JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	WARDEN'S COURT
LOCATION	**:**	CARNARVON
CITATION	**:**	MINERALOGY PTY LTD - v - KURAMA
CORAM	**:**	WILSON SM
HEARD	**:**	22 MAY 2001
DELIVERED	**:**	20 NOVEMBER 2001
FILE NO/S	**:**	OBJECTION 1/001
TENEMENT NO/S	**:**	G08\52
BETWEEN	**:**	KURUMA MARTHUDUNERA NATIVE TITLE CLAIMANTS **(**Objectors) AND MINERALOGY PTY LTD (Applicant)

Catchwords:
Application\General Purpose Lease\Objection
Objection\Native Title\General Purpose Lease
General Purpose Lease\Native Title\Permit to Enter
Application\Permit to Enter\Native Title

Legislation:
Mining Act (WA) 1978 s.8(1), 28, 84(3), 86(1)(3)(4)(5), 87(1)(2), 104, 107, 111A
Mining Regulations (WA) 1981 r.38, 42B.
Interpretation Act (WA) 1984 s.18

Native Title Act (Cwth) 1993 s.3, 8, 24MD(6)(6A)(6B), 24AA, 24LA(1), 24MB(1), 26(1), 26A,B,C, 233, 253
Racial Discrimination Act (Cwth) 1975 s.9
Coastal Waters (State Powers) Act (Cwth) 1980 s.4(2)

Result:
Recommend that Application be refused.

Representation:

Counsel:

Mr JL Southalan	for the Objectors
Mr CP Stevenson	for the Applicant

Solicitors:

Pilbara Native Title Service	for the Objectors
Malleson Stephen Jaques	for the Applicant

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

Bromley v Muswellbrook Coal Coy Pty Ltd [1973] 129 CLR 342

Re Warden Heaney; Ex parte Flint v Nexus Minerals NL**,** Full Court WASC; Unreported No 1652/96 26 February 1997

Western Australia v the Commonwealth (1995) 183 CLR 373

Case(s) also cited:

NIL

Mineralogy Pty Ltd ("the Applicant") make application for the grant of General Purpose Lease 08/52 ("the GPL application") which is located near Cape Preston south of Karratha. Part of the GPL application is located in the

ocean and therefore the provisions of s. 107 of the Mining Act (WA) 1978 (" the Act ") applies.

Objection 1/001(“the Objection”) was lodged by the Kuruma Marthudunera Native Title Claimants (“the Objectors”) to the GPL application. The Objectors are one of the registered native title claimants for the area the subject of the GPL application.

The Applicant submits there has been compliance with the initial requirements under the Act and, therefore, seeks a recommendation to the Hon. Minister for the grant of the GPL application.

The Objection was initially concerned with seeking a recommendation that the Applicant comply with the Aboriginal Heritage (WA) Act 1972 and, in particular, that the Applicant conduct an aboriginal heritage survey in the area the subject of the GPL application.

At hearing, Counsel for the Applicant, indicated that the Applicant would not object to an endorsement on the instrument of licence that the Applicant complies with the provisions of the Aboriginal Heritage Act (WA) 1972. That endorsement can be included in the recommendation to the Hon. Minister for the grant of the GPL application.

At hearing, the Objectors sought leave to amend the Objection in respect to the GPL application. Leave was granted to amend the Objection by inserting in following ground:

> "The applicant has not complied with the provisions or intention of the Mining Act 1978, the Native Title Act 1993 (Cwth), or the Racial Discrimination Act 1975 (Cwth), and granting the tenement would be contrary to the public interest."

The Objector seeks that, if there is to be a recommendation for the grant of the GPL application to the Hon. Minister, such recommendation be subject to conditions to protect the heritage (including sites of significance), lifestyle and

use of natural resources of the Objectors, including the conduct of an adequate aboriginal heritage survey.

Counsel for the Applicant, submits that prior to the amendment of the Objection, the Objectors sought only to protect their private interests. However, the amendment of the Objection has now extended the grounds of the Objection to matters of public interest. With that I agree.

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."

The Objectors submit that it is not in the public interest to recommend the grant of the GPL application where there has been non compliance with the intention and provisions, of not only the Mining Act (WA) 1978("the Act"), but also the Racial Discrimination Act (Cwth) 1975("the RDA") and the Native Title Act (Cwth) 1993("the NTA").

