HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND NETTLE JJ

FORREST & FORREST PTY LTD APPELLANT

AND

STEPHEN McKENZIE WILSON & ORS RESPONDENTS

Forrest & Forrest Pty Ltd v Wilson
[2017] HCA 30
17 August 2017
P59/2016

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 7 July 2016 and 2 September 2016 and, in their place, order that:*

   (a) the appeal be allowed;

   (b) orders 4 and 5 of Allanson J made on 4 June 2015 be set aside and, in their place, order that:

      (i) it be declared that the first respondent did not have jurisdiction to hear the second respondent's application for mining lease 08/478 or the fourth respondent's application for mining lease 08/479 as each application was not accompanied by a mineralisation report referred to in s 74(1)(ca)(ii) of the Mining Act *1978 (WA);*

      (ii) it be declared that the first respondent did not make a valid report and recommendation to the Minister under s 75(5)(c) of the Mining Act *1978 (WA) in relation to the second respondent's application for mining lease*

08/478 or the fourth respondent's application for mining lease 08/479;

(iii) a writ of certiorari be issued quashing the purported report and recommendation made by the first respondent under s 75(5)(c) of the Mining Act *1978 (WA) in relation to the second respondent's application for mining lease 08/478 and in relation to the fourth respondent's application for mining lease 08/479; and*

(iv) the second, third and fourth respondents pay the applicant's costs of the judicial review application; and

(c) the second and fourth respondents pay the appellant's costs of the appeal.

3. The second and fourth respondents pay the appellant's costs of the appeal to this Court.

On appeal from the Supreme Court of Western Australia

Representation

A J Myers QC with A J Papamatheos for the appellant (instructed by Mizen + Mizen)

Submitting appearances for the respondents

P D Quinlan SC, Solicitor-General for the State of Western Australia with T C Russell for the Attorney-General for the State of Western Australia, appearing as amicus curiae (instructed by State Solicitor's Office (WA))

CATCHWORDS

Forrest & Forrest Pty Ltd v Wilson

Mining – Application for mining lease – Statutory conditions – Proper construction of s 74(1)(ca)(ii) of *Mining Act* 1978 (WA) – Where statutory regime conferred power on executive government of State to grant exclusive rights to exploit resources of State – Where s 74(1)(ca)(ii) provided application for mining lease "shall be accompanied by" mineralisation report – Effect of non-compliance with s 74(1)(ca)(ii) – Whether non-compliance with s 74(1)(ca)(ii) invalidated exercises of jurisdiction to progress application through to grant.

Words and phrases – "condition precedent", "indefeasibility", "informality", "irregularity", "jurisdictional error", "shall be accompanied by".

Mining Act 1978 (WA), ss 71, 74, 74A, 75, 116(2).

1 KIEFEL CJ, BELL, GAGELER AND KEANE JJ. At issue in this appeal is whether non-compliance with provisions of the *Mining Act* 1978 (WA) ("the Act") in relation to matters preliminary to the grant of a mining lease would render invalid mining leases granted by the Minister.

2 The Court of Appeal of the Supreme Court of Western Australia rejected the contention of the appellant ("Forrest") that the provisions in question imposed conditions precedent to the valid grant of a mining lease[1]. Whether the Court of Appeal was correct in this regard is an issue of statutory construction informed by this Court's decision in *Project Blue Sky Inc v Australian Broadcasting Authority*[2].

3 Before proceeding further, it is necessary to record that the second to fourth respondents, who made the impugned applications for mining leases, filed submitting appearances, save as to the issue of costs. The Attorney-General for Western Australia was given leave to appear as *amicus curiae*. Pursuant to that leave, the Solicitor-General for Western Australia appeared on behalf of the Attorney-General to put submissions contrary to those advanced on behalf of Forrest.

The legislation

4 The appeal concerns the proper construction of the Act as it stood prior to the commencement of the *Mining Amendment Act* 2012 (WA). It is convenient to summarise the material provisions of the Act before proceeding to a consideration of the facts of the case and the reasons of the courts below.

5 Section 71 of the Act empowered the Minister to grant a mining lease. It was in the following terms:

> "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."

6 The Solicitor-General submitted that the only true conditions precedent to the Minister's power to make a grant under s 71 were the making of an

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1 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 82 [1], 91 [45].

2 (1998) 194 CLR 355; [1998] HCA 28.

application and the receipt by the Minister of a recommendation from the mining registrar or warden.

7 It is to be noted, however, that the Minister's power to make a grant of a mining lease upon satisfaction of these conditions was expressed to be "[s]ubject to this Act", confirming that the Act created the regime whereby a mining lease might be granted by the Minister. There is a line of authority that has previously been applied in Western Australia[3] (but which was not referred to by the Court of Appeal) which supports an approach to statutory construction whereby no effective grant of rights to exploit the mineral resources of the State may be made, except upon compliance with the statutory regime which provides for the making of the grant. In the present case, the principal elements of that regime were ss 74, 74A and 75 of the Act.

8 Section 74 of the Act made provision for the making of an application for a mining lease. In this regard, the section began relevantly:

> "(1) An application for a mining lease –
>
> (a) shall be in the prescribed form; and
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> (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
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> (c) shall be accompanied by the prescribed application fee; and
>
> (ca) shall be accompanied by –
>
> (i) a mining proposal; or
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> (ii) a statement in accordance with subsection (1a) and a mineralisation report prepared by a qualified person;
>
> and

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3 *Nicholas v Western Australia* [1972] WAR 168 at 172, 174. See also *Watson's Bay and South Shore Ferry Co Ltd v Whitfield* (1919) 27 CLR 268; [1919] HCA 69; *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63-64; [1992] HCA 23; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 173-174; [1996] HCA 40; *Western Australia v Ward* (2002) 213 CLR 1 at 121-122 [167]; [2002] HCA 28.

(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)."

9 While these proceedings do not involve the operation of sub-s (1AA), it may be noted that, insofar as sub-s (1AA) contemplated that the mining proposal referred to in sub-s (1)(ca)(i) need not accompany an application for a mining lease, it stands in contrast with the requirement of sub-s (1)(ca)(ii).

10 The requirement that an application be accompanied by the statement referred to in sub-s (1)(ca)(ii) was elaborated in sub-s (1a), which was in the following terms:

"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;

(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."

11 The material before the Court does not show that this statement (for simplicity, a "mining operations statement") was ever lodged by the applicants. Forrest did not make any complaint on this ground; the focus of its concern was upon the late lodgement of the mineralisation report referred to in s 74(1)(ca)(ii).

12 For the purposes of s 74, and sub-s (1)(ca)(ii) in particular, sub-s (7) of s 74 provided relevantly:

"***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;

(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".

13 Section 74(2) dealt with the provision of further information by an applicant in support of its application.

14 Importantly, s 74 required notice of the application to be given by the applicant to the owner and occupier of the land over which the mining lease was sought, and a mineralisation report and mining operations statement to be made available for public inspection. As to the notice, s 74(3) provided:

"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."

15 The "prescribed period" for the service of notice of the application in conformity with s 74(3) was stated in reg 64A(1) of the Mining Regulations 1981 (WA). It required the applicant to serve notice on the owner and occupier in the prescribed form "within 14 days of the lodging of the application to which the notice relates".

16 Section 74(5) provided for public access to information concerning the mining lease application in the following terms:

"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."

17 Section 74A required the provision of a report by the Director, Geological Survey to the Minister as to whether there was significant mineralisation in, on or under the land the subject of the application. Section 74A provided:

"(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."

18 It is to be noted that the power and duty of the Director, Geological Survey to give the Minister a report on mineralisation in the subject land arose under s 74A(1) if the application was accompanied by the documentation referred to in s 74(1)(ca)(ii). The Director, Geological Survey had neither an obligation nor a power to provide the report referred to in s 74A(1) if an application for a mining lease was *not* accompanied by a mineralisation report.

19 It is also pertinent to note that s 74A(5) required the report of the Director, Geological Survey to be made available for public inspection. Insofar as members of the public might be interested in the proposed grant of a mining lease, the report so made available was a vital source of information.

20 Section 75 provided for the determination by the warden of an application for a mining lease, following the expiration of the period for the lodgement of objections. In relation to the right of objection, s 75 provided relevantly:

"(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."

21 The following six sub-sections established a two-track system for the progression of an application to the Minister: unopposed applications proceeding via the mining registrar, and opposed applications proceeding via the warden. Where no notice of objection had been lodged within the prescribed time, sub-ss (2), (2a) and (3) of s 75 made provision for the mining registrar to report to the Minister. These provisions were in the following terms:

"(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."

