3), the mining registrar or warden shall not recommend the grant of an exploration licence under this section unless they are satisfied that the applicant is able to effectively explore the land in respect of which the application has been made.

11 Section 58 of the Act provides:

(1) An application for an exploration licence -

(a) shall be in the prescribed form; and

(b) shall be accompanied by a statement specifying —

i. the proposed method of exploration of the area in respect of which the licence is sought; and

ii. the details of the programme of work proposed to be carried out in such area; and

iii. the estimated amount of money proposed to be expended on the exploration; and

iv. the technical and, subject to subsection (1aa), financial resources available to the applicant; and

(c) accompanied by the amount of the prescribed the first year of the term of the licence or portion thereof as prescribed; and

(d) shall be lodged in the prescribed manner; and

(e) shall be accompanied by the prescribed application fee.

…

(3) An applicant shall at the request of the mining registrar or warden furnish such further information in relation to his application, or such evidence in support thereof, as the mining registrar or warden may require but the mining registrar or warden shall not require information or evidence relating to assays or other results of any testing or sampling that the applicant may have carried out on the land the subject of his application.

(4) Within the prescribed period the applicant shall serve such notice of the application as may be prescribed on the owner and occupier of the land to which the application relates and on such other persons as may be prescribed.

12 Section 59 provides for the determination of an application for an exploration licence. Under s 59(1) and (2), where no objection is lodged to the grant, the mining registrar shall forward a report to the Minister and recommend the grant of the exploration licence, if the mining registrar is satisfied that the applicant has complied in all respects with the provisions of the Act, or recommend the refusal if not so satisfied.

13 Under s 59(4) and (5) where an objection is lodged, the warden shall hear the application and give the objector an opportunity to be heard. The warden shall then forward to the Minister the notes of evidence, any maps or documents referred to, and a report which recommends the grant or refusal of the licence and the reasons for the recommendation. Under s 59(6) the Minister may, on receipt of the report of the mining registrar or the warden, grant or refuse the exploration licence.

14 Under s 61 an exploration licence shall remain in force for a period of five years, and may be extended.

15 During the currency of the licence, the holder must comply with prescribed expenditure conditions, unless an exemption is granted, and is liable to forfeiture for failure to comply with terms and conditions, including expenditure conditions.

16 The holder of an exploration licence has priority for the grant of a mining lease or general purpose lease over the land.

Priority of applications

17 Section 105A of the Act provides, relevantly:

105A. Priorities between applicants for certain tenements

(1) Subject to section 111A, where more than one application is received for a mining tenement (other than a miscellaneous licence) in respect of the same land or any part thereof, the applicant who first complies with the initial requirement in relation to his application has, subject to this Act, the right in priority over every

other applicant to have granted to him in respect of that land or part the mining tenement to which his application relates.

(2) In subsection (3) applicant means an applicant for a prospecting licence, exploration licence, mining lease or general purpose lease.

(3) Where in respect of any land the warden is satisfied that 2 or more applicants complied with the initial requirement in relation to their applications at the same time or within a prescribed period, priority shall, unless written agreement is concluded by the applicants and lodged in the prescribed manner and within the prescribed time, be determined by ballot conducted by the warden on a date to be determined by the warden and notified to the applicants.

…

(4) In this section a reference to compliance with the initial requirement in relation to an application is a reference —

(a) in the case of an application for an exploration licence, to lodging that application in the prescribed manner; …

18 By s 105A, the applicant who first complies with the 'initial requirement' in relation to an application for a mining tenement in respect of the same land has, subject to the Act, priority over every other applicant, unless a ballot is required. No ballot was required in the present case.

19 There are two matters raised for consideration by the parties' submissions in this case:

i. Has the applicant complied with its requirements under s 58(1)(b) such that the warden's jurisdiction is enlivened, and

ii. Is the need for 'initial' compliance in s 105A different to the compliance required in s 58(1), such that even if there is non-compliance of the s58(1)(b) statement, priority is still maintained by the applicant.

Compliance with section 58(1)

20 Section 58(1) prescribes 5 matters which must occur at the time of lodgement of the application for an exploration licence. Section 58(1)(b) requires a statement to accompany the application, setting out certain matters. By s 57(3) a recommendation to grant the application is not to be made to the Minister unless the mining registrar or warden is satisfied that the applicant is able to effectively explore the land in question.

21 Sections 57(3) and 58(1) create two separate considerations.[2] Firstly, pursuant to section 58(1)(b), the warden must determine whether the statement that accompanies

[2] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 and ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [76].

the application for the exploration licence complies with s 58(1)(b). That is, relevantly to the present case: is the application accompanied by a statement specifying:

i. The proposed method of exploration of the area in respect of which the licence is sought;

ii. The details of the program of work proposed to be carried out in such area;

iii. The estimated amount of money proposed to be expended on the exploration, and

iv. the technical and financial resources available to the applicant?