In summary, the Objectors say that the public interest would be offended because, in respect to the RDA and the NTA, they are, for the purposes of the NTA, the claimants of the "ordinary title" to the land the subject of the GPL application. As such they are entitled to the same procedural rights as if they held freehold title to the land under any state law. Accordingly, the Objectors say the Applicant was required to (and did not) obtain a permit to enter upon the land the subject of the GPL application from the Warden pursuant to the Act. In that respect, the Objectors say the Applicant has discriminated against them and failed to comply with the procedural rights given to the owners of freehold land as provided by the NTA.

The Objectors further says that the public interest would be offended because, in respect to the Act, the Applicant has marked out the land the subject of the GPL application without a permit to enter, has sought that the area of the GPL application exceed that prescribed by the Act by some 399 times for an undefined and unlimited purpose of "infrastructure facility".

In my opinion, the matters raised by the Objectors are such that they 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 of the Act. It is not in the public interest that there be non-compliance with Commonwealth legislation, particularly where the non-compliance is discriminatory or results in the non-compliance with State legislation.

Evidence by both the Applicant and the Objector was produced in the form of affidavits. The Applicant relied upon the affidavit of Vimal Kumar Sharma ("Sharma") sworn 22 May 2001(Exhibit 1).

The Objector relied upon the affidavits of Louise Kate Southalan (" L Southalan") and Nicholas Paul Green ("Green") both sworn 15 May 2001, and recorded as Exhibits 2 and 3 respectively.

The affidavit of Sharma contains predominately, as annexes, copies of correspondence from the Applicant dealing with the issue of aboriginal heritage and native title matters. This correspondence was predominately that exchanged between the solicitors for the Applicant and the Objectors.

The affidavit of Southalan also deals with matters similar to that of Sharma. Annexed to Southalan's affidavit is, inter alia, a copy of a document marked "Public Environmental Review" which relates to the area the subject of the GPL application.

The affidavit of Green deals mainly with issues of aboriginal heritage and culture in the area the subject of the GPL application.

Submissions both written and oral were made by Counsel for the Applicant and the Objector in respect to the Application and Objection.

THE GENERAL PURPOSE LEASE APPLICATION

The Applicant's GPL application is for an area of 3990 hectares.

The manner in which an application for a general purpose lease may be made is provided for pursuant to s 86(4) of the Act and says:

"(4) An application for the grant of a general purpose lease in respect to any land-

(a) shall be made, and may be objected to, in like manner to an application for a mining lease; and

(b) shall be determined in the same manner as an application for a mining lease".

The size of the area of land for which a general purpose lease may be applied for is provided for by section 86(3) of the Act and says:

> "(3) The area of land in respect of which any one general purpose lease may be granted shall not exceed 10 hectares, unless the Minister is satisfied that a larger area of land is required for the purposes of the lease, and shall be limited to such depth below the natural surface of the land as may be specified in the lease or, where no depth is so specified, to 15 metres below the lowest part of the natural surface of the land."

Section 86(5) of the Act outlines the requirements for an application for a general purpose lease where the area applied for is to exceed 10 hectares and says:

> "(5) An application for the grant of a general purpose lease in respect of an area of land which exceeds 10 hectares shall be accompanied by a statement specifying the reasons why such an area of land is required for the purposes of the lease."

The purpose for which a general purpose lease may be granted is provided by s 87 of the Act and says:

> "(1) A general purpose lease entitles the lessee thereof and his agents and employees to the exclusive occupation of the land in respect of which the general purpose lease was granted for one or more of the following purposes -
>
> (a) for erecting, placing and operating machinery thereon in connection with the mining operation carried on by the lessee in relation to which the general-purpose lease was granted;
>
> (b) for depositing or treating thereon minerals or tailings obtained from any land in accordance with this Act;

(c) for using the land for any other specified purpose directly connected with mining operations.

(2) The purpose or purposes for which a general purpose lease is granted shall be specified in the lease."

