SHOVELANNA DISPUTE*

There has been considerable media attention in relation to the dispute between Cazaly Resources Limited and the joint venture managed by Hamersley Resources Ltd in relation to which party should have title to the iron ore deposit at Shovelanna Hill.

Following is a summary of the dispute and the status[1] of the various proceedings between the parties.

Tenement History

The land including Shovelanna Hill which is known to contain a significant iron ore resource has been held by Hamersley Resources Ltd (a subsidiary of Rio Tinto Ltd), Hancock Prospecting Pty Ltd and Wright Prospecting Pty Ltd and their predecessors in title (together the Rio JV) since 1969.

The land was originally the subject of a right of occupancy in respect of temporary reserve 5003H. In 1983, TR5003H was converted to E46/8 pursuant to the transitional provisions of the *Mining Act 1978* (WA). E46/8 expired in 1989 following the late lodgment of an extension of term application.

The Minister then exempted the land from the operation of the *Mining Act 1978* (WA) pursuant to section 19 of the *Mining Act 1978* (WA). This precluded competing tenement applications and enabled the Minister to immediately grant new tenure over the same land to the Rio JV notwithstanding section 69 of the *Mining Act 1978* (WA) and without having to comply with the objection procedure under section 59 of the *Mining Act 1978* (WA).

E46/209 was granted to the Rio JV in 1989. During the life of E46/209, 11 applications for an extension of terms and 10 applications for exemption from the expenditure commitment were granted. These applications were purportedly "granted on the basis of Western Australia's long-standing (and still current) iron ore policy which provides for a difference in the treatment of iron ore tenements from those of any other commodity".[2]

E46/209 was due to expire on 26 August 2006. Prior to expiry, the Rio JV paid the next year's rent and prepared an application for a further extension of time which was sent to Marble Bar by courier for lodgment. The application was not received by the Registrar until after the expiry of E46/209.

The Rio JV could not apply for an extension of time for lodgment of the application under regulation 104 of the *Mining Regulations 1981* (WA) because upon expiry of E46/209, the Rio JV had ceased to be the "holder" of a mining tenement.

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* Robert Edel and Alex Jones of DLA Phillips Fox.
By way of disclosure, the authors represent Cazaly Resources Limited in relation to this dispute. The authors have endeavoured to provide an objective and impartial summary of the dispute. By reason of the nature of the proceedings and because the proceedings remain on foot, it is only possible at this stage to summarise the allegations raised by Cazaly Resources Limited. Of course, these allegations are disputed either in whole or in part by the other parties to the proceedings.

1 As at 8 January 2007.

2 In his reason for decision released 27 April 2006, the Minister stated that this was undisputed.

Competing Applications

Cazaly Iron Pty Ltd (Cazaly), a subsidiary of Cazaly Resources Limited, lodged application E46/678 over the land containing the Shovelanna deposit on 29 August 2005 (Cazaly Application).

The lodgment of the Cazaly Application precluded the Minister from exempting the land from the operation of the Mining Act 1978 (WA) pursuant to section 19 of the *Mining Act 1978* (WA).

The Rio JV lodged applications M46/437 to M46/440 over the land containing the Shovelanna deposit on 5 September 2006 (Rio Applications). Other parties also lodged competing applications at later dates.

Cazaly objected to the grant of the Rio Applications on the basis that the Cazaly Application was first in time and had priority under section 105A of the *Mining Act 1978* (WA).

Hancock Prospecting Pty Ltd (one of the members of the Rio JV) objected to the grant of the Cazaly Application on the basis that:

(a) the grant of the Cazaly Application would prejudice or injuriously effect the rights of the Rio JV under the *Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972* (WA) (State Agreement); and

(b) the grant of the application was not in the public interest having regard to the provisions of the State Agreement.

It is by no means clear that the land containing the Shovelanna deposit falls within the scope of the State Agreement, though there may have been negotiations between the Rio JV and the State for the incorporation of the land into the State Agreement.

