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 SUBMISSIONS

Date of document: 14 December 2016
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PART I CERTIFICATION

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

PART II ISSUES

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

(a) the jurisdiction of the Director, Geological Surveys to prepare and give a report as to whether or not there is significant mineralisation in, on or under the land to which an application for a mining lease relates, under section 74A(1); and

(b) the jurisdiction of the warden to hear an application for a mining lease under section 75(4) and to then make a report and recommendation to the Minister under section 75(5)?

PART III JUDICIARY ACT 1903, SECTION 78B

3 The appellant has considered whether a notice should be given under s 78B of the *Judiciary Act* 1903 (Cth) and certifies that no notice needs to be given.

PART IV CITATION

4 The decision of the Court of Appeal of the Supreme Court of Western Australia (McLure P, Newnes and Murphy JJA) is not reported and the media neutral citation is *Forrest & Forrest Pty Ltd v Wilson* [2016] WASCA 116 (**CA**).

5 The decision of the trial judge, Allanson J, is not reported and the media neutral citation is *Forrest & Forrest Pty Ltd v Wilson* [2015] WASC 181 (**T**).

6 The purported report and recommendation of the first respondent, the Warden, is not reported and the media neutral citation is *Yarri & Ors v Forrest & Forrest P/L* [2014] WAMW 6 (**W**).

PART V RELEVANT FACTS

7 On 28 July 2011, applications for mining leases 08/478 (**M478**) and 08/479 (**M479**) were lodged by the second and fourth respondents respectively.[1]

8 No mineralisation reports were lodged contemporaneously with the relevant applications.[2] Thus, the applications were not accompanied by a mineralisation report when lodged, contrary to the requirement of s 74(1)(ca)(ii) (and ss 74A(1), 74A(7), 75(2a), 75(4a) and 75(8)) of the Act.

9 On 1 September 2011, the appellant lodged objections to M478 and M479, which related to land within the boundaries of the Minderoo pastoral lease held by the
10 appellant near Onslow in the Pilbara region of Western Australia.[3]

10 A few months after the applications were lodged, a mineralisation report for each application was lodged.[4] By August 2012, the Director, Geological Survey had purported to prepare a s 74A report for each application.[5]

11 In December 2012, the first respondent purported to hear the applications (alongside other mining tenement applications).[6] The Director's purported reports were before him.[7]

12 In a report (in the form of reasons for decision) delivered on 31 January 2014,[8] the first respondent held that he had jurisdiction to hear applications M478 and M479, even though they were not accompanied by a mineralisation report when the applications
20 were made, and purported to recommend to the Minister that he grant applications M478 and M479 subject to conditions.

13 The appellant was the unsuccessful applicant before Allanson J in seeking to obtain declaratory and prerogative relief in connection with the decision of the first

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1 CA[15].
2 CA[15]. See too: T[46], [53].
3 CA[17]. See too: T[3].
4 CA[17].
5 CA[18].
6 CA[18]. See too: T[10].
7 CA[18].
8 CA[19]. See too W[14]-[66].

respondent to hear applications M478 and M479. The Court of Appeal dismissed an appeal of Allanson J's decision.

PART VI ARGUMENT

A. The jurisdictional fact of the lodgement of a mineralisation report

14 The appellant contends that, by ss 74(1)(ca)(ii), 74A(1) and 75(4a) of the Act, there was a jurisdictional pre-requisite which required a mineralisation report to be lodged with a mining lease application. As the pre-requisite had not been satisfied, the Warden could not hear the applications because, by virtue of s 74A and s 75(4a), it is not possible for the Director to prepare and give a report under that section unless the mineralisation report accompanied the application.

15 McLure P upheld the construction of the primary judge that contemporaneous lodgement of a mineralisation report with a mining lease application was required (CA[28]) and affirmed the factual findings that this did not occur in respect of the applications (CA[17]).

