

- the intention of the grantee, including whether it is willing to enter into an agreement which provides for a site survey to be carried out, is a relevant consideration.¹⁰

The Deputy President held that there was no likelihood that the uranium exploration would interfere with sites of particular significance for the purposes of s 237(b). In reaching this conclusion he relied on the following factors:

- that there is nothing about the site or sites of particular significance identified in this case which would render the Government party's regulatory regime under the AH Act ineffective; and
- the cooperative attitude of the grantee party and the consultation that will occur with the NTP.

Judicial Observations of the Existing Regulatory Regime Relating to Uranium Exploration

In his concluding comments the Deputy President made several observations regarding the existing regulation of uranium exploration, including that:

- under the uranium exploration regulatory regime, regulatory authorities have fewer sanctions available to them in the event of non-compliance with provisions relating to the preparation of a radiation management plan (compared with uranium mining); and
- the protection relating to 'critical groups' of the general public is based on persons in permanent communities in the vicinity of the exploration activity and not persons travelling through the area for the purposes of camping, hunting or gathering bush tucker. There is no mechanism or requirement to consult with native title claimants who may visit the area where exploration is taking place.

THE POTENTIAL IMPOSITION OF PASTORAL CONDITIONS ON MINING LEASES*

***FMG Chichester Pty Ltd v Rinehart and Hancock Prospecting Pty Ltd* [2007] WAMW 14**

Conditions on Mining lease – Pastoral Conditions to grant of mining lease – Mining lease on pastoral lease – Recommendations to Minister on grant of mining lease

Background

On 24 August 2007 Warden Calder delivered a decision in the Warden's Court concerning objections by Gina Rinehart and Hancock Prospecting Pty Ltd (Objectors) to the grant of five mining lease applications (MLAs) to FMG Chichester Pty Ltd (FMG).¹ The MLAs are required for FMG's Cloud Break and Christmas Creek projects.

¹⁰ *Champion v Western Australia* [2005] NNTTA 1.

* Linda A Tompkins BSc (Hons), MSc, PhD (Geology), LLB (Hons), Lawyer, Allens Arthur Robinson and Jolleen Hicks LLB, Law Graduate, Allens Arthur Robinson.

¹ The objections were lodged and the matter was heard before the legislation giving the force of law to FMG's State Agreement (ie *Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006* (WA)) came into force in October 2006. With effect from the enactment of that legislation, the State Agreement exempted four of the five MLAs from the provisions under the *Mining Act 1978* (WA) (*Mining Act*) that entitle a person to object to the grant of a mining tenement. Once these four MLAs are granted (which are MLA 46/449, 46/451, 46/452 and 46/454) they will be 'Agreement Mining Tenements' under the State Agreement, which means they are to be dedicated to the State Agreement project for the production and transportation of iron ore.

The Objectors are the pastoral leaseholders of Mulga Downs Station (Mulga Downs) over which the MLAs were made. The Objectors asked the Warden to recommend that their proposed pastoral conditions be imposed as conditions upon grant if the Warden recommended to the Minister that the MLAs be granted. The Objectors' proposed pastoral conditions sought to reduce the impact of FMG's mining operations on Mulga Downs and to indemnify the Objectors from the risk of any adverse impact of FMG's activities upon the land.

The Warden rejected the Objectors submission and recommended that the MLAs be granted subject to the appropriate standard Department of Industry and Resources (DoIR) conditions being imposed rather than the Objectors' proposed pastoral conditions. The DoIR conditions would address the Objectors' concerns to minimise adverse impacts on their pastoral operations. The Warden held that the Objectors' proposed pastoral conditions were disproportionate to the nature of the activities FMG proposed to carry out on the MLAs.

The Issues

The issues raised by this case are:

- whether the Warden has the power to recommend conditions upon which a mining tenement should be granted;
- whether or not it is appropriate to recommend that any conditions beyond the relevant standard DoIR conditions be imposed upon the grant of a mining lease; and
- what factors need to be taken into account if it is appropriate to recommend that conditions be imposed upon the grant of a mining lease application.

Submissions

Objectors' submissions

The Objectors submitted that FMG's Cloud Break and Christmas Creek projects are very large and will have a significant impact on their pastoral operations. The Objectors said that FMG had not adequately consulted with them regarding their activities on the land the subject of the MLAs. The objectors alleged that FMG had breached the 'Code of Conduct for Mineral Exploration on Pastoral Leases'² by failing to give adequate notice of blasting activities. The Objectors also asserted that FMG had not discussed the establishment of a campsite, use of station roads, storage and removal of sample bags.

