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| **JURISDICTION** | **:** | MINING WARDEN |
| **TITLE OF COURT** | **:** | OPEN COURT |
| **LOCATION** | **:** | PERTH |
| **CITATION** | **:** | KORAB RESOURCES LTD -v- RICHMOND [2007] WAMW 16 |
| **CORAM** | **:** | CALDER M |
| **HEARD** | **:** | 15 JUNE 2007 & 10 AUGUST 2007 |
| **DELIVERED** | **:** | 7 SEPTEMBER 2007 |
| **FILE NO/S** | **:** | APPLICATION FOR EXPLORATION LICENCE 09/1397 |
| **TENEMENT NO/S** | **:** | E09/1397 |
| **BETWEEN** | **:** | KORAB RESOURCES LTD **(**Applicant)<br><br>AND<br><br>WILLIAM ROBERT RICHMOND (Objector) |

*Catchwords:*

APPLICATION - For tenement - Objection to grant - Prior interest
APPLICATION - For tenement - Objection to grant - Public interest
INTEREST – application for tenement – prior contractual connection
OBJECTION - To grant a tenement - Prior interest
OBJECTION - To grant a tenement - Public interest
PRIOR INTEREST - Application for grant of tenement - Objection to - Contractual connection
PRIOR INTEREST - Objection to - Exclusive prior knowledge of surrender

PUBLIC INTEREST - Application for grant of tenement - Ground of objection
PUBLIC INTEREST - Objection to grant of tenement - Interest
PUBLIC INTEREST - Objection to grant of tenement - Surrendered tenement - Contractual connection

*Legislation:*

*Mining Act 1978* (WA), s 69, s 111A

*Result: Recommended that Minister grant E09/1397*

**Representation:**

*Counsel:*

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| Applicant | : | Mr P A Sheiner |
| Objector | : | Mr G H Lawton |

*Solicitors:*

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| Applicant | : | Christensen Vaughan |
| Objector | : | Lawton Lawyers |

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

Audax Resources Pty Ltd v Rosane Pty Ltd [2005] WAMW 8
Devant Pty Ltd v Minister for Mines (unreported; FCt SCt of WA; 18 December 1996)
Murchison Mining v Rowland [2002] WAMW 16

**CALDER M**

## THE PROCEEDINGS

1 Korab Resources Ltd ("the Applicant") lodged application 09/1397 (“E09/1397”) for the grant of an exploration licence. William Robert Richmond ("the Objector") objects to the grant of the tenement upon the ground that, "*The Application was made as a result of collusion between the applicant and the prior tenement holder, ABM Resources Operations Pty Ltd.*"

2 The essence of the case for the Objector is that the circumstances leading up to the making of the application for the exploration licence are such that, pursuant to s 111A of the *Mining Act 1978* (WA) ("the Act"), the Minister ought to be satisfied on reasonable grounds in the public interest that the application should not be granted. The facts upon which that claim is made by the Objector are, in summary, that the ground applied for by the Applicant is identical to surrendered exploration licence 09/1136 (“E09/1136”) which, until the time of surrender, was held by ABM Resources Operations Pty Ltd ("ABM") and that, through the mutual tenement agent of ABM and the Applicant, the Applicant was notified before surrender of the intention of ABM to surrender E09/1136 and, in effect, the Applicant was thereby given exclusive knowledge of the pending surrender and the effect of that was that the Applicant had an exclusive opportunity to lodge an application for the grant of a tenement over the same ground.

3 The Objector says that there was a collusive scheme between ABM, the Applicant, and the agent of both of them whereby all other members of the public were deprived of the opportunity to apply for the surrendered ground. That, it is said, is contrary to the intention of the Act, as ,manifested in part by ss 45(2), 69(1) and 85A, and is a matter of public interest for purposes of s 111A.

4 In opening, counsel for the Applicant said that it was not in dispute that the Applicant had prior notice of the surrender of E09/1136 and that the issue between the parties was whether or not that prior knowledge could justify the intervention of the Minister pursuant to s 111A.

## THE EVIDENCE

### On Behalf of the Objector

5 The Objector did not call any witnesses. Without objection, the Objector tendered a certified copy of a search of the surrendered E09/1136. The surrender was lodged at 9.27 am on 31 October 2006. That is one minute before application 09/1397, the application now before me, was lodged. The Register for E 09/1136 records that the surrender was registered at 9.27 am on 31 October 2006. Pursuant to s 95(6) (d), of the Mining Act 1978 (WA) ("the Act") every right, title and interest held under E09/1136 absolutely ceased and determined on the date that the surrender was registered.

