Facts
Duke Eastern Gas Pipeline Pty Ltd and DEI Eastern Gas Pipeline Pty Ltd ("applicants") were the owners of the right to build the now completed Eastern Gas Pipeline from Longford, Victoria to Horsley, New South Wales. In accordance with a series of Native Title Consent Agreements ("Agreements"), the applicants were obligated to pay moneys to a trust for the benefit of a number of Aboriginal groups with claims over land along the pipeline route. However, at the date of the application, the trust had not yet been created. The applicants instead paid moneys owing under the Agreements into an account established by the applicants for the purpose of keeping these moneys on trust for the benefit of the Aboriginal groups. The applicants applied to the Victorian Supreme Court:

(a) by for an order that moneys paid into the bank account be paid into court; and
(b) for a declaration that the moneys in the bank account represent the amount payable them to the Aboriginal bodies under the Agreements.

Decision
Mr Justice Ashley ordered that the moneys should immediately be paid into court and declared the money "at bank" to be the amount payable under the Agreements.

Reasoning
His Honour held that he had power under Order 54 of the Supreme Court Rules to order payment of the moneys at bank into court. His Honour's only concern was whether to order immediate payment or to adjourn the making of the order to a later date. The argument for adjournment was based on submissions made on behalf of two of the Aboriginal groups that the trust the subject of the Agreements was soon to be constituted and it would, therefore, be more appropriate to have the moneys directly paid into this trust. His Honour's reasoning for ordering the immediate payment was that:

- it was not certain that the trust would be constituted in the near future;
- the Aboriginal groups would receive a better return if the moneys were in court than in the low yield bank account established by the applicants; and
- the moneys would be better protected in court and there would be greater certainty that the moneys would be disbursed in accordance with the Agreements.

Interestingly, in arriving at his decision, Ashley J did not take into account the inconvenience to the applicants of maintaining the account for the benefit of the Aboriginal groups. However, his Honour directed that, once the applicants had paid the entirety of the moneys into court, they should then apply to the Senior Master for disbursements relating to the costs of the application, administering the trust over a number of years and any tax assessed on the accrued interest payable by the applicants on the moneys.

WESTERN AUSTRALIA

PERMIT TO ENTER – PUBLIC INTEREST OBJECTION*

Dodsley Pty Ltd v Applicants for the Thudgari Native Title Claim ([2003] WAMW 14, Warden Richardson SM, Carnarvon Warden's Court, 3 September 2003)

---

* Mark Gerus, Special Counsel, Blakiston & Crabb.

Permit to enter – Marking out miscellaneous licence – Native title claimed land – Public interest objection – Infrastructure facility – Native Title Act – Race Discrimination Act

The Objection

The Yamatji Land and Sea Council lodged an objection on behalf of Thudgari Native Title Claimants ("Objectors") to an application by Dodsley Pty Ltd ("Dodsley") for the grant of a miscellaneous licence for the purposes of a road over part of the Maroonah Pastoral Lease in the North West of Western Australia. The objection stated that Dodsley had failed to obtain an entry permit for the purposes of entering and marking out land that was subject to a native title claim and that:

> "The Applicant has not complied with the provisions or the intention of the Mining Act 1978, the Native Title Act 1993 (Cwth) or the Racial Discrimination Act (Cwth) and the granting of the tenement would be contrary to public interest." ("Objection")

The Objection was in similar terms to an objection to the grant of general purpose leases upheld by Warden Wilson in *Mineralogy Pty Ltd v Kurama.*[1] In *Mineralogy* it was held that by operation of the *Native Title Act* ("NTA") land subject to a native title claim was deemed to be "private land" under the *Mining Act*[2] by operation of the infrastructure facility provisions of the NTA.[3] Warden Wilson held that the applicant for a general purpose lease was required to obtain a permit to enter pursuant to section 30 of the *Mining Act* in order to access land covered by a registered native title claim, notwithstanding that the land was not freehold land. He also characterised an objection in these terms as concerning the "public interest".

In summary, the Objectors relied squarely on *Mineralogy* and sought to characterise the proposed grant of a miscellaneous licence to Dodsley as an "infrastructure facility" for the purposes of section 253(a) of the *Native Title Act* that would attract the operation of sub-section 24MD (6A) of the NTA. If this provision applied, the Objectors were deemed to be holders of "private land" and entitled "to have the same procedural rights as they would have in relation to [the] *act* on the assumption that they instead held ordinary title to any land concerned".

