

WA Court of Appeal dismisses an appeal by Forrest

18 August 2017

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On 17 August 2017, the WA Court of Appeal dismissed an appeal by Forrest & Forrest Pty Ltd (Forrest)

^[1].

HopgoodGanim Lawyers represented Cauldron Energy Limited (**Cauldron**). The Court of Appeal unanimously decided to dismiss Forrest's appeal so Cauldron can progress its applications for exploration licences 08/2385, 08/2386 and E08/2387 (**Applications**) over Forrest's Minderoo Station, east of Onslow.

The Court of Appeal confirmed that the Minister does not need to consider the most current financial information about an applicant for an exploration licence to be able to validly grant an exploration licence. This is significant for the industry as (if the Court had found otherwise) a large number of exploration licence applications would be significantly delayed and/or invalidly granted.

The Court of Appeal also provided clarity regarding the submissions process before the Minister in relation to the grant of a mining tenement. The Court held that the Minister may set out a reasonable submissions process for information and submissions to be provided, and any information provided outside of this process does not need to be considered by the Minister.

Background

Forrest objected to Cauldron's Applications for exploration licences before the warden. At the hearing of the objections, the parties agreed that they would not make submissions about whether conditions should be imposed on the exploration licences, until it was determined whether the Applications had been granted. The Warden also determined that there would only be a hearing in relation to conditions if he decided to recommend the grant of the Application.

Following the hearing, the Warden recommended to the Minister for Mines and Petroleum that Cauldron's Applications be refused, on the basis that Cauldron did not have the financial capacity to undertake its proposed exploration.

The Department received various further submissions from Cauldron and Forrest. On 13 June 2014, the Department notified Forrest that "the matter will now be referred to the Minister with the information presently submitted". On 15 December 2014, Forrest wrote to the Minister, submitting new information regarding an ASX announcement about Cauldron's investors being involved in litigation. The Department advised Forrest that its latest submission was lodged too late for the Minister to consider.

The Minister did not follow the Warden's recommendation and decided that Cauldron's Applications could proceed to determination in accordance with the *Mining Act 1978* (WA) (**Mining Act**) and the *Native Title Act 1993* (Cth).

Forrest applied for judicial review of the Minister's decision and the Honourable Justice Tottle (the primary judge) dismissed Forrest's judicial review application. Forrest lodged the appeal against the primary judge's decision.

Forrest's Grounds of Appeal

Forrest had the following three grounds of appeal, although there is some cross over between grounds two and three:

Ground one - The primary judge made an error in fact and law by concluding that the hearing was "complete" and the Minister's jurisdiction to grant the Applications had been enlivened to where the question of conditions imposed on the Applications had not been substantively dealt with by the warden.

Ground two - The primary judge made an error in law by concluding that the Minister was not bound to consider Forrest's new information about Cauldron's financial resources for the purpose of the Minister's power to grant the Applications under section 59(6) of the Mining Act.

Ground three - That the implied statutory requirement for administrative decision makers to have regard to the most current information available to it, applies to the exercise of the Minister's powers under section 59(6) of the Mining Act.

Court of Appeal's Decision

The Court of Appeal found that Forrest did not make out its grounds of appeal. In relation to ground one, the Court of Appeal inferred that the Warden had determined that the Applications were at an end and that the hearing would not address conditions on the exploration licences.

In this decision, the Court of Appeal confirmed that it is not a mandatory requirement for the Minister to consider the most current financial information about an applicant for an exploration licence to be able to be validly granted. Accordingly, the Court of Appeal found that there was no jurisdictional error in the Minister not taking into account the most current material available regarding Cauldron's financial ability to explore the land.

The Court also determined that, in regards to the provisions of the Mining Act, the Minister may grant an exploration licence having regard only to the contents of the warden's report and accompanying material.

The Court of Appeal also considered the submission process before the Minister. The Court of Appeal held that the:

- opportunity to provide information to the Minister is not unending;
- Minister may set out a timeframe for submissions and responses to submissions (in accordance with procedural fairness); and
- Minister will not be obliged to consider material belatedly submitted by a party outside of a reasonable timeframe provided by the Minister.

In our view the time has come for legislators to set out a formal process for the lodgement of submissions with the Minister to provide certainty and clarity to the parties involved.

For further information or advice, please contact our [Resources and Energy](#) team.

[1] in *Forrest & Forrest Pty Ltd v Minister for Mines and Petroleum*, Kevin Michael Tavener, Mining Warden and Cauldron Energy Limited [2017] WASCA 153

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