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Welcome to the March edition of the HFW Australian Mining Bulletin.

In this edition, we cover recent case law developments of interest to the Australian mining industry, including:

- I know what you did last summer: Supreme Court confirms conduct prior to grant can be considered in exemption applications
- Walking on a *Drem*: royalty holder comes out on top in Supreme Court tussle
- Pass the [penalty] parcel: current tenement holders held liable for past holders' non-compliance
- Sweet Child, No Mine: no mining conditions
- A million ways to mark out in the West: Wardens reinforce importance of strict compliance when marking out

I KNOW WHAT YOU DID LAST SUMMER: SUPREME COURT CONFIRMS CONDUCT PRIOR TO GRANT CAN BE CONSIDERED IN EXEMPTION APPLICATIONS

In *Regis Resources Limited v Cleary in her capacity as Mining Warden* [2024] WASC 427, the Supreme Court (Court) upheld the Warden's finding that the conduct of a tenement-holder prior to the grant of a tenement can be considered when determining applications for exemption.

The Court, however, overturned the Warden's finding that the Minister must be positively satisfied that an applicant is not circumventing *the Mining Act 1978* (WA) (**Act**) before granting an exemption. The Court thus remitted the matter to the Warden for rehearing and determination.

This case involved 10 applications for exemption over various exploration and prospecting licences within a combined reporting group. It was agreed that the total expenditure over the combined reporting group, if apportioned, was sufficient to meet the total expenditure requirements for the group. This is a ground upon which an exemption to expenditure requirements may be granted under s 102(2)(h) of the Act.

Nonetheless, objections to the exemption applications were lodged, on the basis that the holder had engaged in "warehousing", whereby the provisions of the Act were manipulated to retain control of the tenements without conducting exploration. The alleged warehousing involved the surrender of tenements shortly before their expiry, after which a friendly third party would apply for tenements over the same ground before the statutory prohibition against Regis Resources Limited (**Regis**) doing so expired. Regis would then apply and regain control of the tenements.

The Warden accepted the allegations of warehousing and recommended refusal of the exemptions.

Regis applied to the Supreme Court to review the Warden's decision, arguing, among other things, that the Warden and Minister could not have regard to the allegations of warehousing, which relate to

conduct prior to the grant of the relevant tenements. Regis sought a declaration to that effect.

The Court determined that the Warden and Minister should consider conduct relevant to an applicant's "capacity or willingness to undertake expenditure and work on the tenement". Nothing in the Act or its objects limited that assessment to post-grant conduct, and therefore pre-grant non-compliance or collusion to circumvent the Act was properly considered by the Warden.

The Court therefore refused the declaration sought.

The Court did, however, quash the Warden's decision and remit the matter because the Warden had, incorrectly, found that "there must be a positive finding of the Minister that the applicant for an exemption is not circumventing the principles of the Act before the exemption can be granted." There is no such requirement in the Act, and the Warden's decision was therefore set aside.

HFW comment

This case closes a potential loophole that could have facilitated warehousing of tenements contrary to the objects of the Act. Significantly, the Warden can reject an exemption application on the basis of warehousing (or other conduct contrary to the Act), notwithstanding that the grounds for a combined expenditure exemption were otherwise met. This highlights the risks of under-expenditure and reliance on obtaining an exemption, even when grounds for an exemption are available.

“The Court ruled in favour of Drem, finding that the language of the 1994 Royalty Deed was intentionally broad and applied to all of the tenements the subject of the deed, regardless of whether the interests arose from the Joint Venture.”

WALKING ON A *DREM*: ROYALTY HOLDER COMES OUT ON TOP IN SUPREME COURT TUSSLE

In *Drem Pty Limited v LRL (AUST) Pty Ltd* [2024] NSWSC 1422, the Supreme Court of New South Wales (Court) addressed a dispute concerning royalty obligations under historical deeds related to mining tenements at Kathleen Valley, Western Australia.

Background

This case concerned the interpretation of the royalty clause in a 1994 Royalty Deed, which specified that royalties would be calculated based on the payer’s “proportionate share or interest (as varied from time to time)” in, among others, the tenements making up the Kathleen Valley Joint Venture (**Joint Venture**). Drem Pty Ltd (**Drem**), the current royalty holder, submitted that LRL (AUST) Pty Ltd (**LRL**), the current royalty payer, owed royalties based on its current 100% ownership of the Kathleen Valley tenements. Conversely, LRL contended that its royalty obligation should be limited to 87.15%, reflecting the final joint venture interest held by a predecessor party before the Joint Venture was terminated.