Section 111A Decision

On 21 September 2005, Rio Tinto Limited (the parent company of Hamersley Resources Ltd) wrote to the Hon Alan Carpenter MLA, Minister for State Development (Minister Carpenter) requesting that the Minister terminate or refuse the Cazaly Application under section 111A of the *Mining Act 1978* (WA) on the grounds that the grant of the application was not in the public interest.

The parties exchanged lengthy submissions in relation to the exercise of the Minister's discretion.

During the course of this process, the Hon. John Bowler MLA, Minister for Resources (Minister Bowler) replaced Minister Carpenter as the Minister administering the *Mining Act 1978* (WA).

On 24 April 2006, Minister Bowler terminated the Cazaly Applications under section 111A of the *Mining Act 1978* (WA) (Decision).

On 27 April 2006, Minister Bowler published reasons for the Decision. The Minister relied upon three reasons which he said were each sufficient to justify the termination of the Cazaly Application in the public interest.

In broad terms, Minister Bowler's reasons[3] for terminating the Cazaly Application can be summarised as follows:

(a) termination of the Cazaly Application would further the objectives of the State's iron ore policy which was to facilitate the development of iron ore mines by ensuring secure long-term tenure;

(b) investment is encouraged where investors can be confident that ownership of resources is not jeopardised by minor oversights; and

(c) fairness and consistency in decision-making.

Iron Ore Policy

Little is known about the State's iron ore policy because it is not embodied in a publicly available policy document.

The authors understand that one aspect of the policy is that extension of term applications and exemption applications relating to exploration licences authorised for iron ore are granted:

(a) if the tenement contains an inferred iron ore resource;

(b) regardless of whether there was a reason why no exploration was conducted in the previous reporting year; and

(c) regardless of whether the holder plan to conduct exploration in the forthcoming reporting year.

It is arguable that the iron ore policy is contrary to the *Mining Act 1978* (WA).

Supreme Court Proceedings

On 4 August 2006, Cazaly lodged an application in the Supreme Court for judicial review of Minister Bowler's decision to terminate the Cazaly Application. The application named Minister Bowler and the Rio JV as respondents.

In the proceedings, Cazaly was seeking to have the Decision quashed on a number of grounds including:

1. Cazaly was denied procedural fairness because Cazaly was not provided with or give an opportunity to comment on relevant information and documents including:

    (a) the ministerial briefing paper prepared by the Department of Industry and Resources which included information about the iron ore policy and legal advice provided by the State Solicitors Office as to the scope of the Minister's power under section 111A of the *Mining Act 1978* (WA);

    (b) the "statement of principles" which Cazaly understands summarises negotiations which occurred in late 2005 between Rio and Minister Carpenter which included a proposal to incorporate the land containing the Shovelanna deposit into the *Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972* (WA); and

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[3] As at 26 October 2006, the Minster's reasons were available at http://www.ministers.wa.gov.au/bowler/index.cfm?fuseaction=media.main#

(c) information and documents relating to a meeting which occurred between Mr Leigh Clifford (the CEO of Rio Tinto) and Minister Carpenter at which the section 111A request by Rio was discussed; and

(d) other documents which were before Minister Bowler or which Minister Bowler otherwise considered in making the decision under section 111A of the *Mining Act 1978* (WA).

2. Minister Bowler took into account irrelevant matters including:

(a) the iron ore policy which Cazaly contends is contrary to the *Mining Act 1978* (WA); and

(b) the circumstances in which the Rio JV failed to renew E46/209.

3. The Decision was not based upon reasonable grounds because:

(a) the iron ore policy is anti-competitive and contrary to the public interest;

(b) Minister Bowler proceeded under the erroneous assumption that if the extension of term application had been lodged on time it would have been granted whereas the mere existence of an inferred iron ore resource cannot not of itself constitute exceptional circumstances for the grant of an extension;

(c) Minister Bowler proceeded under the erroneous assumption that if the Cazaly Application was terminated then the Rio Applications would inevitably be granted so that the ground was returned to the Rio JV;

(d) the Cazaly Application complied with the *Mining Act 1978* (WA), was in respect of land open for mining under section 18 of the *Mining Act 1978* (WA), and was first in time;

