
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : LEICHARDT INDUSTRIALS PTY LTD v SANTOS WA NORTHWEST PTY LTD (1st), PASTORAL MANAGEMENT PTY LTD (2nd), CITIC PACIFIC MINING MANAGEMENT PTY LTD (3RD) & CITY OF KARRATHA (4th) [2022] WAMW 8

CORAM : WARDEN T McPHEE

HEARD : 24 February 2022

DELIVERED : 10 March 2022

FILE NO/S : Objections 632300, 632301, 632331, 632333, 632388, 632389

TENEMENT NO/S : Applications M47/1622 and M47/1623

BETWEEN : **LEICHARDT INDUSTRIALS PTY LTD**
(Applicant)

AND

SANTOS WA NORTHWEST PTY LTD
(1ST Objector)

PASTORAL MANAGEMENT PTY LTD
(2ND Objector)

CITIC PACIFIC MINING MANAGEMENT PTY LTD
(3rd Objector)

CITY OF KARRATHA
(4TH Objector)

Catchwords: *Application for an extension of time to lodge a mining proposal, invalidity*

Legislation:

- *Mining Act 1978* (WA): ss 74(1AA), 75(ca)(i), 75(ca)(ii), 75(2a), 75(4a), 75O, 75P, 162B
- *Mining Regulations 1981* (WA): r 25AA

Result: *Application for an extension of time granted.*

Representation:

Counsel:

Applicant : Mr Jones
First Objector : Ms Kelly
Second Objector : Mr Chandler
Third Objector : Mr Chandler
Fourth Objector : No Appearance

Solicitors:

Applicant : DLA Piper
First Objector : Hopgoodganim Lawyers
Second Objector : Allens
Third Objector : Allens
Fourth Objector : No Appearance

Cases referred to:

- *Forrest & Forrest Pty Ltd v Wilson and Others* [2017] HCA 30
- *Molopo Australia Ltd v Eastern Gold NL* [1989] WAR 270
- *Allhawk Nominees Pty Ltd & Anor v RBJ Nominees Pty Ltd* [2004] WAMW

REASONS FOR DECISION

Introduction & Background

- 1 I have before me an Interlocutory Application filed by the Applicant in this matter dated 27 October 2021 (the Application).
- 2 The Application was supported by the Affidavit of Mr Nathan Ross Douglas dated 18 October 2021 (Douglas Affidavit), and subsequent to the hearing, the Affidavit of Mr Joshua Austin Scoles dated 25 February 2022 (Scoles Affidavit).
- 3 The Application seeks an extension of time to lodge a substitute mining proposal accompanying applications for mining leases M47/1622 and M47/1623, and the time to be extended pursuant to section 162B of the Act, to and including, 29 October 2021.
- 4 The original application for M47/1622 and M47/1623 had been made on 11 August 2011.
- 5 The application seeks an extension of time, in effect to lodge an amended mining proposal pursuant to section 74(1AA) of the Act.
- 6 In the ordinary course I would not provide reasons in relation to an extension of time of this sort, particularly in circumstances where none of the Objectors oppose the application being made.
- 7 However, as a result of a particular circumstances of this Application, and some of the novel legal issues which have arisen, I consider it appropriate to provide the reasons as follows.
- 8 In summary, I am prepared to grant an extension of time as sought, pursuant to section 162B of the Act, and to section 74(1AA).

Relevant Legal Provisions

9 This application concerns the operation of section 74(ca)(i) in respect of an application for a mining lease which is accompanied by a mining proposal.

10 The relevant provision is set out as follows:

74. Application for mining lease

...

(ca) shall be accompanied by —

(i) a mining proposal; or

...

11 Also relevant to the determination of this matter is section 70O and section 70P which are set out below:

70O. Terms used

(1) In this Division —

guidelines means guidelines approved by the Director General of Mines for the purposes of this Division;

mine closure plan means a document that —

(a) is in the form required by the guidelines; and

(b) contains information of the kind required by the guidelines about the decommissioning of each proposed mine, and the rehabilitation of the land, in respect of which a mining lease is sought or granted, as the case requires;

mining proposal means a document that —

(a) is in the form required by the guidelines; and

(b) contains information of the kind required by the guidelines about proposed mining operations in, on or under the land in respect of which a mining lease is sought or granted, as the case requires; and

(c) contains a mine closure plan;

relevant mining proposal, in relation to a mining lease, means —

- (a) *a mining proposal that accompanied the application for the mining lease under section 74(1)(ca); or*
- (b) *a mining proposal for which there is approval as described in section 82A(2)(b);*

significant mineralisation has the meaning given in subsection (2).

