exploration licence 36/446 by Martin including a declaration that the warden's court did not have jurisdiction to hear and determine Plaint 7/012.

Hawks and Western Resources argued that Plaint 7/012 was an action arising in respect of the matter enumerated in s 132(1)(g) of the *Mining Act* because it sought the imposition or declaration of a constructive trust.

Decision and Reasons

His Honour held that as application for exploration licence 36/446 was not a mining tenement, Plaint 7/012 was not an action in respect of a trust relating to a mining tenement. For similar reasons, Plaint 7/012 was not an action in respect of "generally all rights claimed in, under or in relation to any mining tenement or purported mining tenement."

Hawks and Western Resources also argued that the warden's court had an implied, or incidental, power to reopen or reconsider its decision to make declarations and recommendations made by the warden on 3 March 2000 and should do so on the grounds that the decisions were obtained by fraud and were made in the absence of Hawks.

In dismissing this argument His Honour held:

- Plaint 7/012 invoked the jurisdiction of the warden's court, not the warden acting administratively and as the warden in plaint 9/989 acted in an administrative capacity the warden's court had no power to reopen the decision to recommend forfeiture of the Licence

- Once the Minister had made his decision to forfeit the Licence, the warden is then *functus officio*

Accordingly, His Honour held that the warden's court did not have jurisdiction to hear plaint 7/012. It followed that the warden's court did not have jurisdiction to grant relief or the specific relief sought by Hawks. It also followed that Shadmar was entitled, on the originating summons, to a declaration that the warden's court did not have power to hear Plaint 7/012.

NATIVE TITLE BASED OBJECTIONS UNDER THE MINING ACT*

BHP Billiton Pty Ltd v Karriyarra Native Title Claimants & Ors [2005] WAMW 12

Applications for miscellaneous licences – objections by native title claimants – treated as if held freehold land – s 24MD (6A) and (6B) Native Title Act – ss 28, 29(2), 30, 111A, Mining Act

Warden Calder has handed down his substantive decision on native title objections made under the *Mining Act 1978* (WA) ("Mining Act").[1]

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* Mark Gregory, Senior Associate, Minter Ellison, Perth.

Registered native title claimants had objected to applications for the grant of 10 miscellaneous licences.[2] Warden Calder had held, in his decision on the preliminary issues, that s 24MD(6A) of the *Native Title Act 1993* (Cth) ('NTA') means that registered native title claimants should be afforded all of the 'procedural rights' which an owner of private land (such as freehold title) would have, under the *Mining Act*, relating to the grant of a miscellaneous licence. He found that those procedural rights included rights in relation to the grant of an entry permit for the purpose of marking out land prior to applying for a miscellaneous licence.[3]

In his substantive decision, the Warden applied his preliminary findings to the facts, with some interesting consequences.

Objections

The objections were made by two registered native title claim groups ('Objectors') on the following grounds:[4]

- activities pursuant to the tenements, if granted, could have an adverse impact upon the exercise of native title rights, upon sites of significance, upon the lifestyles of the objectors and upon the environment;
- the objectors should be treated as private landowners by reason of the NTA and the *Racial Discrimination Act 1975* (Cth) ('RDA'). Accordingly, the applicant should have obtained an entry permit under the *Mining Act* prior to marking out the tenements. The applicant should also have notified the Objectors as required under the *Mining Act* as if the Objectors were private landowners;
- because of the failures to comply with the *Mining Act*, the NTA and/or the *RDA*, the grant of the tenements would be contrary to the public interest.

Issues for the Warden

The Warden described the issues he had to consider as follows:[5]

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1 The Warden's decision on some limited preliminary issues was given in *BHP Billiton Pty Ltd v Karriyarra Native Title Claimants & Ors* [2004] WAMW 22 – see (2005) 24 ARELJ 26.

2 The preliminary decision had dealt with applications for 11 miscellaneous licences and 5 mining leases. Only 10 of the miscellaneous licences were dealt with in the substantive decision.