The initial interests in the Joint Venture were held by Hunter Resources (**Hunter**) and Giralia Resources. In 1994, Hunter assigned its rights in the Joint Venture and another joint venture to Sir Samuel Mines NL (**SSM**), which covenanted to pay Hunter a 2% royalty on proceeds from mining operations on the Joint Venture tenements, the tenements from the other joint venture, and another tenement. This agreement included terms allowing the royalty obligation to vary with the payer’s “proportionate share or interest.” Over time, the Kathleen Valley tenements changed hands, with Ramelius Resources acquiring them in 2014, followed by LRL in 2016. In 2020, LRL executed a Deed of Acknowledgment with Drem, agreeing to be bound by the 1994 Royalty Deed.

The Court’s Interpretation of the Royalty Obligation

Drem argued that the broad language of the 1994 Royalty Deed, coupled with LRL’s 100% ownership of the Kathleen Valley tenements, required royalties to be calculated based on the entire proceeds from the exploitation of those tenements. It asserted that the historical context of Joint Venture interests was irrelevant following the termination of the Joint Venture in 2014 and that the 2020 Deed did not limit LRL’s obligations to the 87.15% interest held by a predecessor party. LRL maintained that its obligations were tied to the Joint Venture structure and could not exceed the 87.15% interest held by SSM at the Joint Venture’s conclusion.

The Court ruled in favour of Drem, finding that the language of the 1994 Royalty Deed was intentionally broad and applied to all of the tenements the subject of the deed, regardless of whether the interests arose from the Joint Venture. Justice Hmelnitsky noted that the 1994 Royalty Deed contemplated variations in ownership and explicitly included non-joint venture tenements.

Further, the Court emphasized that the 2020 Deed did not introduce any limitation on the royalty obligations tied to LRL’s 100% ownership. Whilst acknowledging that Drem’s position could result in a windfall gain, the Court held that such an outcome was consistent with the agreement originally negotiated under the 1994 Royalty Deed.

HFW comment

This case is yet another example of a royalty agreement falling for interpretation long after the deed is drafted and the initial parties have been replaced. It highlights the importance of considered advice when negotiating or acquiring an interest in, or subject to, a royalty agreement, to ensure you get what you paid for (and pay for what you get).

PASS THE [PENALTY] PARCEL: CURRENT TENEMENT HOLDERS HELD LIABLE FOR PAST HOLDERS' NON-COMPLIANCE

In a number of recent cases, the Perth Mining Wardens have found current tenement holders liable for the non-compliance of their unrelated predecessors, while foreshadowing increased penalties in forfeiture cases.

In Department of Energy, Mines, Industry Regulation and Safety v Phillip Andrew Dignam [2024] WAMW 43, Warden Maughan considered an application for forfeiture where the Form 5 was filed four days late. Approximately one month after that late filing, the tenement was sold. His Honour found that the current tenement holder was liable for the previous holder's non-compliance with the tenement conditions. Here, the purchaser could have identified the non-compliance by searching the register and not proceeding with the purchase or sought an extension of time for the late filing, but did neither. Noting the short delay, expenditure well in excess of the minimum amount and the tenement holder's ignorance of the non-compliance (even though he should have known), his Honour imposed a fine of $300 in lieu of forfeiture. Importantly, his Honour stressed that this amount was less than would normally be imposed, and other industry participants should not assume a similar result in similar circumstances (where a large fine could be ordered or forfeiture recommended).

In Department of Energy, Mines, Industry Regulation and Safety v Bruce Jeffrey Bates [2024] WAMW 44 (**Bates**), Warden McPhee agreed that the current tenement-holder is liable for the previous holder's non-compliance and must pay any fine imposed in relation to that non-compliance which,in this case, was the non-compliance in filing a Form 5 five days late. His Honour stated his view that, until recently, forfeiture applications brought by the Department have not been taken seriously, with insufficient fines sought and imposed, tenement-holders skipping the hearings, and the Department not engaging counsel.

His Honour expressed the view that tenement holders must satisfy the Warden not to forfeit a tenement, where there has been non-compliance, relying on *Commercial Properties v Italo Nominees Pty Ltd* (Unreported, WASCA, Library No 7427, 16 December 1988).

Warden McPhee reiterated that tenement purchasers must take steps, such as checking the register, enquiring with the Department or seeking warranties from the seller to protect themselves when purchasing tenements. In this case, Mr Bates had not done so. As a result, it was not possible for Mr Bates to avoid a fine. However, in light of Mr Bates' otherwise impeccable conduct, a fine of $300 in lieu of forfeiture was imposed, which his Honour described as "significantly lighter than normal".