22 Once compliance has been determined in the affirmative, only then is and can the second question be engaged: in accordance with s 57(3), does the applicant have the financial and other resources available to carry out the work program?[3] That is, does the applicant have the ability to effectively explore the land in respect of which the application has been made?

23 It may be that often information provided under s 58(1)(b) will be sufficient for the warden to make a determination under s 57(3), however the two considerations are separate and distinct.[4]

24 Warden Roth was of the view that where there is non compliance of s 58(1) "there can be no valid application," that is, no application has been lodged.[5] That view was based on the majority judgement in ***Ex Parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy & Ors***,[6] in which, while determining whether a ballot in that case was required, Chief Justice Malcolm and Justice Steytler also considered whether an application not compliant with s 58(1) could be included in the ballot, should there be one. In that case, 2 of the applicants failed to provide the required s 58 statement at the time of handing their applications to the registrar. Justice Steylter said "there can be no valid application for the purposes of s 58(1) of the Act in the absence of the accompanying statement

[3] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [37].
[4] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 and ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [73].
[5] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [51], [101], [104].
[6] ***Ex Parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy & Ors*** Supreme Court of WA Library No: 960568; (1996) 16 WAR 428.

referred to in s 58(1)(b)."[7] While the facts of that case required focus on the entire absence of a statement under s 58(1), he went on to remark that given the meaning of the term 'initial requirement,' as defined in s 105A(4), and the purpose of the s 58(1) statement, the application lodged must be an application "which complies with the requirements of s 58."[8] That supports a wider reading of non- compliance not only being the entire absence of such a statement, but, also a statement which does not fulfil the purpose of the statement, being the ability of the registrar or warden to then make a determination under s 57(3). In ***Onslow Resources Ltd v The Hon William Joseph Johnston MLA in capacity as Minister for Mines and Petroleum***[9] (***Onslow Resources***), the court, as Allanson J remarked in ***Golden Pig Enterprises Pty Ltd v O'Sullivan***[10] (***Golden Pig***), "observed that the scheme of the Act does not admit of the notion of a 'non-compliant' statement, in the sense of a document that partly meets the description of the statement required."

25 The requirements under s 58(1) are elements in a regime prescribed for the grant of an exploration licence and must be followed for there to be a valid grant.[11] In the absence of one of those matters, the application is not valid.[12] Therefore, any application which does not contain with it, at the time of lodging, a compliant statement under s 58(1), whether because of a complete absence of a statement, or a statement which does not meet the requirements under the section, is not a valid application.

26 The question of compliance with s 58(1) is a jurisdictional fact, there being no application lodged where there is non-compliance. Once the warden is satisfied of the fact of compliance with s 58(1), that is, that the warden has jurisdiction, then the warden's jurisdiction is enlivened, and the warden must make a determination under s

---

[7] ***Ex Parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy & Ors*** Supreme Court of WA Library No: 960568; (1996) 16 WAR 428, 444.
[8] ***Ex Parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy & Others*** Supreme Court of WA Library No: 960568; (1996) 16 WAR 428, 445.
[9] ***Onslow Resources Ltd v The Hon William Joseph Johnston MLA in capacity as Minister for Mines and Petroleum*** [2021] WASCA 151.
[10] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [48].
[11] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [44] - [46], referring to ***Forrest & Forrest Pty Ltd v Wilson*** [2017] HCA 30 [64]; (2017) 2623CLR 510.
[12] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [48], citing ***Ex Parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy & Others*** Supreme Court of WA Library No: 960568; (1996) 16 WAR 428, 444 per Steytler J.

57(3). Any determination under s 57(3) is entirely within the warden's jurisdiction, and discretion.

How is compliance with section 58(1)(b) determined?

27 Section 58 requires an application for an exploration licence to be accompanied by a statement specifying certain matters. The plain meaning of s 58 is that the statement must accompany the application.[13] However, as Allanson J pointed out in ***Golden Pig***, the plain meaning of what is required for the content of the statement to comply with s 58(1)(b) is less readily apparent.[14]

28 In ***Golden Pig***, to determine what is required in the content of the statement under s 58(1)(b)(iv), his Honour set out, and had regard to, well-known principles of construction.[15] His Honour's view as to the intention of the section is:

> *The mining registrar or other person reading the application and accompanying statement should be informed, by those documents, what resources are available to the applicant to carry out the proposed method of exploration and the proposed program of works, and to fund the estimated expenditure.*[16]

29 The onus to satisfy the warden that the statement specifies the requisite material is on the applicant,[17] that is, that it specifies the resources available to it. If there is sufficient material in the statement for the warden then to make a determination pursuant to s57(3), the application will be compliant. The question of whether the statement filed with the application in purported compliance with s 58(1)(b) is compliant is a question of fact, to be determined by the warden.[18]

---

[13] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [53].
[14] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [53].
[15] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [55] – [57], citing ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [78]; ***Will v Broughton*** [2020] NSWCA 355; (2020) 104 NSWLR 170 [53] – [58] and ***South Western Sydney Local Health District v Gould*** [2-18] NSWCA 69; (2018) 97 NSWLR 513 [79].
[16] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [61].
[17] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [70].
[18] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [43], [47].