16 McLure P found (wrongly, it is respectfully submitted) that, despite the express requirement for contemporaneous lodgement of the mineralisation report and the absence of jurisdiction in the warden until the Director had provided a report under s 74A, non-compliance with the requirement of contemporaneous lodgement would not prevent a warden exercising jurisdiction to hear an application (at CA[33]).

17 The finding means, in effect, that contemporaneous lodgement of the report is not a jurisdictional fact.

18 The question of construction is whether the Act manifests an intention that the requirement, in s 74(1)(ca)(ii) (and ss 74A(1), (7) and 75(4a)), to lodge the mineralisation report contemporaneously as a condition of the warden's jurisdiction, such that non-fulfilment of the requirement will mean that the warden's power is not enlivened and the warden's decision is of no legal effect.[9]

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[9] *David Grant & Co Pty Ltd (Receiver appointed) v Westpac Banking Corporation* (1995) 184 CLR 265, 279; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388-9 [91]-[94]; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 148 [28]; *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, 139 [43]-[44].

B. The text of the relevant sections is clear as to the requirement

19 The text of ss 74(1)(ca)(ii), 74A(1) and 75(4a) of the Act is clear in creating a pre-condition or essential preliminary to the jurisdiction of each of the Director, Geological Survey and the Warden, which is that a mineralisation report be lodged with a mining lease application.

20 The lodgement of a mineralisation report with a mining lease application was a condition of the exercise of the power of each of the Director and the Warden.

21 By the opening words of s 74A(1), a power and duty is conferred upon the Director to prepare a report under s 74A(1) *if* the application *is accompanied* by the documentation in s 74(1)(ca)(ii). Section 74A(7) says that the mineralisation report referred to in s 74A is the report that *accompanied* the application. That is, the Director is empowered to undertake his function to prepare the report *if* the mineralisation report was contemporaneously lodged with the application. The wording of s 74A confines the Director to that report and to no other.

22 By the opening words of s 75(4) ("Subject to subsection (4a)"), the warden's jurisdiction to hear an application and give an opportunity to an objector to be heard is subject to the conditions in s 75(4a) being satisfied.

23 Subsection (4a) has effect "*if* the application *is accompanied* by the documentation in s 74(1)(ca)(ii)" and, by s 75(4a)(a), upon the warden having received a copy of the s 74A report in relation to the application. If the Director based a purported s 74A report on something other than a mineralisation report that *accompanied* the application, then there is no s 74A report as contemplated by s 74A(1) and (7).

Four relevant features reveal contemporaneous lodgement of report is a condition of Warden's power

24 There are four main features of the Act which combine to compel the conclusion that, where an applicant for a mining lease chooses to rely upon a s 74(1a) statement and a mineralisation report, compliance with the requirement in s 74(1)(ca)(ii) that these documents "shall accompany" the application for the mining lease is a condition of the warden's power to hear a mining lease application to which objection has been made.

25 *First*, the ordinary meaning of s 74(1)(ca) is that the documentation relied upon must be lodged at the same time as the application is lodged, as the warden, the trial judge

and the Court each correctly held below. The language of s 74(1)(ca) does not admit of any ambiguity or doubt.

26 The tenor of s 74(1)(ca)(ii) is both precise and prescriptive. The use of such language itself conveys an intention not to countenance any degree of non-compliance with the requirement.

27 *Secondly*, with respect to a mining proposal, specific provision is made for such a document to be lodged after the application for the mining lease is lodged: s 74(1AA). That provision does not simply extend the time for lodging a mining proposal. Rather, it facilitates lodgement of a mining proposal after an application has been made and *deems* a proposal lodged within the prescribed time and in the prescribed manner as a proposal that accompanied the application under s 74(1)(ca). In other words, the legislature provided for some flexibility, but did so while reinforcing the ordinary meaning and intended prescriptive effect of the language of s 74(1)(ca). The legislature did not undermine the force of the requirement imposed by s 74(1)(ca)(ii).

