IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P59 of 2016

BETWEEN

FORREST & FORREST PTY LTD
Appellant

and

STEPHEN McKENZIE WILSON
First Respondent

10 and

YARRI MINING PTY LTD
Second Respondent

and

QUARRY PARK PTY LTD
Third Respondent

and

ONSLOW RESOURCES LTD
Fourth Respondent

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SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (AMICUS CURIAE)

Date of document: 1 March 2017

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PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia was granted leave to appear as *amicus curiae* pursuant to Order 1 made by Gageler J on 6 February 2017.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. No longer applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. The relevant legislative provisions as they existed at the relevant time, and as amended, are set out in Annexure 1.

PART V: SUBMISSIONS

5. The issue identified by the Appellant is whether, as a matter of statutory construction, the lodgement of a mineralisation report when applying for a mining lease, as specified by s 74(1)(ca)(ii) of the *Mining Act 1978* (WA) (**the *Mining Act***), is a jurisdictional fact that must be satisfied in order to enliven:

   (i) the jurisdiction of the Director, Geological Surveys (the **Director**) to prepare and give a report under s 74A(1) of the *Mining Act*; and

   (ii) the jurisdiction of the Warden to hear an application under s 75(4) and to make a report and recommendation to the Minister under s 75(5) of the *Mining Act*.

6. The term "jurisdictional fact" is used by the Appellant to identify a criterion, the satisfaction of which enlivens the power of the decision-maker to exercise a

discretion[1]. Whether a statutory requirement is a jurisdictional fact is a question of statutory construction[2].

7. The Attorney General accepts that characterisation of the issue raised by the appeal, subject to making two clarifications.

8. First, the matter identified as a jurisdictional fact by the Appellant is not simply the lodgement of a mineralisation report when applying for a mining lease, but its *contemporaneous* lodgement with the application[3]. It is the consequence of the Appellant's construction that any delay between the application and the lodgement of a mineralisation report (no matter how minor), will deprive the Director and Warden of jurisdiction.

9. Secondly, the issue identified by the Appellant would not only affect the jurisdiction of the Director and the Warden, but also the Minister, whose statutory responsibility it is to grant or refuse applications for mining leases. The necessary corollary of the Appellant's case is that the absence of what it identifies as the "jurisdictional fact" would have the result of rendering void the grant of any mining licence granted by the Minister[4]. The issue therefore includes whether the lodgement of a mineralisation report when applying for a mining lease in circumstances where s74(1)(ca)(ii) is relied upon, is a jurisdictional fact necessary to enliven the jurisdiction of the Minister to grant or refuse the application for a mining lease.

10. Accordingly, the controversy centres on whether s 74(1)(ca)(ii) of the *Mining Act* gives rise to a jurisdictional fact for each of the purposes referred to above, in the sense that the failure to lodge a mineralisation report contemporaneously with an application for a mining lease will deprive the application of any effect and render any mining lease granted in relation to it invalid.

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1 *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at 148, [28].

2 See for instance *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 at 180, [58].

3 See Appellant's Submissions at paragraph [17].

4 That the report and recommendation of the Warden is a mandatory consideration of the Minister (and thereby a precondition to the exercise of his or her power) was established by this Court in *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

11. The Attorney General submits that it does not. Rather, the Attorney General submits that the late lodgement of a mineralisation report is an irregularity which, consistent with the statutory purposes revealed by the *Mining Act* as a whole:

    (a) may, but not must, result in refusal to grant a mining lease; and

    (b) does not result in the invalidity of a mining lease if so granted.

The Scheme of Part IV of the *Mining Act* generally

12. Section s 74(1)(ca) forms part of the statutory scheme for the granting of a variety of mining tenements. Each of Divisions 1, 2, 2A, 3, 4 and 5 of Part IV generally deal with different classes of mining tenements, being prospecting licences, exploration licences, retention licences, mining leases, general purposes leases and miscellaneous licences, respectively.