30 In other words, from that information provided, the person reviewing the application and accompanying statement should be in a position to recommend the application be granted or refused, and the reasons for that recommendation.

31 While the warden does not have to be satisfied that the resources exist, or that they equal or exceed the amount required to complete the work program,[19] there must be satisfaction that they have been specified, and that they are available to the applicant. It may be that once specified, in the final determination under s 57(3) the warden forms the view that the financial or technical resources are insufficient to effectively explore the land. However, that does not mean that the application was not compliant,[20] in the jurisdictional sense identified by Allanson J in ***Golden Pig***.

32 Defining the words in s 58 must be done in the context of the legislation.

33 Therefore, the question of compliance, that is, whether the application for the exploration licence is accompanied by, relevantly to the present case, a statement that specifies the matters set out in s 58(1)(b) (i)-(iv), is informed by the principles and purposes of the Act, the context in which the words appear and the consequences of their literal or grammatical meaning, and not just the literal or grammatical construction of the words used in the legislative provision. One of the primary purposes of the 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,[21] promoting the exploration and exploitation of mineral resources throughout the state. An applicant who is granted a licence, but is incapable of exploring the area or lacks any realistic plan or program of work will remove that land from being available for exploration.

34 Therefore, there must be some degree of certainty or detail, stated definitely, about the proposed methods of exploration, the program of works proposed, the estimated money to be spent on the exploration and the resources available to the applicant. That detail will be sufficient if it enables the decision-maker to make an assessment under s 57(3) about whether the applicant has the ability to effectively explore the land.

---

[19] ***In the matter of Applications for Exploration Licences by Central Pilbara Iron Ore P/L & Ors*** [2012] WAMW 1 [13].
[20] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [75] and [77].
[21] ***Nova Resources NL v French*** (1995) 12 WAR 50, 57 - 58 (Rowland J, with whom the other judges agreed).

35 In ***Mineralogy P/L v FMG Pilbara P/L***[22] (***Mineralogy***) the applicant submitted that the fact of their having the requisite financial resources was "implicit" in the broad statements contained in the s 58(1)(b) statement that given the size and experience of the company, it had the requisite resources. Warden Roth determined that it was not for the Department or Warden to have to 'imply' anything – the resources must be explicitly stated.[23] Further, if a warden has to 'infer', 'imply' or 'calculate' that financial resources are available from the information provided, then the information is not in itself sufficient, or not sufficiently specified.[24] In his view, there must, at minimum, be an explicit indication of the financial resources available to the applicant to pursue the exploration licence being applied for.[25]

36 In ***Golden Pig*** the applicant in its initial statement listed the type of consultants that it intended to engage once the tenement was granted, and provided details of the proposed program and spend, that expenditure being over the minimum required expenditure each year. A term deposit slip from the bank account of the sole director and shareholder was also provided. In Allanson J's view, none of those details 'specified' what resources were available to it; the degree of certainty or detail[26] intended by s 58(1) was absent, the application merely indicating in some way, the resources they intended to access.[27] The applicant had provided, upon request, further information, and some consultants were named. However, there was still no certainty in that information that those consultants were available to the applicant, that is, they were named, but the applicant had not made any enquiry as to whether they would accept engagement.[28]

<u>The s 58(1) statement in the present case</u>

37 In the present case, the applicant provided the following information with the application pursuant to s 58(1)(b):

---

[22] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [22], [81] – [84].
[23] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [44].
[24] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [83], [84].
[25] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [88].
[26] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [59].
[27] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [69].
[28] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [33], citing Warden O'Sullivan's findings on the facts, and [72], Allanson J finding no error in the Warden's factual findings of compliance.

a. They are a company which primarily explores for gold, however it will consider "exploring for all other viable commodities including Iron Ore." Otherwise, the goal for "this exploration strategy is to discover economic mineralisation."