3 There is now a handful of decisions of WA Mining Wardens where different Wardens have come to different conclusions on this point. Warden Calder has found in this decision, and in his decision on preliminary issues, that the grant of an entry permit under the *Mining Act* has associated with it some 'procedural rights' within the meaning of section 24MD(6A) of the NTA. In contrast, Warden Richardson has drawn a distinction between the application for a grant of a tenement (which involves procedural rights) and the separate acts of obtaining an entry permit and marking out (which do not involve procedural rights) – see *Dodsley Pty Ltd v Applicants for the Thudgari (WC 97/095) Native Title Claim* [2003] WAMW 14. See also the comments of Warden Temby on an application for permits to enter in *Re Pilbara Iron Ore Pty Ltd* [2005] WAMW 21, where he said that the 'obligation of an applicant to obtain a permit to enter private land is not a procedural right that the holder of private land enjoys.' As a result of these divergent views, this aspect of the law remains to be settled.

4 Paragraph 3 of the reasons for decision.

5 Paragraph 11.

- should he have arrived at any different conclusions to those in his decision on the preliminary issues?
- (assuming the correctness of his preliminary conclusions):
  - did the applicant have a legal obligation to obtain an entry permit under the *Mining Act*, to authorise it to mark out and apply for the miscellaneous licences insofar as the licences would lie within registered native title claims?
  - if the applicant had such an obligation but failed to obtain such a permit, what consequences should flow from such a failure?
  - if the applicant obtained such a permit, did it mark out and apply for the licence in accordance with the provisions of the *Mining Act* and the NTA?
- do the facts of the case justify the exercise of a discretion by the Minister, in the public interest, to refuse to grant any of the tenements (under s 111A of the *Mining Act*)?
- if the tenement applications are granted, should any special conditions be imposed upon the tenements?

Evidence

Warden Calder made the following relevant findings (among others) on the evidence:

- the applicants had a comprehensive awareness of their statutory obligations in respect of Aboriginal heritage;[6]
- activities authorised by the miscellaneous licences, if granted, would have environmental effects. It was clear that about half a hectare of mangroves would be destroyed, and it was possible that there would be an effect on river flows caused by the construction of bridges;[7]
- there were Aboriginal sites in the vicinity of the ground applied for.[8]

Marking out

The Warden considered that it is not necessary, in order to mark out land, to actually enter the land. Regulation 37 of the *Mining Regulations 1981* requires the placement of a datum post 'at' a corner of the boundary of the ground applied for. The word 'at' can be used to express an approximate location. The Warden held that it is sufficient for the purposes of the *Mining Act* and *Regulations* that a post "be placed at a point that is as close to the subject corner as can be reasonably achieved … using appropriate means of ascertaining that position".[9]

The Warden found on the evidence that the person who effected the marking out did not enter any of the ground applied for under the miscellaneous licences. Rather, he entered adjacent land, the subject of four leases. Those four leases had either extinguished native title, or were expressly excluded from the native title claims.[10]

Accordingly, by entering the area of those four leases to mark out the ground applied for under the miscellaneous licences, the applicants' agent did not enter on any land the subject of a registered native title claim.

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6 Paragraphs 13, 14.
7 Paragraphs 17, 27.
8 Paragraph 32.
9 Paragraph 65.
10 Paragraphs 79-85.

The permit to enter

The applicants had obtained a permit to enter under s 30 of the *Mining Act*. The permit authorised entry on to the areas the subject of the four leases. The permit did not refer to any areas of land the subject of native title claims. The Objectors' submission was that, as registered native title claimants are to be given the same procedural rights as if they held freehold title,[11] the permit should expressly identify areas the subject of native title claims.[12]

The Warden reiterated his conclusion (from his preliminary decision) that where a person has to enter an area the subject of a registered native title claim in order to mark it out, then a permit must be issued. In the Warden's view, the issue of an entry permit carries with it certain procedural rights for the benefit of private land owners. The Warden reiterated his view that such procedural rights should be afforded to registered native title claimants pursuant to s 24MD(6A) of the NTA.[13]

However, the Warden noted that the issuing of a permit is required for valid *entry* on to land, it is not required for valid *marking out*. 'If there is no need to enter private land for the purpose of marking out a tenement over private land then no permit is required before there can be a valid marking out'.[14]

The applicants' agent did not enter the land the subject of registered native title claims in order to mark out that land for the application for miscellaneous licences. In those circumstances, ss 28 or 104 of the *Mining Act* did not require the grant of an entry permit under s 30 in respect of the native title land. The Warden concluded that the validity of the applications was not compromised by any failure to comply with entry permit requirements.[15]

Private landowners' consent for the grant of a mining tenement

Subsection 29(2) of the *Mining Act* prevents the grant of a mining tenement over private land, except with the consent of the owner or occupier of the private land, in certain circumstances.[16]

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11 Following from section 24MD(6A) of the NTA.