6 Counsel for the Objector also tendered a copy of application for exploration licence 09/1419 that was lodged on 6 December 2006 by Kallenia Mines Pty Ltd ("Kallenia") of which the Objector is the sole director and shareholder. The ground applied for in application E09/1419 covers several of the graticular blocks that had been the subject of E09/1136.

7 Counsel for the Objector noted in the course of producing his client's documentary case that the address of the Applicant shown on application E09/1397 is identical to that shown in the register as the address of the holder of E09/1136.

### On Behalf of the Applicant

8 **Mr Andrej Karpinski** is the executive chairman of Korab. Central Tenement Services is Korab's tenement agent and consultant. Mr Graham Williamson, the manager of Central Tenement Services, is the person with whom Korab mostly deals in connection with compliance with statutory requirements in respect of any mining tenements held by Korab. In his oral evidence, Mr Karpinski acknowledged that a series of e-mails that he was then shown were communications that had passed between either Mr Karpinski or his assistant at Korab and Mr Williamson concerning the pending surrender of E09/1136 by ABM and a request by Mr Williamson that Korab inform him whether Korab wished to make application for a tenement to be granted to Korab over the ground to be surrendered by ABM. Mr Karpinski agreed that he had, either personally or through his assistant, instructed Mr Williamson to make application for an exploration licence over the surrendered ground when it was surrendered by ABM.

9 Mr Karpinski said that at the time of those communications he was unaware of the name of the holder of E09/1136. He said that he had only recently become aware that ABM had been the holder. He said that he had no knowledge of ABM. Mr Karpinski said that he had no contact with any person other than Mr Williamson in connection with the information given to him by Mr Williamson and the instructions that he gave to Mr Williamson.

10 During cross-examination Mr Karpinski said that Korab had not paid to acquire the tenements. He said that Korab had never been asked to pay any money to anyone and that no money had ever been paid for the tenement to any person by Korab. Later in cross-examination, however, he appeared to concede that a request had been made for some money to be paid to ABM and that he had instructed Mr Williamson to go ahead and make the payment. He said that no money had been paid and that if a formal request for payment had been received from ABM, the payment would have been made. He denied that the reason that no payment was made to ABM was that the application for E09/1397 had been objected to.

11 **Mr Graham Williamson**, the manager of Central Tenement Services, said that Central Tenement Services was at all material times the tenement agent for both ABM and Korab. He said that he became aware, upon receiving instructions from ABM, that ABM wished to discontinue its applications for some exploration licences and that, upon receiving that information, that he informed Korab by e-mail that the ground the subject of those pending applications would become available for grant of mining tenements and that he asked Korab for instructions as to whether or not Korab wished to avail itself of the opportunity to acquire the ground the subject of the pending applications. He said that, two or three days after that happened, he was advised by ABM that two granted tenements held by ABM were to be surrendered. Those tenements were E09/1136 and E09/1137.

12 Upon receiving that information from ABM, Mr Williamson again e-mailed Korab advising Korab of the pending surrenders. He also asked Korab to advise him whether or not Korab wished to apply for the grant of a tenement over the surrendered ground. He was subsequently instructed by Mr Karpinski to make an application for the grant of the tenement over the surrendered ground. Mr Williamson then prepared the surrenders of E09/1136 and E09/137 and lodged them at the registry together with application E09/1397.

13 Mr Williamson later received from the Registrar at Karratha, where the withdrawal and the surrender and the tenement application documents had been lodged, a request for Mr Williamson to complete an affidavit setting out the circumstances of the relinquishment of the pending tenement applications and the surrenders and to inform the Registrar whether there was any connection between Korab and ABM. That letter from the Registrar was tendered in evidence. Mr Williamson advised Mr Karpinski to swear an affidavit on behalf of Korab in compliance with the Registrar's request. Mr Williamson said that he is not aware of there being any relationship between ABM and Korab.