(e) Cazaly had demonstrated that it had the capability and intention to develop the Shovelanna deposit in the near future and it was therefore in the public interest that the Cazaly Application be granted;

(f) Minister Bowler failed to give proper weight to:

(i) the importance of transparency and certainty in relation to the administration of tenure under the *Mining Act 1978* (WA);

(ii) the fact that the Parliament has not included in the *Mining Act 1978* (WA) a provision allowing the late lodgement of extension of term applications in respect of mining tenements, although it has included express powers to extend time in respect of other matters;

(iii) the fact that a decision to terminate the Cazaly Application would undermine public and international investor confidence in the impartial administration and operation of the *Mining Act 1978* (WA);

(g) the general policy underlying the *Mining Act 1978* (WA) is that a tenement holder is granted exclusive rights for a finite term within which it must explore for and develop a resource failing which those rights will be lost whereas the Rio JV had made negligible effort to explore or exploit the iron ore resource, and had no intention of doing so within the foreseeable future;

The application also seeks declaratory relief in relation to various matters including the scope of the Minister's power under section 111A of the *Mining Act 1978* (WA) and the legality of the iron ore policy.

The application for the order *nisi* was heard 11 August 2006. Justice Templeman held that the application by Cazaly was not a misguided or trivial complaint and that he was satisfied that Cazaly has an arguable case. Justice Templeman also held that the application raises a matter of importance and public interest and that the Decision should therefore be reviewed by the Court of Appeal.

The hearing of the Order Nisi by the Court of Appeal has been set down for 19 and 20 March 2007.

Discovery

Cazaly applied for discovery by the first respondent of documents relevant to the matters referred to in paragraph 21 of the second respondents' submission and in particular, discovery by the first respondent of:

(a) all drafts of the document referred to as the "Statement of Principles" in a submission of the second respondents to the Honourable Mr Carpenter, then Minister for State Development and Minister responsible for the administration of the *Mining Act*;

(b) documents relating to ongoing discussions over the past 6 months between the Minister and the Rio Tinto Limited group of companies concerning various State Agreements referred to in a submission of the second respondents;

(c) the letter from the Hon Mr Carpenter to Rio Tinto Limited in response to a letter from Rio Tinto Limited which enclosed the "Statement of Principles";

(d) various drafts of Rio Tinto Limited State Agreement and secondary processing option documents identified by the Department in response to an application made by Cazaly under the *Freedom of Information Act 1992* (WA);

(e) documents relating to the incorporation, or proposed incorporation, of E46/209, E46/08 or TR5003H into the Rhodes Ridge State Agreement; and

(f) documents relating to or evidencing the meeting between Mr Leigh Clifford (CEO of Rio) and Minister Carpenter which was held in September 2005 in London.

On 22 December 2006 Buss JA ordered the first respondent to discover the documents referred to in (a)-(e) above ([2006] WASCA 282). Buss JA held that there was insufficient factual evidence to support an argument that there was any credible, relevant or significant discussion in relation to Minister Bowler's decision to terminate the Cazaly Application at the meeting in London between Mr Clifford and Minister Carpenter.[4]

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[4] *Cazaly Iron Pty Ltd v The Hon John Bowler MLA, Minister for Resources, Hamersley Resources Ltd, Hancock Prospecting Pty Ltd and Wright Prospecting Pty Ltd* [2006] WASCA 282. This decision is separately reported.

Stay of Rio Applications

Following the termination of the Cazaly Application, the Rio JV sought to progress the Rio Applications to hearing.

Cazaly applied to stay the Rio Applications pending the outcome of the proceedings for judicial review before the Supreme Court.

His Honour Warden Calder granted a stay of the proceedings dealing with the Rio Applications on 27 September 2006.[5]

Amendment of Objections to Rio Applications

Cazaly's objections to the Rio Applications originally only raised the grounds that the Cazaly Application was first in time and had priority under section 105A of the *Mining Act 1978* (WA).

Cazaly applied to amend Cazaly's objections to the Rio Applications to expand the grounds of objection.