28 The reason for allowing this flexibility as to a mining proposal appears to be that it is the most comprehensive and onerous of the three possible classes of information provided for. The absence of similar flexibility for the other classes of information that may be provided reflects an intention that no mining lease application should be made unless that information is immediately available, and is provided. This policy discourages speculative and tactical applications.

29 *Thirdly*, the parliamentary intention to require the s 74(1)(ca)(ii) documentation, where that is proposed to be relied upon by an applicant, to accompany the lodgement of an application for a mining lease, is repeated in several parts of s 75, which deal with the jurisdiction of the mining registrar, the mining warden and the Minister: ss 75(2a), (4a), (8).

30 Each of those provisions begins with the phrase – "[if] the application for the mining lease is accompanied by the documentation referred to in s 74(1)(ca)(ii)". None of these provisions contemplates the possibility that such documentation may be relied upon other than by it accompanying the application for a mining lease. There is no doubt or ambiguity about the meaning of these provisions. They reinforce the precise and prescriptive tenor of s 74(1)(ca)(ii) itself.

31 The structure of the provisions dealing with the warden's power or jurisdiction as regards applications for mining leases is important. The warden's jurisdiction applies where notice of objection is lodged and is not withdrawn. In that event, the warden is empowered and duty bound to hear the application for a mining lease: s 75(4).

32 The conferral of the power on, and the duty of, the warden in s 75(4) is expressly made subject to subsection (4a). That subsection applies where the application for the mining lease is accompanied by the documentation referred to in s 74(1)(ca)(ii), and provides that the warden shall not hear the application unless the warden has received the s 74A report and that it states that there is significant mineralisation present on the relevant land. A s 74A report must be solely based on the mineralisation report that accompanied the application: s 74A(3) and (7).

33 In other words, when qualifying the warden's power in the case where an applicant relies upon a mineralisation report, the Act does so in terms which expressly reflect the prescriptive nature of the requirement in s 74(1)(ca)(ii). The repetition of this intention in the very provision dealing with the warden's power manifests an intention to condition the exercise of the power upon compliance with the requirement in s 74(1)(ca)(ii).

34 The same approach is adopted under ss 75(7) and (8), as regards the Minister's power. The exercise of power under s 75(7) is made subject to s 75(8), which precludes such exercise where the mineralisation report shows no significant mineralisation present on the land. Section 75(8) does not simply refer to the mineralisation report lodged by the applicant. Rather, it specifically refers to an application for a mining lease that is accompanied by the documentation referred to in s 74(1)(ca)(ii), emphasising, again, the importance of lodgement at that time.

35 *Fourthly*, in s 74A(1) (read with s 74A(3) and (7)), when identifying the mineralisation report referred to in s 74(1)(ca)(ii), the legislature expressly provided that the mineralisation report to be considered by the Director is the report which accompanied the application. There is no power for the Director to compel production of a late mineralisation report and no power to extend time to receive some other purported and late document (that is not *the* mineralisation report in s 74A(7)). Section 74A(7) must

be given work to do according to its express terms.[10] Further, once the Director does not have the mineralisation report, he cannot complete his function of providing the s 74A Report.

36 The intention of this s 74A is that a mineralisation report must accompany an application for a mining lease, and no other mineralisation report may be considered by the Director.

C. No other provision detracts from the construction

37 Sections 75(6) and 116(1) do not manifest a contrary intention. As was held in *Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd* (2010) 41 WAR 134, 140 [29], those provisions do not manifest an intention that there are no preconditions to the exercise of powers relating to the granting of tenements.

38 A construction of ss 74 and 75 by which compliance with s 74(1)(ca)(ii) is a condition of the warden's power (and hence, the Minister's power) would not leave s 75(6)(b) without any field of operation.