The Objectors contended that an entry permit for the purposes of marking out under the *Mining Act* was one such procedural right relating to the grant of the miscellaneous licence as it creates rights to enter land which affect the ability for a private land holder to exercise proprietary rights to the fullest extent possible. The Objectors claimed that by reason of being registered native title claimants they had *prima facie* demonstrated the existence of native title rights and interests claimed and by the failure to obtain an entry permit and serve it on the Objectors, the Applicant had not conferred the same interest on the Objectors (as an ordinary title holder) and, therefore, had acted contrary to the *Race Discrimination Act*.

The Applicant's Submissions

The Applicant sought the dismissal of the Objection on various grounds including that *Mineralogy* was wrongly decided and had no application. It contended that the Warden in *Mineralogy* did not focus (as is required by the scheme of the NTA) on specific acts that affect native title – in *Mineralogy* there was a failure to distinguish between the act of grant of an entry permit for marking out and the act of grant of the tenement by the warden or Minister. It was submitted that:

---

1 [2001] WAMW 29 ("*Mineralogy*"), reported in (2002) 21 AMPLJ at 57.
2 Section 8.
3 Subdivision P of Part 2 of the NTA, sections 253, sub-section 24MD(6A) and (6B).

- The act of grant of the miscellaneous licence (and not of grant of an entry permit) was the relevant act to which any "procedural rights" attach.
- The entry permit procedure and marking out may be preconditions to the grant of a miscellaneous licence over private land, but they are a prior and separate "acts" to the grant of the application.[4]
- The NTA provisions under section 24MD provided native title claimants the same procedural rights otherwise enjoyed by a holder of freehold land in relation to the "act" of the proposed *grant* of the application. These procedural rights in relation to the *grant* of the Application, which included the right to be served with a copy of the Application, the right to object under the NTA and the right to be afforded procedural fairness, were enjoyed and had, in fact, been exercised by the Objectors in this case under the NTA.
- There was no "public interest" raised in relation to a failure to obtain a permit to enter land subject to a native title claim that can attract the operation of section 111A of the *Mining Act.* The Objection raised a private interest, allegedly of a (deemed) owner of private land and a failure to satisfy a deemed pre-condition of grant of the application.[5]

Decision of Warden Richardson SM

Warden Richardson did not expressly distinguish *Mineralogy*, but chose not to follow the reasoning in that decision. She held that the application for the miscellaneous licence was not on private land for the purposes of the NTA or the *Mining Act*. Therefore, no entry permit was required. The Warden accepted that the act of marking out land by an Applicant for a miscellaneous licence is a separate and distinct act from the act of the grant by a Warden or Mining Registrar and (applying *Hunter Resources*) must be considered as such when determining an objection. Further, the Warden accepted that the act of marking out does not provide an applicant with any rights or interest in the marked out land nor does it change or affect the rights and interest of the owner and occupier of land – marking out is simply an act which satisfies an administrative requirement of the *Mining Act*. Accordingly, the Warden dismissed the Objection and, subject to compliance with the NTA, ordered that the application for the miscellaneous licence be granted.

Although unnecessary to the result, the Warden also considered whether the grant of an entry permit (to enter "private land") was an act which affects native title.[6] The Warden considered that the Objectors were obliged to establish the existence of native title rights and interests in order to be able to show that any interest had been affected by the grant of an entry permit. The Objectors failed to lead any evidence in this respect and as a consequence there was no basis for concluding that the granting of an entry permit was a future act or that the failure to obtain it was contrary to the provisions or intention of the NTA.

---

4 The Applicant contended that in *Hunter Resources Ltd v Melville* [1988] 164 CLR 234 at 259, the High Court distinguished between the act of marking out land and the act of the application for a mining tenement.

5 As to the distinction between private and public interests see *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473, Jacobs J at 487, approved by Steytler J in *Re: Calder; Ex parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 343 at 353.

6 Section 227 of the *Native Title Act* and Merkel J in *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* (2001) FCA 414 at paras 70 and 71.