McCleary Investments Pty Ltd v Hudson & Anor [2007] NTSC 16

PARTIES:	McCLEARY INVESTMENTS PTY LTD v HUDSON, Donald and NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	SC 158 of 2006 (20632639), SC 8 of 2007 (20701919) and LA 2 of 2007 (20701993)
DELIVERED:	27 February 2007
HEARING DATES:	12 – 14 February 2007
JUDGMENT OF:	RILEY J

CATCHWORDS:

ADMINISTRATIVE LAW – Appeals from Administrative Authorities – Availability of an appeal – decision to grant or refuse approval to enter land – warden acting ministerially not judicially – no appeal allowed

ADMINISTRATIVE LAW – Judicial Review – s 83 Mining Act – jurisdiction of warden – prospective or conditional approval to enter land

may be granted – decision of warden discretionary – guided by purpose, objects and structure of the Act – regard to government policy

ADMINISTRATIVE LAW – Judicial review – s 83 application – no denial of procedural fairness – no impermissible fettering of discretion

MINING – Legislation relating to mining for minerals – Miners rights and mining licences, tenures and interests – s 178(1A) Mining Act – entry on to land prohibited until revocation of land reserved from occupation

MINING – Legislation relating to mining for minerals – Miners rights and mining licences, tenures and interests – s 164 Mining Act – priority – time of receipt of application – effect on applications received after close of business – effect of deeming provisions – s 165(3) Mining Act – priority as between competing exploration licence applications

MINING – Legislation relating to mining for minerals – Miners rights and mining licences, tenures and interests – s 164A Mining Act – substantial compliance – effect where compliance in fact – time when marking out is deemed completed

MINING – Legislation relating to mining for minerals – Miners rights and mining licences, tenures and interests – s 21 Mining Act – where an exploration licence application is lodged prior to a mining tenement application no mining tenement application can be lodged

Mining Act (NT)
Mining Regulations (NT)
Local Court Act
Northern Territory Government Gazette 9/63 – 2006

Enterprise Gold Mines NL v Mineral Horizons NL (No 2) (1988) 52 NTR 23 – followed
Wade v Burns (1966) 115 CLR 537 – followed
Re Calder SM; Ex parte Gardner (1999) 20 WAR 525 – applied
Ex parte Phillips (1906) 23 WN (NSW) 145 – referred to
Ex parte Miller (1907) 7 SR (NSW) 214 – referred to
Keogh v Heffernan (1961) SR (NSW) 535 – referred to
Wake v Murphy (1916) 16 SR (NSW) 523 – referred to

Wallamaine Colliery P/L v Cam & Sons P/L (1961) SR (NSW) 195 – referred to
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1985-1986) 162 CLR 24 - followed
R v Anderson; ex parte Ipec-Air Pty Ltd (1964) 113 CLR 177 – referred to
Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth (1977) 139 CLR 54 – referred to
Bread Manufacturers of New South Wales v Evans (1980-1981) 180 CLR 404 – referred to
Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 420 – followed
Re Drake v Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 644 – referred to
Morellini v IPT Systems Ltd (2003) 34 SR (WA) 40 – referred to
Hong v Minister for Immigration and Multicultural Affairs (1998) 82 FCR 468 – applied

REPRESENTATION:

Counsel:

Plaintiff:	L Silvester with G Clift
Defendants:	J Reeves QC with M Story

Solicitors:

Plaintiff:	Ward Keller
Defendants:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McCleary Investments Pty Ltd v Hudson & Anor [2007] NTSC 16
No SC 158 of 2006 (20632639), SC 8 of 2007 (20701919)
and LA 2 of 2007 (20701993)

IN THE MATTER OF the *Mining Act (NT)*

AND IN THE MATTER OF an appeal against decisions handed down by the Mining Warden at Darwin

BETWEEN:

McCLEARY INVESTMENTS PTY LTD
Plaintiff

AND:

HUDSON, Donald
First defendant

and

NORTHERN TERRITORY OF AUSTRALIA
Second defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 27 February 2007)

[1] The Mining Act (NT) permits the relevant Minister to reserve certain land from occupation under the Act. The effect of so doing is to prohibit the making of any application for an exploration licence, an exploration retention licence or a mining tenement in respect of the land. On

2 November 2006 the Minister announced that identified land that had been reserved from occupation was to be released for exploration. The announcement was followed up by an advertisement in the local press and the publication of an "information package" on the website of the Department of Primary Industry, Fisheries and Mines.

[2] The information package advised that a review of all land covered by such reservations (ROs) within the Northern Territory had been conducted and 18 areas of land had been identified to be released by way of revocation. Included in those areas was land described as RO1292 (Amadeus Basin - Angela and Pamela Uranium Prospects) and RO1103 (Alice Springs Region). According to the information package the revocation was intended for publication in the Government Gazette on 6 December 2006 and, in due course, publication occurred on that day. The notices of cancellation of reservation related to each of RO1103 and RO1292 and advised that the Minister had, under s 178(1) of the Mining Act, cancelled the reservation from occupation "with effect on and from 7 December 2006".

[3] The information package went on to record that exploration licence applications over the areas were invited to be lodged in accordance with the terms of the Mining Act. No mention was made of applications for other mining tenements such as mineral leases or mineral claims.