39 There are several provisions of the Act with which an applicant for a mining lease might not have complied that may attract this power: s 74(2) (provision of information), s 74(3) (service of notice of application upon owner and occupier of relevant land), s 118 (notice to holder of pastoral lease). Further, the reference to "this Act" in s 75(6) includes any subsidiary legislation, such as regulations, made under the *Mining Act: Interpretation Act* 1984, s 46(1), (1a). An applicant for a mining lease who complied with s 74(1) might not have complied with reg 65 (description of shares where more than one applicant) or reg 66 (description of boundaries) of the *Mining Regulations* 1981 (WA).

40 Section 75(6)(b) does not manifest an intention that any and all non-compliance with the provisions of the Act regarding applications for mining leases may be disregarded when the Minister determines whether to grant a mining lease. At the least, there must be an application that has been lodged and the Minister's power under s 75(6)(b) is not enlivened until the Minister receives a report and recommendation under s 75(5).

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10 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382 [69]-[70]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 20 [31].

41 Section 116(2) is of general operation and does not manifest an intention to affect the operation of specific provisions such as s 75(4a).

42 It is, therefore, apparent that the provisions considered in *Yarri v Eaglefield* are different to those under consideration. The language of the provisions there considered was not plain and clear, as is the language of the present provisions, and was capable of being read as referring to an application howsoever made.

43 Because the provisions of the Act dealing with various tenements are expressed in different terms, it should not be assumed that there is a uniformity of meaning as regards whether particular provisions are, or are not, conditions to the existence of certain powers. As regards prospecting licences, there is no provision entitling the warden to grant such tenements despite non-compliance with the Act by an applicant.

44 The terms of ss 75(6)(b) and 116(2) do not alter the ordinary meaning of ss 74, 74A, 75(4a), (7) and (8) of the Act.

D. The statutory purpose is clear

45 The purpose of s 74(1)(ca) is to confine applications for mining leases to circumstances where mineral resources or significant mineralisation have been identified on the relevant land or where mining is proposed.

46 Section 75(8) reinforces this by preventing grant of a mining lease if there is no significant mineralisation in, on or under the land to which the application relates.

47 Confining applications for mining leases to such circumstances, within the context of the Act, has a number of purposes. These include:

(a) reducing unfair priority – applications for mining leases which are delayed by a late mineralisation report, by the choice or tardiness of an applicant or otherwise, prevent a mining registrar or warden having jurisdiction under ss 75(2a) or (4a) and, by reason of the application's prioritised status under s 105A(1), prevents or delays all other persons with a pending, but later and fully compliant application for a mining tenement over the subject land obtaining that mining tenement. This is because priority is given to the applicant who first complies with the "initial requirement" in relation to the application. In the case of a mining lease, that is a reference to marking out the land the subject of the application: s 105A(4)(b)(i);

(b) administrative efficiency and the avoidance of backlogs – to reduce the number of defective applications for mining leases which the mining registrars or wardens under s 75, the Director under s 74A, or the Department administering the Act under s 11, have to manage or follow up non-compliant applicants; and

(c) the prevention of "land-banking" – holders of an existing prospecting, retention or exploration licence cannot be allowed or encouraged to extend the life of those tenements under ss 49(2), 67(2) or 70L(2), as applicable, by making an application for a mining lease without having to lodge the mineralisation report with the application, while that holder continues to undertake exploration in the hope of later proving the specific geological foundation[11] for lodgment of a late mineralisation report.[12]

48 Section 74(1)(ca)(ii), s 74A and the definition of "Director, Geological Survey" were introduced into the Act by the passage of the *Mining Amendment Bill* 2004 (WA). Those provisions were designed to ensure a mining lease is only applied for where mineral resources or significant mineralisation had been identified on the relevant land or where mining is proposed.

49 The changes were described by the then Minister for State Development during his Second Reading speech as "*bringing about one of the most far-reaching and fundamental changes to the State's mining legislation in the last 100 years*". The purpose was to ensure that mining leases would no longer be used as *de facto* exploration licences and to remove the administrative burden for government of assessing and processing premature mining lease applications.