b. As to the proposed method of exploration and program of work in the "initial phase of exploration for year 1":

   i. Desktop studies, compile historical WAMEX reports and data, compile, and re-process open file GSWA data sets (geology, geochemistry, geophysics), remote sensing and data processing, open file seismic reflection data compilation and re-processing, with a proposed expenditure of $7,000;

   ii. site reconnaissance and geological mapping, with a proposed expenditure of $5,000;

   iii. geophysical surveying: gravity transects and infill, magnetotelluric transects, passive seismic transects, with a proposed expenditure of $2,000; and

   iv. geological management, with a proposed expenditure of $2,000.

c. Subsequent phases will depend on the results obtained from previous phases of exploration.

d. As to the technical resources available to it, the statement appears to have had pasted into it, without attribution, a statement from 'Resource Potentials' which outlines what that company can do to "assist your project", in particular:

   i. "True Fella draws on a diverse bouquet" of contract technical services used by Resource Potentials, a consulting and contracting business who can "tailor exploration programs for client specific projects." According to the statement the Resource Potentials team are trained by Dr Jayson Meyers, with team members including hydrologists, mining engineers and metallurgists, who will be used as required by Dr Meyers "with performance of True Fella work programs…" Examples of work programs are also listed as:

      i. detail geological and structural mapping;

      ii. target generation and assessment of tenements;

      iii. geochemical surveys (rock chip sampling and Davis Tube testing);

      iv. RAB and RC drilling of regional exploration targets;

v. resource drill outs (using RC and diamond drilling); and

vi. pre-feasibility to bankable feasibility on projects.

ii. Dr Jayson Meyers has a bachelors degree in science (geology), a Masters degree in science (geochemistry) and a doctoral degree in geophysics.

e. As to the financial resources available to it, the applicant provided:

i. A Westpac Business One bank statement in its name dated 25 June 2021 to 27 September 2021 showing $107,825.38 in credit, and

ii. a statement that it has taken into account its entire portfolio of tenements "when considering the financial commitments and as such True Fella will be able to secure financial funds in excess of $250,000."

38 There are no details of what money is to be spent or program of works is to occur after the first year.

39 The objector raises the following objections to the s 58(1) statement:

i. In relation to the proposed method of exploration, the details provided are only in relation to the initial phase of exploration for the first year and do not provide details of how the applicant will ensure the full area of the application will be explored during the full five year term of the license.

ii. Neither does the statement include details of the selection rationale for the proposed target mineral or minerals for the application.

iii. In relation to the technical resources available to the applicant, the statement only indicates that the applicant intends to outsource the activity by utilising the services of Resource Potentials. Resource Potentials, according to the objector, is a third-party geological services company. Further, the objector alleges in its Particulars of Objection, that the text provided in the applicant's statement is extracted from the Resource Potentials website. It provides no details of the individuals who will be available to the applicant, their expertise or qualifications.

iv. There are no details of the applicant's agreement with Resource Potentials or their availability during the term of the license.

v. In relation to the financial resources, the objector has undertaken an exercise of setting out the tenements held or subject to application by the applicant and the minimum expenditure required for each. The objector has determined that the

minimum expenditure requirements, should all those under application be granted, in addition to those already granted, is $463,560 in the next 12 months. Accordingly, the objector says that the funds available to the applicant are not sufficient to comply with the prescribed expenditure across the tenement, or its entire portfolio.

vi. Furthermore, the objector claims that the applicant's statement that it has the ability to secure funds in excess of $250,000 is a bold conclusory statement that does not specify the actual resources available to it or that the resources available are sufficient. Also, there is no identification of whether the funds would be available to a parent company or the applicant itself.

40 Before making a determination in relation to those objections, there are two necessary comments.

41 Firstly, as I have set out, the objector claims that the statement in relation to Resources Potential has come from a website. That is an allegation made in the Particulars of Objection but not supported by any evidence. While reg 154(1)(d) provides for the warden to inform themselves as they see appropriate, in my view that does not extend to a warden researching on the Internet to find company websites and making comparisons. If the objector wanted the warden to review the website when considering the issue of compliance, evidence should have been put forward which sets out a link to the website with details of when the website was accessed. As that has not been done I have disregarded that contention.

42 Secondly, the objector extensively referred to a Guideline published by the Department when particularising why, in its view, the statement under s 58(1) is not compliant. While annexed to the Particulars of Objection, no evidence was provided as to when or how the Guidline was accessed, but I have assumed it was accessed through the Department's website, and is current.

43 As at 3 August 2022, the Department of Mines, Industry Regulation and Safety, "How do I…" website contains the following page, and words:

> **Section 58(1)(b) statement to accompany applications for exploration licences**
>
> When making an application for an exploration licence the applicant must provide evidence of their ability to effectively explore the land once the licence is granted.

