Forrest & Forrest strikes again – your exploration licences may be at risk

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The mining industry is in disbelief following a Warden's Court decision published today, which potentially results in all exploration licences in Western Australia being invalid due to non-compliance with the Mining Act.

The Minister for Mines has not yet commented on the decision and its potentially far-reaching consequences.

In this alert, HopgoodGanim Lawyers summarise the announcement and the potential consequences of this decision on the validity of granted exploration licences across the State.

In *True Fella Pty Ltd v Pantoro South Pty Ltd* [2022] WAMW 19, the Warden adopted the 'strict compliance' stance taken by the High Court in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30, finding that an application for an exploration licence was invalid due to the applicant submitting a non-compliant s 58 statement.

True Fella and Pantoro had competing exploration licence applications over the same area and had objected to each other's applications. The parties agreed for the question of the compliance of True Fella's first in time application to be decided by the Warden first.

Under the Mining Act, an application for an exploration licence must be accompanied by a statement under s 58(1) (s 58 statement). A s 58 statement must state the proposed method of exploration in the application area, the details of the programme of work proposed to be carried out in the area, the estimated amount of money proposed to be spent on exploration and the technical and financial resources available to the applicant.

The purpose of the s 58 statement is to provide the Warden or Mining Registrar with sufficient information to determine whether to recommend the grant of an exploration licence to the Minister for Mines.

The Warden found that there was no application for an exploration licence whatsoever, because the s 58 statement which accompanied the application was deficient.

The s 58 statement was found to be non-compliant for the following reasons.

Proposed programme of work

The evidence before the Warden was that the s 58 statement provided a description of the applicant's planned work and planned expenditure for the first year only, and stated that subsequent phases of work would depend on exploration results from previous phases of exploration, as is commonly the approach in the industry.

Extraordinarily, the Warden found that s 58 of the Mining Act requires an applicant to:

- *provide a programme of work for the full term (5 years) of the exploration licence;*
- *specifically identify the areas of the exploration licence which are to be subject to the*

exploration and the reasons for choosing those areas; and
- *provide a proposed budget for the full term and for the full area of the exploration licence.*

In the s 58 statement, the applicant stated that it was primarily a gold explorer but the goal for the exploration on the application area was “economic mineralisation”. The applicant did not specify target minerals.

The Warden found that it may assist the decision maker to determine whether the proposed programme of work was an effective method of exploration of the land, if the s 58 statement identified the minerals or the areas to be targeted in exploration. The Warden stated that in some cases, a s 58 statement may even need to identify a rationale for targeting certain minerals.

Technical resources available to the applicant

The applicant’s s 58 statement outlined that the applicant would outsource the activity by utilising the services of a third party geological consultant. Less controversially, the Warden found that the s 58 statement was deficient because it only contained broad statements about the applicant’s technical capacity that were not connected to the plans set out in the applicant’s programme of work and the warden did not have any information about their engagement. This rationale follows the decision of previous wardens, in particular the decision in *Golden Pig Enterprises Pty Ltd v O’Sullivan* [2021] WASC 396.

Invalidity of application

The Warden found that because the application did not comply with s 58(1) of the Mining Act, the application was invalid and in effect, did not exist.

In our experience, it is rare for a s 58 statement to provide details of a programme of work after the first and second years, or to delineate specific areas to be targeted.

Unfortunately, we expect that many exploration and mining companies in Western Australia will be affected by this decision. This affects not only exploration licence applications but calls into question the validity of granted exploration licences across the State.

We expect that the response from industry will be swift and vocal.

For a discussion about how this decision may affect your mining tenements, please contact our Resources and Energy team.

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