22 It is to be noted that, in s 75(3), the question whether the applicant had "complied in all respects with the provisions of this Act" was a matter to be determined to the satisfaction of the mining registrar. In this regard, reference to

the provisions of s 75 which dealt with cases where there had been an objection lodged shows that no similar provision was to be found in relation to the powers of the warden.

23 Correspondingly, sub-ss (4), (4a) and (5) provided for a hearing by the warden where an objection had been lodged, with sub-s (4) providing:

> "Subject to subsection (4a), if a notice of objection –
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> (a) is lodged within the prescribed time; or
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> (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,
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> 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."

24 It may be noted that s 75(4)(b) made express provision for the warden to excuse non-compliance by an objector with the time limits prescribed for the lodging of an objection. This express provision is to be contrasted with the absence of any provision authorising the warden to excuse non-compliance with any of the provisions of s 74 of the Act.

25 It is also to be noted that the provision for a hearing made by s 75(4) was expressed to be subject to s 75(4a), which was in the following terms:

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

26 As a matter of ordinary parlance, one would understand s 75(4a) as stating, in pars (a) and (b), the conditions upon which the warden was authorised to hear an application. But the only kind of application which the warden was able to hear, if those conditions were satisfied, was an application accompanied

by the documentation referred to in s 74(1)(ca)(ii). An application not so accompanied was outside the statutory regime.

27 Section 75(5) provided for the warden to make a recommendation to the Minister. It was in the following terms:

> "The warden shall as soon as practicable after the hearing of the application forward to the Minister for the Minister's consideration –
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> (a) the notes of evidence;
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> (b) any maps or other documents referred to in the notes of evidence; and
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> (c) a report which recommends the grant or refusal of the mining lease and sets out the reasons for that recommendation."

28 The power and duty of the warden to forward a report to the Minister pursuant to s 75(5)(c) arose after the hearing contemplated by s 75(4).

29 Section 75 went on to make the following provisions in relation to the power of the Minister to grant a mining lease:

> "(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 –
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> (a) the report recommends the grant or refusal of the mining lease; and
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> (b) the applicant has or has not complied in all respects with the provisions of this Act.
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> …
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> (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.
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> …

(10) In this section –

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

30 It may be noted that s 75(6), which empowered the Minister to make a grant of a lease notwithstanding non-compliance with the Act, applied only in relation to non-compliance with the Act *by the applicant*: it did not excuse non-compliance with the requirements of the Act on the part of those charged with administering the Act, including the warden and the Minister.

31 Section 116 of the Act provided for the grant of an instrument of lease to a successful applicant. It was in the following terms:

"(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."

32 As is apparent from the text, the first clause of s 116(2) is apt to protect the title of the grantee of a mining lease, and the second clause (commencing "and no person dealing") onwards is apt to protect the position of a transferee from that grantee.

33 It is to be noted that the indefeasibility of title provided by the first clause of s 116(2) to a successful applicant protects only against "any informality or irregularity in the application or … proceedings previous to the grant … of that tenement". As will be explained in due course, non-compliance with the conditions in ss 74, 74A and 75 cannot sensibly be described as an "informality or irregularity in the application or … proceedings previous to the grant" of the mining lease.

The facts

34 On 28 July 2011, the second and fourth respondents to this appeal lodged applications for mining leases 08/478 ("M478") and 08/479 ("M479") respectively. No mining operations statement or mineralisation report was lodged contemporaneously with these applications[4].

35 On 1 September 2011, Forrest lodged objections to M478 and M479, which related to land within the boundaries of the Minderoo pastoral lease held by Forrest near Onslow in the Pilbara region of Western Australia[5].

36 A few months after the applications were lodged, a mineralisation report for each application was lodged[6]. It does not appear that mining operations statements were ever lodged.

37 By August 2012, the Director, Geological Survey had prepared a report under s 74A of the Act for each application. In December 2012, the warden (who is the first respondent) heard the applications with the s 74A reports of the Director, Geological Survey before him[7].

The warden's report

38 In a report (in the form of reasons for decision) delivered on 31 January 2014, the warden held that he had jurisdiction to hear applications M478 and

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4 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 85-86 [15].

5 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 86 [17].

6 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 86 [17].

7 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 86 [18].

M479 notwithstanding that they were not accompanied by a mineralisation report when the applications were made[8].

39 The warden's report reached the same conclusions in relation to a third mining lease application, 08/489 ("M489"), which was lodged by the third respondent[9]. The second, third and fourth respondents are related entities[10].

40 At the outset of the warden's reasons, he dealt with an objection by Forrest that he had no jurisdiction to hear the applications on the basis that they were not accompanied by mineralisation reports, as required by s 74(1)(ca)(ii), at the time of application. It was argued by Forrest that the requirement under s 74(1)(ca)(ii) that the mineralisation report be submitted contemporaneously with the application was a strict one, as indicated by the circumstance that, in contrast to the case of a mining proposal in s 74(1)(ca)(i), no provision was made for the late lodgement of a mining operations statement or a mineralisation report after the date of application[11]. It was argued that non-compliance with s 74(1)(ca)(ii) meant that the condition upon which the Director, Geological Survey was required to give the Minister a report under s 74A(1) was not satisfied. It was said that, by parity of reasoning, nor was the condition of the warden's power to hear the application under s 75(4a) of the Act satisfied[12]. Accordingly, Forrest submitted, the warden was obliged to conclude that he lacked jurisdiction to hear and determine the applications[13].

41 The warden rejected Forrest's submission, holding that an application for a mining lease that does not comply with the requirements of s 74(1)(ca)(ii) of the Act remains an application for a mining lease, albeit one that cannot be heard and determined by the warden until both a mineralisation report pursuant to s 74(1)(ca)(ii), and a report from the Director, Geological Survey stating that the land contains significant mineralisation pursuant to s 74A, have been provided[14].

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8 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [37].

9 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [37].

10 *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181 at [1].

11 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [22].

12 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [27]-[28].

13 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [29].

14 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [55].

The warden considered that it was the fact of lodgement of the mineralisation report, rather than its timeousness, that was a necessary precondition to the powers exercisable by the Director, Geological Survey and the warden under ss 74A and 75(4) respectively[15]. The warden considered that failure to lodge the mineralisation report on time was no more than an irregularity, which could be cured by subsequent lodgement, as well as by the wide discretion given to the Minister pursuant to s 75(6)(b) of the Act to grant an application notwithstanding non-compliance with the provisions of the Act[16].

42 After dealing with a number of other objections which are not presently relevant, the warden made a recommendation that the Minister grant applications M478, M479 and M489[17].

43 Forrest then applied to the Supreme Court of Western Australia to quash the warden's recommendation[18]. Before turning to consider the fate of that application, it may be noted that, in this Court, the Solicitor-General was not disposed to defend the conclusion of the warden that failure to ensure that the mineralisation report was lodged with the application for a mining lease was a mere irregularity, which could be cured by subsequent lodgement. The Solicitor-General accepted that, had Forrest commenced proceedings to prohibit the warden proceeding to determine the applications, those proceedings would have succeeded. But it was submitted that, if the Minister had proceeded to grant the mining leases sought by the applications, they would have been validly granted.

The judicial review proceedings

44 Forrest applied for judicial review of the warden's decision on 10 grounds[19]. The only ground which is relevant in this Court is the first, whereby Forrest contended that the warden made a jurisdictional error in holding that he had jurisdiction to hear the applications for the mining leases.

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15 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [57].

16 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [57]-[60].

17 *Yarri v Forrest & Forrest Pty Ltd* [2014] WAMW 6 at [143].

18 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 86 [20].

19 *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181 at [4].

45 Allanson J concluded that the warden's hearing of the applications, despite non-compliance with s 74(1)(ca)(ii), did not amount to a jurisdictional error on the part of the warden. His Honour held that s 75(4a) stated only two preconditions to the warden hearing an application, namely that he had received a copy of the s 74A report, and that that report stated that the subject land contained significant mineralisation. His Honour considered that the expression "accompanied by the documentation referred to in section 74(1)(ca)(ii)", which appeared at several places in the Act, including s 74A(1), and s 75(4a) itself, was descriptive of the kind of application to which it related, as opposed to prescriptive of a rule that an application could not proceed unless the requirements of the relevant provision were satisfied[20].

46 Allanson J also observed that s 75(6) expressly authorised the Minister to exercise the power to grant or refuse the mining lease, irrespective of whether the applicant had complied in all respects with the provisions of the Act[21]. In addition, his Honour noted that s 116(2) provided that, except in the case of fraud, a mining tenement granted under the 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". His Honour considered this provision to be particularly relevant in this case because the Minister had in fact granted M489 and the accompanying miscellaneous licence L08/70[22], so that the protection of s 116(2) was available to protect the title of the successful applicant.