[4] It was noted that the Angela and Pamela uranium prospects had been actively explored in the 1980s and that it was anticipated there would be a

high level of interest in these prospects. In light of that expectation applicants were invited to include within their applications a range of information regarding the past performance of the applicant, its financial and technical capacities and other information which would be relevant to the awarding of an exploration licence in circumstances where there would be more than one applicant. The information package went on to note that:

> "The basic objective in awarding any exploration licence is to select the application most likely to achieve the fullest assessment of the mineral potential within the area in the minimum guaranteed period."

The attention of applicants was drawn to the provisions of the Mining Act which dealt with timing and issues of priority in lodging and considering exploration licence applications. It was stated that no applications could be received before 7 December 2006 and that applications received after that date would be of no force or effect.

The applications by the plaintiff

[5] The plaintiff company, through its Managing Director Mr N S McCleary, became aware of the announcement and obtained a copy of the information package. Mr McCleary conducted some research with the assistance of the Mines Department and determined that he would peg mineral claims in respect of the Angela and Pamela prospects. He did not intend to apply for an exploration licence.

[6] An application for a mineral claim is made to the Minister pursuant to s 83 of the Act. That section is in the following terms:

> "83. Form of application for mineral claim
>
> (1) In addition to the requirements of section 140D (if applicable) and section 162, an application for a mineral claim –
>
> (a) shall be lodged with the Department;
>
> (b) shall include a description of the land to which the application relates;
>
> (c) shall include concise particulars of the applicant's proposals for initial work and expenditure on the land;
>
> (d) shall state the names and addresses of the owners and occupiers of land that will be, or is likely to be, affected by the grant of the proposed claim;
>
> (e) shall state the percentages into which the proposed claim is to be divided; and
>
> (f) shall be accompanied by an amount of money sufficient to cover the cost of advertising the application as required by this Act.
>
> (2) An application under subsection (1) shall not be made in respect of land the subject of an exploration licence, nor shall a person enter the land for the purpose of marking out the land in the prescribed manner before the application is made, unless the holder of the exploration licence has consented in writing to the application being made.
>
> (3) An application under subsection (1) shall not be made unless the applicant has, prior to making the application, obtained the approval of a warden to enter the land the subject of the proposed application for the purpose of marking out that land in the prescribed manner.

(4) An approval under subsection (3) shall be in the prescribed form and may be subject to such conditions, if any, as the warden thinks fit and specifies in the approval.

(5) A person who contravenes or fails to comply with –

(a) this section; or

(b) an approval granted under subsection (3),

is guilty of an offence.

Penalty: $5,000."

[7] In order to comply with s 83(3) Mr McCleary engaged Capricorn Mapping and Mining Title Services to apply for approval to enter the land, the subject of RO1292 and RO1103. To disguise his interest in RO1292 and RO1103 Mr McCleary instructed that the application relate to a wider range of land, the subject of ROs, which included both RO1292 and RO1103. The application was lodged and, on 20 November 2006, the Department advised Mr McCleary that approval to enter would not be granted because some of the areas he wished to enter were already covered by a granted title or were under application.

[8] On 4 December 2006 a further application for approval to enter land was lodged, this time limited to RO1292 and RO1103. The warden responded by letter dated 5 December 2006 outlining concerns he had with the application and seeking comment from the plaintiff. In his letter he expressed "the preliminary view that until such time as the various reservations from

occupation are revoked over the subject areas to which you seek access I have no authority to grant your request". The solicitors for the plaintiff, Ward Keller, responded by letter dated 6 December 2006 making various submissions. At about 5.20 pm on 6 December 2006 Mr McCleary telephoned the Principal Registrar and Director of Titles of the Department, Mr P F Whitfield, and pressed him for information as to whether the warden had granted the approval to enter the land. He was advised by Mr Whitfield that the warden had sent advice of his decision to the plaintiff's representative and, when pressed further, Mr Whitfield said: "I believe he may have refused your submission". In fact a notice of refusal of the application was sent by facsimile from the office of the warden to Ward Keller, the solicitors for the plaintiff, at 5.59 pm on that day (*the first 11A decision* – so called because Mining Regulation 11A applies). It clearly stated that approval had been refused.

[9] Notwithstanding the advice he had received from Mr Whitfield, Mr McCleary and a "pegging crew" he had assembled, went out to the area on 6 December 2006 and, immediately after midnight, proceeded to mark out areas on RO1292. The process continued until about 1.30 am when work was abandoned for the night. On the morning of 7 December 2006 the party returned to the land and completed the marking out process by flagging trees in accordance with the requirements of Regulation 19 of the Mining Regulations. The process was completed at about 2 pm on that day.

[10] On the morning of 7 December 2006 the solicitors, Ward Keller, wrote to the Mining Warden, Mr Hudson, requesting written reasons for his refusal to approve entry onto the land. Those written reasons were provided on 9 January 2007. Also on 7 December 2006 Ward Keller, in a separate document, again sought approval for the plaintiff to enter the land formerly the subject of RO1292. That application was also rejected in a response of the same day (*the second 11A decision*) with the explanation of the warden that:

> "I am aware that due to applications for exploration being received, pursuant to s 21 of the Mining Act, that there is no land available within the subject area that is requested by McCleary Investments Pty Ltd, accordingly the request for approval to enter on land is refused."