Pursuant to s 87(2) of the Act, the Applicant annexed to the GPL application an attachment outlining the purpose or purposes for which the area of land was required. That attachment stated:

"Application for Mining Tenement (Attachment)

A general purpose lease for infrastructure facility including any of the following:

(1) a road, railway, bridge or other transport facility;

(2) a jetty or port;

(3) an airport or landing strip;

(4) an electrical generation, transmission or distribution facility;

(5) a storage, distribution or gathering or other transmission facility for:

oil or gas; or

derivatives of oil or gas;

(6) a storage or transportation facility for coal, any other mineral or mineral concentrate;

(7) a dam, pipeline, channel or other water management, distribution or reticulation facility;

(8) a cable, antenna, tower or other communication facility;

(9) any other thing that is similar to any or all of the things mentioned in paragraphs 1 to 8 above and that the Commonwealth Minister determines in writing to be an infrastructure facility for the purposes of paragraph (1) of "*infrastructure*

> *facility*" as set out in section 253 of the Native Title Act 1993 and regulations as amended from time to time."

Pursuant to s 86(5) of the Act, the Applicant's agent, W P Stewart and Associates Pty Ltd, in a statement dated 25 January 2001 to the Hon. Minister, outlined the reason why an area in excess of 10 hectares was required by the GPL application.

The statement said as follows:

> **"Applications for two general purpose leases under division 4 of the Mining Act (WA) 1978."**

Attached to this letter are two applications for general-purpose lease, one for an area of 1186 hectares ("the first GPL") and the other for an area of 3990 hectares ("the second GPL"). Please note that the first GPL connects on its southern boundary with the northern boundary of the second GPL.

Because these GPL's are each considerably in excess of the 10 hectare limit imposed by s 86 of the Mining Act, it is necessary for Mineralogy to seek approval to apply for GPL MIN excess of 10 hectares as provided by the Act.

The purpose for which the GPL's is sought is set out in the attached applications. The GPL's are required as part of Austeel Project which is currently Australia's largest industrial undertaking with a capital cost of $5 billion. This plan (and its associated steel plant) will produce well in excess of $2.5 billion worth of export income for Australia each year when fully operating (currently planned for 2004).

The purposes for each GPL are "*specified purposes directly connected with mining operations*" (s 87(1)(c) of the Mining Act).

These purposes are also set out in detail in the application themselves. Mineralogy hereby applies for permission under the Mining Act to apply for the two GPL's for areas greater than 10 hectares.

There are several reasons why the general purpose leases should be granted in excess of 10 hectares:

> "1. The grant of only two GPL's is administratively much easier for both the State and for Mineralogy, than would be the case if standard 10-hectare GPL's were granted. For the total area sought, no less than 518 GPL's would need to be issued of standard 10-hectare size - an administrative "nightmare for the department and the company and incur substantial additional cost for no good purpose". There will, for example, be far fewer renewal notices required.
>
> 2. The service of notices as required under the Act will be much more effectively and relevant to the third parties that receives it.
>
> 3. The process in the Warden's Court will be easier to follow and allow for any objections to be heard once, then multiple times in respect to different parts of the applications.
>
> 4. Survey and advertising will be simpler. Advertising costs will be lower and require less space than 518 separate applications.
>
> We request you confirm your approval at your earliest convenience."

The Applicant's agent, Wayne Stewart, signed the statement.

The Objector submits that the GPL application fails to comply with the Act in that the Applicant has:

> (1) sought to be granted an area in excess of the 10 hectares without a sufficient or justifiable reason;
>
> (2) failed to explain or adequately explain the purpose for which the area applied for is required.

The Objector argues that the purposes for which the Applicant seeks the grant of the GPL application cannot be characterised as any of the purposes provided by s 87(1) of the Act. In any event the Objector says, what the

Applicants calls an "infrastructure facility" is not directly connected or connected with mining operations and is more akin to "downstream processing".

The Applicant says that the grant of a GPL application would not be contrary to s 87(1) of the Act. The purpose for which GPL application is made can be characterised as being "in connection with mining operations for depositing or treating minerals obtained in accordance with the Act or using the land for a specified purpose directly connected with mining operations".