14 During cross-examination Mr Williamson's attention was drawn to the e-mails that had passed between the Applicant and Central Tenement Services in which Mr Williamson said, on 24 October 2006: "*...the current applicant is only looking for around $1500 - $2000 to recover some of their costs…"* and, on 27 October: "*…our client is now prepared to either transfer or surrender two additional tenements…in favour of Korab for a further $1000…"*. Mr Williamson said what he there said a reference to a suggestion that emanated from him and not from Korab or ABM to the effect that Korab should pay an amount of money to ABM as consideration for ABM relinquishing the pending applications and surrendering E09/1136 and E09/1137, thus enabling Korab to apply for the grant of tenements over the same ground.

15 Mr Williamson said that, as soon as ABM became aware that there was an objection to Korab's application for E09/1397, he was instructed by ABM that ABM did not want to have any money paid to it by Korab. He said that he had discussed with Mr Karpinski that decision by ABM. Mr Williamson said that it was when he was initially discussing the surrenders and relinquishments with the exploration manager of ABM that Mr Williamson had asked the exploration manager whether ABM wanted to get anything from the relinquishments and surrenders and was told by the manager to "*do what you can*".

## SUBMISSIONS

### On Behalf of the Objector

16 The Objector says that the circumstances of the timing of the lodgment of the surrender of E09/1136 and of the application for E09/1397 and of the common agent of ABM and the Applicant results in an irresistible inference that there was an arrangement of collusion

between Korab and ABM in circumvention of the ground turn-over principle upon which s 69 of the Act is based. Subsection 69(1) says that when an exploration licence is surrendered, the land the subject of the licence shall not be applied for as an exploration licence – "*(b) by or on behalf of any person who had an interest in the exploration licence immediately prior to that date ... within a period of three months from and including that date*". In par (a) of subs 69(1) there is reference to "*... the date of surrender ...*". I take "*that date*" in par (b) to be a reference to the date of surrender.

17 Counsel submits that in the exchange of e-mails between Mr Karpinski and Mr Williamson it is evident that not only was there an invitation to collude conveyed by Mr Williamson but, in addition, a fee of between $1500 and $2000 was sought as consideration for the lodgment of the surrender.

18 The Objector says that the effect of the collusive scheme was that all but Korab were excluded from making an application for the grant of a tenement over the surrendered ground. It is said that it is not necessary for there to be a breach of a specific provision of s 69 for the conduct of the parties to be contrary to public policy. The Full Court decision of ***Devant Pty Ltd v Minister for Mines*** (unreported; FCt SCt of WA; 18 December 1996) is cited in support of that submission.

19 Counsel for the Objector submitted that the decision of the Warden in ***Audax Resources Pty Ltd v Rosane Pty Ltd*** [2005] WAMW 8 is not an authority that is inconsistent with the submissions in this case of the Objector. That is so, it is said, because in ***Audax*** the Warden found that there was no arrangement between the surrendering party and the party who subsequently applied for the grant of a tenement over the surrendered ground.

20 The submission of the Objector is that the Warden should recommend in this case to the Minister that the application for the exploration licence be refused under s 111A of the *Mining Act* in the interests of the proper administration of the Act.

21 At the conclusion of closing submissions on behalf of the Applicant counsel for the Objector expanded his submissions by arguing that, pursuant to par 69(1)(b) of the Act, the agreement that was entered into between Korab and ABM for Korab to pay an amount of money in consideration for ABM enabling Korab to have the exclusive opportunity to apply for the ground that was surrendered created an "interest" for

purposes of par 69(1)(b) of the Act. He said that even if such an interest was not created for purposes of s 69, then the arrangement was one which came sufficiently close to creating such an interest as should attract the provisions of s 111A as a matter of relevant public interest. Counsel said that the course of conduct engaged in by ABM and Korab was designed to and had the effect of excluding all other persons from the opportunity to make an application for the grant of a tenement over the surrendered land.

**On Behalf of the Applicant**

22 Counsel for the Applicant conceded that there was a commercial consideration sought by Williamson on behalf of ABM for the purported purpose of trying to recover some of ABM's costs associated with the holding and surrender of the subject tenement. He said that the arrangement was not one that was legally binding on any person.

