[2012] WAMW 2

JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	OPEN COURT
LOCATION	**:**	KARRATHA
CITATION	**:**	**MINERALOGY P/L V KURUMA MARTHUDUNDERA NTC [2012] WAMW 2**
CORAM	**:**	CAMPIONE M
HEARD	**:**	22 MARCH 2010
DELIVERED	**:**	23 JANUARY 2012
FILE NO/S	**:**	OBJECTIONS KR 162 TO 165/056
TENEMENT NO/S	**:**	APPLICATIONS FOR MINING LEASES 08/371 TO 374
BETWEEN	**:**	MINERALOGY PTY LTD (Applicant) V KURUMA MARTHUDUNDERA NATIVE TITLE CLAIMANTS (Objectors)

Catchwords:

Application for mining leases – objections based on public interest – registered native title rights – cultural heritage – role of Warden – impact of State Agreement – whether Warden should automatically recommend grant where there has been compliance with the provisions of the Act and Regulations

Legislation:

Mining Act (WA) 1978: s. 85(1) & (2), 111A

Native Title Act (Cth) 1993: s. 31(1)(b)

Result:

Applications recommend for refusal

Representation:

Counsel:

Applicant	:	Mr W Haseler
Objectors	:	Ms S Burnside and Ms N Casley

Solicitors:

Applicant	:	Legal Department Mineralogy Pty Ltd
Objectors	:	Yamatji Marlpa Aboriginal Corporation

Case(s) referred to in judgment(s):

FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49

BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2005] WAMW 12

Re Warden French; Ex parte Serpentine-Jarrahdale Ratepayers and Residents Association (1994) 11 WAR 315

Mineralogy Pty Ltd v Kumura (No 2) [2002] WAMW 3

Re Warden Heaney; Ex parte Serpentine-Jarrahdale Ratepayers and Residents Association Inc (1997) 18 WAR 320

Independent Person Referral 1 of 2004

Mineralogy v Kuruma Marthudunera [2008] WAMW 3

Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd [2009]

Case(s) also cited:

Nil

INTRODUCTION

1. Before the Court for consideration are four applications for Mining Leases lodged by Mineralogy Pty Ltd ("the Applicant") in September 2006. The Applicant is the holder of the underlying Exploration Licence 08/691.

2. The Kuruma Marthudundera Native Title Claim group ("the Objectors") has lodged objections to each of those applications.

BACKGROUND

3. The Objectors are registered native title applicants over the land on which the Applicant seeks to have the proposed tenement granted. The applications are all in the area of the native title claim, except for some of M 08/347. Mr Sampi tells the court that that is an unclaimed area which is near a law ground where young KM men go through Law.

4. The Applicant applied for the mining leases prior to the amendments to the Mining Act, and therefore is not required to have an accompanying mining proposal or mineralisation report. The Applicant has indicated that the most likely method of mineral extraction will be an open cut mine and further, proposes to store waste from the mine within the leases (see the Applicants Response to Request for Particulars at paragraph 2(b)).

GROUNDS OF OBJECTION

5. The Objectors filed particulars of their objections, however at the hearing before me they relied on a single ground of objection, namely that the applications are contrary to public interest.

6. Specifically, the Objectors believe that activities that might be allowed under the proposed tenement could have an adverse impact upon the exercise of native title rights, cultural heritage (including sites of significance) and lifestyles of the Objectors.

7. The Objectors contend that work and activity allowed under the leases could also affect the environment and flora and fauna in the area, which would impact on the Objectors and the granting of the tenements would be contrary to the public interest.

THE APPLICANT'S EVIDENCE

8. The Applicant relies on the affidavit of Vimal Kumar Sharma, who was produced for cross examination.

9. Mr Sharma has been employed by the Applicant since 1999 and is currently its Managing Director. His evidence is that the applications relate to the development of a major iron ore project in the future.

10. The Applications fall within Area B2 of the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 as amended ("the State Agreement"). Mr Sharma contends that the State Agreement demonstrates the State Government's support of the Sino Iron Project.

11. There is in fact no evidence in support of the applications contained in his affidavit. Rather, his affidavit contains submissions in relation to the law, more properly made by legal counsel. He merely makes bald assertions that the Applicant will comply with all relevant Native Title Act and Aboriginal Heritage Act laws and regulations, including the Native Title Act, the Aboriginal Heritage Act and the Environmental Protection Act.