12 Paragraph 89.

13 It is necessary to read the Warden's decision on the preliminary issues to understand his views about the 'procedural rights' which attach to an entry permit. The case note for the Warden's preliminary decision is cited at footnote 1, above. The Warden's discussion of the relevant procedural rights is set out at paragraphs 12 to 27 of his preliminary decision.

14 Paragraph 91.

15 It seems that Warden Calder would have held the tenement applications to be invalid if entry permits had been required and had not properly been obtained, or had not been obtained in the proper form, or had not properly been notified to the objectors. The Warden referred, it seems with approval, to the High Court decision in *Bromley v Muswellbrook* (1973) 129 CLR 342, that the lack of a valid entry permit has the effect that applications for tenements are invalid for failure to comply with statutory marking out requirements (see paragraphs 53, 61, 90). In his preliminary decision the Warden had stated his view that *Bromley* applies in these circumstances. The Warden also considered the case of *Lardil & Ors v Queensland & Ors* (2001) 108 FCR 453. A majority of Judges in the *Lardil* case had, in *obiter* remarks, said that a failure to follow the procedures relating to the grant of a 'future act' under the NTA did not necessarily invalidate the grant. The Warden considered that *Lardil* was not particularly relevant to the present case, where the issue turned on the failure to obtain an entry permit, and the consequences of that failure for a valid application for a mining tenement (see paragraphs 112 to 121).

16 The circumstances relate to various uses of land, or the location of various improvements on land, such as crops or buildings. Mining tenements cannot be granted over private land, without the consent of the owner or occupier of the land, within 100 metres of such uses or improvements.

However, the evidence before the Warden did not establish the existence of relevant land uses or improvements, such as would require the consent of a private land owner or occupier.

The Minister's discretion to prevent the grant of a tenement in the public interest

The objectors invoked the 'public interest' provisions of s 111A of the *Mining Act.*[17] The Objectors raised three matters:[18]

- the potential effects on Aboriginal heritage;
- the potential effects on environmental qualities, particularly the destruction of mangroves and the effects of proposed bridge construction on river beds and banks, water flows and permanent pools;
- the impact on native title rights and interests including fishing, gathering bush tucker, camping, hunting and protecting traditional sites.

The Warden noted that, in some cases, the *Aboriginal Heritage Act 1972* (WA) ("AHA") may be inadequate to protect Aboriginal sites. However in the present case the Warden had seen no evidence to justify refusal of the tenements because of a concern that the AHA might be inadequate. The Warden noted the applicants' 'genuine desire to identify and preserve and protect such sites'.[19] The Warden noted the Objectors' concerns about the effects of bridge construction on Aboriginal mythological sites. The Warden said that such concerns 'must however be balanced against the interests of the applicants'.[20] The Warden concluded that, in this case:

> the policies and provisions of the *Mining Act*, the [AHA] and the NTA, together with the attitude and desires and intentions of the applicants are adequate to address the matters that have been raised without resort to the provisions of s 111A.[21]

The Warden noted that there was little evidence concerning the environmental effects of activities under the miscellaneous licences if granted. He noted that a small area of low-environmental quality mangroves would be destroyed. He did not consider that the environmental concerns of the objectors were sufficient to justify referring the matter to the Minister under s 111A.[22]

Proposed conditions on the grant of the miscellaneous licences

The Objectors asked for conditions to be placed on the tenements dealing with matters such as:

- archaeological and ethnographic surveys to be carried out in a manner agreed by the Objectors (condition 1), and no damage to be done to Aboriginal sites without the consent of the Objectors (condition 2);

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17 Section 111A allows the Minister to intervene, to prevent the grant of a mining tenement, where the Minister is satisfied on 'reasonable grounds in the public interest' that the land should not be disturbed or the application should not be granted.

18 See paragraphs 93 to 95.

19 Paragraph 100.

20 Paragraph 102.

21 Paragraph 107. The Warden did not expressly deal with the Objectors' submission concerning the impact on native title rights and interests. He seems to have subsumed this issue into his comment that the provisions of the *Mining Act*, the AHA and the NTA provide sufficient protection without resort to section 111A.