- (2) *For the purposes of this Division there is significant mineralisation in, on or under land to which an application for a mining lease relates if exploration results in respect of a deposit of minerals located in, on or under that land indicate that there is a reasonable prospect of minerals being obtained by mining operations.*

70P. Guidelines to be publicly available

The Director General of Mines shall ensure that the guidelines are made available, without charge, for public inspection in the prescribed manner

- 12 As indicated above, section 74(1AA) is also relevant, applying Regulation 25AA.

74(1AA) Instead of accompanying an application for a mining lease under subsection (1)(ca), a mining proposal may be lodged within the prescribed time and in the prescribed manner and, if so lodged, is to be treated for the purposes of this Division as a mining proposal that accompanied the application for the mining lease under section 74(1)(ca).

- 13 Finally, of note is the operation of section 162B of the Act. That provision is as follows:

162B. Extension of prescribed period or time

(1) If this Act provides for something to be done within a prescribed period or a prescribed time, the Minister or a warden may, in a particular case, extend the period or the time for doing the thing.

(2) The power in subsection (1) may be exercised whether or not the prescribed period has ended or the prescribed time has passed.

- 14 In context of the dispute more broadly, the following provisions are also worthy of mention, namely section 75(2a) and section 75(4a).

Application of the law to the circumstances of this case

- 15 It appears that this is a matter which is a yet further manifestation of the consequential difficulties associated with the application of the Act by the

Department of Mines, Industry Regulation and Safety (the Department) in light of the decision of the High Court in *Forrest & Forrest Pty Ltd v Wilson and Others* being 2017 HCA 30 (*Forrest & Forrest*).

- 16 In very broad terms that is a determination which resulted in what might be referred to as detailing a requirement of strict compliance in relation to certain aspects of applications for certain types of mining tenements.
- 17 As a result of the nature of the decision, it appears that there has developed a degree of caution within the Department as to the manner in which mining applications are to be dealt with.
- 18 Some of those matters were the subject of discussion in a recent decision of mine, being *Blue Ribbon Mines Pty Ltd v Roy Hill & Ors* [2022] WAMW 3.
- 19 Relevantly for this matter the applicant's application for a mining lease, was the subject of a response from the Department by a Mining Registrar.
- 20 That response, and the subsequent chain of correspondence is contained in the Douglas Affidavit, from page 546.
- 21 In broad terms, by way of letter dated 21 September 2021 (First Letter), the response from the Mining Registrar to the Applicant, appeared to be that a view had been taken that the application for mining leases were invalid as a result of what was said to be a failure to comply with the requirements of the statutory guidelines in relation to the application for a mining lease. The letter contained a number of comments, in effect requesting further material.
- 22 What is able to be established without doubt, is that a document referred to as a mining proposal was filed with the applications for a mining lease. Where there is the possibility of a dispute, arises from a suggestion in the First Letter, that the Department requiring some additional materials in respect of the mining proposal, made the application invalid.

- 23 It appears to be the case that at the time of the First Letter, the Department took a view that the circumstances giving rise to the request for additional information also necessitated a conclusion that the mining application was invalid on its face.
- 24 In the circumstances that was responded to with a degree of robustness by the applicant's solicitors (by letter dated 13 October 2021), who replied to the Mining Registrar, setting out a series of reasons as to why in their view the application was not invalid.
- 25 That was as a result of a legal construction which was then subsequently advanced before me.
- 26 Somewhat surprisingly, a further response was provided by the Mining Registrar by email dated 15 October 2021 (Second Letter) in terms as follows:
- a. *“Thank you for your letter.*
 - b. *Please be advised I set aside the action stated in my invalid letter dated the 21 September, 2021 and await the outcome of your client's Applications before the Mining Warden”*
- 27 The nature of that communication, is such as to compel a conclusion that the Department appeared to immediately resile from the position taken previously, that the application in question was invalid. I consider that second determination, with respect, was entirely correct.
- 28 The submission made by the Applicant was, inter alia, that the jurisdiction to determine the validity of the application had moved to the Warden, upon the filing of the objections to the grant of applications M47/1622 and M47/1623 on 14 and 15 September 2021, which was relevantly, prior to the First Letter.
- 29 Applying section 75(4) and 75(7) of the Act, the Warden hearing the applications then has jurisdiction to determine them following the filing of objections. The Applicant submitted that of itself, precluded the purported exercise of

jurisdiction by the Department on the question of the validity of the application at the time of the First Letter. I accept that submission.