13. In relation to each class of tenement, there are differing processes and requirements attaching to an application for the tenement which, depending upon the circumstances, may be granted by different office-holders under the *Mining Act*: the mining registrar, the Warden or the Minister as the case may be.

14. Within that scheme, provision is made for the circumstances in which an irregularity in compliance with the provisions of the *Mining Act* may or may not affect whether the tenement can be granted.

15. The provisions of Part IV, as a whole, reflect a statutory policy, it is submitted, that:

    (a) where an application is not the subject of objection, it may be granted administratively (or recommended to be granted) by the mining registrar, without any deliberative process, so long as the provisions of the *Mining Act* have been complied with in all respects[5];

    (b) where an application is the subject of objection, the *Mining Act* provides for a deliberative process and the decision of a Warden or the Minister, in

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5 See *Mining Act*, s 42(2) (prospecting licence), s 59(3) (recommendation for exploration licence), s 70D(3) (recommendation for retention licence), s 92 (miscellaneous licence).

relation to which compliance in all respects with the provisions of the *Mining Act* is a relevant, but not determinative consideration[6].

Division 3 of Part IV of the *Mining Act* – Mining Leases

16. This statutory scheme is reflected in Division 3 of Part IV in relation to mining leases.

17. By s 71 of the *Mining Act*, the power to grant a mining lease lies with the Minister. Section 71 provides:

> "Subject to this Act, the Minister may, on the application of any person, after receiving a recommendation of the mining registrar or the warden in accordance with section 75, grant to the person a lease to be known as a mining lease on such terms and conditions as the Minister considers reasonable."

18. The general power in s 71, it is submitted, includes two statutory preconditions to the grant of a mining lease:

(a) That there be an "application"; and

(b) The Minister has received a recommendation of the mining registrar or the warden in accordance with s 75.

The "Application"

19. In relation to the first of these requirements, two points may be made.

20. First, while an "application" is a precondition for the grant of a lease, an "application" will not fail to meet that statutory description because it is does not comply, in some respect, with the provisions of the *Mining Act*. This was established, in relation to the identical provisions in respect of exploration licences by the Court of Appeal in *Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd* (2010) 41 WAR 134. The Court's conclusion in *Yarri Mining v Eaglefield*, and the reasons for it (at [51]-[61]) are, it is respectfully submitted, correct[7].

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6 See *Mining Act*, ss40 and 42(3) (prospecting licence), s 59(6) (exploration licence), s 70E(6) (retention licence), s 75(6) (mining lease), s 90(4) (general purpose lease).

7 The Appellant, who refers to *Yarri Mining v Eaglefield* in its Submissions at [37], [42], does not suggest otherwise.

21. Secondly, the *Mining Act* draws a distinction between the "application" itself and the documents or other things (including prescribed rent or fees) that must accompany it[8]. In accepting the Appellant's contention that that the expression 'shall be accompanied by' requires that the documents specified in s 74(1)(ca)(ii) be lodged contemporaneously with the application, McLure P, correctly it is submitted, observed that "an application under s 74 is separate and distinct from the documents which must accompany it"[9].

The Issue in the Present Case: Documents Accompanying an "Application"

22. The additional precondition to the Warden's (and ultimately the Minister's) jurisdiction or power for which the Appellant contends is the contemporaneous lodgement of a mineralisation report under s 74(1)(ca).

23. In that regard, s 74(1)(ca) provided (at the time of the application) that an application:

> "shall be accompanied by —
>
> (i) a mining proposal; or
>
> (ii) a statement in accordance with subsection (1a) and a mineralisation report prepared by a qualified person;"[10]

24. A mineralisation report is "a report that sets out details of exploration results in respect of minerals located in, on or under the land to which the application relates"[11].

25. The Court of Appeal held that, as a matter of the construction of the expression "shall be accompanied by", s 74(1)(ca)(ii) required that the mining operations statement and the mineralisation report be lodged contemporaneously with the

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8 In this context see, for example, *Mining Act* s 41(1)(b) (prosecting licences); s 58(1)(b), (c) and (e) (exploration licence); s 70C(1)(b), (c) and (e) (retention licence); s 74(1)(b), (c) and (ca); s 90(4) (general purpose lease); s 92 (miscellaneous licence).