50 The Explanatory Memorandum (**EM**) to the *Mining Amendment Bill 2004* (WA) relevantly provided at page 1, dealing with "Part 6", that "*primarily the changes will 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*

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11 See the specific detail needed for a mineralisation report in the definition in s 74(7), to be obtained from actual exploration, including details of analytical results from samples of minerals.

12 By preventing this potential abuse, further effect is given to the provisions as to expiry of the terms of the prospecting, retention and exploration licences (ss 45(1)-(1a), 61(1)-(2), 70E(1)-(2)) and the evident desire, following expiry of a tenement, of the legislation to allow persons other than a former tenement holder to have the opportunity to apply for the land as a new mining tenement (ss 45(2), 69(1) or 70N(1)).

exists." (emphasis added). See also the reference to the clauses in the EM which became ss 74A, 75(2a) and 75(4a), contained in the annexure of statutory materials.

51 The Hon CM Brown (Minister for State Development) (Legislative Assembly, *Mining Amendment Bill 2004* - Second Reading, 26 August 2004, pp 5728b-5730a), said:

> One of the most pressing amendments is the introduction of a process that will enable applicants for the backlog of 5,250 mining leases to revert to exploration title over a 12-month period, as in the majority of cases all that is being sought is further exploration rights rather than a title for productive mining. In conjunction with this, there are provisions that will limit new applications for mining leases to those cases where significant mineralisation has been discovered or mining proposals are lodged with the application. This will bring about one of the most far-reaching and fundamental changes to the State's mining legislation in the last 100 years. During that time the various forms of tenement title available have not clearly separated the two major activities of exploration and mining operations. By requiring applicants to identify significant mineralisation on or in the ground when making application will mean that mining leases will no longer be used as de facto exploration titles.

52 There is manifest a clear purpose in favour of requiring lodgement of the mineralisation report with the application for the mining lease to enable the application to proceed.

E. Errors in the Court of Appeal

53 The conclusion reached at CA[45] went some way to supporting the appellant. The Court held: (a) the failure to provide a mineralisation report at all will, *as a matter of fact*, prevent the satisfaction of the essential condition (a recommendation to the Minister) in s 75(2) and s 75(5); (b) without a mineralisation report there can be no s 74A report; (c) without a s 74A report, there can be no recommendation by the mining registrar under s 75(2), no hearing by the Warden under s 75(4) and no recommendation by the Warden under s 75(5); and, then, surprisingly, (d) it was an essential preliminary condition that the mineralisation report be lodged "some time", but it did not have to accompany the application.

54 The finding at (d) above is wrong because it did not take into account the fact that the Director may only make a s 74A report based on a mineralisation report that accompanies the relevant application, not some other mineralisation report. This is made clear by the express words of s 74A(1) and s 74A(7) which define the "mineralisation report" referred to in s 74A as "the mineralisation report that

accompanies the application." The imperative in s 74(1)(ca), repeated in numerous subsequent provisions, was not accorded any or any sufficient attention by the Court of Appeal.

55 McLure P at CA[33] supported her finding that the requirement in s 74(1)(ca)(ii) of the Act that the mineralisation report be lodged contemporaneously with the application is not a condition precedent to the exercise of the jurisdiction of the warden to hear the application under s 75(4) of the Act with four reasons found at CA[38]-[43].

56 The first reason appears to be a starting presumption against characterisation of the requirement in s 74(1)(ca) as a jurisdictional fact. The President focused on what she saw as "the automatic and inevitable consequences of invalidity."

57 The President should have given effect to the words of the statute. Furthermore, the object those words are intended to achieve is not obviously irrational, but, to the contrary, is just and sensible.[13] The President failed to take this into account in the reasons at CA[38]-[39]. The *true* consequence of holding the requirement of contemporaneous lodgement in s 74(1)(ca) to be a jurisdictional fact would be to carry out the express statutory purpose of that provision (as supported by ss 74A(1), 74A(7), 75(2a), 75(4a), 75(8)). Non-compliant applications would not proceed and cause no further administrative burden for the decision-makers or stake-holders.