12. Mr Sharma did not withstand cross examination. His evidence was both vague and rigid. He made wide sweeping statements, which could not be substantiated in the witness box. He did not inspire me with confidence as to the approach of the Applicant and seemed to be misguided about the provisions of the Mining Act.

THE OBJECTORS EVIDENCE

13. The Objectors rely on the affidavits of Neil Ricky Finlay and Matthew Sampi, both of whom were produced for cross-examination at the request of the Applicant, only to be asked a single question each in cross-examination. I accept that both of these gentlemen are respected, senior and knowledgeable men within the KM people.

14. In his affidavit Mr Finlay told the court that he is a Kuruma elder and a member of the KM native title claim group. He is the applicant for a determination of native title (WAD 6090 of 1998). Mr Finlay deposes to the fact that he can talk about these areas on behalf of the KM people. He was born at Red Hill and frequents that area. In his affidavit he eloquently describes the importance of the area to the KM

people, including their rights and interests and their duty to look after the country.

15. He also describes the history of Queens Table and the fact that people can't go close to it, as it is a burial place containing bones. Significantly, the application for MO8/373 includes part of the Cane River and there are important waterholes on the Robe and west side of Mt Amy, which are important waterways for his group.

16. Mr Finlay met with PNTS anthropologist Linda Geddes on 10 February 2010 to talk about the land and waters affected by the applications. He also goes on heritage surveys and works with mining companies to make sure that sites are protected. He deposes that other mining companies listen to the KM people and are looking after the place.

17. In relation to the Applicants Mr Finlay doubts their genuineness as they have not engaged in bona fide negotiations with the KM people. He complains that the Applicants have never treated the KM people with respect and have never undertaken proper surveys with the KM people. He says that the KM people are worried about what the Applicant has done in the past and is worried about what they might do on their country and the damage that they may cause to their heritage. He concludes by stating that the KM people will not want to go onto the areas covered by the leases if they know that the Applicant "owns them".

EVIDENCE OF MATTHEW SAMPI

18. Mr Sampi describes himself as a knowledgeable KM man and an active member of the KM native title claim group. He is also able to talk about the areas on behalf of the KM people. His family used to work on the Cane River Station and he described the importance and significance of the areas in his affidavit including rights and interest, hunting and Law ceremonies.

19. Like Mr Finlay, Mr Sampi does not trust the Applicant and is very concerned as to what would happen if the Applicant was permitted to mine in the area. He tells the court that the Applicant and the KM people have had many arguments over the years. He states that the Applicant has never done proper heritage surveys with them and does not know where the sites are.

20. He has complained to the Department of Indigenous Affairs about the Applicant as he believes that they have damaged or destroyed sites and concludes that they lack respect. The Applicant does not come and speak to the KM people properly. His evidence is that the Applicant did not notify the KM people of their proposed application and they found out about it through the newspaper. He states that Mineralogy have not consulted or negotiated with the KM people properly.

21. None of their evidence, which I accept, was contested by the Applicant. I accept their evidence about the significance of the area.

22. The evidence of Mr Finlay and Sampi speak volumes about the importance and cultural significance of the areas over which the

mining leases are sought to the KM people. Collectively their affidavits reveal:

- the leases are in the middle of three important sites, Walyarta (Mt Amy), Karlarrinya (Queen's Table) and Mungala (Red Hill);
- there are important waterways in the areas, where spirits are, including part of the Cane River, and permanent waterholes. The Cane River overflows in to the Warramboo Wash and the water from Silvergrass comes down in to the Cane River and the wash. The Warramboo Wash is an area between Mt Stuart and Red Hill Stations and the Cane River Law grounds;
- the Cane River is sacred and it might be dangerous to people if the area is disturbed;
- the land and the waterways are good providers of bush tucker and bush medicines and is a significant and reliable hunting area;
- the area is close to the Cane River Law grounds and KM people can camp in the area for extended periods of time;
- it is a good place to gather wood to make spears and artefacts;
- the plants are used for food and medicine, including traditional medicine;
- there are burial grounds and bones in the area;
- there are artefacts in the scrub area, an important engraving near Mt Amy and lots of engravings at Red Hill;
- it is an important area to the people historically as well as culturally; and
- mining would disturb the areas where there families grew up and lived, including the old people;

APPLICANT'S SUBMISSIONS

23. The Applicant submits that the State is required to grant the mining leases to the Applicant pursuant to the State Agreement. Further, it asserts that it has complied in all respects with the provisions of the Mining Act, and so therefore the Warden should recommend grant to the Minister. The thrust of these submissions is essentially that there is no role for the Warden to play and asserts that the Objectors objections ought not be dealt with by the Warden (see paragraphs 15-19 and 22-25 of the affidavit of Mr Sharma).