9 *Forrest and Forrest Pty Ltd v Wilson* [2016] WASCA 116 (**Court of Appeal**) at [26].

10 Section 74(1)(ca) of the *Mining Act* has since been amended to include a third alternative "accompanying document", namely a "resource report" (see s 74(1)(ca)(iii)). While not relevant to the application in the present case, the inclusion of a third method of satisfying s 74(1)(ca), reinforces, it is submitted, the submissions made below as to its proper construction.

11 *Mining Act*, s 74(7).

application[12]. That construction is not challenged in this appeal and, indeed, the Appellant relies upon it.

26. The significance of that construction, however, must not be overstated in the context of the issue raised in the appeal.

27. In that regard, the Attorney General makes two submissions.

28. First, s 74(1)(ca)(ii) must be seen in the context of the provision as a whole. Section 74(1)(c) does not ***require*** that a mineralisation report be lodged at all. The lodgement of a mining operations statement and mineralisation report was one of two[13] alternative ways of fulfilling the requirements of 74(1)(c): an applicant for a mining lease could instead choose to accompany the application with a mining proposal (s 74(1)(ca)(ii))[14]. In such a case, as the Appellant notes at [27], there is express provision for lodgement of the mining proposal after the application.

29. Given such a choice, it is not possible, even on the Appellant's construction, to conclude that an application lodged without any of the documents falling within s 74(1)(ca) would be, as at the date of lodgement, invalid or ineffective. Even on the Appellant's construction the "validity" of the application would have to await knowledge of whether the applicant has chosen to utilise s 74(1)(ca)(i).

30. Secondly, and more importantly, whether the *Mining Act* requires (or contemplates) that a particular process be followed is an entirely different question as to whether the failure to follow that process, in any particular respect, will nullify or invalidate that statutory process and the result of it. That is the very distinction emphasised by the Court in *Project Blue Sky v Australian*

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12 Court of Appeal at [28].

13 And, following the inclusion of s 74(1)(ca)(iii), is now one of three alternatives.

14 This also explains the use of the word "if" as the opening word of s 74A(1), s 75(2a) and s 75(4a). See also s 75(8).

Broadcasting Authority[15] (***Project Blue Sky***), and recognised by the Court of Appeal below[16].

31. The Appellant's Submissions, for example, lay great emphasis upon the language of s 74(1)(ca)(ii) being "precise and prescriptive"[17] and not admitting of any "doubt or ambiguity"[18]. No doubt that emphasis is correct, insofar as it led to the Court of Appeal's conclusion that the *Mining Act* contemplates and requires contemporaneous lodgement of a mineralisation report (where that alternative is followed).

32. The precision and clarity with which s 74(1)(ca)(ii) produces that result, does not, however, assist in the real issue, which is whether non-compliance is such as to result in invalidity.

33. Indeed, to focus on the "precise and prescriptive" words in s 74(1)(ca), tends, it is respectfully submitted, to fall into the use of the elusive and since rejected distinction between directory and mandatory requirements. Such a focus, it is submitted, deflects attention from the real issue, which is whether an act done in breach of the legislative provision is invalid[19].

34. As McHugh , Gummow, Kirby & Hayne JJ stated in *Project Blue Sky* at [93]:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. … In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".

35. The better question in the present case, is not to ask how clearly, precisely or unambiguously, does s 74(1)(ca)(ii) require contemporaneous lodgement of a

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15 [1998] HCA 28; (1998) 194 CLR 355 per McHugh , Gummow, Kirby & Hayne JJ at 388-391, [91] – [93].

16 Court of Appeal at [29] - [31], *Project Blue Sky* at 388-391, [91].

17 See, for example, Appellant's Submissions at paragraphs [26] ("precise and prescriptive"), [27] ("intended prescriptive effect"), [30] ("precise and prescriptive tenor"), [33] ("prescriptive nature"), [61] ("precise and prescriptive").