The Court of Appeal

47 Forrest appealed against the decision of Allanson J to the Court of Appeal of the Supreme Court of Western Australia. McLure P, with whom Newnes and Murphy JJA agreed, upheld the decision of Allanson J.

48 McLure P accepted that the expression "shall be accompanied by" in s 74(1)(ca) of the Act gave rise to a requirement that the mineralisation report be lodged contemporaneously with the application[23]. Her Honour accepted that the

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20 *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181 at [49].

21 *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181 at [51].

22 *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181 at [11], [52].

23 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 87 [25].

text of s 74(1AA) compelled that construction[24], and that that construction was consistent with the statutory purpose of ss 74(1)(ca)(ii) and 74(1AA) as confirmed by the second reading speeches and explanatory memoranda for the Amendment Bills that introduced those provisions into the Act[25]. Nevertheless, her Honour concluded that only a failure to provide a mineralisation report *at all* would prevent the satisfaction of a condition precedent to the mining registrar or warden making a recommendation to the Minister. Only in the absence of such a report would those decision-makers be without jurisdiction to hear the application (in the warden's case) and make a recommendation to the Minister (in both their cases)[26].

49 McLure P concluded that Allanson J was correct to conclude that s 74(1)(ca)(ii) did not create a condition precedent to the hearing by, and recommendation of, the warden[27]. Her Honour considered that this conclusion followed from the approach required by this Court's decision in *Project Blue Sky*[28].

50 Her Honour held that, as a matter of the construction of ss 74, 74A and 75 of the Act, non-compliance with those provisions did not prevent the Minister from granting a valid mining lease. There were four principal strands in her Honour's reasoning. First, McLure P observed that the phrase "shall be accompanied by" was used, not only in relation to the documents specified in s 74(1)(ca)(ii), but also in relation to the requirements in s 74(1)(b) (that a prescribed rent be paid), s 74(1)(c) (that a prescribed application fee be paid), and, subject to the deeming provision in s 74(1AA), s 74(1)(ca)(i) (that a mining proposal be lodged). Her Honour considered[29] that this phrase must have the same significance each time it was used in s 74(1), and went on to say:

> "Having regard to the variety in the nature of the requirements [in s 74(1)] and the serious consequences of non-compliance however minor or

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24 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 87 [25].

25 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 87 [27].

26 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 91 [45].

27 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 88-89 [33].

28 (1998) 194 CLR 355 at 388-389 [91].

29 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 90 [40].

technical, there is no justification in principle or purpose for concluding that contemporaneous lodgment is a condition precedent to the mining registrar or the warden making a recommendation."

51 Secondly, her Honour agreed with Allanson J that the expression "if an application for a mining lease is accompanied by the documentation referred to in section 74(1)(ca)(ii)", which is deployed at various points in the Act, is descriptive of the application to which it relates, rather than being a prescription that an application which does not satisfy s 74(1)(ca)(ii) is invalid[30]. Her Honour said that to adopt the opposing view would be to recast sub-ss (2a) and (4a) of s 75 such that their descriptive "if" clauses would instead become prescriptive "not unless" clauses[31].

52 Thirdly, McLure P noted[32] that courts are reluctant to characterise a fact or legislative criterion as jurisdictional, for the reasons explained by Dixon J in *Parisienne Basket Shoes Pty Ltd v Whyte*[33].

53 Finally, her Honour noted that the consequences of characterising compliance with s 74(1)(ca)(ii) as setting up a condition precedent to the exercise of the powers in ss 75(4) and 75(6) would be far-reaching. To invalidate the warden's recommendation and so deprive the Minister of the power to grant or refuse the application would force the applicant to start from scratch by lodging a new application, with accompanying payments and documents, in circumstances where there had already been significant delay in the application proceeding through to completion[34]. McLure P considered that a flexible approach to non-compliance, which would avoid such inconvenience, was central to the scheme in s 75, and was consistent also with the text and purpose of s 116(2) of the Act[35].

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30 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 90 [41].

31 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 90 [42].

32 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 89-90 [38].

33 (1938) 59 CLR 369 at 391; [1938] HCA 7.

34 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 89-90 [38].

35 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 91 [44].

54 By grant of special leave, Forrest appealed to this Court from the decision of the Court of Appeal.

The appeal to this Court

55 It will be necessary to discuss each of the four strands in the reasoning of the Court of Appeal; but before doing so, it is desirable to summarise the broad thrust of the arguments agitated by Forrest and the Solicitor-General on appeal in order to establish the context for that discussion.

56 Forrest submitted that ss 74(1)(ca)(ii), 74A(1) and 75(4a) of the Act expressly contemplated that a mineralisation report was to be one lodged with a mining lease application, with the evident purpose of ensuring that non-compliant applications would not proceed to a hearing by the warden or a grant by the Minister. It was said that a non-compliant application should not be allowed to progress as a burden upon the administration of the Act, or work to the disadvantage of stakeholders such as owners and occupiers of land, or miners in competition with applicants. Forrest argued that the Minister was precluded from proceeding to grant a lease where non-compliance with s 74(1)(ca)(ii) was shown because the pre-requisite to the Minister's jurisdiction under ss 71 and 75(6), being the forwarding of a recommendation from the warden after a hearing authorised by sub-ss (4) and (4a) of s 75, could not be met.

57 The Solicitor-General submitted that whether an Act requires that a particular process be followed is an entirely different question from whether the failure to follow that process will nullify or invalidate that statutory process and the result of it. In this regard, the Solicitor-General relied upon this Court's decision in *Project Blue Sky* and argued that, while the language of s 74(1)(ca)(ii) may well be "precise and prescriptive", that does not assist in resolving the issue whether non-compliance results in invalidity.

58 The Solicitor-General submitted that the question is not how clearly, precisely or unambiguously s 74(1)(ca)(ii) required contemporaneous lodgement, but rather what the language of the Act as a whole revealed about the effect of non-compliance with that requirement. And in this regard, the Solicitor-General contended that either s 75(6) or s 116(2) provided the "surest guide" to the statutory purpose in relation to *all* failures to comply with the requirements of the Act.

59 In response to the Solicitor-General's contention that Forrest's approach to statutory construction had placed undue weight on the "precise and prescriptive" nature of the language of s 74(1)(ca)(ii), Forrest argued that its approach was entirely orthodox, amounting to no more than using the text of the relevant

provisions to discern the statutory purpose, in order to apply the approach in *Project Blue Sky*[36].

60 In light of the contentions of Forrest and the Solicitor-General, one may turn to a consideration of the reasoning of the Court of Appeal. That consideration must begin with a discussion of this Court's decision in *Project Blue Sky*.

Project Blue Sky

61 In *Project Blue Sky*, the majority of the Court said[37]:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment ... There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue." (footnote omitted)

62 In *Project Blue Sky*, this Court was concerned with whether a statutory requirement that an administrative agency perform its functions in a manner consistent with Australia's obligations under any convention or international agreement to which Australia is a party was intended to invalidate an act done in breach of the requirement. The majority in *Project Blue Sky* were strongly influenced in reaching a conclusion in the negative by the consideration that the requirement in question regulated the exercise of functions already conferred on the agency, rather than imposed essential preliminaries to the exercise of those functions[38]. Their Honours were also influenced by the circumstance that the provisions did not have "a rule-like quality which [could] be easily identified and applied"[39], many of the obligations relevant in that case being "expressed in

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36 (1998) 194 CLR 355 at 388-389 [91], 390-391 [93].

37 (1998) 194 CLR 355 at 388-389 [91].

38 (1998) 194 CLR 355 at 391 [94].

39 (1998) 194 CLR 355 at 391 [95].

indeterminate language"[40]. Also important to the decision was the consideration that "public inconvenience would be a result of the invalidity of the act"[41], especially if those affected by non-compliance were neither responsible for, nor aware of, the non-compliance.

63 The present case is readily distinguishable. A consideration of "the language of the statute, its subject matter and objects, and the consequences for the parties of holding void" acts done in breach of the Act, reveals that ss 74(1)(ca)(ii), 74A(1) and 75(4a) imposed essential preliminaries to the exercise of the power conferred by s 71 of the Act. That this was so was made clear by both the express terms and the structure of the provisions as sequential steps in an integrated process leading to the possibility of the grant of a mining lease by the Minister. These provisions were not expressed in indeterminate terms: they imposed rules which could be easily identified and applied. In addition, any inconvenience suffered by treating the requirements of the Act as conditions precedent to the exercise of the Minister's power would enure only to those with some responsibility for the non-observance, whereas (as will be explained) the contrary view would disadvantage both the public interest and individuals who were within the protection of the Act. Finally, and importantly, *Project Blue Sky* was not concerned with a statutory regime for the making of grants of rights to exploit the resources of a State.