The Applicant in support of his argument referred to **Re Warden Heaney; Ex parte: Flint v Nexus Minerals NL**, Full Court WASC; Unreported No 1652/96, 26 February 1997, in which Kennedy J said:

> "It is important for the present purposes to note that the expenditure does not have to be on mining, as such, to satisfy the terms of reg 21. It may be 'in connection with' mining. The words 'in connection with' are words of wide import and, as with the words 'connected with', and, subject to the context in which the words are used, are capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote … in the present context, the words 'in connection with' can readily extend to matters leading up to mining."

In my opinion, it is important that the words "subject to the context in which the words are used" are not lost. That clarification creates the limits within which the context of any words can be taken.

"Mining Operations" is defined in s 8(1) of the Act as:

> "… any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted or refined or dealt with for the purpose of obtaining any mineral therefrom whether it has been previously disturbed or not and includes -
>
> (a) the removal of overburden by mechanical or other means and the stacking, deposit, storage and treatment of any substance considered to contain any mineral;

(b) operations by means of which salt or other evaporates may be harvested;

(c) operations by means of which mineral is recovered from the sea or any natural water supply; and

(d) the doing of all lawful acts incidents or conducive to any such operation or purposes."

The words "mining operations", is in my opinion, limited to the area directly required to erect, place or operate machinery on and connected with the extraction, storage and treatment of any earth, rock, stone, fluid, tailings or mineral-bearing substances from which minerals will be extracted.

Further, in my opinion, the words "dealt with for the purposes of obtaining any mineral therefrom" does not extend the meaning of the words "mining operation" to include anything outside the removal of the mineral (in this case) from the earth, its treatment and the erection and storage of equipment needed directly for that purpose.

The processes beyond mining operations that require land for the erection of equipment for the transportation of minerals to export facilities and other infrastructures such as power plants, conveyors, pipelines, roads and airstrips are not, in my opinion, in connection with or directly connected with mining operations for the grant of a general purpose lease.

I do not accept that all processes and all facilities that will in some way contribute towards the extraction of minerals from mineral bearing substances are intended by the Act to be regarded as part of “mining operations”. If that were to be the intention of the Act then, it would seem, there would be no need for the provision within the Act, for the grant of a general purpose lease or a miscellaneous license.

A general purpose lease is, in my opinion, designed to be an auxiliary lease to support the machinery for the extraction, storage and treatment of mineral-bearing substance. That is supported, in my view, by the limits placed

upon its size and shape by the Act. The applicant for a general purpose lease is required by the Act, to state the purpose for which the lease will be used, and the reason why an area in excess of the prescribed size should be granted.

It has been difficult to determine the exact purpose for which the Applicant proposes to use the 3990 hectares it seeks in the GPL application.

In my opinion, the Applicant has been less than forthright in its GPL application, with the Objector and me as to the purpose for which the area is required and why such a large area is required when the area generally granted does not exceed 10 hectares. In that respect, I refer to the letter from the Applicant's solicitor to the Objector's solicitor, dated 15 May 2001, and marked Exhibit 2, annexe LKS12, which states:

> "The requirements of our client for mining tenements at Cape Preston is evolving as the detail of the project is evolving. This is the usual process. The tenement applied for will be used for the establishment of infrastructure and processing facilities associated with the project."

Counsel for the Applicant said that the area applied for is needed for a project of this size. I simply do not accept that proposition. The Act requires an applicant for a general purpose lease, which exceeds 10 hectares, to satisfy the Hon. Minister that a larger area is required. The reason contained in the statement attached to the GPL application suggests that the only reason such a large area have been applied for is administrative convenience. In my opinion, the Applicant has not produced any reason that would suggest that the area applied for would be used for any of the purposes provided by s 87 of the Act.

Attached to Exhibit 1 annexe VS 21 is a copy of a brochure, which at page 14 outlines by way of schematic diagram the area the subject of the GPL application. According to that diagram, the area the subject of the GPL application will contain a desalination plant, conveyor belt, associated roads, pipelines, power lines, causeway, small craft harbour and import jetty.

The area shown in that schematic diagram and other various diagrams throughout the brochure does not in, my opinion, suggest that an area of 3990 hectares is required for the construction of various facilities for the Applicant's project.

In my opinion, such facilities would be more accurately described to include those purposes prescribed by r. 42B of the Mining Regulations for which the grant of a miscellaneous licence may be made under s. 91 of the Act.

