IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P59 of 2016

BETWEEN:

FORREST & FORREST PTY LTD
Appellant
and

STEPHEN McKENZIE WILSON
First Respondent
and

YARRI MINING PTY LTD
Second Respondent
and

QUARRY PARK PTY LTD
Third Respondent
and

ONSLOW RESOURCES LTD
Fourth Respondent

APPELLANT'S REPLY

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PART I CERTIFICATION

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

PART II APPELLANT'S REPLY

There is a statutory pre-condition

2 Section 74(1)(ca)(ii) requires lodgement of a mineralisation report at the time of lodgement of the relevant mining lease application, a matter the Attorney General does not dispute.[1]

3 The making of the choice to proceed by way of mineralisation report under s 74(1)(ca)(ii) engages the pre-condition to the jurisdiction of each of the Director, Geological Survey (**Director**) and the warden. Once an application for a mining lease is to be pursued by an applicant by way of documentation referred to in s 74(1)(ca)(ii), then the Director has a duty to prepare a report under s 74A(1) based on the mineralisation report that accompanied the application. No other mineralisation report may be considered by the Director.

4 The prefatory language of s 74A(1) is used to describe an application for a mining lease where the applicant has sought to proceed by way of documentation under s 74(1)(ca)(ii), as opposed to an application under s 74(1)(ca)(i).

5 The same words are used in ss 75(2a), 75(4a) and 75(8). There is no hint of contemplation that an applicant may elect to rely upon the s 74(1)(ca)(ii) documentation other than by that documentation accompanying the lodgement of a mining lease application. 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 – and thereby permit an applicant for a mining lease to lodge a late mineralisation report and avoid the substantive effect of each of those provisions.

6 The Director must base a report under s 74A on the mineralisation report that accompanied the application for the mining lease: ss 74A(3) and 74A(7). Any request

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1 Submissions of the Attorney General for Western Australia (Amicus Curiae) of 1 March 2017 (**ACS**), at [25].

for further information must be based on matters dealt with in that mineralisation report: ss 74A(2) and 74A(7).

7 The Director is not therefore able to prepare a report under s 74A when no mineralisation report accompanied the application for a mining lease. The construction offered by the Attorney General in ACS [11], that lodgement of a mineralisation report with an application for a mining lease is not a jurisdictional fact and is only an irregularity, if late, does not address these express requirements of s 74A and their effect on the operation of s 75(4a).

8 Further, the reference at ACS [20] to *Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd* (2010) 41 WAR 134 (a case in which particular concessions were made) is not relevant as it is not contended that there was no "application" for a mining lease. Rather, the present situation falls within that category of case identified in *Yarri*, 41 WAR 140, [29], by reference to *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 279, where there is a failure to comply with a pre-condition to the existence of the power.

The warden could not proceed

9 On an application for a mining lease where the applicant has sought to proceed by way of documentation under s 74(1)(ca)(ii), by s 75(4a), a warden is precluded from hearing the application unless each of the requirements in s 75(4a)(a) and (b) is met.

10 The requirement in s 75(4a) that the warden has received a copy of the section 74A report from the Director cannot be met in these applications because the Director could not prepare a report under s 74A, as no mineralisation report accompanied the applications for the mining leases.

11 Contrary to ACS [49], the prohibitions in each of ss 75(2a), 75(4a) and 75(8) could not be defeated or circumvented by late lodgement of a mineralisation report. Neither the mining registrar nor the warden could, under s 75(2) or 75(5), respectively, proceed to forward a report as to the applications to the Minister.

The Minister cannot proceed

12 As neither the mining registrar nor warden could forward a report to the Minister, then that pre-requisite to the Minister's jurisdiction under ss 71 and 75(6), namely the

receipt of a mining registrar or warden's report, was not satisfied so as to enliven the Minister's jurisdiction to grant or refuse the mining lease applications.

The consequentialist approach is not correct

13 The submissions for the Attorney General focus upon possible consequences of the appellant's construction and upon provisions other than those falling to be construed.

14 The Attorney General accepts in ACS [44] the statutory purpose identified in Appellant's Submissions (**AS**) [51], yet that purpose would not be achieved if it was possible for an applicant to lodge a mineralisation report at some time after lodging the application.

10 15 As to ACS [30]-[35], the focus on the language of imperative used and repeated through ss 74(1)(ca), 74A(1), 74(7), 75(2a) and 75(4a), is to use the text of the relevant provisions to discern the statutory purpose, in order to apply the test in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 389 [91], 391 [93]. Using the language in that way to discern statutory purpose is an orthodox approach: *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378, 388-9 [25]-[26]. Focus on language in this way is not to seek to utilise a distinction between mandatory and directory requirements.

16 As to the contention at ACS [36]-[37], s 75(6) does not provide the "surest guide" to the statutory purpose in relation to *all* failures to comply with the requirements of the
20 Act. As identified in AS [65], s 75(6) does not manifest an intention that other parts of s 75 and ss 74(1)(ca) and 74A be read in a manner inconsistent with their ordinary meaning.

17 Further, s 75(6) proceeds on the basis that the Minister's jurisdiction is enlivened, which the Attorney General accepts requires a report of the mining registrar or warden (ACS [18(b)], [43]). But the Minister's jurisdiction could not be enlivened when the mining registrar or warden, as applicable, is precluded from preparing such a report by ss 75(2a) and 75(4a), respectively. See AS [65]-[66].

18 As to ACS [39], as identified in AS [65], s 116(2) does not manifest an intention to read other parts of s 75 and ss 74(1)(ca) and 74A in a manner inconsistent with their
30 ordinary meaning, or to allow the Minister (or a warden) to exceed their jurisdiction.

19 In any event, concern for uncertainty arising from the invalidity of administrative acts (the grant of a mining lease) cannot be carried too far. Concerns about uncertainty will invariably arise on any application of the test in *Project Blue Sky*. Prejudice to a purported holder or a third party arising from a purported grant is a discretionary factor that can warrant refusal of relief sought to quash the legal effect of the decision under review.

20 As to ACS [40]-[41], non-compliance with the sections referred to therein are not qualified by the requirements of ss 74A and 75(4a).

21 As to ACS [45]-[46], the statutory purpose of the prohibitions in ss 75(2a) and 75(4a) is achieved, and cannot be circumvented by the late lodgement of a mineralisation report if the appellant's construction of the prefatory words of each of s 74A(1), 75(2a) and 75(4a) is accepted.

22 The alternate construction identified by the Attorney General:

(a) does not engage with the clear language of s 74A as to the jurisdiction of the Director to prepare and give a report as to whether or not there is significant mineralisation and its effect on the operation of s 75(4a);

(b) pays insufficient regard to the relevant statutory purpose of ss 74(1)(ca), 74A(1), 74A(7), 75(2a) and 75(4a), being to confine applications for mining leases only to circumstances where mineral resources or significant mineralisation have been identified, including confining applications to only *when* such circumstances exist; and

(c) elevates an asserted purpose of other provisions of the Act (ss 75(6) and 116(2)) above the language used and places excessive store on possible consequences for non-complying applications for mining leases.

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