58 While the President focused at CA[38]-[39] on the "delays, cost and other prejudice" in reference to the second to fourth respondents (all brought upon themselves by being non-compliant applicants), the true cost of public inconvenience of processing pre-mature mining lease applications was not dealt with: that being *the* actual statutory purpose of the provisions.

59 Further, the reference at CA[38] to the consequences "in this case" and upon "additional delay" said here to be "over two and a half years" were extraneous factual matters that have no place in the task to statutory construction. They form no part of an objective legal inquiry of what Parliament intended to be consequences of a breach. That inquiry is undertaken by reference to "the language of the relevant provision and

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13 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 33-34 [27]-[29].

the scope and object of the whole statute".[14] This focus on those extraneous factual matters was impermissible.[15]

60 The reference in CA[38] to a state of "gridlock", including by reference to the suggestion that the Minister would be "deprived of the power to grant or refuse the application", is incorrect because the Minister's overarching power in s 111A can be (and is) used in the public interest summarily to terminate pending tenement applications.

61 The second reason (CA[40]) was that "there is no justification in principle or purpose for concluding that contemporaneous lodgement is a condition precedent to the mining registrar or the Warden making a recommendation." The justification and purpose is set out above. That purpose has been reflected in the words of the statute. Section 74(1)(ca)(ii) is supported by ss 74A(1), 74A(7), 75(2a), 75(4a) and 75(8), which are all precise and prescriptive and do not apply to the other requirements of s 74(1)(b). The use of such language, and repetition of such language, itself conveys an intention not to countenance any degree of non-compliance with the requirement.

62 The Warden could not determine, wrongly, that a mineralisation report had been lodged, when it had not, to assume jurisdiction; his or her jurisdiction depended on the true existence of an accompanying mineralisation report.

63 The Court of Appeal's third reason (CA[41]-[42]) and characterisation of the opening words of s 75(4a) as being "descriptive of such an application" ought not be accepted for the following reasons:

(a) This makes little sense in a case where an applicant has chosen to rely upon s 74(1)(ca)(ii), but has not lodged the requisite documentation at the required time. The opening words do not refer to something that has not been done, but to something that is sought to be relied upon, and has been done. The opening words cannot be read as if they were descriptive of what has not been done.

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14 *Tasker v Fullwood* [1978] 1 NSWLR 20, 24; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 389, [91], 391 [93].

15 See also the Hon Justice Nye Perram, "Project Blue Sky: Invalidity and the evolution of consequences for unlawful administrative action" (2012) 21 Australian Journal of Administrative Law 62, 68.

(b) The prefatory words in s 75(2a) and s 75(4a) must be read in the immediate context of the express requirement of contemporaneous lodgement in s 74A(1) and 74A(3), and as directed by the definition in s 74A(7).

(c) A point at CA[42] is made by hypothetically re-drafting a provision which McLure P says would better fit the appellant's construction. But that is not how to construe an actual provision. While s 75(4a) uses the word "unless" to impose the preconditions set out in subparas (a) and (b), that does not alter the ordinary meaning of "if" as it appears at the commencement of s 75(4a). That is, the text of s 75(4a) sustains the pre-condition by use of the word "if".

10 (d) There is a further point that arises from s 75(4), which confers power on the Warden to deal with applications made under s 74. Section 75(4) begins with the words: "Subject to subsection (4a)". The very conferral of power on the Warden is qualified by s 75(4a). It is in this light that the conditionality conveyed by the opening phrase of s 75(4a) is to be understood. That leads to the role of the Director under s 74A and the fact that he may only report on the mineralisation report that accompanied the application. Without such a report the Director has no role to perform.