> An application for an exploration licence must be accompanied by a statement specifying information such as the method of exploration, details of the program of proposed work, proposed estimated expenditure on exploration and the technical and financial resources available to the applicant.

The page then provides a link as follows:

> The attached Guidelines for applicants – Section 58(1)(b) statement to accompany applications for exploration licences is intended as a guide to assist applicants for exploration licences with the preparation of this statement.[29]

44 The Guideline provided is dated 22 March 2012.

45 Department Guidelines are not made pursuant to legislation. They are the Department's, no doubt very helpful, attempt at assisting those applying under the regime to have the best attempt at lodging applications. They are not the law, and neither should they be taken to set out the law. Sometimes, they are contrary to the law, as Warden Roth found in relation to a previous iteration of this guideline.[30] Any decision regarding the adequacy of a statement under s 58(1) is for the warden to make according to the Act, not the Department's view of what will be adequate. Accordingly, reference to the Guideline attempting to persuade the warden that the statement is not compliant is misconceived.

46 There is a second reason why reliance on this Guideline in particular in making submissions to the warden about compliance is not appropriate. While referring to s 58(1), the Guideline appears to be drafted to assist applicants to satisfy the ultimate requirement of the legislation - to provide sufficient information to persuade the registrar, warden or Minister that the applicant is able to effectively explore the land; after all, that is the ultimate goal of an applicant, not simply to be compliant with s 58(1). Accordingly, using the Guideline to object to compliance under s 58(1) risks error by conflating the separate and distinct questions in s's 58(1) and 57(3) identified by Allanson J in ***Golden Pig***. On those bases, I have not had regard to the Guidline when determining the question of compliance.

Proposed method of exploration, program of work and estimated expenditure

47 Section 58(1)(b) requires specification of:

i. The proposed method of exploration of the area;

[29] Section 58(1)(b) statement to accompany applications for exploration licences (dmp.wa.gov.au), accessed 3 August 2022.

[30] ***In the matter of Applications for Exploration Licences by Central Pilbara Iron Ore P/L & Ors*** [2012] WAMW 1 [61]-[62].

ii. The details of the program of works;

iii. Estimated amount of money proposed to the expended on the exploration.

48 The applicant has provided one statement under the heading 'Proposed Method of Exploration and Exploration Program.' There is no reason why the items in s 58(1)(b)(1)-(iv) (in this case items (i)-(iii) in that section) should be set out separately, however there is a danger in not setting out in the sequence provided in each of the sub-sections the information required that the warden will be required to make inferences, imply or assume that from each of the apparently combined requirements, each requirement has been satisfactorily addressed.[31]

49 The term of the licence is 5 years. The area of the licence, if granted, is the whole of the area the subject of the application. Having regard to the principles of the Act, the features of an exploration licence and the use of those particular words, in my view the Act requires a description not only of the applicant's plan and planned expenditure in the first year, but for the life of the licence, and for the full area of the licence. Without conflating the separate questions posed by s's 58(1)(b) and 57(3), an assessment under 57(3) will not be possible without information about the applicant's intentions and resources available to it over the life of the licence, nor without the intended areas of exploration, and the reasons for choosing those areas, being specifically stated, that is, specified. I accept that exploration must start somewhere, usually with mapping the ground, analysing existing data and taking samples in the first year and that programs of work may be guided by finds, and that not every centimetre of land is used in exploration. However, an assessment of whether the applicant can effectively explore the land is an assessment of the use of all of the land over which the application has been made, over the full term of the licence, because that is what has been applied for. Without that information being provided under s 58(1), that assessment, under s 57(3) cannot be made.

50 As I have identified, the applicant has not specified the target mineral. While it has acknowledged that it is primarily a gold explorer, it has given a broad statement that the goal for this exploration is "economic mineralisation." It may be that identification of a target mineral, or even minerals, and the rationale for that target, in some cases, would assist the decision-maker under s 57(3) to determine whether the proposed program of

[31] ***In the matter of competing applications for Exploration Licences by Hammersley Iron P/L & Brockman Exploration P/L*** [2012] WAMW 22 [42].

work is an effective method of exploration of the land. In this case, as I have identified, there is a lack of detail in the specification of the proposed method of exploration, and the program of work, in that it does not specify what is intended over the entire term of the licence. Further, it does not specify what areas of the licence are to be subject to the exploration, or the program of work. Not specifying those details, it consequently does not specify the estimated amount of money proposed to be spent in the exploration over the term of the licence, nor acknowledge the minimum expenditure, with a description of work to meet it, over the following 4 years. Accordingly, the identification of the target mineral, in this case, would not have assisted in the overall statement being compliant.