30 Further, and relevantly in this case, I note it is not suggested that no mining proposal was lodged.

31 It is in this context the application for an extension of time under section 162B of the Act has been made to me.

32 As a result, it seems to me that even prior to the Second Letter, the First Letter had no force or effect in respect of the question of the validity of the application at the relevant time, as the Department at that time, having accepted the applications initially, and the objections, had no jurisdiction to make a determination of invalidity, such as to in any way interfere in the exercise of my jurisdiction.

33 The Second Letter, in my opinion, placed that position beyond doubt, by effectively withdrawing even the allegation that the applications were invalid.

34 In the matter as it appeared before me, no objecting party alleges that the application is invalid for the reasons advanced by the Department in the First Letter. Each counsel appearing for the objecting parties expressly accepted that to be so, save for the Fifth Objector, which did not appear. In that regard, I was advised by counsel for the Applicant, and accept, that the Fifth Objector did not object to the Application.

35 Accordingly, it falls to me to determine the Application.

36 There is a degree of novelty in relation to the manner under consideration. My searches have not revealed any authorities relevant to the application for a mining lease, which is accompanied by a mining proposal pursuant to section 74(ca)(i) of the Act.

37 This is important as immediately it may be said it may be possible to distinguish the ratio decidendi falling from *Forrest & Forrest*, from the matter before me.

38 That is for the simple reason that the application giving rise to the dispute in *Forrest & Forrest* and the subsequent determination in relation to strict compliance, related to an application for a mining lease accompanied by a mineralisation report pursuant to section 75(ca)(ii) of the Act.

39 The matter before me is quite different and involves, in my opinion, the application of a different jurisdictional provision. In *Forrest & Forrest*, the determination that was relevant giving rise to requirements for strict compliance can, in my opinion be fairly said to be related to the application of section 75(2a) and section 75(4a) to an application made pursuant to section 75(ca)(ii) of the Act.

40 It is not necessarily the case that the comments in respect of strict compliance made by the High Court in that matter, apply to all other provisions of the Act, and even to all other applications for mining leases generally.

41 I am fortified in this view by the recent approach taken by his honour Justice Tottle, in *Wyloo Metals Pty Ltd v Quarry Park Pty Ltd* [2021] WASC 356 (22 October 2021) whereby issues arising from a broad concept of strict compliance were ventilated. In that matter, a determination was made which was consistent with a notion that the principle of strict compliance is (obviously) correct as far as it goes in relation to the provisions which it applies to, but does not necessarily reach further in respect of all obligations under the Act.

42 In my respectful view that approach is also entirely consistent with the reasons in *Forrest & Forrest* itself, which at paragraph 64 says the following:

“Regrettably the Court of Appeal was not referred to and did not consider, the line of authority which establishes that where a statutory regime confers power on the executive government of the State to grant exclusive rights to exploit the resource of the State, the regime will, subject to provisions to the contrary, be understood with mandating compliance with the requirements of the regime is essential to the making of a valid grant.”

43 The most relevant aspects of the above reasons of the majority in the context of this case, are the words “*subject to provision to the contrary*”.

- 44 In the matter before me the relevant provisions to the contrary of the Act are sections 75(ca)(i) and 74(1AA).
- 45 Considering the latter provision first, that provision must contemplate a notion that a valid application may be made with a mining proposal which does not meet the requirements of the Department for one reason or another.
- 46 In my respectful view that simply must be so because there would be no need for a provision giving a right to file what must be regarded as either an amended or replacement mining proposal, if there was a requirement for strict compliance in relation to the filing of the mining proposal at first instance with the application.
- 47 I find further support for this interpretation, in the provisions of section 75O of the Act. Section 75O sets out a definition of mining proposal which is detailed relevantly above.
- 48 In my view sections (a) and (c) of the definition, create in effect a mandatory requirement for the provision of form and an accompanying plan.
- 49 Noteworthy, and of most relevance to this matter, is the effect of section (b) of that definition, which on its face requires a detailed consideration of the relevant mining proposal, to determine if it meets the guidelines which are from time to time published by the Department.
- 50 In my view, that must mean that a mining proposal which is submitted for consideration as part of an application for a mining lease would be the subject of a review by the Department, to determine if it meets the requirements of the guidelines.
- 51 However that does not mean, and in my view and cannot mean on the face of the provision when read with section 74(1AA), that a determination by the Department that a mining proposal accompanying an application for a mining lease, which does not meet the Departmental guidelines for whatever reason at

all, therefore means that there has been non-compliance with the jurisdictional requirements of the Act in terms of the making of a valid application at all.