23 The Applicant says that Steytler J in ***Devant's*** case acknowledged that there could be "collusion" in connection with the surrender of a tenement and the making of an application by another party for the grant of a tenement over the surrendered ground where the collusion comprises knowledge on the party of the Applicant of the intention of the former tenement holder to surrender the ground that will then be applied for. I assume that the Applicant relies upon that part of his Honour's decision where his Honour said (13):

> "*It is plain that the 'collusion' to which the Minister referred was that between Mr Chitty and Devant and that it comprised no more than that Devant knew that Mr Chitty was to surrender the existing tenements at a particular time and was therefore able, itself, to apply for the tenement immediately thereafter. It is difficult to imagine that Devant could have advanced any evidence to defeat the conclusion that there had been 'collusion' in that sense. It did not dispute, as indeed it could not sensibly have done, that Devant had availed itself of Mr Chitty's knowledge.*"

24 In the case now before me the Applicant concedes that, in that narrow sense, there was collusion. The Applicant says, however, that prior knowledge of an impending surrender does not constitute reasonable grounds for a refusal on the part of the Minister to grant a tenement, nor does the mere existence of an agreement between the holder of a surrendered tenement and a subsequent applicant for grant of a tenement give reasonable grounds for refusal to grant a tenement. In that regard

reliance is placed upon what was said in ***Audax*** (74-75), namely, that it was not the collusive nature of the agreement between the holder of the surrendered tenement and the applicant for the grant of tenements over the surrendered ground that attracted the operation of the provisions of s 111A but, rather, it was the effect of the agreement that gave rise to the Minister being able to exercise his discretion under s 111A.

25 The effect of the agreement in ***Devant's*** case was that, if the application for the grant of new tenements over the same ground had succeeded, the holder of the surrendered tenement would have had control of the new tenements and, as a consequence of being a director and major shareholder of the new tenement holder, would thereby have retained control over and a *de facto* interest in the new tenements over the same land that had been the subject of the surrendered tenements. It was in the public interest to not allow that to happen, it being a circumvention of the legislative objective of subs 45(2) of the Act. Section 45(2) of the Act is the equivalent of s 69 except that it relates to prospecting licences rather than exploration licences.

26 It is also submitted that it was said (75) in ***Audax*** that the Court did not say in ***Devant's*** case that prior knowledge of an impending surrender was sufficient to attract the operation of s 111A and nor did it say that the mere existence of an arrangement would, of itself, justify a refusal to grant pursuant to s 111A. It is said that it is apparent from the decision of ***Devant*** that there must be an essential additional element, namely, that the ground turn-over principle has been defeated.

27 The Applicant submits that in this case there is no suggestion of an attempted or possible circumvention of the ground turn-over principle. There is no evidence, it is said, of any relationship between ABM and Korab other than that they both were clients of Mr Williamson. It is said that there is no evidence or suggestion that ABM could or will exercise any control over the Applicant. Reference is made to the decision of Warden Wilson in ***Murchison Mining v Rowland*** [2002] WAMW 16 where the Warden said (12):

> "*... That the Applicant is friends with a person who had a previous interest in the tenement or his lawyer does not of itself amount to proof of some relationship with the person to whom the provisions of s 84A of the Mining Act applies.*"

28 The Applicant observes that the Act does not prescribe any period of time for which ground must remain open after the surrender of the

tenement, nor does it make an offence to collude with respect to information regarding the proposed surrender of tenements. It is said that, in any event, such conduct could not be said to be contrary to any discernible "underlying principle" within the Act. It was also submitted that s 111A does not provide a mechanism by which the Minister or the Warden can, in effect, step into the shoes of the legislature and prohibit or penalise conduct that is not otherwise contrary to the Act.

## CONCLUSIONS

### *DEVANT'S* CASE

29 The essential relevant circumstances in the case of ***Devant*** are that a director of and majority shareholder in Devant Pty Ltd ("the Company") had surrendered prospecting licences of which he had been, in person, the registered proprietor and, approximately 30 minutes after the surrender, the Company had lodged applications for the grant of tenements over the surrendered ground. The leading judgment is that of Steytler J.

30 The case of the applicant before the Supreme Court was that the Minister, in exercising his discretion pursuant to s 111A of the Act to refuse the applications by Devant, had denied Devant procedural fairness, had acted contrary to law in that his decision was so unreasonable that no person exercising the discretion would have reached the same conclusion, that there was no evidence to support a conclusion of collusion between Devant and its director and that the Minister took into account irrelevant considerations. The appellant alleged that there was no public interest that required refusal by the Minister.