18 See, for example, Appellant's Submissions at paragraphs [25] ("does not admit of any ambiguity or doubt"), [30] ("no doubt or ambiguity"), [42] ("plain and clear").

19 *Project Blue Sky* at 391, [93].

mineralisation report, but, rather, what does the language of the *Mining Act* as a whole reveal as to whether non-compliance with that provision should invalidate the application, the Warden's jurisdiction and the Minister's discretion?

The Provisions of the Mining Act in Relation to Irregularities

36. Understood in this way, the only provision expressly addressing the issue in the present case is s 75(6), which provides:

> "(6) On receipt of a report under subsection (2) or (5), the Minister may, subject to subsection (7), grant or refuse the mining lease as the Minister thinks fit, and irrespective of whether —
>
> (a) the report recommends the grant or refusal of the mining lease; and
>
> (b) the applicant has or has not complied in all respects with the provisions of this Act."

37. Section 75(6)(b), it is submitted, provides the surest guide to the statutory purpose in relation to the failure to comply with the provisions of the *Mining Act*. It draws no distinction between failures that may be disregarded by the Minister and failures that may not. It reflects a general legislative intention that irregularity associated with an application for a mining lease is not intended to result in invalidity of the application, or of the process, or leases granted as a result of that process. In this regard, it is submitted that the Court of Appeal (per McLure P) was correct to describe the *Mining Act* as reflecting a "flexible approach to non-compliance"[20].

38. While s 75(6)(b) is concerned with irregularities recognised *prior* to the grant of a mining lease, the indefeasibility provisions of the *Mining Act*, ensure that, save in the case of fraud, the revelation of irregularities in the application or in the proceedings previous to a grant will not affect the validity of the grant. In that regard s 116(2), which provides that "except in the case of fraud, a mining tenement granted ... under this Act shall not be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the grant ... of that tenement", is expressly designed to

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[20] Court of Appeal at [44].

ensure the protection of third parties dealing with a registered proprietor of a tenement.

39. The Appellant accepts that the consequence of its construction is that the indefeasibility of provisions in s 116(2) would not be engaged in a case such as the present (had the irregularity gone unnoticed) as it would be a ""purported grant" or a grant without jurisdiction"[21]. The Attorney General agrees that that would be the effect of the Appellant's construction. Such a result, however, is a further reason for rejecting the construction. That is, the prejudice to the administration of the *Mining Act* identified by the Court of Appeal[22] would not be confined to delay but would extend to uncertainty in the validity of tenures and the adverse commercial consequences that s 116(2) is intended to avoid.

40. The Appellant (at Submissions, paragraphs [37]-[40]) endeavours to deal with s75(6)(b) (and s 116(2)) by submitting that its construction would not leave s 75(6)(b) without a field of operation because s 75(6)(b) may still apply to various other forms of "non-compliance" (and refers, by way of example, to ss 74(2), 74(3) and 118 of the *Mining Act* and Regulations 65 and 66 of the *Mining Regulations 1981* (WA)).

41. The difficulty with that submission is that it does not reveal why the particular non-compliance complained of by the Appellant (which is ultimately a matter of timing) is "jurisdictional" whereas other forms of non-compliance are not. Each of the provisions referred to by the Appellant imposes obligations on an applicant in equally prescriptive terms as s 74(1)(ca)(ii), and some of them (such as the failure to serve the application on the owner of the relevant land under s74(3)) could be regarded as more "essential" than the timing of the mineralisation report[23].

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21 Appellant's Submissions at [67].

22 Court of Appeal at [38].

23 See, for example, *Mining Act*, s 74(2) "shall … furnish such further information"; s 74(3) "shall serve such notice"; s 118 "shall within the prescribed period post a copy of the notice together with a map…", Regulation 65 "shall state the number of shares in which the tenement is to be held and their division ..." and Regulation 66 "The boundaries of every mining tenement applied for, other than an exploration licence, shall be described…".