51 I am of the view that the identification of only the first years' program, without the rationale for exploring for particular minerals or specification of the areas to be targeted, in this case, does not enable the decision-maker under s 57(3) to make a determination as to the applicant's ability to effectively explore the ground applied for, and therefore the applicant's application in this case is not sufficient to satisfy s 58(1)(b) (i) and (ii).

The technical resources available to the applicant

52 Similar to the statement provided in ***Golden Pig***, the applicant in the present case has named expert consultants. The statement says that True Fella "draws" on them. That sounds as if there is a present arrangement between them – that is, the inference is that there is such an arrangement, and the grammar is such that it sounds like True Fella is the author of the paragraph. However, later in the statement, the voice changes, with,

> *The experienced team at Resource Potentials can assist your project at a variety of development stages, from tenement evaluation and initial exploration program planning, to drill targeting and resource definition.*

(emphasis added).

53 Further, that statement is broad and unconnected to the plans set out in the 'Proposed Method of Exploration and Exploration Program' section in the statement. Given the change in voice, it is uncertain whether True Fella, or their agent, wrote the statement, or if, as is alleged by the objector, the paragraph is merely a generic statement taken from somewhere. It is for the applicant to satisfy the warden that their statement is compliant. Therefore, it is for the applicant to satisfy the warden that their statement specifies the technical resources available to it. Given the uncertainty about who wrote

the paragraph, and the broad nature of the statement as to the services offered, there is uncertainty as to whether the applicant is outlining the services for which Resource Potentials have been engaged, whether this is a generic outline of the potential services Resource Potentials can offer True Fella, or whether, if the latter, the statement was provided as a result of an enquiry by True Fella, or has been collated by True Fella from public information. With that, there is nothing to confirm that Resource Potentials have been engaged, or have even been notified that they may be engaged on this licence. Therefore, there is no specification of whether the services of Resource Potentials are available to the applicant. Accordingly, the applicant has failed to specify details required in s 58(1)(b)(iv), and the application does not comply.

The financial resources available to the applicant

54 Section 58(1)(b)(iv) also requires the specification of the financial resources available to the applicant. The objector submits that the applicant should have specified in its application its other tenements, and commitments on those tenements, so that the warden or Minister may make an assessment of the real financial position of the applicant. In my view that is not what the section requires.

55 Broad statements as to the financial capability of a company without bank statements, or simply supplying the balance sheets of a company, have been found not to comply, because they require the warden to make inferences or calculate the funds actually available.[32] However, caution must be exercised not to overstate the type of material necessary to satisfy the requirements of s 58(1)(b). In determining that level of detail, reference must be made to the principles of the Act and the mining regime and the wording and context of the section. As in the present case, applications are sometimes made in competition with others. Time is usually of the essence in order to gain priority, or to be included in a ballot. It would be contrary to the reality of the mining regime that the s 58(1) statement is so detailed, and requires such a significant analysis of the applicant's circumstances that significant time in priority would be lost, or applicants have difficulty making applications, thus stalling the desired outcome that land is explored and mined. On the other hand, applications should not be lodged by applicant's who are reckless as to whether they can, or know they cannot, because of other commitments, effectively explore the ground.

[32] For example, ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20.

56 The section requires the specification of the financial resources available to the applicant, as opposed to the financial resources available to the applicant in relation to, or confined to, the application itself. The wording suggests that account may be required of financial commitments outside the tenement applied for.

57 The objector says that without that detail, the application is not compliant. There is a difference between statements that are so broad, or statements where there is no obvious connection between the applicant and the holder of the bank account proffered as evidence, that there is uncertainty as to what is available to the applicant, and statements that clearly show the cash available to the applicant itself. The latter, in my view, as in this case in relation to the bank account, is a clear statement of what is available, at a time close to the application, to the applicant. That is, the fact is, that in order to explore the tenement, that money is available. Whether that tenement will compete with others in the applicant's portfolio is a question which relies on an analysis of much more than just the minimum annual commitment on each tenement, whether granted or not.

58 If a tenement holder fails to spend money on the tenement, then the mining regime has a built-in safeguard to ensure land is being mined, or is open for mining – the application for forfeiture for under expenditure by any person. It is the question of availability that s 58(1)(b)(iv) is concerned with, not a detailed financial analysis of the possibilities of its availability depending on many variables. It may be that in some cases, the affairs of the company, or company structure or finances, are so complicated that they do require a detailed analysis of other commitments to comply with s 58(1), however in the present case, I have nothing before me which suggests that True Fella is making the application on behalf of another company (leaving aside the objection regarding an alleged breach of s 69 of the Act), or parent company whose assets it relies on to explore the land.

