



FORREST'S HIGH COURT WIN – HOW DOES THIS IMPACT YOU?

Andrew Forrest's recent win in the High Court has cemented the importance of complying with the Mining Act when making an application for a mining tenement.

Summary of the verdict:

- Compliance with the Mining Act during the application process is essential for a mining lease to be validly granted.
- A granted mining lease that did not comply with section 74(1)(ca) of the Mining Act when it was applied for may be declared invalid.
- An application for a mining lease that did not comply with section 74(1)(ca) of the Mining Act is an invalid application and should not be granted.
- Tenement holders who have titles set aside because of non-compliant applications are "authors of their own misfortune".

In this special edition resources update, we discuss the implications of this decision on operating mining projects and provide a practical checklist to check and deal with the potential impact on your tenements.

Case Brief: [Forrest & Forrest Pty Ltd v Wilson \[2017\] HCA 30](#)

A majority verdict of the High Court has ruled that a tenement holder's failure to provide a mineralisation report at the time it lodged an application for a mining lease resulted in the application being invalid.

Section 74(1)(ca) of the *Mining Act 1978* (WA) (**Mining Act**) requires a mineralisation report or resource report to be lodged at the same time as an application for a mining lease or alternatively, a mining proposal to be lodged within 14 days of the application.

As a result of the High Court's verdict, if a mining lease application does not comply with section 74(1)(ca) then either the Mining Registrar, Warden or Minister do not have the power to progress the application through to grant. If a tenement is granted without these supporting documents, then it may be declared invalid.

The verdict narrows the protection that the Mining Act provides to tenement holders if there was an informality or irregularity in the application process. The Mining Act will not protect a tenement holder if they did not comply with section 74.

What does this mean for your projects?

The impact of this decision could mean that if a mining lease has been granted, but the holder did not strictly comply with the Mining Act when the application was made, there is a risk that the mining lease could be declared invalid.

Mining lease holders should be wary that opportunistic third parties may use this decision as an opportunity to lodge tenement applications over potentially invalid mining leases and subsequently seek declarations that the mining lease is invalid.

However, this decision only affects mining leases and tenement holders who did not comply with section 74(1)(ca) of the Mining Act.

In particular, it will not affect tenement holders who acquired their mining leases via a transfer after grant as they will have their title protected by section 116 of the Mining Act.

In addition, it will not impact holders of mining leases that were granted before 10 February 2006 because section 74(1)(ca) was included in the Mining Act as part of a suite of amendments which did not take effect until that date.



How to check whether your tenements are impacted

Miners should carry out an audit of their mining leases to confirm whether they are impacted by this decision.

We have prepared the below checklist to help you to identify whether or not your mining leases are at risk of being declared invalid.

For all **granted mining leases**, check:

- Did you purchase a mining lease? If you are not the original holder of the tenement and acquired it after it was granted, then you are protected by section 116 of the Mining Act which affords protection to transferees. No further action is required.
- If you are the original holder, then:
 - Was the mining lease applied for prior to 10 February 2006? If it was, it is not affected as section 74(1)(ca) of the Mining Act did not come into effect until that date.
 - If the mining lease was applied for on or after 10 February 2006, then check:
 1. If a mineralisation report and a supporting statement were lodged to support the application, when were they lodged? If either document was not lodged at the same time as the Form 21, then the mining lease may be invalid (s74(1)(ca)(ii) & 74(1a)).
 2. If a resource report and a supporting statement were lodged to support the application, when were they lodged? If either document was not lodged at the same time as the Form 21, then the mining lease may be invalid (s74(1)(ca)(iii) & 74(1a)).
 3. If a mining proposal was lodged to support the application, when was it lodged? If it was lodged later than 14 days after the Form 21, then the mining lease may be invalid (s74(1)(ca)(i) & reg. 25AA).

For all **pending applications for mining leases** lodged on or after 10 February 2006, carry out an audit of your applications following the checklist at points 1 to 3 above.

Miners who have not complied with the Mining Act in lodging a mining lease application are urged to reapply in order to ensure that the mining lease is valid upon grant.

What should you do if you are impacted?

Given the impracticality of carrying out compliance audits of large tenement packages, and the significant risks posed to advanced projects in particular, we consider that legislation should be passed to confirm the validity of granted mining tenements.

However in the meantime, to avoid the costs and instability that could arise from a third party challenging the validity of your mining leases, if you have concerns about whether your tenements may be declared invalid, one way to protect your ground is to lodge a fresh (compliant) tenement application over the same ground.

Advice should be sought as to whether there is any consequential effect from making a new application over the same ground.

If a third party does challenge the validity of your mining leases and lodge tenement applications over your ground, it should be noted that the Minister may invoke his powers under section 111A of the Mining Act to refuse to hear third party applications. We suggest that if this happens, you should lodge an objection to any such application and in addition, petition the Minister to terminate the application in accordance with section 111A.

If you would like any further information about this topic, we would be happy to discuss this with you.

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