42. Ultimately the Appellant does not identify the principled basis for elevating the requirement of s 74(1)(ca)(ii) to a level of significance denied to the other requirements of the *Mining Act*.

43. In this regard, insofar as any requirements are truly to be regarded as "jurisdictional" in the sense of being pre-conditions to the power to grant a mining lease, they are those found in s 71 itself; namely that there be an "application" and that the Minister has received a recommendation of the mining registrar or the Warden.

The Statutory Purpose of the Requirement for Significant Mineralisation

10 44. It may be accepted that the statutory requirement for significant mineralisation for the grant of a mining lease reflects the statutory purpose of ensuring that leases are only granted in those cases where significant mineralisation has been discovered or mining proposals are lodged and of preventing mining leases being used as *de facto* exploration titles (see Appellant's Submissions at [51]).

45. That statutory purpose, however, is achieved by the provisions of s 75 which provide that, before a mining lease can be referred to the Minister (or granted by the Minister), there must be a report under s 74A of the *Mining Act* to the effect that "there is significant mineralisation in, on or under the land to which the application relates" (s 75(2a), s 75(4a) and s75(8)).

20 46. Those provisions, which amply achieve the statutory purpose, should be construed as involving matters of substance, rather than giving rise to procedural or jurisdictional technicality. In that regard, it is submitted, the Court of Appeal was correct to hold that the statutory expression "if an application for a mining lease is accompanied by the documentation in section 74(1)(ca)(ii)" in those provisions is "descriptive, not prescriptive" and that its purpose and effect is to identify that the relevant provision (s 75(2a), s 75(4a), s 75(8)) applies to an application falling within s 74(1)(ca)(ii) rather than an application falling within s 74(1)(ca)(i) [24].

47. The terms of ss 75(2a), 75(4a) and 75(8) are, of course, drafted on the
30 assumption of strict compliance with s 74(1)(ca)(ii), as a matter of timing. They

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[24] Court of Appeal at [41].

should not be construed, however, as defeating an application in the case of non-compliance (no matter how minor), in circumstances in which the consequences of non-compliance are expressly addressed in s 75(6)(b).

48. In this regard, the legislative purpose of ss 75(2a), 75(4a) and 75(8) is sufficiently met by the requirement that a recommendation may only be made, or an application only granted, where significant mineralisation is present. The legislative purpose does not require that any non-compliance with the contemporaneity requirement of s 74(1)(ca)(ii) should be fatal to the application. As submitted above such invalidity would be inimical to the purpose of the *Mining Act* generally in promoting the mining of mineral deposits.

49. In addition, were the Appellant's construction correct and ss 75(2a), 75(4a) and 75(8) to be construed as excluding, for all purposes, a mineralisation report lodged after the application, the result would be that each of the prohibitions would have no application *at all* in cases in which a mineralisation report was not lodged contemporaneously with the application. In the absence of those prohibitions the respective power of the mining registrar, the warden and the Minister would be unconstrained by the contents of a s 74A report.

50. That conclusion cannot be correct and supports a purposive construction consistent with the flexible approach to non-compliance with the *Mining Act*.

PART VI: LENGTH OF ORAL ARGUMENT

51. It is estimated that the oral argument for the Attorney General for Western Australia will take 45 minutes.

Dated: 1 March 2017.

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ANNEXURE 1

APPLICABLE PROVISIONS

MINING ACT 1978 (WA)

This Annexure sets out the applicable provisions in force at both the time of application and the hearing before the Warden, and as relevantly amended.

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PROVISIONS IN FORCE AT THE RELEVANT TIME

71. Grant of mining lease

Subject to this Act, the Minister may, on the application of any person, after receiving a recommendation of the mining registrar or the warden in accordance with section 75, grant to the person a lease to be known as a mining lease on such terms and conditions as the Minister considers reasonable.

[Section 71 amended by No. 122 of 1982 s. 20; No. 58 of 1994 s. 29(4).]