[11] In the meantime Capricorn lodged with the Department by e-mail applications for mineral leases over the land formerly the subject of RO1103 and RO1292. These were received by the Department at 12.24 am on 7 December 2006. Copies of the forms were also received by facsimile. In relation to those mineral lease applications the Department responded later in the morning advising that the applications "may not be valid pursuant to s 21(1) of the Northern Territory Mining Act" and would not be accepted until further investigations had been conducted (*the first ML decision*). Advice was given that if the plaintiff wished to lodge exploration licence applications those applications would be considered along with any other such applications received during the course of the day.

[12] On 15 December 2006 the Principal Registrar wrote to Capricorn advising that the applications for mineral leases over the areas formerly known as RO1292 and RO1103 "are not able to be accepted" (*the second ML decision*) because:

> "Pursuant to s 21(1) of the Mining Act where a miner has applied for the grant of an exploration licence, no miner, including the applicant, may subsequently lodge an application for the grant of a mining tenement in respect of the land until the Minister has granted or refused the exploration licence.
>
> Exploration licence applications were lodged with this Department over both areas prior to the mineral lease applications. Accordingly, under s 21(1) the applications for the mineral leases, or any other form of mining tenement or exploration retention licence cannot be accepted."

[13] On 20 December 2006 Ward Keller on behalf of the plaintiff sought to lodge seven mineral claim applications identified as "Ghan 1 to Ghan 7" regarding portion of the land formerly the subject of RO1292 but those applications were not accepted (*the MC decision*).

The entries onto the land

[14] In an affidavit sworn on 9 February 2007 Mr McCleary said, in relation to his entry upon the land at around midnight on 6 December 2006, that:

> "My state of mind was that the warden had not refused permission to the plaintiff to enter the land, including the areas, and that he would grant such permission."

How that could be so in light of the advice he had received from Mr Whitfield and in all the surrounding circumstances is problematic. When

he was cross-examined regarding this issue Mr McCleary said he simply did not believe Mr Whitfield. This was said notwithstanding the evidence of Mr McCleary that he contacted Mr Whitfield specifically to obtain that information and it was only forthcoming after he pressed Mr Whitfield for an answer. Mr McCleary gave evidence that he thought the warden was withholding his approval until the following day and would at that time grant approval for the plaintiff to enter upon the land. When further questioned he said that at the time he entered upon the land before midnight on 6 December 2006 he was of the view that the "warden either had not given approval or had not made up his mind". If that be so, then, at the time he entered upon the land, Mr McCleary must have believed permission to do so had not been granted.

[15] The state of mind of Mr McCleary at the relevant time may also be assessed in the light of the initial response from the warden to his application for approval to enter the land. On 5 December 2006 he had received the letter from the warden in relation to his earlier application in which the warden advised he had formed a "preliminary view" that he had no authority to grant approval to enter upon the land "until revocation occurs".
Mr McCleary had no reason to believe the preliminary view of the warden had changed. In his evidence he acknowledged that he had instructed his solicitors to write to the warden expressly advising that the plaintiff had no "intention to enter onto the land until it is no longer reserved from occupation". Further he instructed his solicitors to advise the warden that,

should the approval not be forthcoming by 1.30 pm on 6 December 2006, the plaintiff "will be obliged to urgently consider any other option open to it to obtain that approval". The time limit passed. No other option was pursued although an application to a magistrate/warden was available, as was the seeking of injunctive relief. There can be no doubt Mr McCleary was aware of the need for approval and the importance of the approval.

[16] Despite his initial evidence to the contrary, it is plain that Mr McCleary did not believe that he had approval to enter upon the land pursuant to s 83(3) of the Act at any relevant time. His entry upon the land was in full knowledge of the requirements of the Act for approval and occurred in the knowledge that he did not have such approval.

[17] Mr McCleary was responsible for at least four entries upon the land before RO1292 and RO1103 were revoked. He drove out to the land and entered upon it on 3 or 4 December 2006 to "look at the lay of the land". On 5 December 2006 he sent members of his pegging crew to the land "to acquaint themselves with the ground in daylight". On the morning of 6 December 2006 he caused agents to deposit in excess of 100 concrete blocks on the land in areas designated as being Mineral Claims Ghan 1 to Ghan 7. Two truckloads of blocks and four men entered upon the land at his direction "to facilitate the marking out of the said areas on 7 December 2006". He said of those men that they must have had GPS assistance to place the blocks near to where they would be required. Finally he, and others at his direction, entered on the land prior to midnight on 6 December

2006 so that he would be in a position to drive in the first peg at one second after midnight.

[18] The following morning Mr McCleary, along with members of his pegging team, returned to the area and again entered upon the land. It was undisputed that at the time of this fifth entry upon the land he had received a copy of the advice of the warden to the effect that his application for approval to enter the land had been refused. Notwithstanding that express advice he returned to the land.

[19] At no time did the plaintiff or Mr McCleary obtain approval to enter upon the land in respect of any of those occasions. By way of explanation of his conduct in entering the land without approval, Mr McCleary said that in his view he did not require permission unless he intended to physically drive pegs into the ground. He said of each of the entries that they were not for the purpose of marking out the land but, rather, were preparatory to that process. He did not seek legal advice in relation to the view he had formed.