In *Department of Energy, Mines, Industry Regulation and Safety v Cue Consolidated Mining Pty Ltd* [2024] WAMW 45 (**Cue Consolidated**), Warden Maughan ordered forfeiture instead be after rent for two prospecting licences was paid 48 and 49 days late

Throughout proceedings, Cue Consolidated Mining (**Respondent**) offered various explanations for the late payment . The first explanation was that the tenement manager was interstate. A delay in project funding from overseas, combined with Form 5s lost beneath office filing and having an incorrect address registered with the Department, were then offered as reasons. By the time affidavit evidence was due, the Respondent's director was solely blaming late payment on the incorrect address being registered with the Department. Counsel for the Respondent could provide no reasonable explanation for the earlier attribution of the blame to the non-receipt of international funding.

Warden Maughan took a similar view to Warden McPhee in *Bates*, suggesting s 96(3) contemplated an order for forfeiture unless the circumstances of the case dictated otherwise.

The registration of an incorrect address with the Department was found not to be a sufficient circumstance. The Warden also found that a party cannot rely on the Department to notify them of their obligations. Similarly, neither the intention to conduct future work, nor inclusion in a combined reporting group, were sufficient reasons to avoid forfeiture.

Warden Maughan recommended forfeiting the tenements, relying on what he considered to be unexplained and dishonest contradictions in explanations on the part of the Respondent, together with a history of non-compliance.

HFW comment

The Perth Mining Wardens have placed the industry on notice that Departmental forfeiture applications must be taken seriously, and that forfeiture will be considered. Gone are the days where such applications can be ignored on the assumption that only a fine will be imposed.

We do note that, despite the determinations in *Bates* and *Cue Consolidated*, the circumstances in which an onus falls on the tenement-holder to justify not forfeiting a tenement are limited to cases where there is no evidence of expenditure (i.e. complete non-compliance), as in *Commercial Properties: Richore Pty Ltd v Cougar Metals NL (Subject to DOCA)* [2023] WASC 2 [63]-[73]. In those circumstances, an evidentiary onus falls on the tenement-holder to support a finding that the non-compliance is of sufficient gravity to justify forfeiture. In cases where some expenditure has been proved, it falls on the party seeking forfeiture to prove the non-compliance was of sufficient gravity to justify forfeiture: *Re Roberts SM; Ex parte Burge* [2003] WASCA 2 at [28].

Following a consistent theme throughout recent decisions, at all levels, about the WA Mining Act, compliance (and therefore prevention) is key.

SWEET CHILD, NO MINE: NO MINING CONDITIONS

In *Mt Roe Mining Pty Ltd v Pilbara Energy Company Pty Ltd & Ors* [2024] WAMW 41 the Warden considered when it is permissible, and in accordance with the Mining Act 1978 (WA) (Act), for a "No Mining" condition to be imposed upon an exploration license.

Background

In this matter, Mt Roe Mining Pty Ltd (**Applicant**) sought a recommendation for the grant of an exploration licence (**Application**). The Objectors, Pilbara Energy Company Pty Ltd, The Pilbara Infrastructure Pty Ltd and Pilbara Water and Power Pty Ltd (**Objectors**), largely agreed to allow the Applicant to proceed, but jointly sought a number of "No Mining" conditions (**Conditions**). The proposed Conditions were designed to protect established infrastructure owned and operated by the Objectors, those being a railway line, various pipelines, and powerlines with associated infrastructure.

On 30 May 2024 the parties had agreed a Minute of Programming Directions (**MOPD**), which had been subject to the common practice of referral to the Department of Energy, Mines, Industry Regulation and Safety (**Department**) for consideration. In response, the Department provided a Regulation 68 Report (**Report**). The Report noted that the MOPD had sought a "No Mining" condition to an unlimited depth, which it deemed could not be supported "as it has the effect of sterilising the subject land and does not allow for any mining or other activities from the surface to the centre of the earth". The Department was of the view that

suitable protection could be provided through the application of relevant standard conditions and exiting legislative frameworks provided in the *Rail Freight Systems Act 2000, Rail Safety National Law* (WA) Act 2015 and the *Railways (Access) Act* 1998 and, further, indicated a preference for the parties to reach a private agreement on the matter. In conclusion, the Department advised that the "No Mining " conditions were "not supported".

The Judgment

For the purpose of the Application, the parties submitted to the Court an Agreed Statement of Facts (**ASOF**) which acknowledged the significance of the infrastructure at issue. The ASOF set out the potential financial harm and risk to commercial and state interests, should the infrastructure become damaged or inoperative, and highlighted various safety issues and possible implications of exploration activities in the vicinity of the infrastructure.