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74. Application for mining lease

(1) An application for a mining lease —

(a) shall be in the prescribed form; and

(b) shall be accompanied by the amount of the prescribed rent for the first year of the term of the lease or portion thereof as prescribed; and

(c) shall be accompanied by the prescribed application fee; and

(ca) shall be accompanied by —

(i) a mining proposal; or

(ii) a statement in accordance with subsection (1a) and a mineralisation report prepared by a qualified person;

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and

(d) shall be lodged in the prescribed manner.

(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).

(1a) The statement referred to in subsection (1)(ca)(ii) shall set out information about the mining operations that are likely to be carried out in, on or under the land to which the application relates including information as to —

(a) when mining is likely to commence; and

(b) the most likely method of mining; and

(c) the location, and the area, of land that is likely to be required for the operation of plant, machinery and equipment and for other activities associated with those mining operations.

(2) The applicant shall at the request of the mining registrar or warden furnish such further information in relation to the application, or such evidence in support thereof, as the mining registrar or warden may require but the mining registrar or warden shall not require any 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.

(3) 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.

(4) The application shall be made by reference to a written description of the area of the land in respect of which the lease is sought, and be accompanied by a map on which are clearly delineated the boundaries of that area.

(5) The Director General of Mines shall ensure that —

(a) any document referred to in subsection (1)(ca) that accompanies the application; and

(b) any document furnished by the applicant in response to a request under subsection (2),

are made available for public inspection at reasonable times.

(6) The regulations may require a person to pay a fee specified in the regulations —

(a) for inspecting a document referred to in subsection (5); or

(b) for obtaining a copy of the document or any part of it.

(7) In this section —

likely means reasonably likely having regard to the information available to the applicant when the application is made;

mineralisation report means a report that sets out details of exploration results in respect of a deposit of minerals located in, on or under the land to which the application relates, including details of —

(a) the type of minerals located in, on or under that land; and

(b) the location, depth and extent of those minerals and the way in which that extent has been determined; and

(c) analytical results obtained from samples of those minerals;

qualified person means a person who —

(a) is a member of a prescribed body; and

(b) complies with any requirement of the regulations as to relevant qualifications or experience.

[Section 74 amended by No. 100 of 1985 s. 50; No. 37 of 1993 s. 26 and 28(1); No. 58 of 1994 s. 28; No. 39 of 2004 s. 29; No. 12 of 2010 s. 31.]

74A. Report on significant mineralisation required for certain applications

(1) If an application for a mining lease is accompanied by the documentation referred to in section 74(1)(ca)(ii), the Director, Geological Survey shall give the Minister a report as to whether or not there is significant mineralisation in, on or under the land to which the application relates.

(2) For the purposes of preparing the report, the Director, Geological Survey may request the applicant to provide further information in relation to matters dealt with in the mineralisation report.

(3) The report shall be based solely on information contained in the mineralisation report and any further information provided by the applicant in response to a request under subsection (2).

(4) The Director, Geological Survey shall give a copy of the report to the mining registrar and the warden.

(5) The Director General of Mines shall ensure that the report is made available for public inspection at reasonable times.

(6) The regulations may require a person to pay a fee specified in the regulations —

(a) for inspecting the report; or

(b) for obtaining a copy of the report or any part of it.

(7) In this section —

mineralisation report means the mineralisation report that accompanied the application.

[Section 74A inserted by No. 39 of 2004 s. 30.]

75. Determination of application for mining lease

(1) A person who wishes to object to the granting of an application for a mining lease shall lodge a notice of objection within the prescribed time and in the prescribed manner.

(1a) A person is not entitled to lodge a notice of objection if the basis for the objection is that there is no significant mineralisation in, on or under the land to which the application relates.

(2) Subject to subsection (2a), if no notice of objection is lodged within the prescribed time, or any notice of objection is withdrawn, the mining registrar shall, unless subsection (4)(b) applies, forward to the Minister a report which recommends the grant or refusal of the mining lease and sets out the reasons for that recommendation.

(2a) If the application for the mining lease is accompanied by the documentation referred to in section 74(1)(ca)(ii), the mining registrar shall not forward a report under subsection (2) unless —

(a) the mining registrar has received a copy of the section 74A report in relation to the application; and

(b) the section 74A report states that there is significant mineralisation in, on or under the land to which the application relates.