The Objectors argued that it was a matter of public interest that the interests of pastoralists, as co-users of the land, be considered in the administration of the Mining Act when granting mining leases. The Objectors submitted that none of the reports and management plans undertaken to date on FMG's projects had expressly addressed the impact of FMG's mining activities on Mulga Downs. Environmental management plans addressed numerous water, fauna and flora environmental concerns but not in the context of the impact on pastoral operations. The Objectors claimed that only indirect references were made to the activities of pastoralists in the various review reports and management plans generated in relation to FMG's project. They submitted that their proposed pastoral conditions are, therefore, necessary and appropriate particularly due to the scale and changeability of FMG's mining plans and activities.

The Objectors argued that the Warden has a responsibility to consider the proposed pastoral conditions and, to the extent that the Warden considers the proposed pastoral conditions are

² The Code of Conduct for Mineral Exploration on Pastoral Leases is jointly published by the Chamber of Minerals and Energy, the Association of Mining and Exploration Companies and the Pastoralists and Graziers Association of WA.

reasonable, a further responsibility to recommend to the Minister that the conditions be imposed. The Objectors submitted, and Warden Calder agreed, that FMG's contention that the Warden does not have the power to recommend conditions is wrong and inconsistent with previous authorities.³

Applicant's submissions

FMG said that there will be no extractive mining on the tenements granted pursuant to the MLAs and that only part of the area the subject of the MLAs are within the boundaries of Mulga Downs. The uses, or proposed uses, of the tenements granted pursuant to the MLAs include a temporary exploration camp, a construction and mine camp, a train-loader, an aerodrome and an access road from the Cloud Break mine to the aerodrome and to the camp. FMG submitted that the concerns raised by the Objectors were more appropriate to a private access agreement, whereby, the parties could negotiate and resolve the manner in which they would jointly manage the potential impacts that the project may have on the pastoral operations.

With respect to the Objectors' public interest submissions, FMG argued that the interests the Objectors were relying on are matters of private interest that do not attract the provisions of s 111A of the *Mining Act*.

FMG also claimed that there is no justification of the Objectors being provided with any information beyond that which relates to their pastoral operation.

FMG said that the Warden's obligation under the *Mining Act* to recommend to the Minister to either grant or refuse a mining lease application did not give the Warden power to recommend what conditions to impose. Such a power is reserved solely for the Minister. FMG said that only the Minister had power to impose conditions to prevent and reduce injury to land (s 84 of the *Mining Act*).

The Proposed Pastoral Conditions

FMG, in its submissions, addressed each of the 11 proposed pastoral conditions which are summarised as follows:

No	Pastoral Condition	FMG's response
1	Would require that FMG must not commence any developmental or productive mining or construction activity unless the activity has been approved under a mining proposal submitted under the Mining Act or pursuant to the State Agreement.	Condition is unnecessary as FMG is bound to comply with any approved proposals.
2	Mining operations must be conducted in accordance with the Minister's approval and approved proposals arising from a mining proposal submitted under the Mining Act or granted pursuant to the State Agreement.	As per condition 1.
3	FMG must not carry out any developmental or mining activities other than those approved under the various environmental approvals approved under the State Agreement or pursuant to a Mining Act proposal.	As per condition 1.
4	FMG must give written notice to and consult with the Objectors, including providing copies of, amongst other things, all applications and proposals.	The matters are all outside the scope of any legislative required environmental or mining proposal or the State Agreement. The proposals are more

³ *Re Calder; Ex parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 343; *Striker Resources NL v Benrama Pty Ltd & Ors* [2001] WAMW 7.