24. Further, the Applicant asserts that it is not a public interest which the Objectors seek to protect, but rather a private one. Objections raised under the Native Title Act, the Environmental Protection Act and the Heritage Act, it submits, should be dealt with pursuant to that legislation and implies that these matters should not be heard by the Warden.

25. The Applicant asserts that that are no relevant provisions in the Mining Act to support the Objections.

OBJECTORS' SUBMISSIONS

26. The Objectors submit that the interests they are seeking to protect are in the public interest and that it can object on any ground. It submits that just because there is no objection based on compliance that the Application should not automatically be recommended for grant.

27. The Objector's submit that:

1. activities that might be allowed under the Leases could have an adverse impact upon the exercise of their registered native title rights, interest and lifestyles;
2. activities that might be allowed under the leases could have an adverse impact upon their cultural heritage, including sites of significance;
3. work and activity allowed under the leases could also affect the environment and flora and fauna in the area, which would impact on the Objectors as traditional owners of the area; and
4. the grant of the leases would be contrary to the public interest.

28. The assumption is that the proposed activities are likely to impact and affect the entirety of the lease area, particularly taking into account the provisions of sections 85(1) and (2) of the Act.

29. The Objectors assert that the Applicant is not genuine in its statement that it will consult with the Objectors. No consultation has taken place to date and the Applicant has not provided any detail of how it proposes to consult, including when and on what terms. They say that the assurance to consult is limited and vague rather than a serious commitment. After having heard evidence from Mr Sharma I agree with the Objectors' submission in this regard.

30. Despite the Applicant's undertaking to comply with the NTA the Objectors note that if the leases are granted, the Applicant will be obliged to negotiate in good faith with the Objectors within a period of 6 months (see s. 31(1)(b) NTA). However, the NTA does not prescribe any ongoing engagement following this period and does not

require the parties to enter into an agreement, only to negotiate with a view to reaching one (see **FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49**).

31. The Objectors submit that bare compliance with the NTA on the part of the Applicant will not allay their concerns about the grant of the leases to the Applicant. The Objectors submit that it is not in the public interest to interfere with or restrict the exercise of native title rights and interests and traditional culture. Further, that the Applicant's undertaking to consult "in accordance with the Aboriginal Heritage Act" is disingenuous, as that particular Act does not oblige proponents to consult.

32. The Objectors point to and rely on **BHP Billiton Pty Ltd v Karriyarra Native Title Claimants [2005] WAMW 12**:

> *"in some circumstances the [AH Act] may not in practice achieve as much by way of ensuring protection as may be achieved by other means, including the imposition of conditions pursuant to the Mining Act upon the grant of a tenement" (per Warden Calder at page 130).*

33. The Objectors submit that the Applicant has previously been found to have a particularly poor approach to cultural and heritage matters, including a complete lack of consultation. It points to and relies on the decisions made in:

- Independent Person Referral 1 of 2004;
- Mineralogy v Kuruma Marthudunera [2008] WAMW 3; and
- Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd [2009]

34. In support of this submission the Objectors point to the lack of detail which has been provided by the Applicant generally and the lack of clarity in the map it provided to them, making it difficult to assess the extent and seriousness of any impact of the proposed mining activities on the land.

35. The Objectors submit that the State Agreement does not lead to any conclusion that the Applicant is exempt from any statutory system, including objections pursuant to the Act. I share that view. Obviously the impact of the State Agreement and the intentions of the Government are something which are squarely within the contemplation of the Minister, who has a far wider discretion available to him than I do.

THE LAW

36. It is now well settled that the Warden is acting as a filtering process. In **Re Warden French; Ex parte Serpentine-Jarrahdale Ratepayers and Residents Association (1994) 11 WAR 315** Ipp J notes that:

> *"In hearing an application for the grant of [a mining lease] the Warden is performing an investigatory and recommendatory function that assists the Minister in determining whether the tenement should be granted".*

37. I am empowered to make a recommendation to the Minister, who may accept or reject that recommendation. Further, the Act expressly empowers the Minister to take into account the public interest.