(3) The mining registrar shall —

(a) recommend the grant of the mining lease if satisfied that the applicant has complied in all respects with the provisions of this Act; or

(b) recommend the refusal of the mining lease if not so satisfied.

(4) Subject to subsection (4a), if a notice of objection —

(a) is lodged within the prescribed time; or

(b) is not lodged within the prescribed time but is lodged before the mining registrar has forwarded a report to the Minister under subsection (2) and the warden is satisfied that there are reasonable grounds for late lodgment,

and the notice of objection is not withdrawn, the warden shall hear the application for the mining lease on a day appointed by the warden and may give any person who has lodged such a notice of objection an opportunity to be heard.

(4a) If the application for the mining lease is accompanied by the documentation referred to in section 74(1)(ca)(ii), the warden shall not hear the application unless —

(a) the warden has received a copy of the section 74A report in relation to the application; and

(b) the section 74A report states that there is significant mineralisation in, on or under the land to which the application relates.

(5) The warden shall as soon as practicable after the hearing of the application forward to the Minister for the Minister's consideration —

(a) the notes of evidence; and

(b) any maps or other documents referred to in the notes of evidence; and

(c) a report which recommends the grant or refusal of the mining lease and sets out the reasons for that recommendation.

(6) On receipt of a report under subsection (2) or (5), the Minister may, subject to subsection (7), grant or refuse the mining lease as the Minister thinks fit, and irrespective of whether —

(a) the report recommends the grant or refusal of the mining lease; and

(b) the applicant has or has not complied in all respects with the provisions of this Act.

(7) In the case of an application for a mining lease made by the holder of —

(a) a prospecting licence under section 49; or

(b) an exploration licence under section 67; or

(c) a retention licence under section 70L,

the Minister shall, subject to subsection (8) and the other provisions of this Act, grant to that holder one or more mining leases —

(d) in respect of any part or parts of the land the subject of the prospecting licence, exploration licence or retention licence, as the case requires; and

(e) on such terms and conditions as the Minister considers reasonable.

(8) In the case of an application for a mining lease that is accompanied by the documentation referred to in section 74(1)(ca)(ii), the Minister shall refuse to grant the mining lease if the section 74A report states that there is no significant mineralisation in, on or under the land to which the application relates.

(9) Subsection (7) does not apply to an application for a mining lease if all or part of the land to which that application relates falls within one or more of the classes of land referred to in section 24(1) or is in a marine nature reserve, marine park or marine management area.

(10) In this section —

section 74A report means the report given to the Minister under section 74A.

[Section 75 inserted by No. 58 of 1994 s. 29(1); amended by No. 52 of 1995 s. 29; No. 5 of 1997 s. 41(2); No. 39 of 2004 s. 31 and 63; No. 12 of 2010 s. 32.]

116. Instrument of licence or lease

(1) The holder of a mining tenement granted pursuant to this Act shall be entitled to receive an instrument of licence or lease as the case may be in such form as may be prescribed.

(2) Except in the case of fraud, a mining tenement granted or renewed under this Act shall not be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the grant or renewal of that tenement and no person dealing with a registered holder of a mining tenement shall be required or in any way concerned to inquire into or ascertain the circumstances under which the registered holder or any previous holder was registered, or to see to the application of any purchase or consideration money, or be affected by notice, actual or constructive, of any unregistered trust or interest any rule of law or equity to the contrary notwithstanding, and the knowledge that any such unregistered trust or interest is in existence shall not of itself be imputed as fraud.

(3) In subsection (2) —

registered, in relation to a holder or previous holder of a mining tenement, means that the name of the holder or previous holder is or was entered in the register as the holder of the mining tenement.

[Section 116 amended by No. 100 of 1985 s. 85; No. 54 of 1996 s. 16.]