64 Regrettably, the Court of Appeal was not referred to, and did not consider, the line of authority[42] which establishes that where a statutory regime confers power on the executive government of a State to grant exclusive rights to exploit the resources of the State, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant. When a statute that provides for the disposition of interests in the resources of a State "prescribes a mode of exercise

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40 (1998) 194 CLR 355 at 391-392 [96].

41 (1998) 194 CLR 355 at 392 [97]-[98].

42 *Watson's Bay and South Shore Ferry Co Ltd v Whitfield* (1919) 27 CLR 268; *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 76; [1977] HCA 71; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63-64; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 173; *Western Australia v Ward* (2002) 213 CLR 1 at 121-122 [167]. See also *New South Wales Aboriginal Land Council v Minister Administering Crown Lands Act* (2016) 91 ALJR 177 at 200 [121]; 339 ALR 367 at 394-395; [2016] HCA 50.

of the statutory power, that mode must be followed and observed"[43]. The statutory conditions regulating the making of a grant must be observed. A grant will be effective if the regime is complied with, but not otherwise[44].

65 This approach to statutory construction had its origin in colonial times in legislation which vested the disposition of land not already disposed of by the Crown in the legislatures of the Australian colonies[45]. Nothing said in *Project Blue Sky* diminished the force of the authorities which support this approach. Adherence to this approach supports parliamentary control of the disposition of lands held by the Crown in right of the State. It gives effect to an abiding appreciation that the public interest is not well served by allowing non-compliance with a legislative regime to be overlooked or excused by the officers of the executive government charged with its administration. To permit such a state of affairs might imperil the honest and efficient enforcement of the statutory regime, by allowing scope for dealings between miners and officers of the executive government in relation to the relaxation of the requirements of the legislation. One can be confident that such a state of affairs was not intended by the Act.

66 A consideration of the language of the Act, to which one may now turn, does not reveal any intention to depart from the settled approach to the construction of such a legislative regime, save to the limited extent expressly indicated by ss 75(6)(b) and 116(2).

The language of the Act

Sections 74, 74A and 75

67 The clear meaning of s 74(1)(ca)(ii), as a matter of ordinary parlance, was that the documentation relied upon must have been lodged at the same time as the application was lodged, as each of the courts below held. The text of s 74(1)(ca) did not admit of any ambiguity or doubt on this point. The tenor of s 74(1)(ca)(ii) was both precise and prescriptive, conveying an intention not to countenance any degree of non-compliance with the requirement.

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43 *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533.

44 *Nicholas v Western Australia* [1972] WAR 168 at 172, 174.

45 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 455-456; [1913] HCA 33; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 172-174; *Western Australia v Ward* (2002) 213 CLR 1 at 117-122 [157]-[168].

68 The prefatory words of ss 74A(1), 75(2a), 75(4a) and 75(8) distinguish such applications from those where a choice was made to proceed by way of lodging a mining proposal under s 74(1)(ca)(i). It is not open to read those provisions as if they provided "if the application for the mining lease is accompanied *or followed* by the s 74(1)(ca)(ii) documentation". In contrast, the specific provision for late lodgement of a mining proposal in s 74(1AA) served to reinforce the requirement of contemporaneous lodgement in that it deemed a proposal lodged within the prescribed time after the application to have been a proposal that accompanied the application. This contrast confirms the ordinary meaning and prescriptive effect of the language of s 74(1)(ca).

69 As to the point made by the Court of Appeal that a failure to comply with s 74(1)(ca)(ii) could not be regarded as having more serious consequences for an application for a mining lease than a failure to comply with par (b) or (c) of s 74(1), it may be accepted that a failure to comply with any of these provisions should attract the same consequences. But with all respect, it is not possible to accept that the legislation intended that an application for a mining lease might proceed in the case of non-compliance with par (b) or (c) of s 74(1). The executive government of Western Australia was given no warrant to allow an application for the grant of valuable rights to exploit minerals in the State, and the concomitant expense to the State and administrative burden on its officers, to proceed "on credit". The Court of Appeal erred in proceeding upon an assumption to the contrary.

70 In addition, an applicant for a mining lease who chose to proceed by way of mineralisation report under s 74(1)(ca)(ii) engaged the powers and duties of each of the Director, Geological Survey and the warden in the process leading to the grant by the Minister. Once an application was to be pursued in that way, the Director, Geological Survey became empowered and obliged to prepare a report under s 74A(1) based on the mineralisation report that accompanied the application, and no other. The Court of Appeal erred in holding that, while it was an essential preliminary condition that the mineralisation report be lodged at "some time", the report did not have to accompany the application.

71 In departing from the terms of the Act in this way, the Court of Appeal failed to take into account the circumstance that, as the express words of sub-ss (1) and (7) of s 74A made clear, the Director, Geological Survey was obliged to provide a s 74A report based on a mineralisation report that accompanied the relevant application, not some other mineralisation report provided at some unspecified other time. The mineralisation report that the Director, Geological Survey was required to consider in producing his or her report pursuant to s 74A was expressly defined in s 74A(7) to mean *the* mineralisation report that accompanied the application. No power was conferred

on the Director, Geological Survey to extend time or to act upon some other document. The Director, Geological Survey was not authorised to receive or act upon a mineralisation report in any way other than that prescribed. Section 74A(7) had to be allowed to work according to its express terms and ordinary meaning.

72 The Court of Appeal also erred in treating the opening words of ss 74A(1) and 75(4a) as referring to an application of the kind that was *required* to be accompanied by the documentation referred to in s 74(1)(ca)(ii) even if it was, in fact, not so accompanied. Under s 74A(1), the power and duty of the Director, Geological Survey to prepare a report arose only "*[i]f* an application for a mining lease *is accompanied* by the documentation referred to in section 74(1)(ca)(ii)". Similarly, the warden's power to hear an application was expressly conditioned by the opening words of s 75(4), "[s]ubject to subsection (4a)". Sub-section (4a) was engaged only "*[i]f* the application for the mining lease *is accompanied* by the documentation referred to in section 74(1)(ca)(ii)". As a matter of ordinary parlance, those words referred not to something that has not been done, but rather, to something that has been done. In so doing, they reinforced the express requirement of contemporaneous lodgement contained in sub-ss (1), (3) and (7) of s 74A. Further, the circumstance that s 75(4) began with the words "[s]ubject to subsection (4a)" confirmed, as clearly as words can, that the opening phrase of s 75(4a) should be understood as conveying conditionality.

73 The phrase "[i]f the application for the mining lease is accompanied by the documentation referred to in section 74(1)(ca)(ii)" was substantially repeated in each of sub-ss (2a), (4a) and (8) of s 75. These were the three provisions that grounded the decision-making authority of the mining registrar, the warden, and the Minister respectively. These provisions left no room for the possibility that the documentation referred to in s 74(1)(ca)(ii) might be relied upon other than as an accompaniment to the application for a mining lease; on the contrary, each reinforced the essentiality of the requirement in s 74(1)(ca)(ii) itself.

Sections 75(6) and 116(2)

74 The express provision made by ss 75(6) and 116(2) in relation to the consequences of non-compliance with the requirements of the Act preliminary to the exercise of the Minister's powers under s 71 is itself an indication that matters of non-compliance with the Act outside the scope of ss 75(6) and 116(2) were fatal to the validity of a grant so affected.

75 Section 75(6)(b) allowed the Minister to grant or refuse a mining lease notwithstanding an applicant's non-compliance in all respects with the provisions of the Act. It did not manifest an intention that any and all non-compliance with

the provisions of the Act regarding applications for mining leases could be disregarded when the Minister determined whether to grant a lease. In particular, it did not purport to allow the Minister to make a grant where the warden had failed to comply with the Act, as, for example, by proceeding to a hearing under s 75(4) contrary to the requirements of s 75(4a).

76 Section 116(2) was not cast in terms which were apt to confer indefeasibility of title in respect of any non-compliance with the requirements of the Act. Unlike s 75(6)(b), s 116(2) did not speak of a want of "compliance" with the provisions of the Act, but of "informality or irregularity" in the application or proceedings. "Informality" means a want of legal form as distinct from a want of legal substance. The term "irregularity" refers to a lack of regularity in the method or manner in which a power is exercised[46]: it is a term used in deliberate contrast to an act beyond power. The failure of the warden to observe the requirement of s 75(4a) cannot fairly be described as an "informality or irregularity in the application or in the proceedings previous to the grant" of the mining lease.