[20] Each of the entries upon the land was for the purpose of marking out the land. The only reason for each entry was the intention to peg the land soon after midnight on 6 December 2006. The trips were to familiarise the team with the land, to deliver materials for use in the marking out process and for Mr McCleary and others to be present for the striking of the first peg. Each entry was solely for the purpose of marking out the land and each entry required approval. None was obtained. I reject the evidence of

Mr McCleary as to his state of mind. I did not find him to be a satisfactory witness. I do not accept that he believed he only needed approval to enter the land for the physical activity of pegging the land.

The review

[21] These proceedings were commenced on 21 December 2006. The plaintiff sought to appeal the first 11A decision and the second 11A decision which were both made by the warden. In the alternative it sought judicial review of those decisions. Further the plaintiff sought judicial review of the remaining decisions which were made by the Principal Registrar, Mr Whitfield. All of the proceedings were heard together.

The availability of an appeal

[22] It is necessary to determine whether an appeal is available regarding the two Regulation 11A decisions made by the warden. The right of appeal is to be found in s 159 of the Mining Act which allows an appeal from a "decision of a warden's court or a warden in the same manner as an appeal against a decision of the Local Court or a Magistrate so lies". Section 19 of the Local Court Act allows an appeal on a question of law from a final order of the court. The reference in s 159 of the Mining Act to an appeal from a decision of a warden makes it clear that, for an appeal to lie, it is not necessary that the warden be sitting as a warden's court: *Enterprise Gold Mines NL v Mineral Horizons NL (No 2)* (1988) 52 NTR 23 at 25.

[23] In *Enterprise Gold Mines* the Full Court considered the nature of an appeal under s 159 of the Mining Act. Asche CJ expressed the view that there should be a right of appeal where there is a "decision in the sense of a choice made after considering alternatives" (ie a decision which is judicial in character) arrived at by either a warden or a warden's court, as distinct from an administrative act. In other words, there will be a right of appeal where the warden fulfils a judicial function by determining disputes between parties that arise under the Mining Act. In the case of administrative functions that do not involve such a decision the appropriate remedy lies in the field of judicial review.

[24] In *Wade v Burns* (1966) 115 CLR 537 Barwick CJ observed that the grant or refusal of an application for authority to enter upon land involves a warden acting "merely ministerially as an official, and not in any sense in exercise of a jurisdiction". He went on to say that the nature of the warden's function in the circumstances of the New South Wales Act in determining an application for authority to enter upon land involved consideration of matters of law upon which it was unlikely that the legislature intended committing its decision "unexaminably to the warden" and he concluded that "the Court is free to decide that question itself". He went on to conclude that mandamus will lie in relation to such a function.

[25] In *Re Calder SM; Ex parte Gardner* (1999) 20 WAR 525 the Western Australian Court of Appeal considered the issue of whether a warden was carrying out administrative functions or judicial functions in the particular

circumstances of that case. Ipp J (with whom Pidgeon J agreed) observed that: "A warden, acting other than as the warden's court and not sitting in open court, may act judicially or administratively, depending on the nature of the functions to be discharged". He illustrated this by identifying functions which he regarded as "purely administrative functions" and included in that category the provisions of s 30(1) of the Western Australian Act of which he said: "It empowers a warden to permit a person to enter private land to search for any mineral or mark out a mining tenement". He relied upon *Wade v Burns* (supra) in support.

[26] As counsel for the defendant pointed out, there has been a similar conclusion reached in a series of New South Wales cases where approval to enter private land issued under the authority of a warden was held to be ministerial or administrative: *Ex parte Phillips* (1906) 23 WN (NSW) 145; *Ex parte Miller* (1907) 7 SR (NSW) 214; *Wake v Murphy* (1916) 16 SR (NSW) 523; *Keogh v Heffernan* (1961) SR (NSW) 535 and *Wallamaine Colliery P/L v Cam & Sons P/L* (1961) SR (NSW) 195. Those cases are, of course, not binding on me. However they reflect a consistent approach to the issue over many years. No authority to the contrary was identified.

[27] The decision of a warden to either grant or refuse an application for approval to enter land, the subject of a proposed application, is a ministerial or administrative decision. It is not amenable to appeal under s 159 of the Mining Act. In the circumstances the appeal in relation to the two

Regulation 11A decisions made by the warden is incompetent and the proceedings in that regard must be dismissed.

The first and second 11A decisions – Judicial review

[28] The first and second Regulation 11A decisions were made by the Mining Warden and were to refuse the plaintiff's applications to enter the relevant land. The first refusal was communicated to the legal representatives of the plaintiff on 6 December 2006 prior to the revocation of the reserved status of the land and the second was communicated on the morning of 7 December 2006 after the revocation.