59 The objector has performed an analysis not only of the applicant's financial position, but also of the tenements both being held by the applicant, and applied for. There is no guarantee that all of the applications will be successful. To determine that, an analysis would have to be undertaken of the other applications within the exercise of the assessment of the present application. Whether the applicant has sufficient funds to cover even those applications already granted would also require an analysis of those licences, their minimum commitments and their current status. The mere fact that an analysis is required of anything, at this stage, suggests a conflation of the 2 questions identified by Allanson J in ***Golden Pig***. It may be that the applicant is eventually asked

to supply information about commitments to other tenements under s 58(3), having mentioned them in the statement, however in my view the supply of a bank statement, in the applicant's name, showing cash available well above the initial commitment identified is, save my comments below, sufficient to comply under s 58(1)(b) in this case. Whether that cash is sufficient, after analysis of that information and any other information that may be requested, is a question for consideration under s 57(3).

60 However, the applicant has also made a broad statement that it has the ability to secure other funds. It has referred to its other tenements. It said that it is by virtue of these tenements that it may secure further funds. Such a broad, bland statement, in my view has no specification of how that is to occur, and whether the ability to obtain more funds is actually available to the applicant. and on who's opinion. Having referred to its portfolio in reliance of that statement, it was incumbent on the applicant to provide details of the other tenements and the lending analysis that underpins the claim for availability of those funds. Had that been the only statement about the financial resources available to the applicant in this case, I doubt it would be found to be compliant with that part of s 58(1)(b)(iv). As it is, it is not a helpful claim, but its inclusion in this case does not itself render the application non-complaint with that part of s 58(1)(b)(iv).

61 There is a further issue with the question of the financial resources available to the applicant: the applicant has only provided an estimation of its work and expenditure for the first year of the licence. Accordingly, even though I have found that in this case the provision of the bank statement in the applicant's name specifies financial resources available to it, the application is still nevertheless non-compliant because it has not provided the required information which would enable the decision-maker under s 57(3) to make a proper analysis of the financial resources available to the applicant over the term of the licence.

62 Each of the requirements of s 58(1) must be complied with for the application to be compliant.[33] Therefore, with one or more requirements not being compliant, the application is not compliant.

[33] ***In the matter of competing applications for Exploration Licences by Hammersley Iron P/L & Brockman Exploration P/L*** [2012] WAMW 22 [32].

Application to 105A

63 The legislative purpose of s 105A is to assist the Minister in determining the priority in which they are required to consider applications for mining tenements lodged by applicants over the same land.[34] Section 105A(1) bestows priority to the applicant who first complies with the initial requirement relevant to their application. Section 105A(4) defines 'initial requirement' in relation to exploration licences as "lodging that application in the prescribed manner." In ***Golden Pig***, his Honour remarked that compliance with the initial requirement, in an application for an exploration licence is a reference to lodging the application in the manner prescribed by reg 59A.[35]

64 Reg 59A requires the application to be lodged at a mining registrar's office. At first glance, reg 105A(4) read with reg 59A may appear to suggest that for priority to be achieved under s 105A, all that is required is for the application to be received by the registrar, irrespective of its content – that is, it is a question of form only. The applicant submitted that that is a permissible reading of the description of 'initial compliance.'

65 Reference was made by the applicant to remarks made by Her Honour President McLure in ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd & Ors***.[36] In that matter the court was asked to determine whether a grant of exploration licences to a person apparently in breach of s 69 of the Act, that is, a person having some connection with the previous tenement holder applying within the 3-month moratorium, was a valid grant. Her Honour President McLure, Owen JA and Buss JA agreeing, considered that an application made by such a person was still an application, thus satisfying one of the preconditions to the exercising of the Minister's power that an application be made "by any person." Her Honour gave, as an example, her view that even an application not in compliance of s 58(1) would still be an application "*for the purposes of the condition*."[37] In my view, in using those words in that context, she intended to confine her review of the law to the validity of an application "by any person" as opposed to an application

[34] ***In the matter of competing applications for Exploration Licences by Hammersley Iron P/L & Brockman Exploration P/L*** [2012] WAMW 22 [20]. While the cited remark relates to applications made at the same time over the same land, in my view the general principle of the purpose of the provision relates to any applications made over the same land.
[35] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [18].
[36] ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd & Ors*** [2010] WASCA 132 [51].
[37] ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd & Ors*** [2010] WASCA 132 [51].

otherwise not in compliance with any other of the pre-conditions necessary for the exercise of power by the registrar, warden or Minister.

66 However, Warden Wilson relied on her Honour's remarks to determine that, in his view, an application which does not comply with initial requirements of the Act as required by s 105A is still an application, albeit it may not be included in a ballot.[38] Given the inclusion of an application in a ballot is a secondary method of determining priority under certain conditions, in my view there is no difference between determining initial compliance for the purposes of s 105A(1) and the requirement under s 105A(4).