38. It follows that it is incumbent upon the Applicant to adduce the necessary evidence to assist the court to discharge that function. In my view that simply has not happened in this case. I repeat and adopt what was said by Warden Wilson in **Mineralogy Pty Ltd v Kumura (No 2) [2002] WAMW 3** where he said:

> *"In my opinion, it is important that if I am to properly carry out my functions as a Warden I must be presented with sufficient information upon which to make a recommendation to the Minister. My function at these proceedings is to Act as a filter for the Minister in proceedings such as these".*

39. The question of public interest was considered by Franklin J in **Re Warden Heaney; Ex parte Serpentine-Jarrahdale Ratepayers and Residents Association Inc (1997) 18 WAR 320**.

Franklin J said at page 325:

> *"Whilst, on their own, private interests are not a relevant consideration, they may well be such if there is a public interest in their protection. It does not necessarily follow (although it might in a particular case) that, because of the provisions of those sections of the Act, there can be no aspect of public interest in an objection lodged by a private landowner or occupier who is entitled to the protection provided by those sections. That indeed was raised by Jacobs J in Sinclair in the above quoted passage which, in my view, in its entirety, appears appropriate to the concept of "public interest" in the context of the Act. It is important to recognise, however, that in that context the public interest is that identified in section 111A. Consequently, in my view, to be relevant as going to " public interest", an objection, whether lodged primarily in respect of a "private interest", or as one of "public interest" must contain a discernible objection concerning the public interest of such a nature as to be capable of exciting the consideration of the Minister under section 111A. That is to say, it must be discernible from the objection that it raises a question which, objectively viewed, can reasonably give rise to a concern that the disturbance of the relevant land or grant of the application may not be in the public interest. The determination whether or not such disturbance or grant is or is not in the public interest is a matter for the Minister to be taken into consideration in the exercise of his discretion under section 111A."*

40. The Applicant has not been forthright in providing that information.

41. Given the operation of section 111A of the Act, it is clear that objections need not only relate to non-compliance with the Act, but can encompass matters that go purely to the public interest. The Objector is clearly raising matters that go the public interest as opposed to private interests and they are clearly of such a nature as to be capable of exciting the consideration of the Minister under section 111A.

42. The Applicant's contention that the State is required to grant the leases pursuant to the State Agreement is fallacious and there is nothing in the State Agreement in my view to lead to that conclusion. Further, the existence of the State Agreement does not quarantine the Applicant from exposure to the Mining Act and from objections brought pursuant to section 111A. There is nothing to oblige the Warden to recommend the leases for grant or indeed to oblige the Minister to grant the leases.

43. In my view the Applicant has not placed sufficient material before me to enable me to properly discharge my function, properly assess the applications through the filtering process and make the appropriate recommendation to the Minister. It is not the role of the Warden to either make assumptions or to fill in the gaps. The Applicant has not condescended to provide details as to the location of the mines or the positioning of waste dumps, or the use of ground water, rendering it impossible to properly assess the impact of the

proposed mining on the public interest. That is not withstanding that the Objector of course bears the burden of establishing that the grant of the tenements is not in the public interest for the purposes of section 111A of the Act.

44. The Applicant's submission that the role of the Warden is to rubber-stamp an application if the provisions of the Mining Act have been complied with is plainly wrong. Further, the Applicant is mistaken in its submission that the objections are based on private interests and in its approach to the applicability of the Mining Act.

45. I accept the evidence of Mr Sampi and Mr Finlay, both of whom are senior and knowledgeable men within the KM group as to the significance of the land vis a vis native title and cultural and heritage matters. That evidence was not contested. I have also taken into account and accept their evidence in relation to the apparent reluctance to inform, consult and negotiate with the people (in compliance with legislation). Certainly I formed the view when hearing the case that the Applicant discloses a rigid approach and a sense of absolute entitlement in relation to its mining endeavours. The past conduct of Mineralogy as disclosed in previous case law as well as its approach in this matter gives rise to serious and genuine concerns about heritage protection within the leases as well as compliance with the legislation. It does not appear to me that the Applicant is genuine in its assertion to consult with the KM people.

46. I have concluded that the Objectors have satisfied me that it is not in the public interest to recommend the grant of the applications to the Minister.

CONCLUSION

47. Accordingly, for the reasons set out in my report to the Minister above it is my recommendation to the Minister that the applications be refused.