[29] The Mining Act allows for an application to be made to a warden to enter on land. The application may be made by the holder of a miner's right (which the plaintiff held) under s 11 of the Act "to survey and reconnoitre" the land. Such an application may also be made under s 83 of the Act for the purpose of marking out the land in relation to an application for a mineral claim. In this matter each of the applications made on behalf of the plaintiff was made pursuant to s 83 of the Act. The first such application was in a document which included advice that the intention was "to peg MCs as per the Act" and therefore necessarily referred to s 83(3). The plaintiff wished to apply for a mineral claim and sought to enter upon the land in order to mark out the land for that purpose. When the next application for approval to enter upon the land was made the situation was the same and the rejection included reference to it being an application pursuant to s 83 of the Mining

Act. No issue was taken by the plaintiff with this. In his evidence Mr McCleary made it clear that the plaintiff had no need or desire to make application for approval under s 11 of the Act. The belief of the plaintiff from its research was that there was a considerable deposit of uranium in the area. In its view the necessary exploration had already been done by others.

[30] The decision of the warden on each occasion was a discretionary decision of an administrative kind and this Court has a limited role in reviewing such decisions. The general principle was expressed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-1986) 162 CLR 24 where it was said (at 40-41):

> "The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned."

[31] At the request of the plaintiff the warden gave reasons for decision in relation to the refusal of the first 11A application. The initial concern of the warden was that he did not have jurisdiction to grant the application because, at the time, the land was the subject of reservation from occupation under s 178(1) of the Act. He referred to s 178(1A) which provided that "an application for an exploration licence, exploration retention licence or mining tenement shall not be made in respect of any land reserved from occupation" under s 178(1) of the Act. The warden concluded, correctly,

that the requested approval for the plaintiff to enter upon land pursuant to s 83 of the Act was to facilitate the making of such an application in relation to land contained in the reservation. He reasoned that, as the making of such an application was prohibited by the terms of s 178(1A), s 83 must be read subject to that provision and he therefore concluded that he had no discretion to exercise. In so deciding he overlooked the fact that the application on behalf of the plaintiff was expressed to be for approval to enter once the reservation had been revoked, at which time s 178(1A) would have no further impact. He was not being asked to authorise entry in order to facilitate an application in contravention of s 178(1A) but, rather, to authorise entry if and when the revocation had taken effect. The application for approval under the section was prospective and, by virtue of s 83(4), approval may have been granted subject to conditions including a requirement that entry shall not occur unless and until some future act, in this case the revocation, had taken effect. There is nothing in the section which suggests conditional approval should not be granted in an appropriate case. In my view the warden did have the power to authorise entry as requested and he erred in concluding otherwise.

[32] Notwithstanding his conclusion the warden, quite appropriately, went on to consider the decision he would make if he did have jurisdiction. He concluded that he would not, in any event, have granted approval to enter upon the land in this case. He rejected the contention of the plaintiff's solicitors that the grant of an approval was "automatic". He observed that,

as there were no express criteria contained in s 83 of the Act, he should exercise his discretion in accordance with general principles and be guided by the purpose, objects and structure of the Act. He was correct in adopting that approach to his task: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (supra at 39-40 per Mason J).

[33] The warden then referred to the two objects set out in s 3A of the Act being to provide a framework within which persons may undertake activities to explore for and mine mineral resources and the need to enable the value of the mineral resources in the Territory to be maximised. He concluded that the approach referred to in the document entitled "Information Package Release of Land for Exploration" issued by the Department of Primary Industry, Fisheries and Mines met those objectives. He went on to say:

> "In considering this material I formed the view that the intention of the Northern Territory Government was to announce, in advance, the proposed revocation of the ROs in order to allow prospective mineral explorers to lodge applications for the grant of an exploration licence (EL). This intention was formed in the knowledge (as indicated by the content of the information package) that by virtue of the operation of ss 18(aa) and 164(2) all applications for the grant of an EL received on 7 December would be considered of equal priority.
>
> I also formed the view based on the information contained in the 4 December application that the intention of the applicant was to peg the subject area at 0001h on 7 December 2006 and that any subsequent application for a mineral claim would be considered as received at this time and receive (pursuant to s 164(1)) priority over any EL (or other) applications received subsequent to this time.
>
> I concluded that the applicant was attempting to create for itself an advantage over those who intended to follow the course proposed by

> the government and lodge EL applications over the course of the day (7 December 2006)."

[34] The warden went on to say that he sought to exercise his discretion in a manner that he considered would enable the value of the mineral resources to be maximised and also in a manner that was efficient and responsible as required by s 3A(2)(f) of the Act. He stated that he was entitled to consider and take into account the announced government policy but noted, correctly, that the policy was not binding upon him. It was a relevant consideration.

[35] The reasons of the warden make it plain that he did not regard himself as being obliged to give effect to government policy. Rather, he concluded for himself that the objects and purposes of the Act would be furthered by adopting the approach he followed. In particular he concluded that to grant approval to enter upon the land which, in turn, would lead to the plaintiff lodging an application for a mineral claim over the land, would be inconsistent with the object of enabling the value of mineral resources in the Territory to be maximised and would not promote an "efficient and responsible" approach to the release of the land.

[36] It is not an error on the part of a decision maker in the position of the warden in this case to have regard to government policy: *R v Anderson; ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 205-206; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 61 and at 115. See also the discussion of the issue by Mason and Wilson JJ in *Bread Manufacturers of New South Wales v Evans* (1980-1981) 180 CLR

404 at 429-431. This was not a case where the warden was expressly excluded from taking government policy into account and it was not a case where he was obliged to make his decision by reference to defined criteria or considerations. As was observed by Bowen CJ and Deane J in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 420:

> "Ordinarily, however, an administrative officer charged with the exercise of discretionary power will be entitled, in the absence of specifically defined criteria or considerations, to take into account government policy. The propriety of paying regard to general policy considerations is most evident in a case such as the present where there are no specified statutory criteria for the exercise of the discretionary power and where the power is entrusted to a Minister of the Crown responsible to Parliament."