67 In my view, that the compliance with the 'initial requirement' required by s 105A is only a question of form does not sit with the consequences of an application being not compliant under s 58(1). The grant of an exploration licence is a disposition of interests in the resources of the State made by the executive government.[39] In those circumstances, the requirements of the regime resulting in a grant are mandatory for the making of a valid grant. In ***Onslow Resources***, while dealing with a mining lease, the court was of the view that the remarks of the High Court in ***Forrest & Forrest*** regarding the mandatory nature of such a regime relate to the proper construction of the Act as a whole.[40] In ***Golden Pig***, Allanson J acknowledged the application of the High Court's remarks to exploration licences, and adopted the statement of the court in ***Onslow Resources*** that there cannot be a notion of a non-compliant statement, being predicated by the High Court's remarks.[41] Therefore, where the requirements of a regime are mandatory, a statement is either compliant, or it is not. The consequence acknowledged by Allanson J is that the non-compliant statement cannot be regularised by the provision of further information.[42] A more basic consequence is that neither the registrar nor the warden are empowered to consider it, even with the provision of further information.

---

[38] ***In the matter of competing applications for Exploration Licences by Hammersley Iron P/L & Brockman Exploration P/L*** [2012] WAMW 22 [34] – [35].
[39] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [44], citing ***Forrest & Forrest Pty Ltd v Wilson*** [2017] HCA 30; (2017) 262 CLR 510 [64] and ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [45].
[40] ***Onslow Resources Ltd v Hon William Joseph Johnston MLA in capacity as Minister for Mines and Petroleum*** [2021] WASCA 151 [48].
[41] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [44], [47], [48] citing ***Onslow Resources Ltd v Hon William Joseph Johnston MLA in capacity as Minister for Mines and Petroleum*** [2021] WASCA 151 [49].
[42] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [49].

68 An application cannot be first in time, or in time at all, if it does not comply with the requirements of s 58(1). It cannot be the case that despite the non-compliance of an application, the mere lodgement of that application marks the applicant's priority, when by virtue of that non-compliance, there is no jurisdiction to assess that application. There is, in effect, no use for the priority.

69 I agree with Warden Roth's views in ***Mineralogy***. The application of s 105A does not require a different approach to s 58(1). If the information provided complies with the requirements of s 58(1), then the application is lodged; no further analysis of the information is required pursuant to s 105A, or to be accorded any priority under s 105A.[43] If the statement provided is not compliant, there is no valid application pursuant to s 58 and that applicant, despite handing over its application first, does not have priority.[44] They are not a party to any actions carried out under s 105A.

70 Section 105A uses the word 'initial.' It could be said that if that did not mean something different to the compliance required under s 58(1), there would be no need for that word. However, in my view, the inclusion of that word leaves room for the operation of s 58(3). Given a non-compliant application cannot be regularised pursuant to the provision of further information,[45] only when an application is compliant can there be a request for, or provision of, further information under s 58(3).

71 Where an application purportedly lodged does not comply with s 58(1), the applicant does not have priority that would be accorded to it according to the timing of that lodgement. Should they wish to make an application to be considered in the normal course of the *Mining Act* and *Mining Regulation* procedures, they may provide further information pursuant to s 58(3). However, reliance on material provided pursuant to s 58(3) does not restore what would have been the original priority, had the application been compliant. Priority purportedly held (although not, in fact held, due to the non-compliant application) cannot be restored, because there is nothing to restore – it was never, in fact, held, the application never having been lodged.[46] In that case, the date and time of priority would be fixed as the date the further information is provided.

[43] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [44].
[44] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [48].
[45] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [49].
[46] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [102] – [104].

72 In contrast, in assessing an application (which, by definition, is compliant) to determine whether the applicant can effectively explore the land, further information may be requested pursuant to s 58(3). Compliance is to be judged on the initial application, and only if compliant can more information be sought under s 58(3). There is no priority to restore in that case; priority is maintained, the applicant having achieved that priority by already having made a compliant application, that is, the applicant complied with initial requirements.

73 Therefore, the requirement that there be compliance with initial requirements first to be accorded priority over every other applicant under s 105A(1) requires a compliant application as understood by s 58(1) and lodged as instructed under reg 59A.

Conclusion

74 True Fella has not lodged a compliant application. Accordingly, despite its purported application being received by the mining registrar first, it cannot be accorded priority over all other applicants.

75 Furthermore, the application not being compliant, True Fella has not lodged an application. The warden will hear the parties as to the appropriate orders in relation to application E63/2150 and Objection 636195 and as to how those orders will effect E63/2149 proceeding.

_____

Warden GM Cleary

18 August 2022