PROVISIONS AS RELEVANTLY AMENDED BY NO. 51 OF 2012

74. Application for mining lease

(1) An application for a mining lease —

(a) shall be in the prescribed form; and

(b) shall be accompanied by the amount of the prescribed rent for the first year of the term of the lease or portion thereof as prescribed; and

(c) shall be accompanied by the prescribed application fee; and

(ca) shall be accompanied by —

(i) a mining proposal; or

(ii) a statement in accordance with subsection (1a) and a mineralisation report prepared by a qualified person; or

(iii) a statement in accordance with subsection (1a) and a resource report;

and

(d) shall be lodged in the prescribed manner.

(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).

(1a) The statement referred to in subsection (1)(ca)(ii) and (iii) shall set out information about the mining operations that are likely to be carried out in, on or under the land to which the application relates including information as to —

(a) when mining is likely to commence; and

(b) the most likely method of mining; and

(c) the location, and the area, of land that is likely to be required for the operation of plant, machinery and equipment and for other activities associated with those mining operations.

(2) The applicant shall at the request of the mining registrar or warden furnish such further information in relation to the application, or such evidence in support thereof, as the mining registrar or warden may require but the mining registrar or warden shall not require any 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.

(3) 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.

(4) The application shall be made by reference to a written description of the area of the land in respect of which the lease is sought, and be accompanied by a map on which are clearly delineated the boundaries of that area.

(5) The Director General of Mines shall ensure that —

(a) any document referred to in subsection (1)(ca) that accompanies the application; and

(b) any document furnished by the applicant in response to a request under subsection (2),

are made available for public inspection at reasonable times.

(6) The regulations may require a person to pay a fee specified in the regulations —

(a) for inspecting a document referred to in subsection (5); or

(b) for obtaining a copy of the document or any part of it.

(7) In this section —

JORC Code means the *Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves* prepared by the Joint Ore Reserves Committee of the Australasian Institute of Mining and Metallurgy, the Australian Institute of Geoscientists and the Minerals Council of Australia as in force from time to time;

likely means reasonably likely having regard to the information available to the applicant when the application is made;

mineralisation report means a report that sets out details of exploration results in respect of a deposit of minerals located in, on or under the land to which the application relates, including details of —

(a) the type of minerals located in, on or under that land; and

(b) the location, depth and extent of those minerals and the way in which that extent has been determined; and

(c) analytical results obtained from samples of those minerals;

qualified person means a person who —

(a) is a member of a prescribed body; and

(b) complies with any requirement of the regulations as to relevant qualifications or experience;

resource report means a report —

(a) that sets out details of the mineral resources located in, on or under the land to which the application relates; and

(b) that complies with the JORC Code; and

(c) that has been made to the Australian Securities Exchange Limited.

[Section 74 amended by No. 100 of 1985 s. 50; No. 37 of 1993 s. 26 and 28(1); No. 58 of 1994 s. 28; No. 39 of 2004 s. 29; No. 12 of 2010 s. 31; No. 51 of 2012 s. 23.]

116. Instrument of licence or lease

(1) The holder of a mining tenement granted pursuant to this Act ~~shall be entitled~~ is entitled, on payment of the prescribed fee, to receive an instrument of licence or lease as the case may be in such form as may be prescribed.

(2) Except in the case of fraud, a mining tenement granted or renewed under this Act shall not be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the grant or renewal of that tenement and no person dealing with a registered holder of a mining tenement shall be required or in any way concerned to inquire into or ascertain the circumstances under which the registered holder or any previous holder was registered, or to see to the application of any purchase or consideration money, or be affected by notice, actual or constructive, of any unregistered trust or interest any rule of law or equity to the contrary notwithstanding, and the knowledge that any such unregistered trust or interest is in existence shall not of itself be imputed as fraud.

(3) In subsection (2) —

registered, in relation to a holder or previous holder of a mining tenement, means that the name of the holder or previous holder is or was entered in the register as the holder of the mining tenement.

[Section 116 amended by No. 100 of 1985 s. 85; No. 54 of 1996 s. 16; No. 51 of 2012 s. 34.]