See also *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 644 per Brennan J (President) and *Morellini v IPT Systems Ltd* (2003) 34 SR (WA) 40.

[37] In the circumstances of this case the warden determined that the intention of the plaintiff was to bypass the scheme devised to facilitate the efficient and orderly release of land for the purposes of the Act. The plaintiff sought to exploit what it saw as a loophole in the scheme in order to obtain for itself an advantage over others who had an interest in the mineral potential of the land. The decision of the warden, which served to avoid that consequence, was consistent with the objects of the Act. It allowed the value of the mineral resources concerned to be maximised. The warden expressed himself in the following terms:

> "If I did not have regard to the announced intentions of government (assuming I was however somehow aware of the proposed revocation of the RO) but considered the application purely against the legislative and factual setting extant at that time, I formed the view that to allow the applicant the advantage over other potential miners and explorers which would arise from the granting of the application would not further the objects and purpose of the Act and accordingly I would decline to exercise my discretion in the applicant's favour."

[38] I see no error on the part of the warden in proceeding as he did and in reaching the conclusions he reached.

[39] In relation to the second 11A decision which was made on 7 December 2006 the warden gave the following reason for refusing the application of the plaintiff for entry upon the land:

> "I am aware that due to applications for exploration being received pursuant to s 21 of the Mining Act that there is no land available within the subject area that is requested by McCleary Investments Pty Ltd, accordingly the request for approval to enter on land is refused."

[40] Section 21(1) and (2)(d) of the Mining Act are as follows:

> "(1) Subject to subsection (2), where a miner has applied to the Minister for the grant to that miner of an exploration licence, no miner, including the applicant, may subsequently lodge an application for the grant of a mining tenement or exploration retention licence in respect of the land or any part of it while the Minister has not granted or refused the grant of the exploration licence applied for.
>
> (2) Subsection (1) does not prevent –
>
> …
>
> (d) a miner from lodging an application for the grant of a mining tenement or exploration retention licence in respect of

> land the subject of an application for an exploration licence where the land was marked out in the prescribed manner on or before the date on which the application for the exploration licence was lodged."

[41] At the time of the receipt of the second 11A application there was in existence a series of exploration licence applications in relation to the land. Further, for reasons I will discuss shortly, the land had not, at that time, been marked out in the prescribed manner. It followed that there was no purpose to be served in granting approval to the plaintiff to enter upon the land because of the effect of s 21. The application did not reveal the purpose for which the plaintiff sought to enter upon the land but if it was to re-peg the land for the purpose of seeking the grant of a mining tenement it would fall foul of s 21.

[42] Adopting a scattergun approach, the plaintiff went on to challenge the 11A decisions of the warden on numerous additional bases. Some of the complaints made by the plaintiff relied upon the provisions of s 11 of the Act. As has been pointed out the only applications made by the plaintiff were pursuant to s 83 of the Act and s 11 had no relevance to the proceedings.

[43] It was submitted that the warden undertook an impermissible fettering of his discretion. The submission focused upon s 11 of the Act and was therefore misconceived. In relation to the applications as lodged under s 83 of the Act the reasons for decision of the warden do not reveal any impermissible fettering of the discretion. The warden proceeded in accordance with his

view of the purposes, objects and structure of the Act. It has not been demonstrated that he fell into error.

[44] The plaintiff contended that it was denied procedural fairness in that the warden did not alert it to "all the reasons why the (warden) was proposing to deny the plaintiff vested statutory rights and legal and other interests under the Act, particularly the rights of holders of miner's rights to apply for an ML and mark out and apply for an MC". The submission is misconceived. The right of the holder of a miner's right to apply for approval to enter land is to be found in s 11 of the Act. The plaintiff did not seek entry under that provision. In addition, in relation to an application for a mineral lease, there is no need to enter upon the land in order to make such an application. In any event had the plaintiff made more detailed submissions on the matters of which it now complains, for the reasons I have discussed, the resulting decision would have remained the same.

[45] For the reasons already advanced the submissions made on behalf of the plaintiff that the decisions of the warden were unreasonable, made for an improper purpose, resulted from taking into account irrelevant considerations or through failing to take into account relevant considerations, must be rejected. They are without foundation.

The mineral claims applications

[46] On 20 December 2006 the solicitor for the plaintiff attended at the Titles Division of the Department and sought to lodge seven mineral claims

applications on behalf of the plaintiff in relation to part of the land formerly the subject of RO1292. He was advised by the Principal Registrar that the applications would not be accepted because they were not accompanied by the Mining Warden's approval as required by s 83(3) and (4) of the Act.

[47] There is no dispute that the plaintiff had not obtained the approval of the warden to enter upon the land for the purpose of marking out that land or, indeed, for any purpose. The applications sought to be lodged on behalf of the plaintiff did not include an approval in the prescribed form. The applications were incomplete and the Principal Registrar was correct in declining to receive them. No reviewable error occurred.