77 The concern of the Court of Appeal that upsetting titles to mining leases might cause unintended hardship was misplaced. To the extent that the titles of the second and fourth respondents were liable to be set aside, it may be said that they were the authors of their own misfortune. And as to those who took a transfer of a mining lease from them, such transferees would be protected by the second clause of s 116(2). In *Hunter Resources Ltd v Melville*[47], Toohey J, noting the differences between s 116(2) of the Act and the Torrens system statutes whereby the registered proprietor holds free of any unregistered interest other than those expressly excepted, went on to say:

> "It should not be assumed … that registration of the original grant cures any defects in the application leading to the grant. But it is unnecessary to express a view on that matter. Clearly enough, a person dealing with the registered holder will, in the absence of fraud, obtain the protection of s 116."

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46 *Davis's Tutor v Glasgow Victoria Hospitals* 1950 SC 382 at 385; *M'Ginty v Glasgow Victoria Hospitals* 1951 SC 200 at 211.

47 (1988) 164 CLR 234 at 259; [1988] HCA 5.

Parisienne Basket Shoes Pty Ltd v Whyte

78 In *Parisienne Basket Shoes Pty Ltd v Whyte*[48], in the passage referred to by McLure P, Dixon J said:

> "It cannot be denied that, if the legislature see fit to do it, any event or fact or circumstance whatever may be made a condition upon the occurrence or existence of which the jurisdiction of a court shall depend. But, if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed."

79 The approach explained by Dixon J does not give rise to a presumption that a decision by the warden as to whether facts exist is within his or her jurisdiction: the warden is not one of the ordinary courts of justice. There is no occasion to presume that the warden is authorised by the Act to make a mistake as to the facts upon which his or her jurisdiction depends.

80 It can also be seen that s 75(4a) stands in marked contrast to s 75(3), which was so expressed that its operation depended on the satisfaction of the mining registrar that certain facts exist. The different approach of the Act to decisions of the mining registrar is understandable given that the mining registrar is concerned only with applications which are unopposed.

81 The Court of Appeal erred in relying on a presumption against characterising the requirements in ss 74(1)(ca), 74A(1), 75(4) and 75(4a) as steps in a sequential process prescribed for the exercise of the power to make a grant, departure from which led to legal invalidity. Effect should have been given to the text of the Act, bearing in mind that it established a regime to facilitate the grant of rights to exploit the valuable resources of the State.

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48 (1938) 59 CLR 369 at 391.

The objects of the regime

82 The conclusion of the Court of Appeal that "there is no justification in principle or purpose for concluding that contemporaneous lodgment is a condition precedent to the mining registrar or the warden making a recommendation" was focused upon the "delays, cost and other prejudice" already experienced by the second and fourth respondents. Quite apart from the consideration that these delays and costs resulted from those respondents' own non-compliance with the Act, this focus overlooked the consideration that non-observance of the requirements of the regime governing the grant of mining leases was apt to disadvantage both the public interest and individuals in ways that the Act did not intend.

83 In accordance with *Project Blue Sky*[49], the necessary inquiry is[50]:

> "as to whether the statutory purpose of the duty, when considered within the particular statutory scheme of which it forms part, would or would not be advanced by holding an exercise of decision-making power affected by breach of the duty to be invalid." (footnote omitted)

84 Compliance with the regime established by ss 74, 74A and 75 was apt to improve administrative efficiency and to avoid backlogs by reducing the number of defective applications for mining leases that mining registrars, wardens, Directors, Geological Survey, and officers of the Department administering the Act have to manage and follow up. The Court of Appeal failed to appreciate that reduction of the problems of management of applications for mining tenements, an object of the prescriptive regime constituted by ss 74, 74A and 75 of the Act acknowledged by the Court of Appeal[51], would be furthered by the Act denying validity to acts done in disregard of the statute.

85 Compliance with the requirement that a mineralisation report accompany an application was apt to reduce the administrative burden upon the Department. Officers of the Department should not have been troubled by the uncertainty and expense of attending to an application that was not accompanied by the documentation necessary to allow it to proceed. Whether that objective might be

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49 (1998) 194 CLR 355 at 390-391 [93].

50 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 33 [26]; [2015] HCA 51.

51 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 89-90 [38].

more efficiently accomplished by relying upon those affected by non-compliance with the Act to take proceedings to halt a non-compliant decision-making process was a matter of policy for the legislature. A legislative judgment that that would be an unreliable mode of ensuring compliance with the Act is perfectly intelligible. Indeed, consistently with *Project Blue Sky*, where non-observance of a condition bearing upon the exercise of a statutory power would work to the material disadvantage of individuals for whose protection the condition exists, considerations of justice and convenience tell strongly in favour of holding invalid acts done in neglect of the condition[52].

86 The Act's insistence upon a mineralisation report as an accompaniment to the application also served the purpose of ensuring that owners and occupiers of subject land were not troubled unnecessarily or prematurely by half-baked proposals. The Court of Appeal did not advert to the consideration that owners and occupiers of land affected by an application might be disadvantaged by an administration of the Act which proceeded in disregard of its requirements.

87 The Act, in requiring any objection to be lodged by an owner or occupier of land affected by an application for a mining lease within a prescribed time from the service of the application, ensured that an objection would be informed by reference to the information concerning mineralisation which accompanied the application for the mining lease. While s 75(1a) denied a right of objection if its basis was that there was no significant mineralisation in, on or under the land the subject of the application, it did not suggest that the absence of significant mineralisation was not a consideration relevant to whether the application should be granted: it simply denied a ground of objection on this basis alone. It left it open to an owner or occupier to rely upon the mineralisation report to support an objection that the mineralisation so disclosed was not such as to warrant the grant of a mining lease, having regard to, for example, the attendant adverse effects upon the rights of an owner or occupier by reason of the exploitation of that mineralisation.

88 The provision of the informed views of those who objected to an application was apt to improve the quality of decision-making by those charged with the administration of the Act. An objection lodged before the mineralisation report was made available would necessarily be framed without the benefit of that information. A failure to comply with the requirements of s 74(1)(ca)(ii) could thus compromise the rights of objectors. Non-compliance with statutory

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52 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at 33-34 [27]-[28].

provisions designed to ensure that a right of objection to proposed action is exercised effectively has been regarded as invalidating the decision-making process[53].

89 In addition, the relaxed view of the effect of non-compliance with the Act favoured by the Court of Appeal was apt to enure to the disadvantage of miners in competition for access to the State's resources. Compliance with the regime established by ss 74, 74A and 75 was necessary to prevent "land-banking", whereby holders of existing prospecting, retention or exploration licences that were soon to expire, who had not yet encountered a specific geological foundation for lodgement of a mineralisation report, might be minded cynically to use the mechanism of applying for a mining lease to extend their time for exploration.

90 In introducing ss 74(1)(ca)(ii) and 74A into the Act by passage of the Mining Amendment Bill 2004 (WA), the Explanatory Memorandum for the Bill stated that the changes were to "ensure a mining lease is *only applied for* when accompanied by a notice of intent to commence productive mining operations or a statement that significant mineralisation exists" (emphasis added)[54]. Similarly, the Minister for State Development referred in his second reading speech[55] to the significant problem that exploration title holders were using the mechanism of a mining lease application as a way to seek "further exploration rights rather than a title for productive mining". The Minister explained that the Bill would address this problem by "limit[ing] new applications for mining leases to those cases where significant mineralisation has been discovered or mining proposals are lodged with the application".

Conclusion

91 For these reasons, the appeal to this Court should be allowed and the relief sought by Forrest granted. In relation to the relief sought by Forrest, it may be noted that no order is sought to set aside any mining lease that might have been granted to the second and fourth respondents. It may be that Forrest is content to

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53 Cf *Scurr v Brisbane City Council* (1973) 133 CLR 242 esp at 251-252, 258-259; [1973] HCA 39. See also at 245-246.

54 Western Australia, Legislative Assembly, Mining Amendment Bill 2004, Explanatory Memorandum at 1.

55 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 26 August 2004 at 5728-5730.

rely upon the apparent willingness of the Minister to abide the result of these proceedings[56].

Costs

92 All four respondents filed submitting appearances in these proceedings. The second to fourth respondents filed and served written submissions on costs. They submitted that in the event that Forrest's appeal were to succeed, the usual order as to costs, whereby costs follow the event, should not be made. They argued that none of them played a substantive role in, or contributed significantly to, the overall costs of the proceedings.

93 The position of the third respondent is significantly different from that of the second and fourth respondents. On Forrest's judicial review application, Allanson J upheld Forrest's challenge to the warden's recommendation in relation to the application of the third respondent. His Honour found that the warden did err in recommending the grant of M489 to the third respondent, and granted a declaration that the warden's recommendation in respect of that application was invalid[57]. No appeal was brought against that decision, and the third respondent played no part in Forrest's appeals to the Court of Appeal and this Court, save as to making submissions as to costs.