Regulation 42B of the Mining Regulations (WA) 1981 provides:

"**Prescribed purposes for grant of miscellaneous licences**

42B. For the purposes of section 91(1), a miscellaneous licence may be granted for the use of land for one or more of the following purposes -

(a) a road;

(b) a tramway;

(c) an aerial rope way;

(d) a pipeline;

(e) a power line;

(f) a conveyor system;

(g) a tunnel;

(h) a bridge;

(i) taking water

(ia) a search for ground water;

(j) hydraulic reclamation and transport of tailings;

(k) an aerodrome;

(l) a meteorological station;

(m) a sulphur dioxide monitoring station; or

(n) any other purpose directly connected with mining operations approved by the Director General of Mines.".

In my opinion, regulation 42B(n) of the Mining Regulation is to be interpreted to mean purposes directly connected with mining operations of a type categorised by this regulation, pursuant to the ejusdem generis rule.

To interpret the provisions of the Act and its Regulations, relating to both general purpose leases and miscellaneous licences in any other way would, in my opinion, ignore the purposes and objects of the Act as required by s 18 of the Interpretation Act (WA) 1984.

A miscellaneous licence can be of any shape and size in accordance with Regulation 38 of the Mining Regulations (WA) 1981.

Counsel for the Applicant put to me that "In a project of this size and magnitude a miscellaneous licence is not the appropriate type of tenure from a bankability, feasibility and a state agreement viewpoint."

I accept that the project proposed by the Applicant is a very large project, as is the case for many projects in the north west of Western Australia.

However, size does not warrant or justify non-compliance or disregard to the provisions of the Act and its associated Regulations.

For those reasons, I am of the opinion, that the Objectors have raised in their Objection discernible matters concerning the public interest of such a nature as to be capable of exciting the consideration of the Hon. Minister under s. 111A.

Even if I were to accept the submissions of the Applicant in there best light, it is not in the best interests of the public I recommend to the Hon. Minister to grant the GPL application for such a large area, particularly when the purpose or purposes for which the land is intended to be used has not been sufficiently identified by the Applicant and, in any event, is not in compliance with the purposes provided by s. 87 of the Act.

Accordingly, I would recommend to the Hon. Minister that, pursuant to s. 111A, the application for General Purpose Lease 08/52 be wholly refused.

The Affect of the RDA, NTA and the Act on the GPL Application

The Objectors submit that, under the provisions of the RDA, if a law deals with the human rights of one race of people or ethnicity differently from that of another there is discrimination.

Section 9 of the RDA defines "human right" as including the "*right to own property alone as well as in association with others…and the right to equal participation in cultural activities*".

The Objectors say that their rights in the land the subject of the GPL application, as recognised by their law and culture, are not treated equally to the property rights recognised under the Torrens System of land administration. That the Objectors say is because the Act does not recognise the Objectors as freehold owners of the land the subject of the GPL application. As such, the Objectors say they are discriminated against contrary to the RDA.

The Objectors say that the High Court of Australia recognised that a written law discriminates where it treats the human rights of indigenous people differently to non-indigenous people.

In the case of **Western Australia v The Commonwealth** (1995) 183 CLR 373 at 437, the High Court said:

"Where indigenous persons have a right to own or to inherit property within Australia arising from their law and custom but the security or enjoyment of that property is more limited than the security enjoyed by others who have a right to own or to inherit other property, the indigenous persons are given, by section 10(1) of the Racial Discrimination Act, security in the enjoyment of their property 'to the same extent' as persons generally have security in the enjoyment of their property".

The Objectors contend that the NTA modifies the legal procedure and rights that would be otherwise available to them through the RDA. The Objectors submit that they are to be afforded the same procedural rights as if they were to hold the land, the subject of the GPL application, as freehold title.

In that regard, the Objectors submit that s. 24MD(6) & (6A) of the NTA is applicable to this matter. The failure by the Applicant to comply with any of the obligations under the NTA is, according to the Objectors, fatal to the GPL application.

There are a number of provisions of the NTA, which have a bearing upon the GPL application. A number of these provisions will be referred to which, in my opinion, are applicable to the GPL application.

The main objects of the NTA are stated in s.3 of the NTA to be, inter alia, provision for the recognition and protection of native title and the establishment of the ways in which future dealings affecting native title may proceed.

