Implications of the Decision

While the Warden rejected Jindalee's application to have all applications heard together, the decision does help to clarify the process for having competing applications heard together. The case affirms the limitations of the role of the Warden in situations of competing ELAs to the hearing of the priority application first and independently of other competing applications. However, the Warden did leave open the possibility that in appropriate circumstances the Warden may be prepared to conduct hearings of competing applications in the manner proposed by Jindalee.

REVERSION LICENCE SCHEME*

Midwest Corporation Ltd [2008] WAMW 2

Application and criterion for reversion licences

Summary

On 10 January 2008, Warden Calder recommended for grant three exploration licence applications lodged by Midwest Corporation Limited (Midwest) pursuant to the reversion licence scheme established in accordance with s 120AA of the *Mining Act 1978* (WA) (Mining Act) (Reversion Scheme).

In recommending the applications for grant, Warden Calder considered the various requirements of the Reversion Scheme. The Scheme was introduced in February 2006. It allows an applicant for a mining lease to apply for, and have granted, prospecting licences or exploration licences over the area the subject of their pending mining lease application. The Warden also concluded that it was not necessary for an applicant for a prospecting licence or exploration licence under the Reversion Scheme to expressly refer to it at the time the application is lodged.

Background

In 1993 Midwest was granted exploration licence 20/209 (E20/209). In 2004 Midwest applied for mining lease 20/493 (MLA 20/493) over part of the land the subject of E20/209. That part of E20/209 was kept alive pursuant to s 67(2) of the Mining Act. The balance of the land previously the subject of E20/209 was relinquished. Exploration activities continued on the area of E20/209 also covered by MLA 20/493.

During the period February 2006 to February 2007, Midwest applied for three exploration licences (the ELAs), each of which was over ground the subject of the current E20/209 and MLA 20/493. In February and March 2006, Midwest lodged exploration licences 20/627 (ELA 20/627) and 20/628 (ELA 20/634) respectively. Collectively, ELA 20/627 and ELA20/634 covered ground identical to that covered by E20/209 and MLA 20/493. Midwest lodged a further exploration licence application (ELA20/658) in February 2007. This overlapped the area the subject of the two ELAs lodged in 2006 and occupied the whole area covered by E20/209 and MLA 20/493.

Objections were lodged against each of the ELAs by St Barbara Limited. However, those objections were resolved by agreement on the eve of the hearing. There were, therefore, no objections on foot when the applications were dealt with by the Warden.

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* Melanie Jasper BA LLB (Dist), Lawyer, Allens Arthur Robinson.

The Reversion Scheme

Section 120AA of the Mining Act commenced operation on 10 February 2006. The section empowers the Governor to establish a scheme by order published in the *Government Gazette* pursuant to which an applicant for a mining lease can apply for a prospecting licence or exploration licence over the land the subject of that mining lease application.

The Mining (Reversion Licence Application Scheme) Order 2006 (Order) was made by the Governor in Council and published in the *Government Gazette* 3 February 2006. It is the combination of the Order and s 120AA which effectively create the Reversion Scheme. Key aspects of the Order considered by Warden Calder are outlined below.

Timing of applications

Under cl 6 of the Order, a person who has made a mining lease application or applications on or before 10 February 2006 may apply for one or more prospecting licences or exploration licences over that land (Reversion Application). Clause 7 provides that Reversion Applications must be made by 10 February 2007.

Application of Mining Act and Regulations

Pursuant to cl 5 of the Order, the provisions of the Mining Act and *Mining Regulations 1981* (WA) apply to and in relation to the making and determination of a Reversion Application.

Reversion Application over part of block

Under cl 8 of the Order, Reversion Applications may include land that is not the subject of the relevant mining lease application if:

(a) the Reversion Application is for an exploration licence;

(b) there is a "continuing licence" (as defined in s 120AA(1) of the Mining Act, namely a prospecting licence, exploration licence or retention licence in relation to the land the subject of the Reversion Application); and

(c) the "continuing licence" is an exploration licence.

In cases where those three criteria are met, the Reversion Application may only include a graticular block that is the subject of the continuing licence if the whole or part of the block is the subject of the relevant mining lease application.

In Warden Calder's view, the inclusion of cl 8 of the Order and s 120AA(8) of the Mining Act meant the provisions which usually govern the grant of exploration licences over part of a block, namely subss (2f) and (2h) of s 57 of the Mining Act, do not apply to Reversion Applications.

Priorities

Clause 12 of the Order provides that if the boundaries of the ground the subject of a Reversion Application are identical to or entirely within the boundaries of the relevant mining lease application, then the reversion applicant has the same right of priority to the grant of the Reversion Application as that person has to the grant of the mining lease.

Reversion Endorsement on the Form of the Application

Warden Calder acknowledged that a failure to identify that an application is made under the Reversion Scheme may be inconvenient and increase the time and cost for an objector to a Reversion Application (ie because the objector may need to seek particulars to establish this).

However, he concluded that there was no statutory requirement that an applicant must include with their application form, a statement that the application is made pursuant to the Reversion Scheme.

Recommendation for Grant

Warden Calder concluded that because:

(a) ELAs 20/627 and 20/634 were wholly within the boundary of MLA 20/943;

(b) ELA 20/658 had boundaries identical to those of MLA 20/943; and

(c) E20/209 was kept alive by the lodgment of MLA20/493 pursuant to s 67(2) of the Mining Act,

none of the land the subject of MLA 20/493 was, or is, open for mining. As a result, no issue of competing priority could arise from lodgment of other applications by anyone other than Midwest.

Warden Calder recommended that the Minister give consideration to and determine each of the exploration licence applications in the order in which they were lodged. He recommended that ELA 20/627 and ELA 20/634 be granted. If the Minister refused to grant the whole or part of the land the subject of those exploration licences, Warden Calder recommended that the Minister grant ELA 20/658 over any land available for grant after the final determination by the Minister of both ELA 20/627 and 20/634.

NEW ZEALAND

NEW ZEALAND OVERSEAS INVESTMENT ACT REGULATIONS 2008*

In a hurried move that has drawn widespread and vocal criticism from investment groups, business leaders and professional advisers, the Government has enacted legislation that makes it more difficult for "overseas persons" to acquire interests in strategically important infrastructure in New Zealand.

Against the backdrop of a difficult and contentious takeover proposal for Auckland International Airport, the legislation is seen by many as anti-foreign investment in New Zealand and an exercise in good old Kiwi xenophobia.

Under the amended reg 28(h) of the *Overseas Investment Regulations 2005*, effective 4 March 2008, the Ministers of Finance and Land Information are now required to take into account, in considering applications for Overseas Investment Office (OIO, the New Zealand equivalent of Australia's Foreign Investment Review Board) consent: "whether the overseas investment will, or is likely to, assist New Zealand to maintain New Zealand control of strategically important infrastructure on sensitive land."

An "overseas person" is, broadly, any entity controlled as to 25% or more by non-New Zealand interests. The definition is very comprehensive and tracks ultimate ownership.

Already under the *Overseas Investment Act 2005*, certain factors must be taken into account by the Ministers when considering whether to grant consent to an overseas person making an overseas investment in New Zealand. These are, in summary:

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* Brigid McArthur, BA/LLB (Hons), Partner, Chapman Tripp.