94 The second and fourth respondents gave notice of their intention to take part in Forrest's appeal to the Court of Appeal, and filed written submissions and a notice of contention in that regard. Before the hearing of that appeal, the solicitors for the second and fourth respondents were granted leave to cease acting in the proceedings on their behalf. The second and fourth respondents were not represented at the hearing of the appeal. Upon dismissing the appeal, the Court of Appeal gave the second and fourth respondents liberty to apply for an order for costs, and subsequently ordered Forrest to pay their costs.

95 When Forrest applied for special leave to appeal to this Court, the second to fourth respondents filed a submitting appearance, and when special leave was granted they filed a submitting appearance in the appeal. The second to fourth respondents argue that in these circumstances they should not be required to pay Forrest's costs of the appeal.

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56 *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181 at [11].

57 *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181 at [129].

96 While it is true that an order for costs is compensatory and not punitive in nature[58], that consideration is beside the point in the present case. Forrest was obliged to pursue its challenge to the orders of Allanson J to the Court of Appeal and to this Court in order to correct the erroneous decision of the warden. The successful participation of the second and fourth respondents in the proceedings before Allanson J necessitated Forrest's appeal to the Court of Appeal and to this Court. In addition, the second and fourth respondents resisted Forrest's appeal to the Court of Appeal and sought and recovered an order for the costs they incurred in the course of that resistance. The subsequent adoption by the second and fourth respondents of a passive role came too late to enable them to assert that justice requires that they should not be required to indemnify Forrest against the costs that it was obliged to incur in order to vindicate its rights.

97 The responsibility of the second and fourth respondents for the costs incurred by Forrest contrasts strongly with that of the third respondent, whose responsibility for the injustice perpetrated against Forrest ceased at the judgment by Allanson J. No order for costs should be made against the third respondent in relation to the subsequent appeals.

Orders

98 The appeal should be allowed.

99 The orders of the Court of Appeal made on 7 July 2016 and 2 September 2016 should be set aside and, in their place, it should be ordered that:

(a) the appeal be allowed;

(b) orders 4 and 5 of Allanson J made on 4 June 2015 be set aside and, in their place, order that:

(i) it be declared that the first respondent did not have jurisdiction to hear the second respondent's application for mining lease 08/478 or the fourth respondent's application for mining lease 08/479 as each application was not accompanied by a mineralisation report referred to in s 74(1)(ca)(ii) of the *Mining Act* 1978 (WA);

(ii) it be declared that the first respondent did not make a valid report and recommendation to the Minister under s 75(5)(c)

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58 *Latoudis v Casey* (1990) 170 CLR 534 at 543; [1990] HCA 59.

of the *Mining Act* 1978 (WA) in relation to the second respondent's application for mining lease 08/478 or the fourth respondent's application for mining lease 08/479;

(iii) a writ of certiorari be issued quashing the purported report and recommendation made by the first respondent under s 75(5)(c) of the *Mining Act* 1978 (WA) in relation to the second respondent's application for mining lease 08/478 and in relation to the fourth respondent's application for mining lease 08/479; and

(iv) the second, third and fourth respondents pay the applicant's costs of the judicial review application; and

(c) the second and fourth respondents pay the appellant's costs of the appeal.

100 The second and fourth respondents should pay the appellant's costs of the appeal to this Court.

101 NETTLE J. I regret that I have come to a different view from the majority. I agree that s 74(1)(ca)(ii) of the *Mining Act* 1978 (WA) requires that an application for a mining lease of the kind in suit be accompanied by the documentation referred to in that provision at the time of lodgement of the application. But, with respect, I do not agree that a delay between lodgement of an application and lodgement of the documentation *ipso facto* vitiates the Minister's power to grant a mining lease in response to the application.

102 As the majority observe[59], s 74(1)(ca)(ii) imposes a "precise and prescriptive" requirement. Accordingly, if this were a question of contractual construction, the precision and prescriptiveness of the provision could be taken to mean that the provision operates as a condition precedent of which time is of the essence[60]. But even then, the Court might not be too ready to construe it in that manner[61]. Regard would have to be had to the contract as a whole[62]. And, *a fortiori*, since this matter is one of statutory construction, regard must be had, not just to the language of the provision, but also to the scope and object of the statute as a whole[63]. As was submitted by the Solicitor-General for the State of Western Australia, appearing on behalf of the Attorney-General for Western Australia as *amicus curiae*, it is not just a matter of how clearly and precisely s 74(1)(ca)(ii) expresses the requirement that the documentation be lodged at the same time as the application. The relevant enquiry is whether the *Mining Act* as

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59 See [67].

60 See, for example, *Bowes v Chaleyer* (1923) 32 CLR 159 at 168 per Knox CJ, 188 per Higgins J, 195-197 per Starke J; [1923] HCA 15; *Clifton v Coffey* (1924) 34 CLR 434 at 440 per Isaacs ACJ and Gavan Duffy J; [1924] HCA 35.

61 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 556-557 per Mason ACJ, Wilson, Brennan and Dawson JJ; [1987] HCA 15. See also *Bowes v Chaleyer* (1923) 32 CLR 159 at 171, 174 per Isaacs and Rich JJ; *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 at 303-304 per Latham CJ; [1938] HCA 66.

62 *Bettini v Gye* (1876) 1 QBD 183 at 187-188; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 430-431 per Stephen, Mason and Jacobs JJ (Aickin J agreeing at 437); [1978] HCA 12.

63 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [24] per French CJ and Hayne J, 404-405 [68] per Crennan and Bell JJ, 411-412 [88] per Kiefel J; [2012] HCA 56.

a whole reveals a statutory purpose that failure to lodge the documentation at the same time as the application *ipso facto* vitiates the Minister's power to grant the lease which is sought.

103 Looking at the *Mining Act* as a whole, three considerations in particular lead me to conclude that it is not the purpose of this legislation to achieve that effect. First, it is readily conceivable that, in a given case, despite best efforts and without substantive fault on the part of anyone concerned, the documentation referred to in s 74(1)(ca)(ii) might not be filed until hours or even days after the application is lodged. For example, an application might be lodged by the applicant's solicitor strictly within time and yet, due to a delay in the post or corruption in email transmission, a mineralisation report on its way from the applicant's consulting geologist may not arrive until some days later. It is difficult to see how such a delay could prejudice any party concerned. Yet, if the effect of s 74(1)(ca)(ii) were as the majority have concluded, the Minister would be powerless to grant the mining lease. I consider that to be an unlikely purpose to attribute to the legislation.

104 Secondly, s 75(6) arms the Minister with an apparently broad power to grant or refuse a mining lease as the Minister thinks fit. In particular, s 75(6)(b) expressly provides that the Minister may grant a mining lease irrespective of whether "the applicant has or has not complied in all respects with the provisions of" the *Mining Act*. In terms, it confers a broad-ranging discretion on the Minister to waive strict compliance by the applicant with any requirement of the *Mining Act*. And, although not unlimited, the apparent breadth of the discretion is emphasised by the contextual support it derives from s 75(6)(a), which empowers the Minister to grant a mining lease regardless of whether the mining registrar or the warden has recommended the grant or refusal of it[64]. As McLure P observed[65] in the Court of Appeal of the Supreme Court of Western Australia, s 75(6) reflects a "flexible approach to non-compliance". In an Act such as the *Mining Act*, it is to be expected that Parliament's purpose is to arm the Minister with a broad-ranging discretionary power to deal with irregularities[66]. It

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64 See and compare *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 170-172 per Brennan CJ, Gaudron and Gummow JJ; [1996] HCA 44.

65 *Forrest & Forrest Pty Ltd v Wilson* (2016) 10 ARLR 81 at 90-91 [43]-[44] (Newnes JA and Murphy JA agreeing at 92 [56], [57]).

66 See generally *R v Commissioner of Patents; Ex parte Martin* (1953) 89 CLR 381 at 396-397, 398 per Williams ACJ, cf at 400 per Webb J, 406-407 per Fullagar J (Kitto J and Taylor J agreeing at 408); [1953] HCA 67; *Associated Minerals Pty Ltd v NSW Rutile Mining Co Pty Ltd* (1961) 35 ALJR 296 at 297 per Dixon CJ, Kitto, Taylor and Menzies JJ; [1962] ALR 236 at 237-238; *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 451 [172] per Kirby J; [1999] HCA 5;

(Footnote continues on next page)

would severely limit the power of the Minister to deal with irregularities under s 75(6), and so, as it appears to me, run counter to Parliament's purpose, if a failure strictly to comply with provisions like s 74(1)(ca)(ii) were beyond the reach of s 75(6).