Section 5 of the NTA provides that the Crown, in right of the State of Western Australia, is bound by the NTA. Pursuant to s.8 of NTA, the NTA " is not intended to affect the operation of any law of the State…that is capable of operating concurrently with this Act."

The NTA considers different kinds of acts that affect native title and includes " future acts". Future acts is defined in s.233 NTA as being, inter alia, acts which take place after January 1st 1994 and which affect native title in the way set out in s.233. I am of the opinion that the grant of the GPL application will be a future act as provided by the NTA.

There are extensive provisions within the NTA that relates to the doing of future acts. These provisions are predominately contained in Division 3 of Part 2 of the NTA, particularly s.24AA to s.60AA.

Pursuant to s.24AA (1) of the NTA, "Acts that do not affect native title are not future acts".

The provisions of s.24LA (1) of the NTA do not apply to the GPL application as the grant of a general purpose lease will result in the conferral of an exclusive possession over the land and water to which the application relates. The exclusive occupation of the land the subject of the GPL application is conferred by s.86 (1) of the Act.

Section 24MB of the NTA makes provisions for subdivision M of the NTA to apply to a future act if it is an act that passes the freehold test. In my opinion, the grant of the GPL application is an act to which s.24MB (1) of the NTA applies. Accordingly, I am of the opinion that, the GPL application passes the freehold test under the NTA.

The provisions of sub division M of the NTA only applies to a future act if it relates to an onshore place. "Onshore Place" is defined by s.253 of the NTA to mean:

"land or waters within the limits of a State or Territory to which this Act extends ."

It is my opinion that, the limits of the State of Western Australia extends to the coastal waters 3 nautical miles from the low water mark pursuant to the provisions of s.4 (2) of the Coastal Waters (State Powers) Act (Cwth) 1980. The GPL application does not extend beyond 3 nautical miles from the low water mark of the coast. Therefore, the entirety of the GPL application is an onshore place under the provisions of the NTA.

Section 24MD of the NTA makes provision for the treatment of acts that pass the freehold test. Pursuant to s 24MD(6)(a) of the NTA the provisions of s 24MD(6A) and (6B) apply to "future acts" other than those to which subdivision P of the NTA applies.

By virtue of s 26(1)(c)(i) of the NTA, subdivision P of the NTA applies, to a "future act" that creates a right to mine, whether by the grant of a mining lease or otherwise, except where the act is done by the a State solely to create a mining lease for the sole purpose of the construction of an infrastructure facility associated with mining.

In my opinion, the NTA recognises and distinguishes between mining tenements for mining and those intended for the construction of infrastructure associated with mining.

"Mine" is defined by s.253 of the NTA and includes:

> "(a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or…..
>
> (a) quarry;
>
> but does not include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or the bed beneath waters, for a purpose other than:
>
> (d) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or
>
> (e) processing the sand, gravel, rocks or soil by non mechanical means."

"Infrastructure facility" is defined in s 253 of the NTA and says:

> "I**nfrastructure Facility"** includes any of the following -
>
> (a) a road, railway, bridge or other transport facility;
>
> (b) a jetty or port;
>
> (c) an airport or landing strip;
>
> (d) an electricity generation, transmission or distribution facility;

(e) a storage, distribution or gathering or other transmission facility for -

(i) oil or gas; or

(ii) derivatives of oil or gas;

(f) a storage or transportation facility for coal, any other mineral or any mineral concentrate;

(g) a dam, pipeline, channel or other water management, distribution or reticulation facility;

(h) a cable, antenna, tower or other communication facility;

(i) any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines in writing to be an infrastructure facility for the purposes of this paragraph."

Section 24MD(6) of the NTA, provides that unless a future act is one within the four named categories specified in that sub section then the consequences provided by sub section (6A) and (6B) applies.

In my opinion, the grant of the GPL application is not a future act applicable to sections 26A, 26B,or 26C of the NTA. I am also of the opinion that sub division P of Part 2 Division 3("Sub Division P") of the NTA does not apply to a future act such as the grant of the GPL application.

Sub Division P of the NTA applies where the future act is the grant of a right to mine. This creates for both the Objectors and Applicants a right to negotiate under the provisions of the NTA.