The parties set out further agreed facts and assumptions by way of the MOPD provided to the Court and jointly sought orders on the papers that the Conditions be allowed.

On 10 October 2024, the Court granted the application largely on the terms of the MOPD, inclusive of the proposed Conditions, though with some proposed amendments to the framing of the Conditions for the parties' further consideration and response.

In arriving at this position, the Court examined the circumstances in which it is permissible for the Minister to impose a "No Mining" condition upon an exploration licence. Warden McPhee identified the most pertinent question at issue to be "whether the imposition of such a proposed condition and it (sic) terms, may be said to be in accordance with and for the purposes of the Act (the Mining Act) in any particular case."

The Warden relied on the matter of *Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd* [2022] WASC 362 (***Blue Ribbon***) where his Honour the Chief Justice set out the following:

> *In my view, depending on the circumstances of a particular case, it may be open to the Minister to impose a condition that prohibits mining activity over specific areas that are the subject of an exploration licence. In particular, in light of the decision in Western Reefs, a condition to that effect may well be the appropriate mechanism for preventing injurious affection of another mining tenement. It might also, for example be justified in particular circumstances by other considerations. There might, for example, be a specific area of environmental or heritage significance within the area of an exploration licence, in relation to which it would be appropriate by the imposition of conditions to ensure that the specific area remains undisturbed…for those reasons, in my view and subject to the conditions otherwise being validly imposed in accordance with, and for the purposes of, the Mining Act, the Minister would have power to impose conditions that would prevent mining or exploration activities on discrete areas within an exploration licence.*

In the decision at hand, the Warden highlighted the importance of establishing a "sufficient evidentiary basis" for the proper and informed exercise of the discretion set out in *Blue Ribbon*. In his consideration of the matter on the papers, the Warden advised the parties of his concerns that the evidentiary basis was not met by way of the MOPD and ASOF provided. The parties then "buttressed their evidentiary position" by way of an affidavit, which provided significant details of the factual matters relied upon, including further details of the complete extent of the infrastructure at issue. This level of detail provided the Warden with sufficient evidence to exercise the discretion set out in *Blue Ribbon*. On this point, Warden McPhee provided future applicants distinct guidance: "Parties seeking a recommendation from the Warden as to the imposition of a "No Mining" condition ought provide the sort of detailed consideration described above, to inform the necessary discretionary exercise."

In this decision, the Warden found that, on the basis of the materials provided by the parties, the proposed conditions were lawful, appropriate and did not go beyond that which is reasonably capable of being regarded as related to the legitimate purposes of the Act.

The Warden did, however, take issue with the appropriate form of the "No Mining" conditions and proposed a preferred framing, inviting the parties to make further submissions. The parties responded with a joint submission in respect of the matter, accepting the substance of the Warden's recommendations, but noting some further proposed amendments.

On 25 October 2024, the Warden delivered his decision in *Mt Roe Mining Pty Ltd v Pilbara Energy Company Pty Ltd & Ors [No 2]* [2024] WAMW 47, accepting the joint submission of the parties and making final orders on the papers. Helpfully, the Warden highlighted that, in his view "any no mining condition which is sought to be made, ought to include the sort of clause to be imposed in this matter".

HFW comment

These matters set out the circumstances in which the discretion to allow "No Mining" conditions will apply. The matters serve as a reminder that parties seeking exploration licences upon land already inhabited by significant infrastructure will be well-served by cooperating closely with all stakeholders. Further, in any exploration license application subject to a proposed "No Mining" condition, attention to the details of the infrastructure at issue – and indeed the precise wording of any proposed conditions – is paramount in achieving the desired outcome.

A MILLION WAYS TO MARK OUT IN THE WEST: WARDENS REINFORCE IMPORTANCE OF STRICT COMPLIANCE WHEN MARKING OUT

***Wayne Craig Van Blitterswyk v Craig Steven West* [2024] WAMW 50 (West) and *Richard Czornowol and Stephen Howe v Ross Frederick Crew* [2024] WAMW 52 (Crew) provided a timely reminder of the importance of complying with the *Mining Act 1978's* (Act) marking out requirements .**

West

Background

In *West*, Mr West objected to Mr Van Blitterswyk's (**Applicant**) application for a prospecting licence, asserting non-compliance with the marking out requirements of the Act.

The Applicant accepted that the Form 20 he had attached to the datum post, as reflected in the Form 21 filed as the application, did not accurately record the location of the pegs in the ground the subject of the application. The Applicant applied to amend the application to accurately reflect the marking out on the ground.