105 I acknowledge that there are some apparent textual difficulties in construing s 75(6)(a) and (b) as apt to include a lack of strict compliance with s 74(1)(ca)(ii). In terms, the chapeau of s 75(6) conditions the Minister's power to grant a mining lease on receipt of a report under s 75(2) or (5), and I accept that a possible construction of s 75(2a) and (4a) is that the mining registrar's power to forward a report to the Minister under s 75(2) and the warden's power to forward a report to the Minister under s 75(5) are conditioned on an application for a mining lease being accompanied by the documentation referred to in s 74(1)(ca)(ii) at the time of lodgement of the application[67]. But, at the same time, the effects of a strict textual analysis cut both ways. There is nothing in s 75(6) which expressly conditions the Minister's power to grant a mining lease on the fact of the mining registrar or warden having acted in accordance with the requirements of the Act[68]. The only condition expressly imposed by s 75(6) is that the Minister has received one or other kind of report. And, as s 75(6)(a) makes plain, the Minister may then act notwithstanding the report's recommendations. Accordingly, read in context, I think the better view of the effect of s 75(6) to be that it arms the Minister with power to waive both formal and substantive requirements of the objection and recommendation provisions, including provisions that regulate the mining registrar's and warden's powers to report to the Minister under s 75(2) and (5).

106 Thirdly, s 116(2) of the *Mining Act* provides that:

> "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

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Minister for Planning v Walker (2008) 161 LGERA 423 at 454 [53]-[55] per Hodgson JA (Campbell JA and Bell JA agreeing at 455 [65], [66]); *Ilic v City of Adelaide* (2010) 107 SASR 139 at 157 [60], 158 [68]-[69]; *Martin v State of New South Wales (No 14)* [2012] NSWCA 46 at [40]-[42]; *Gold and Copper Resources Pty Ltd v Hon Chris Hartcher MP, Minister for Resources and Energy, Special Minister (No 2)* [2014] NSWLEC 30 at [45]-[46].

67 See and compare *Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd* (2010) 41 WAR 134 at 144 [49] per McLure P (Owen JA and Buss JA agreeing at 147 [73], [74]).

68 See and compare *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457 per Mason CJ, Deane and Gaudron JJ; [1989] HCA 15.

> 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." (emphasis added)

107 The first part of that provision is similar to the first part of s 63(1) of the *Transfer of Land Act* 1893 (WA)[69] ("the TLA conclusive evidence provision"), which provides that:

> "No certificate of title created and registered upon an application to bring land under this Act or upon an application to be registered as proprietor on a transmission shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate ..."

Section 116(2) of the *Mining Act* thus affords a mining lease a level of protection against impeachment on account of informality or irregularity in the application for the lease or proceedings previous to its grant which, in significant respects, is similar to the level of protection afforded by the first part of the TLA conclusive evidence provision to a registered Torrens title against impeachment on account of informality or irregularity in the application or proceedings previous to registration[70].

108 Section 116(2) does not protect the grant of a mining tenement to the extent that the tenement is granted over land the subject of an existing mining tenement[71]. But that is because s 105B renders the grant of a mining tenement subject to survey and, more particularly, because s 117(2) provides that each grant of a mining tenement shall be deemed to contain an express reservation of

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69 See also comparable provisions in other States: *Real Property Act* 1900 (NSW), s 40; *Land Title Act* 1994 (Q), s 46; *Real Property Act* 1886 (SA), s 51A; *Land Titles Act* 1980 (Tas), s 39; *Transfer of Land Act* 1958 (Vic), s 41.

70 See *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 243 per Mason CJ and Gaudron J, 246 per Wilson J, 255-256 per Dawson J, cf at 259 per Toohey J; [1988] HCA 5; *Crocker Consolidated Pty Ltd v Wille* [1988] WAR 187 at 191 per Burt CJ (Olney J agreeing at 191); *Atkins v Minister for Mines* (1996) 15 WAR 226 at 236-237.

71 See *Atkins* (1996) 15 WAR 226 at 237.

the rights to which the holder of the existing mining tenement is entitled. In such a case, it may accurately be said that the Minister has no power to grant a mining tenement over land the subject of an existing tenement, since, by the express terms of the legislation, each grant of a mining tenement is subject to existing grants. By contrast, there is nothing in the *Mining Act* that expressly or as a matter of necessary as opposed to possible implication denies power to the Minister to grant a mining lease in response to a report forwarded by the mining registrar or warden in relation to an application that was not accompanied by the documentation required by s 74(1)(ca)(ii) at the time of lodgement.

109 Axiomatically, the word "informality" is confined to matters of form. But, subject to context, the word "irregularity" is potentially a term of wide connotation. In its natural and ordinary sense, it includes "deviation from or violation of a rule, law, or principle ... deviation from what is usual or normal"[72]. In the context of bankruptcy legislation, the expression "formal defect or an irregularity"[73] – which is superficially not unlike "informality or irregularity" – has been more narrowly construed[74]. That is so, however, because, in bankruptcy legislation, a "formal defect or an irregularity" refers to a formal defect or an irregularity in a bankruptcy notice, and it is considered that the only such formal defects or irregularities that should be tolerated are those which are incapable of misleading the debtor. More pertinently, in the context of town-planning legislation, and in particular the promulgation of a planning scheme, the statutory expression "informality defect or error" – which is also not dissimilar to "informality or irregularity" – has been held to refer to "some informality, defect or error in relation to the express statutory requirements to attend on the conception or preparation of the scheme"[75]. As *Burchall v Shire of Sherbrooke* demonstrates[76], the expression "informality defect or error" – and, by analogy, "informality or irregularity" – is capable of including an authority's failure to comply with statutory requirements relating to the exercise of power.

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72 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 367-368 per Gibbs CJ; [1985] HCA 67 citing the *Oxford English Dictionary*.

73 *Bankruptcy Act* 1966 (Cth), s 306.

74 See, for example, *James v Federal Commissioner of Taxation* (1955) 93 CLR 631 at 644; [1955] HCA 75; *Adams v Lambert* (2006) 228 CLR 409 at 419-420 [27]-[28]; [2006] HCA 10; *Re Wimborne; Ex parte The Debtor* (1979) 24 ALR 494 at 498-499; *Malek v Macquarie Leasing Pty Ltd* (2007) 156 FCR 552 at 557-558 [21]-[23]; *Snelgrove v Roskell* (2007) 157 FCR 313 at 317-318 [37]-[42].

75 *Burchall v Shire of Sherbrooke* (1968) 118 CLR 562 at 570 per Barwick CJ; see also at 579-580 per Owen J; [1968] HCA 69.

76 (1968) 118 CLR 562 at 570 per Barwick CJ; see also at 579-580 per Owen J.

110 Similarly, in relation to the TLA conclusive evidence provision and like provisions, the expression "informality or irregularity" is one of potentially wide connotation, apt to include both formal defects and substantive failures to comply with mandatory requirements relating to applications for, and proceedings prior to, the grant of a registered title[77].

111 In *Hunter Resources Ltd v Melville*, Toohey J observed[78] that:

> "There is no section [in the *Mining Act*] corresponding with the Torrens System provision whereby the registered proprietor holds free of any unregistered interest other than those expressly mentioned in the section: cf *Transfer of Land Act*, s 68."

But, contrary to his Honour's further observation, it does not follow that:

> "It should not be assumed therefore that registration of the original grant cures any defects in the application leading to the grant."

112 Paramountcy provisions of Torrens title legislation (of which s 68 is representative[79]) accord paramountcy to registered title over all unregistered encumbrances, estates and interests, save those specifically delineated in the provisions. Such provisions are not concerned, or at least not directly so, with protecting registered title against impeachment on account of informalities or irregularities in applications for, or in the proceedings previous to, registration. The latter role is assigned to the first part of the TLA conclusive evidence provision, and its analogues, on which the first part of s 116(2) of the *Mining Act*

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77 See, for example, *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 541-543 per Hutley JA (Reynolds JA agreeing at 540); *Palais Parking Station Pty Ltd v Shea* (1980) 24 SASR 425 at 428, 429-430 per King CJ (Williams J agreeing at 442); *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643 at 655 [27] per Ormiston JA; *City of Canada Bay Council v F & D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424 at 446-447 [82]-[83]. See and compare Gardner and Jorek, "Dealings with Mining Titles under the Mining Act 1978 (WA): Part 2 – The Effect of Registration & Caveats", (2006) 25 *Australian Resources and Energy Law Journal* 41 at 42-43, 49; Skead, "The Registration and Caveat Systems under the Mining Act 1978 (WA): A Torrens Clone?", (2007) 26 *Australian Resources and Energy Law Journal* 185 at 188-190, 192, 200-201.

78 (1988) 164 CLR 234 at 259.