The mineral lease applications

[48] The plaintiff, by its agent Capricorn, also sought to lodge two mineral lease applications. Lodging of such applications may be effected by facsimile: *Hong v Minister for Immigration* (1998) 82 FCR 468 at 472-473. At 12.10 am on 7 December 2006 Capricorn sought to lodge an application for a mineral lease in respect of the land formerly contained in RO1103. An application for a mineral lease in respect of the land formerly contained in RO1292 was sought to be lodged at 12.17 am. The applications were each received at 12.24 am. The evidence reveals a difference between witnesses as to when the applications were sent and when they were received. It is the time of receipt which is of relevance and I have adopted that time. It is likely the difference between plaintiff and defendant is explained by

differences in the time recording mechanisms on the sending and receiving machines.

[49] Later on the morning of 7 December 2006 the Principal Registrar wrote to the plaintiff's agent advising that the mineral lease applications "may not be valid pursuant to s 21(1) of the Northern Territory Mining Act" and indicated that they would not be accepted "until we investigate the matter further". An invitation was extended to the plaintiff to lodge exploration licence applications which would be considered along with any other exploration licence applications received on that day.

[50] On 15 December 2006 the Principal Registrar again wrote to Capricorn and, on this occasion, advised that the applications were not able to be accepted due to the existence of prior exploration licence applications. The relevant part of the letter is set out above at par [12].

[51] The defendant submitted that the interpretation by the Principal Registrar of s 21(1) of the Act when read with s 164 was correct. It was noted that applications for mineral leases differ from the other applications because, in relation to them, there is no issue arising as to a need for approval to enter land and there are no marking out issues.

[52] The evidence led on behalf of the defendant revealed that, in relation to RO1292, exploration licence applications had been received by e-mail from Legend International Investments Pty Ltd at 4.52 pm on 6 December 2006; by facsimile from Corporate Developments Pty Ltd and Marathon Resources

Ltd at 12.02 am on 7 December 2006; and by e-mail from Corporate Developments Pty Ltd and Marathon Resources Ltd at 12.09 am and 12.11 am on 7 December 2006. These were received prior to receipt of the plaintiff's mineral lease application regarding the land formerly the subject of RO1292. There were further exploration licence applications received later in the day.

[53] In relation to the land formerly the subject of RO1103 the evidence revealed that exploration licence applications had been received by e-mail from Legend International Investments Pty Ltd at 4.57 pm on 6 December 2006 and further such applications were received over the course of 7 December 2006 but none prior to the time at which the plaintiff's mineral lease application was received by the defendant.

[54] The priority to be accorded different applications is to be determined in accordance with the provisions of s 164 of the Mining Act. That section is in the following terms:

> "164. Priority in considering applications
>
> (1) Where 2 or more applications are lodged under this Act for the grant of an exploration licence, exploration retention licence or mining tenement in respect of the same land, unless specific provision is made in this Act relating to the priority to be given, the applicant who first lodges his application shall receive priority in the consideration of his application.
>
> (2) Where 2 or more applications for the grant of an exploration licence referred to in subsection (1) are lodged on the same day, they have the same priority as each other.

> (3) For the purposes of subsection (1), an application for a mining tenement, other than a mineral lease, shall be deemed to be lodged at the time when the area of land which is the subject of the application is marked out in accordance with the Regulations.
>
> (4) For the purpose of ascertaining priority under subsection (2), an application for the grant of an exploration licence that is received by the Department after close of business on a particular day is to be taken to be lodged on the next day the Department is open for business.
>
> (5) The hours during which offices of the Department are open for business are to be set out in guidelines made under section 8AA."

[55] Section 164(1) of the Act deals with priority as between applications for different forms of mining interests. It establishes that in a competition between applications for such differing interests priority is to be given to the applicant who first lodges his application.

[56] Sections 164(2) and (4) differ from s 164(1) in that they apply exclusively to the priority to be accorded to an exploration licence in competition with another exploration licence. In such cases where two or more applications for exploration licences are lodged on the same day they are to have the same priority as each other. In determining whether two or more such applications are lodged on the same day and therefore are to be accorded equal priority, any application which is lodged after close of business on a particular day (day 1) is to be taken as having been lodged on the next day the Department is open for business (day 2). Any application lodged after close of business on day 1 will be deemed to have been lodged on day 2 and will be accorded equal priority with other applications lodged on day 2.

[57] It follows that it is not necessary to determine what is meant by the expression “the next day” in s 164(4) of the Act. Whether that expression means the time at which the office is next open for business (as submitted by the plaintiff) or at 12.01 am on the next day (as submitted by the defendant) is not to the point. All applications for exploration licences lodged on that day will, as amongst themselves, have the same priority.

[58] The deeming effect of s 164(4) is not a deeming for all purposes. It is limited to resolving issues of priority between applications for exploration licences. It is not to deem *any* application for an exploration licence lodged after close of business on a particular day to have been lodged on the next day the Department is open for business. The deeming is expressly confined to circumstances where such deeming is required for the purpose of ascertaining priority between two or more applications for the grant of an exploration licence. In particular it does not impact upon the timing of lodgement of an application for an exploration licence which is in competition for priority with an application for a mining tenement under s 164(1) of the Act. Priority as between those applications will be determined by “who first lodges his application” unaffected by any reference to the deeming provision.