52 That interpretation in my respectful view is not open within the framework of the Act when considering an application for a mining lease accompanied by a mining proposal.

53 What is relevant in this matter is the substituted mining proposal, which was filed on 29 October 2021. There was no information before me as to whether or not that subsequent mining proposal met the requirements, though the submission was made from the bar table by counsel appearing for the applicant that it was understood that it did.

54 In the context of the Application, the relevant issue therefore becomes this; the substituted mining proposal was filed on 29 October 2021. The original applications for mining leases were filed on 11 August 2021.

55 Section 74(1AA), provides by way of the application of Regulation 25AA, provides an applicant relevantly, an additional 14 days from the date of the original application to file another mining proposal.

56 That date in this matter relevantly was 25 August 2021.

57 The subsequent mining proposal was filed on 29 October 2021.

58 The communication from the Department highlighting what was said to be the shortcomings in the mining proposal, was sent on 21 September 2021.

59 It follows, that in seeking to rely on the amended mining proposal before the Warden hearing the eventual application, the applicant requires an extension of time pursuant to section 162B of the Act, read with section 74(1AA) to provide the amended mining proposal on 29 October 2021.

60 Leaving aside issues of jurisdictional power at the moment, section 162B of the Act, provides a power to the Warden relevantly to grant an extension of time for

the doing of a thing, after the expiration of the time required for the doing of the thing in question.

- 61 I consider I have the power in general terms to grant an extension of time pursuant to the application of section 162B of the Act. The principles associated with the grant of such an extension of time are well known and outlined in *Molopo Australia Ltd v Eastern Gold NL* [1989] WAR 270, see also *Allhawk Nominees Pty Ltd & Anor v RBJ Nominees Pty Ltd* [2004] WAMW 18, and need not be repeated.
- 62 Relevantly in this case the delay in question is identified by reference to the time frames described above.
- 63 In addition, it cannot be said that the Applicant has acted with anything other than complete alacrity in order to address the suggested shortcomings in the mining proposal identified by the Department.
- 64 Further, and of particular note is the fact that none of the objectors raised any issue, concern or prejudice as to the filing of an amended mining proposal, and the granting of the Application before me.
- 65 The final point to note in relation to the application for the extension of time, is that the original mining proposal as filed with the application for a mining lease, was a voluminous document.
- 66 Necessarily, the work required to be done to address the concerns expressed by the Department, which was seemingly done by 29 October 2021, no doubt required detailed consideration of the suggested shortcomings and the steps necessary to amend accordingly.
- 67 It follows that in my respectful view the period of time that is sought by way of the extension of time is short and the explanation as to the reason why there was non-compliance with the relevant time frame is entirely reasonable and explicable. In summary, the period of extension sought in this case is reasonable.

68 Accordingly, I have no hesitation, save for the issues outlined immediately below, in the granting of an extension of time as sought.

Jurisdictional Question?

69 It was submitted to me on the Application that the grant of an extension of time, would retrospectively validate the mining application and cure any perceived defects in the application process.

70 Accordingly, it was said by counsel appearing for the Applicant, that there was no jurisdictional problem, because it would be cured by the nature of an order made to extend time to file an amended mining proposal. That amended mining proposal stood in the place of the original mining proposal, which was said to be defective, and accordingly no jurisdictional issue arose.

71 In all of the circumstances of this case, and in particular the fact the Department appears to have withdrawn the suggestion of invalidity, and no Objector relies on the Departments position, it is not an issue which in my respectful view requires determination before me today.

72 However, I am not completely comfortable expressing a view that applications for a mining lease pursuant to section 75(ca)(i) which might be considered invalid, are able to be cured in all circumstances in this way.

73 Relevantly for this case, in applying section 74(1AA) of the Act, it must necessarily be the case that section 162B of the Act, grants the Warden the power to extend the period of time to provide a substituted mining proposal, or indeed on one view and considering the words “*instead of . . .*” in section 74(1AA), a mining proposal in circumstances where there was no such proposal lodged at the time the application was made.

74 In my respectful view that distinguishes the case from *Forrest & Forrest*, where no like provision existed, which would grant a party which had not filed a

mineralisation report as was relevant in that matter, an additional period of time within which to file it.