64 The Court of Appeal's fourth reason (CA[43]) as to the "general approach" of being flexible with non-compliance is to ignore the words of the statute. It attempts to elevate
20 a "purpose", identified by considerations not found in the words of the legislation, above the terms of the legislation itself.[16] Moreover, it could not be said, in the face of the statutory language deployed, that the Warden, acting in an administrative capacity, was granted exclusive and ultimate authority to deal flexibly with the mandatory requirement of the lodgement of a mineralisation report.

65 As explained above, neither s 75(6)-(7), nor s 116(2), manifests an intention to detract from the construction advocated by the appellant. Sections 75(6) and 116(2) do not manifest an intention as to require other parts of ss 75, 74(1) and 74A to be read in a manner which is inconsistent with their ordinary meaning.

66 Further, the Minister's capacity to disregard instances of non-compliance in s 75(6)-
30 (7) is conditioned on him first having jurisdiction to consider an application. The

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16 *Australian Education Union v Department of Education* (2012) 248 CLR 1, 14 [28]; *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378, 388-9 [25]-[26].

Minister's power to grant or refuse a mining lease is conditioned by receipt of a valid report and recommendation under ss 71 and 75(6), and the Minister is bound to consider the report and recommendation.[17]

67 Further, the "indefeasibility" of title only attaches in s 116(2) *after grant*, and not earlier, and "grant" in s 116 must mean valid grant by a decision-maker with jurisdiction, not "purported grant" or a grant without jurisdiction.[18]

68 Further, even if this *general purpose* of the legislation identified in CA[43] were sustainable, it could not be pursued "at all costs".[19] It was a subordinate purpose to the statutory purpose of the relevant provisions to prevent the inconveniences, and any abuses, of premature mining lease applications.

69 None of the four reasons support a departure from the plain meaning of the text, the structure of the Act, and the purpose of the provision, all of which combine to compel the conclusion that the lodgement of a mineralisation report, with an application, is an essential pre-condition to the Director's task and the Warden's jurisdiction to hear an application for a mining lease under s 75(4).

PART VII APPLICABLE LEGISLATION

70 The relevant provisions of the *Mining Act* 1978 (WA) are set out in the annexure.

PART VIII ORDERS SOUGHT

71 The orders sought are as follows:

(1) The appeal be 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:

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17 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149, 167.3, 170.9, 172.9-173.2, 174.8.

18 See *Crocker Consolidated Pty Ltd v Wille* [1988] WAR 187, 191 (Burt CJ, with Olney J agreeing) ("The policy of the Act is that the grant is the licensee's root of title and in the absence of fraud and *assuming jurisdiction to make it* is indefeasible." (emphasis added)); *Watson v National Companies and Securities Commission* [1988] WAR 332, 337, 338 (Malcolm CJ), 349 (Wallace J), and 353 (Brinsden J) and *Atkins v Minister for Mines* (1996) 15 WAR 226, 234-9 (Rowland J). The limitations on s 116 were also noted in *Hunter Resources Ltd v Melville* (1988) 164 CLR 234, 246 (Wilson J) and 259 (Toohey J).

19 *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 632-3 [40]-[41].

a. order that the appeal be allowed with costs;

b. declare 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);

c. declare 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) for the second respondent's application for mining lease 08/478 or the fourth respondent's application for mining lease 08/479;

d. a writ of certiorari issue 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 application by the second respondent for mining lease 08/478 and in relation to the application by the fourth respondent for mining lease 08/479; and

e. order that order 4 of the Supreme Court of Western Australia made on 4 June 2015 in CIV 2054 of 2014 be varied such that the second, third and fourth respondents pay all of the costs of the judicial review application, to be taxed if not agreed.

(3) The second, third and fourth respondents pay the appellant's costs of the proceeding, to be taxed, if not agreed.

PART IX ESTIMATED LENGTH OF ORAL ARGUMENT

72 The appellant estimates that it will require 1.5 hours for its oral argument.

Dated: 14 December 2016

A.J. Myers
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