22 See paragraphs 125, 127, 128.

- no mining or other activity within 100 metres of any springs, bores, or burial grounds that might be discovered within the tenement areas (condition 3);
- works should not result in any pylons or other construction in the rivers (condition 4);
- all works should be the subject of a management plan made in consultation with the native title claimants and approved by the Environmental Protection Authority (conditions 5 and 6);
- the applicants should carry out a study of the cumulative effects of industrial development on the mangrove environment (condition 6A);
- an existing bridge should be modified by the applicants to allow better waterflow (condition 7).

The Warden decided that it would be inappropriate to impose any conditions which effectively gave the native title claimants a power of veto (conditions 1 and 2) or that would limit the applicants' statutory rights in respect of Aboriginal sites (condition 2). The evidence did not support the imposition of condition 3, and in any event the protection of burial sites would adequately be dealt with by existing legislation and consultation between the applicants and the native title claimants.

The evidence about environmental impacts was not sufficient to justify the imposition of proposed condition 4.

Conditions 5 and 6 were appropriate, so long as they were drafted to ensure that the native title claimants could be consulted, but had no power of veto.

Condition 6A was not appropriate, in that it would be unfair to impose the burden of historical and future impact studies on the applicants. Condition 7 did not relate to a bridge within any of the miscellaneous licences applied for, so it would be inappropriate.

Interaction with the NTA

The Warden reiterated his conclusion from his preliminary decision that, while he intended to grant all 10 miscellaneous licences, the applications should first be processed under s 24MD(6B) of the NTA. Once those procedures had been complied with, the Warden would complete the grant of the tenements.[23]

Implications

Warden Calder found that the applicants' entry permit did not need to refer expressly to the registered native title claims, because that land did not need to be entered (and in fact was not entered) in order to mark out the tenements. However, the Warden reaffirmed his earlier decision that, where registered native title claim land needs to be entered for marking out, then the requirement of an entry permit carries with it 'procedural rights' which must be afforded to the registered native title claimants, because s 24MD(6A) of the NTA requires them to be treated in the same way as private land owners.

The tenement applicants in this case were fortunate that the marking out did not require entry onto land the subject of registered native title claims. Warden Calder appears likely to dismiss tenement applications where entry permit formalities are not complied with. In his view, where registered

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[23] See the preliminary decision (cited in footnote 1) at paragraphs 30 to 32.

native title claim land must be entered, the entry permit formalities require the permit to expressly refer to the registered native title claims, and for notice of the entry to be given to the registered claimants upon first entry.

As a result of the divergent views of Wardens in this State, the law is uncertain as to the obligations on tenement applicants when obtaining entry permits (and when entering land) in respect of registered native title claimants.[24]

Cautious tenement applicants may well consider that the safest path is to have entry permits expressly refer to any registered native claims if claimed land must be entered. The same caution would lead a cautious applicant to notify registered native title claimants upon first entering the land (under s 31 of the *Mining Act*).

Further, the same sense of caution would require a tenement applicant to consider whether land the subject of a registered native title claim falls within sub-s 29(2) of the *Mining Act* (in that the land is subject to any of the uses or improvements specified in that subsection) and therefore the consent of the registered native title claimants should be obtained in order for the tenement to be granted.

Of course, these extra steps in relation to entry permits make the task for tenement applicants more onerous.

Because of the onerous nature of such additional requirements in relation to entry permits where land is subject to registered native title claims, it is hoped that the Supreme Court will visit this area of law shortly, and make clear the proper approach.

TRESPASS AND INJUNCTION ON EXPLORATION LICENCE[*]

Westover Holdings Pty Ltd v BHP Billiton Minerals Pty Ltd & Ors [2005] WAMW 20

Exploration Licence – Trespass – Nuisance – Remedy – Mandatory Injunction – Plaint

Westover plainted BHP Billiton and others (BHPB) in relation to an area of overburden which had, as part of rehabilitation of the site, been battered down causing it to extend outside the boundary of BHPB's mineral lease and onto an area which, at a later date, became part of Westover's exploration licence.

Westover sought a declaration that BHPB was not entitled to have deposited or caused to have deposited mining material within the boundary of what was now Westover's exploration licence and a mandatory injunction requiring BHPB to remove the overburden from the exploration licence.

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[24] See footnote 3 above.

[*] Jennifer Johnson, Solicitor, Mallesons Stephen Jaques.