No	Pastoral Condition	FMG's response
		appropriate for a private pastoral access agreement.
5	Notification and consultation in condition 4 be undertaken within a sufficient time to enable the Objectors to consider the proposal and consult with FMG and government agencies.	As per condition 4.
6	Prior to commencing any developmental or productive mining or construction activity a pastoral management plan be developed that addresses a number of specific issues including groundwater, hydrology and impacts on stockfeed resource.	DoIR standard conditions 433, 438, 454, 458, 459, 488 and 490 cover the issues raised. The condition would effectively give the Objectors a power of veto, and is more properly the subject of a private pastoral access agreement.
7	FMG must comply with the requirements of the pastoral management plan.	As per condition 6.
8	Terms and implementation of the pastoral management plan be reviewed annually and may be amended by the Department of Environment and Department of Conservation and Land management (<i>CALM</i>).	As per condition 6.
9	DoIR standard conditions 205 to 210 inclusive will apply to the extent that mining activities affect the proposed CALM exclusion area.	The environmental impact of mining activities on the CALM exclusion area is a matter between FMG and the Department of Environment and Conservation.
10	Upon request of the Objectors FMG will, at its cost, implement or fund any measure or action required to remedy or mitigate the impact of mining activities on pastoral operations and indemnify the Objectors for expenses they may incur in remedying or mitigating such measures or actions on Mulga Downs.	The matter is more properly dealt with in a private pastoral access agreement, and if there is any damage the Objectors can apply for compensation, if required.
11	FMG must indemnify the Objectors, its officers, employees, agents and consultants in relation to specified incidents or damage or other costs and within 14 days of grant of the mining lease a deed of indemnity must be executed.	As per condition 10.

Warden's Conclusions

The Warden recommended that the MLAs be granted subject to the standard and relevant DoIR conditions.

Warden's power

The Warden agreed with the Objectors that the Minister has a wide discretion to impose conditions on a mining lease (s 71 of the Mining Act) and that the Minister's powers are not limited by s 84 of the Mining Act. The Warden, therefore, has an obligation to consider what conditions should be imposed on the grant of a mining lease and to recommend conditions to the Minister.

What conditions to impose

When determining what conditions to impose, the Warden made the following findings:

‘The legislative context should be considered. Under the Mining Act once a tenement is granted over a pastoral lease, the pastoral leaseholder's interests are broadly subservient to the rights and interests of the tenement holder. This does not mean the pastoral leaseholder's interests are to be ignored. The Minister is obliged on public interest grounds to still consider the pastoral leaseholder's rights and interests when determining a mining

lease application. But that duty does not arise from section 111A of the Mining Act but rather is derived from general administrative law principles that every Minister must ensure that all legislation is properly administered. However, the Minister must not impose conditions which have the effect that the mining tenement holder cannot exercise its rights granted under the Mining Act to optimally exploit the tenement.

The pastoral leaseholder does not have any right of veto over mining operations that may be carried out on a tenement.

The Mining Act expressly provides for compensation to be paid to pastoral leaseholders for any loss or damage suffered due to mining operations. No compensation is payable for deprivation of the possession of the surface of land, for damage to the surface of land or for severance of the land from the rest of the pastoral leasehold (unless it is agreed between the miner and pastoralist or is authorised by the Warden's Court).

The Minister administering the Mining Act has no power to impose a condition that requires the participation of another Minister without that Minister's consent, if the condition is not otherwise authorised by legislation. For example, a condition cannot be imposed requiring the parties to prepare a pastoral management plan to the requirements of the Minister for the Environment without that Minister's consent.

FMG's planned activities on the MLAs are relatively minor in terms of their "impact on the ground, on the pastoral operations and in terms of their relativity to the operations and area of the whole project".

General comments

The Warden also commented on the relationship between FMG and the Objectors. The Warden concluded that he was satisfied that FMG did not adequately take into account the Objectors' rights and interests when carrying out its activities. FMG did not have proper procedures in place to provide timely information and advice to the Objectors on proposed activities on Mulga Downs. The insufficient effort to consult with the Objectors is evidence of FMG's 'lack of concern for the interests of the Objectors in connection with their pastoral activities and the potential or actual impact upon those pastoral operations' by FMG's activities. The Warden also found that the Objectors did not act in a cooperative manner that encouraged consultation between the parties.

Implications from the Decision

The decision raised some pertinent issues in respect of pastoralists interests and concerns during the process of grant of mining leases. Although the facts of this case indicated that the standard DoIR conditions would adequately, albeit indirectly, address the pastoralists' concerns, the case highlights the subservient position of pastoral leases to granted mining tenements. However, given other facts and appropriate circumstances, Warden Calder did leave open the possibility of imposing conditions upon the grant of a tenement that address the compensation and indemnity issues raised in the proposed pastoral conditions 10 and 11.

The case also underscores the need for cooperative negotiations between miners and all stakeholders, including pastoralists, and the increasing importance and support for private access arrangements.