[59] Before applying these provisions to the circumstances of this matter it is necessary to say something about the applications for exploration licences lodged after close of business on 6 December 2006 and at a time when the reservation from occupation under s 178 was still extant. It was the

submission on behalf of the defendant that such an application should be deemed to have been lodged at midnight on 6/7 December 2006. Reliance was placed upon s 164(4) for this purpose. The submission must be rejected. As has been pointed out the deeming provision in s 164(4) will apply only to issues of priority as between competing applications for exploration licences. In the present case, as at the time the application was lodged, the land was reserved from occupation. By operation of s 178(1A) an application for an exploration licence "shall not be made" in respect of that land whilst it has the status of being reserved from occupation. The land did not become available for occupation until after midnight on 6 December 2006. The applications upon which the defendant sought to rely were made when the land was not available and must have been rejected. Such an approach to the provision was reflected, correctly, in the information package released by the defendant which advised applicants that:

> "Pursuant to s 178 of the Mining Act, no applications can be received before 7 December 2006."

[60] In relation to the land the subject of RO1292 it is not disputed by the plaintiff that an application for an exploration licence had been lodged by another corporation at or about 12.03 am. This application was lodged before the application for a mineral lease was lodged on behalf of the plaintiff. By operation of s 164(1) of the Act the earlier application for an exploration licence was to receive priority over the later application for a

mineral lease. Further, and more importantly, by operation of s 21 of the Act the later applications for mining tenements could not validly be lodged. In the circumstances the decision to refuse the mineral lease application in relation to the land the subject of RO1292 was correctly made. No reviewable error occurred.

[61] The situation was different in relation to the land the subject of RO1103. There the plaintiff's application for a mineral lease was received at 12.17 am on 7 December 2006. There had been an application for an exploration licence lodged at 4.57 pm on 6 December 2006 but, for the reasons I have expressed, that application was premature. There was no other application received prior to 12.17 am on 7 December 2006. In those circumstances s 21of the Act did not operate to preclude the lodging of the application by the plaintiff. The Registrar was in error in refusing to accept the mineral lease application in respect of the land the subject of RO1103.

[62] In relation to the applications for mineral claims, I have already indicated that no reviewable error occurred in declining to receive those claims. However, in light of the argument presented, I should say something about the priority issue.

[63] By operation of s 164(3) an application for a mineral claim is deemed to have been lodged at the time when the area of land which is the subject of the application is marked out in accordance with the Regulations. In this case the evidence of Mr McCleary and the members of his pegging team was

to the effect that the pegging-out process commenced shortly after midnight on 7 December 2006 and continued through to 1.30 am on that morning. The work was then abandoned and the party returned later in the morning. All that remained to be attended to was the flagging of trees as required by Regulation 19(1) of the Mining Regulations. That process was completed at 2 pm. It was submitted on behalf of the plaintiff that the marking out should be regarded as having been completed at 1.30 am on 7 December 2006 rather than at 2 pm on that day because, by then, there had been substantial compliance with the requirements of the Act. Reference was made to s 164A(1) of the Mining Act which permits the Minister, inter alia, to grant or renew a mining tenement notwithstanding that the applicant for the tenement "may not have complied in all respects with the provisions of this Act or the Regulations". The purpose of the section is to provide a discretion to the Minister to relieve an applicant from the consequences of a failure to strictly comply with the provisions of the Act or Regulations. Section 164A does not have application in the circumstances of the present case where there is no suggestion that there was any failure to comply with the requirements of the Act. The plaintiff sought to rely upon the provision to achieve an earlier deemed time of lodgement than would be the case if the time of completion of the whole marking out process was considered. That is not the purpose of the section. In this matter the marking out was completed at 2 pm on 7 December 2006 and, if it had been necessary to determine the issue, that is the time at which the application would be

deemed to have been lodged pursuant to the provisions of s 164(3) of the Act.

[64] By the time the applications for a mineral claim had been lodged, applications for exploration licences had been received and, by operation of s 21 of the Act, the applications for mineral claims could not be lodged. Further, as has been noted, the requirements of s 83(3) and (4) of the Act had not been met and the applications were incomplete.

Conclusions

[65] In all the circumstances I make the following orders:

(i) The appeals against the first and second Regulation 11A decisions are incompetent and will be dismissed.

(ii) The applications for relief by way of judicial review in respect of the first and second Regulation 11A decisions will be dismissed.

(iii) The applications for relief by way of judicial review in respect of the decision not to receive and process the applications by the plaintiff for mineral claims will be dismissed.

(iv) The application for relief by way of judicial review in respect of the decision not to receive and process the application by the plaintiff for a mineral lease over the land formerly contained in RO1292 (Amadeus Basin – Angela and Pamela Uranium Prospects) will be dismissed.

(v) In relation to the decision not to receive and process the application by the plaintiff for a mineral lease over the land formerly contained in RO1103 (Alice Springs Region) I find that the decision maker erred and I declare that the plaintiff was entitled to have its application for a mineral lease over

that particular land received and processed in accordance with the law.

[66] I will hear the parties as to the orders to be made and on the issue of costs.

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