His Honour Warden Calder allowed the amendment on 27 September 2006.[6]

The amended objections raise the following grounds which Cazaly contends justify the refusal of the Rio Applications under section 111A of the *Mining Act 1978* (WA):

1. Since 1989 the Rio JV has not conducted any significant exploration on E46/209.
2. In the event that the Rio Applications are granted, the Rio JV does not intend to conduct any exploration or mining in the foreseeable future.
3. The Rio JV was only able to continue to hold E46/209 by reason of a policy administered by the Department of Industry & Resources of giving special treatment to iron ore tenements so as to allow exploration licences authorised for iron ore to be utilised as holding titles.
4. The iron ore policy is inconsistent with the provisions of the *Mining Act 1978* (WA) and/or contrary to the purpose of the *Mining Act 1978* (WA).
5. The 11 extensions of terms granted in respect of E46/209 were unlawfully granted because:
   (a) the Rio JV had no intention of conducting further exploration or mining on the ground the subject of E46/209 in the foreseeable future; and
   (b) the extension of term applications did not disclose exceptional circumstances which could have justified the grant of an extension of term.
6. The Rio JV has already had an adequate opportunity to explore and develop the land the subject of the Application and, in accordance with the objectives of the *Mining Act 1978* (WA), another party should now be given the opportunity.

The Rio JV disputes some or all of these matters.

Conclusion

The dispute has already given rise to a variety of interesting legal issues and it is anticipated that it will continue to do so for some time.

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5 *Hamersley Resources Pty Ltd, Hancock Prospecting Pty Ltd & Wright Prospecting Pty Ltd v Cazaly Iron Pty Ltd (formerly Cyril Resources Pty Ltd)* [2006] WAMW 18. This decision is separately reported.

6 Ibid.

The dispute is also likely to test the extent to which the provisions of the *Mining Act 1978* (WA) entrench what are widely considered to be fundamental resource policies in this State such as:

(a) land open for mining is allocated to explorers on a first come first served basis rather than awarded to a preferred applicant; and

(b) once allocated, land must be actively explored or otherwise turned over to another explorer.

PREROGATIVE WRITS: APPLICATION TO AMEND ORDER NISI AND DISCOVERY*

Cazaly Iron Pty Ltd v The Hon John Bowler MLA, Minister for Resources, Hamersley Resources Ltd, Hancock Prospecting Pty Ltd and Wright Prospecting Pty Ltd ([2006] WASCA 282)

Application for writ of certiorari and declaratory relief – Exercise of power under section 111A(1) of the Mining Act 1978 (WA) – Whether reasonably arguable that the applicant was denied procedural fairness – Obligation of Minister to provide applicant with sufficient information about matters referred to in second respondents' written submission to the Minister – Whether ex parte communication with Minister's predecessor should have been disclosed – Application for discovery

Background[1]

This decision relates to an interlocutory application by Cazaly Iron Pty Ltd (Cazaly) in proceedings for judicial review of the Minister for Resources' decision to terminate Cazaly's application for E46/678 (Cazaly Application).

Cazaly's interlocutory application sought leave to amend the grounds of the order *nisi* and orders for discovery against the first and second respondents.

Cazaly sought leave to amend the order *nisi* to clarify its argument that the failure of the Minister to provide Cazaly with sufficient information and opportunity to be heard constituted a denial of procedural fairness. An affidavit was sworn by an officer of the Department of Industry and Resources voluntarily giving discovery on behalf of the first respondent. The second respondent did not give any discovery.

Cazaly sought further and better discovery of the documents provided by the first respondent, specifically:

(a) various documents referred to in submissions made by the second respondents to the first respondent, including:

  (i) drafts of a document referred to as the "Statement of Principles";

  (ii) correspondence between the State and Rio Tinto Limited relating to "ongoing discussions with [the Minister] over the last 6 months concerning the various State agreements to which members of the RTIO group of companies are party";

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* Robert Edel and Andrew Pullinger, DLA Phillips Fox.
DLA Phillips Fox represents Cazaly Iron Pty Ltd in relation to this dispute.

1 See [2006] WAMW 18.