75 Accordingly, in my view, the matter falls squarely within the comments referred to above from *Forrest & Forrest*, about “*provisions to the contrary*”. In this case it is clear that there is a right to provide a mining proposal after the fact of the application, and further there is an additional power in the Act for a Warden to grant an extension of time to facilitate a late filing of a mining proposal.

76 Again, it is not in dispute that a mining proposal was filed with the application.

77 As a result, in all of circumstances presented it is my respectful view that I am able to grant an extension of time to file the relevant mining proposal, and that in my view given the original application was accompanied by a mining proposal, there is in fact no invalidity issue arising in any event.

78 That therefore means that the mining proposal originally filed, and the substituted one filed on 29 October 2021, can, in my opinion, be regarded (in each case) as providing the jurisdictional basis for valid applications because in each case, each of them was an application accompanied by a mining proposal.

79 The question as to whether the applications (and the mining proposal) will be a sufficient basis to enable grants to be made, is another altogether different question for a different day.

80 The final point to note in relation to the matter is that following the hearing, the Scoles Affidavit was filed, which attached several documents. Most relevantly, the first document was a letter dated 29 October 2021 to the Department, from relevantly the representatives of the applicants.

81 Those documents were ‘handed up’ at the hearing before me, and I requested that they be properly put in evidence.

82 That letter referred to above, attached the additional mining proposal and was provided in evidence to establish the fact of the date of the submission of that

proposal for the purposes of the relevant extension of time, and its required length.

- 83 Another document attached to the Affidavit, however, is somewhat more problematic, and worthy of additional comment.
- 84 Annexure JCS-5 of the Scoles Affidavit, is a document which is described as a “*Department of Mines, Industry Regulation, Safety Resource Tenure Strict Compliance Guideline consequent to High Court of Australia **Forrest & Forrest v Wilson and Others** [2017] HCA 30*”, and appears to be an internal policy document of the Department.
- 85 Whilst it is not completely clear, it appears likely that the application of that policy document, gave rise to the correspondence from the Department referred to above (detailed in the Douglas Affidavit), and the initial determination in the First Letter to describe the application as invalid.
- 86 In the Scoles Affidavit, there were statements to the effect that the policy document was not publicly available. Further the document had been obtained by the applicant by way of freedom of information requests made to the Department.
- 87 The document appears to be an internal policy guideline relating to the manner in which ***Forrest & Forrest*** is to be applied by the department in relation to a range of different mining tenement applications.
- 88 At the hearing before me a number of concerns were expressed about the nature of the application of the relevant guideline and how it worked.
- 89 Whilst those concerns do not need to be addressed in respect of this matter, given the manner in which the Department withdrew its invalidity assertion, in my opinion, section 75P of the Act suggests that in the context of an application for a mining lease accompanied by a mining proposal at least, no content of any guideline which is not publicly available can be relied upon to suggest that the

mining proposal provided with an application for a mining lease, does not meet the necessary requirements.

90 In my view the effect of section 70P is plain, and namely that the guidelines that the Department might seek to apply in relation to the requirements of, in particular part (b) of the definition of “*mining proposal*” for the purposes of section 74(ca)(i) of the Act, are required to be publicly available.

91 In a particular circumstance of this case, it is not necessary for me to go further in relation to that document.

Conclusion

92 In my respectful view the application for an extension of time under section 162B is brought up before me in circumstances where I have jurisdiction to make the order sought.

93 In the circumstances the Applicant has made out a basis for an extension of time.

94 There is no objection to the course of action being taken by the objecting parties.

95 Furthermore, the objecting parties as they appeared before me on 24 February 2022, expressly resiled from any suggestion that they would advance a position to say, that the application for a mining lease as made on 11 August 2021, was invalid as a result of the shortcomings identified by the Department in the mining proposal.

96 As a result, in all of the circumstances presented, namely that the explanation for the requirements of the extension of time are reasonable and acceptable, I will grant the extension of time to file the mining proposal to 29 October 2021 as sought.

97 Accordingly, the matter as it remains before me, namely being an objection to an application for mining leases, ought to now move forward with reference to the mining proposal as filed on 29 October 2021.

- 98 To facilitate the future conduct of the matter, I will also direct the matter be placed into the mention list on 25 March 2022.
- 99 If any party wishes to raise any consequential orders in respect of this Application which are considered necessary and appropriate, they may be attended to at that next directions hearing.

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line and a diagonal stroke.

Warden T W McPhee

10 March 2022