The Court considered 2 issues in deciding the application.

- Issue 1: What is the consequence of the Form 20 not accurately recording the detail of the location of the pegs in the ground?
- Issue 2: Is it open to a party to amend a Form 20 and associated application, to cure this sort of defect?

Issue 1

The Court relied on the case of *Forrest & Forrest v O'Sullivan* [2020] WASC 468 which makes clear that a defect in marking out results in a determination that an application is invalid, that is, an error in marking out constitutes a jurisdictional error.

The application was therefore invalid.

Issue 2

The Court found that because the application as made was invalid, it could not be amended by filing an amended application or relying on regulation 84E of the *Mining Regulations 1981* (WA) (**Regulations**), as the power of a Warden sitting administratively only arises when a valid application and a valid objection are lodged.

Regulation 84E of the Regulations provides that an application to amend particulars in the register must be lodged in a Form 30 and accompanied by a statutory declaration stating the reasons for the requested amendment. The Court found that regulation 84E only provides an avenue to amend particulars in the register, but not the power to amend an application to make it compliant.

Accordingly, valid marking out is a prerequisite to the making of an application for a prospecting licence, and invalid marking out cannot be made valid by simply amending the register.

The Applicant was required to mark out afresh, affix a new Form 20 to complete the marking out, and file a correct Form 21. Any consequential loss of priority is irrelevant. Where there has been no valid marking out,

"It is open to a person conducting a marking out exercise to correct an error "along the way". For example, if a person discovered that a fixed post was out of place, the post could be moved and replaced without the need to replace other existing posts..."

there is no jurisdiction, and therefore no capacity to amend. Any error made in the marking out process renders an application invalid for the purposes of priority and the party must start the process from the beginning.

Crew

Background

In *Crew*, Mr Czornowol and Mr Howe (**Applicants**) applied for a special prospecting licence, which was objected to on the basis that the tenement was not marked out in accordance with the Act and Regulations and as a result, the jurisdiction of the Court was not enlivened.

The Applicants made three marking out endeavours in respect of substantially the same ground, on 26 August 2023, 30 September 2023 and 6 October 2023. The marking out on 6 October 2023 was relied upon in the application for a special prospecting licence. The Form 20 the subject of this marking out was affixed to a datum post in substitution for the marking out conducted on 30 September 2023. The Applicants did not mark out the tenement afresh on 6 October, rather, adopted the previous marking out.

Issues for determination

The Court considered two issues:

- Issue 1: did the marking out on 6 October 2023 offend against the rule which does not permit the adopting of post, trenches, rows of stones etc from a previous marking out?
- Issue 2: did the marking out on 6 October 2023 offend against regulation 63(1) of the Regulations? Regulation 63(1) provides that a person who marks out land as a mining tenement in accordance with the Regulations but fails to lodge an application within the prescribed time shall not be at liberty to mark out any portion of the same land within 21 days from the date of the first marking out.

The Court found that nothing in the Act or Regulations prevents marking out occurring over an extended period, and that marking out is concluded only when a Form 20 is annexed to a datum post. All that is lost in a delay between marking out and affixing a Form 20 is priority.

It is open to a person conducting a marking out exercise to correct an error "along the way". For example, if a person discovered that a fixed post was out of place, the post could be moved and replaced without the need to replace other existing posts, so long as a Form 20 is annexed to the datum post showing the correct coordinates for all posts.

In respect of issue 1, the Court found that the Applicants' conduct on 6 October 2023 of adopting their own posts from a previous marking out on 30 September 2023 did not offend against the Act or Regulations.

However, in respect of issue 2, the Court found that the marking out completed on 6 October 2023 *did* offend against regulation 63. An act of marking out had already been completed on 30 September 2023. The marking out on 6 October 2023 occurred only 6 days later. Accordingly, the Applicants had not waited the prescribed period of 21 days before completing a second marking out by affixing a Form 20 to the existing datum post, meaning that regulation 63 applied. Citing a previous decision, the Court confirmed that the purpose of regulation 63 is to prevent marking out in a manner which might lead to competitors for tenements being misled.

While the jurisdiction of the Court was established, the marking out was invalid pursuant to regulation 63 and the application was recommended for refusal.

HFW Comment

The cases of *West* and *Crew* highlight the importance of accurately marking out area the subject of an application for a prospecting licence. Failure to do so will result in an applicant being required to commence the process from the start and, as a result, losing priority in the relevant land. Incorrect marking out cannot be cured by a simple amendment.

Further, strict compliance with the Act and Regulations must be observed when marking out a tenement, including when a party is correcting an error in a previous marking out attempt.

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