79 See also *Real Property Act* 1900 (NSW), s 42; *Land Title Act* 1994 (Q), ss 37, 184; *Real Property Act* 1886 (SA), s 69; *Land Titles Act* 1980 (Tas), s 40; *Transfer of Land Act* 1958 (Vic), s 42.

is based. Thus, as Mason CJ and Gaudron J observed in *Hunter Resources*[80], s 116(2) is:

> "designed to protect the grant [of a mining tenement] as a root of title and it gives emphasis to the statutory policy that the grant [of the mining tenement] is a root of title."

113 Similarly, as Wilson J stated in the same case[81]:

> "Once a [mining tenement] is granted, s 116(2) has the effect of protecting the [mining tenement] from attack on the basis of, inter alia, non-compliance with the marking out requirements."

114 It is important to observe, too, that reg 24 of the Mining Regulations 1981 (WA) requires an applicant for a mining lease to comply with the prescribed marking out requirements, and reg 64(1) provides that an application for a mining lease must be lodged within 10 days of that marking out. Consequently, when Wilson J spoke of s 116(2) protecting what in *Hunter Resources* was a prospecting licence from attack on account of non-compliance with marking out requirements, his Honour was speaking of an applicant's failure to comply with a statutory requirement that should have resulted in the warden rejecting the application. In essential respects, an applicant's failure strictly to comply with the requirement imposed by s 74(1)(ca)(ii) is similar[82]. It is something that should result in the warden rejecting the application, and yet, for the same reasons, it is aptly described as an irregularity within the meaning of s 116(2).

115 Additionally, as was observed in *Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd*[83], where statutory language is equivocal or ambiguous, "public inconvenience, prejudice and uncertainty resulting from invalidity and the existence of statutory penalties for breach of the [*Mining Act*] are powerful and weighty considerations" in the determination of whether it is the purpose of the Act that a breach of a statutory requirement should result in such invalidity. Here, if s 116(2) did not have the effect of insulating a mining lease from impeachment on the ground of failure strictly to comply with the requirements of s 74(1)(ca)(ii), a putative lessee would be at risk of prosecution for an offence

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80 (1988) 164 CLR 234 at 243.

81 *Hunter Resources* (1988) 164 CLR 234 at 246. See also at 255-256 per Dawson J.

82 See also *Crocker Consolidated* [1988] WAR 187 at 191 per Burt CJ (Olney J agreeing at 191). Cf *Atkins* (1996) 15 WAR 226 at 236-237.

83 (2010) 41 WAR 134 at 144 [50] per McLure P (Owen JA and Buss JA agreeing at 147 [73], [74]).

under s 155 of the *Mining Act* of carrying out mining operations on the area of the putative lease while not duly authorised. Possibly, the putative lessee would have a defence of an honest claim of right under s 22 of the *Criminal Code* (WA)[84]. But even so, why should it be supposed that it is the purpose of s 116(2) to leave the putative lessee to take that chance?

116 Furthermore, whatever be the position under the criminal law, unless s 116(2) affords the scope of protection from impeachment conceived of by the majority of this Court in *Hunter Resources*[85], the putative lessee would be at risk of liability for trespass to land at the suit of an owner of any private land over which the lease area extended, and presumably entitled to join the Crown in right of the State of Western Australia by way of a claim for contribution or indemnity. Section 160 of the *Mining Act* might appear adequate to protect the Minister and any officers acting "in pursuance of any authority lawfully given under [the] Act", but it does not purport to provide the Crown as such with any degree of immunity.

117 It is also not without relevance that mining projects in Western Australia are frequently of a type and scale that involve the investment of vast amounts of money and both human and mechanical resources, and are financed by loans secured on the faith of the title comprised of the mining lease by mortgage in accordance with reg 77 of the Mining Regulations. The second part of s 116(2) of the *Mining Act* may be adequate to hold a registered mortgagee safe against claims on the mining lease made by previous holders and the holders of unregistered interests. But, in terms, it says nothing about defects in the lease resulting from irregularities in the application or proceedings previous to the grant of the lease. Accordingly, if strict compliance with the requirements of s 74(1)(ca)(ii) were a condition precedent to the power of the Minister to grant a mining lease – with the result that the first part of s 116(2) was incapable of protecting a mining lease once issued against impeachment on the basis of failure by the applicant to comply with those requirements and the subsequent failure by the mining registrar or warden to comply with the provisions governing the exercise of their power – it may be that a mortgage of such a mining lease would be a mortgage over nothing[86]. One assumes that financiers have proceeded until

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84 See *Investments (WA) Pty Ltd v City of Swan (No 2)* (2013) 197 LGERA 197 at 207 [58]-[62].

85 (1988) 164 CLR 234 at 243 per Mason CJ and Gaudron J, 246 per Wilson J.

86 Hunt, *Mining Law in Western Australia*, 4th ed (2009) at 278-279. See also Domansky, "Dealings and Registration", (2001) 20 *Australian Mining and Petroleum Law Journal* 36 at 38; cf Skead, "The Registration and Caveat Systems under the Mining Act 1978 (WA): A Torrens Clone?", (2007) 26 *Australian Resources and Energy Law Journal* 185 at 192-193.

now upon the assumption, supported by Mason CJ, Gaudron and Wilson JJ's construction of s 116(2) in *Hunter Resources* and the Full Court of the Supreme Court of Western Australia's decision in *Crocker Consolidated Pty Ltd v Wille*[87], that a mining lease cannot be impeached on account of such defects. In the absence of compelling reasons to do so, I do not consider that it should be concluded that s 116(2) lacks that effect[88].

118 So to reason does not mean that s 116(2) is a licence to ignore the requirements of the *Mining Act*. It remains that, until and unless a mining lease is granted, failure to comply with the requirements of the *Mining Act* relating to the grant of a lease will provide a basis for objection, judicial review and appropriate remedies to ensure compliance[89]. What it does mean, however, is that, if no effort is made to restrain the grant of a mining lease before the lease is granted, it will then be too late to impeach the lease on the basis of failure to comply with those requirements. It is consistent with the order and certainty of title that s 116(2) is designed to achieve that such attacks must be made, if at all, before grant.

119 Finally, it is to be observed that, under what is sometimes called the *Cudgen Rutile* doctrine[90], if a statute regulating the disposal of an interest in Crown land prescribes a mode of exercising that statutory power, it must be followed and, if it is not followed, action taken in breach of its requirements will be adjudged as beyond power. But, although the grant of a mining lease may be so affected by irregularity comprised of a lack of compliance with such a requirement, not every failure to comply with statutory requirements relating to the grant of a mining tenement goes to power. Here, for the reasons stated, the Minister's power to grant a mining lease appears to be conditioned on receipt of a report under s 75(2) or (5)[91]. But the *Mining Act* does not in terms condition the Minister's power to grant a mining lease on compliance by the mining registrar

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87 [1988] WAR 187 at 191 per Burt CJ (Olney J agreeing at 191).

88 See and compare *Yarri* (2010) 41 WAR 134 at 145 [53]-[56] per McLure P (Owen JA and Buss JA agreeing at 147 [73], [74]).

89 See *Hot Holdings* (1996) 185 CLR 149 at 174-175 per Brennan CJ, Gaudron and Gummow JJ.

90 See *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533. See also *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 76 per Mason J; [1977] HCA 71; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63 per Brennan J; [1992] HCA 23.

91 See *Hot Holdings* (1996) 185 CLR 149 at 166 per Brennan CJ, Gaudron and Gummow JJ, 180 per Dawson and Toohey JJ.

and warden with the provisions governing the exercise of their powers. Rather, despite any failure on the part of those officers to comply with the provisions governing the exercise of their powers, I consider that, upon the proper construction of s 75(6), once the Minister receives a report under s 75(2) or (5), the Minister is empowered to grant or refuse a lease notwithstanding the recommendations of the report. Whether it would be proper for the Minister to grant a lease despite knowing of such officers' failure to comply with those provisions would depend on the facts of the case. It would be a decision for the Minister to make in the exercise of the Minister's discretion, and, like most other discretionary administrative decisions, it would be subject to judicial review[92]. But, if not so reviewed, by s 116(2) the Parliament has decreed that, once the mining lease is granted, it is not to be impeached on that basis. In that context, the *Cudgen Rutile* doctrine would not apply.

Conclusion

120 In the result, I would hold that strict compliance with the requirements of s 74(1)(ca)(ii) is not a condition precedent to the exercise of the Minister's power under s 75(6) to grant an application for a mining lease. On that basis, I would order that the appeal be dismissed.

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92 *Hot Holdings* (1996) 185 CLR 149 at 171-172, 174-175 per Brennan CJ, Gaudron and Gummow JJ.