To "Mine" as defined by s.253 of the NTA includes, in my opinion, any of the activities the Act permits to be conducted on prospecting licences, mining leases and exploration licences.

Therefore, in my opinion, a general purpose lease and a miscellaneous licence, can for the purposes of the NTA be, characterised as an "infrastructure

facility". It follows, therefore, that a general purpose lease and a miscellaneous licence are subject to the consequences of s 24MD(6A) and (6B) of the NTA.

Section 24MD(6A) of the NTA says:

> "The native title holders, and any registered native title claimants in relation to the land or waters concerned, 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 and to the land adjoining, or surrounding, any waters concerned."

"Ordinary title" is relevantly defined by s. 253 of the NTA to mean:

"…in relation to an onshore place that is land, means:

> "(a) if the land is not in the Australian Capital Territory or the Jervis Bay Territory - freehold estate in fee simple in the land other than such an estate granted by or under a law that grant such estates only to or for the benefit of Aboriginal people or Torres Strait Islanders…"

"Procedural rights" pursuant to s 253 of the NTA means:

"….in relation to an act" means -

(a) a right to be notified of the act; or

(b) a right to object to the act; or

(c) any other right that is available as part of the procedures that are to be followed when it is proposed to do the act."

In my opinion, the word "act" referred to in the definition of procedural rights relates to any future act proposed to be carried out in respect to the land or water the subject of any native title claim. The right of a native title claimant or holder to be notified of a future act or to object to a future act, is in my opinion extended by the provision of clause (c) of the definition of "procedural right". Clause (c) of the definition of procedural right means, in my opinion, that any right that is available as part of any procedure that is to be followed before a future act can carried out must be afforded to the native title claimant or holder.

The provisions of s. 24MD(6A) of the NTA, provides that native title claimants or holders have the same procedural rights as they would have in relation to a future act on the assumption that they hold ordinary title to any land.

In my opinion, the provisions of s. 24MD(6A) of the NTA requires that any land or water that is held by native title holders or is subject to native title claim, is assumed to be land that is freehold estate in fee simple, or "private land" as defined in s. 8 of the Act. That assumption is to be held notwithstanding the true status of the land at law. The land the subject of the GPL application is Vacant Crown Land, but for the purposes of the NTA, is to be regarded as private land.

Accordingly, it follows that any land held or subject to a native title claim and is for the purposes of infrastructure facility it is to be regarded as private land. The provisions of the Act relating to private land must be complied with before any future act can occur. In this case the future act would be the grant of the GPL application.

The granting of a permit to enter upon private land is provided by s.30 of the Act and says:

> "30. (1) A person who desires to enter on any private land to search for any mineral or to mark out a mining tenement may apply in writing to a Warden for a permit to enter on the private land."

A person is not permitted to enter upon private land unless in accordance with s.28 of the Act which states:

> "(4) A person shall not enter on any private land for any purpose referred to in subsection (1) unless he does so pursuant to a permit issued under section 30."

Consequently, the Applicant was required to obtain a permit from a Warden to enter upon the area of the GPL application to mark out. To enter

upon the land, the subject of the GPL application, for the purposes of marking out without a permit is unlawful pursuant to the provisions of s.28 of the Act.

There has been nothing produced to me, by either the Applicant or the Objectors, to satisfy me that that the Applicant complied with s.28 of the Act by obtaining from a Warden a permit to enter the land the subject of the GPL application for the purposes of marking out.

Accordingly, I find the Applicant, failed to obtain a permit to enter upon the land, the subject of the GPL application, before marking out occurred.

It is not in dispute, that the method of marking out, the service of the GPL application on the appropriate parties and advertising has occurred otherwise than in accordance with the Act.

In **Bromley v Muswellbrook Coal Company Pty Ltd [1973] 129 CLR 342** at 346 the Honourable Mr Justice Menzies said:

> "It is not to be thought that a trespasser who marks out land could obtain priority under section 57(10) for what he has done unlawfully. Accordingly the coal company's application is not an application authorised by section 70B and cannot be granted under section 58."

Therefore, it is clear that where the marking out of a mining tenement takes place other than as is lawfully provided by statute, an applicant cannot be rewarded with the grant of the tenement.

For those reasons I would recommend to the Hon. Minister that application for General Purpose Lease 08/52 be refused.