31 In giving consideration to the appellant's case, his Honour Steytler J addressed what he described as the "*underlying purpose*" of s 45 of the Act and said (11) that it was plain that the underlying purpose was:

> "*... that, when a prospecting licence is surrendered, forfeited or expires, someone other than the holder of that prospecting licence should have the opportunity of applying for a prospecting licence or exemption in respect of the land the subject thereof and that, in order to facilitate this, the original tenement holder should not mark out the tenement or apply for a prospecting licence or an exploration licence in respect of that tenement*

> *within a period of three months from the date of surrender, forfeiture or expiry.*
>
> *In those circumstances, it seems to me, the facts known to the Minister raised an obvious question whether it was in the public interest for the purpose underlying s 45 of the Act to be circumvented in the way in which that had been done ...*".

32 His Honour later said, in the context of the ground of appeal that asserted that the decision of the Minister was made for an unauthorised purpose, (16):

> "*... I have already said that it was open, and indeed, in my opinion, entirely reasonable, for the Minister to have concluded that there is a public interest in ensuring the policy which underlies s 45 of the Act is not circumvented. The fact that the circumvention was brought to his attention by some person acting in his own interest does not alter that position.*"

## THE *AUDAX* CASE

33 This was a case heard by me. Audax made applications for the grant of two tenements, an exploration licence and a prospecting licence. The applications were objected to on the basis, *inter alia*, that Audax had breached s 85A of the Act, it being alleged that immediately prior to their surrender Audax had held an interest in eight mining leases and that the applications of Audax for the grant of the two tenements included all or some of the ground the subject of the eight surrendered mining leases. It was also a further ground of objection that s 111A had application. As in the present case, in respect of the public interest ground, the objector argued that there was a scheme or arrangement between the former holder and Audax that was collusive in nature and had the effect of excluding third parties and the public at large from the opportunity to apply for the grant of a tenement over the surrendered land and thus defeated the ground turn-over principle sought to be achieved by s 85A.

34 There was a commercial connection between Audax and the holder of the surrendered tenement in question. However, that commercial connection was not one whereby, for purposes of s 85A of the Act, Audax held an "interest" in the surrendered tenement for.

35 This is not a case where, for the purposes of subs 69(1) of the Act, the Applicant had an interest in the surrendered ground immediately prior to the date of the surrender. It was not a case where the circumstances connected with the making of the application by the Applicant are such as give rise to any discretion on the part of the Minister pursuant to s 111A of the Act to terminate the application or to refuse the application. My reasons are as follows.

36 I find that, until Mr Williamson was informed by ABM of its intention to do so, Mr Williamson had no prior knowledge or expectation or suspicion that ABM intended to discontinue its pending applications for the grant of tenements or to surrender E09/1136 or E09/1137. He never informed any person connected with Korab of such matters until after he became aware, upon being told of its intentions by ABM, that the ground now applied for and other ground would become available to be the subject of applications for the grant of tenements. I am satisfied that, prior to Mr Williamson advising Mr Karpinski of the pending discontinuances and surrenders, Mr Karpinski and no other person connected with Korab had any knowledge or expectation or suspicion that ABM was about to take such action. I am also satisfied that prior to Mr Williamson informing him of the intention of ABM to discontinue the pending applications and to surrender the two exploration licences. Mr Karpinski was unaware of the existence of ABM and had never had any dealings with ABM or any persons who were connected with ABM.

37 I find that Mr Karpinski, on behalf of Korab, did instruct Mr Williamson that Korab was prepared to pay an amount of $1500 to $2000 to ABM in connection with what had been proposed to him by Mr Williamson, namely, that when the land the subject of the pending applications and the land the subject of the pending surrenders became available, Mr Williamson would make an application for the grant of a tenement on behalf or Korab over the same ground. I am satisfied that it was Mr Williamson who suggested to an officer of ABM that by seeking a payment of money from Korab or, if not Korab, some other applicant for the ground that was to become available, ABM may be able to recover some of its costs.

38 I find that it was not ABM or Korab or any of their respective officers who suggested that any such payment be made. I am satisfied that Mr Williamson was authorised by ABM to request that Korab make a payment in the amount suggested and that it was Mr Williamson who asked Korab to make the payment and it was Mr Williamson who conveyed to ABM that Korab was prepared to pay the money. The

money was never paid because when Korab's application 09/1397 was objected to, Mr Williamson was told by an officer of ABM that ABM no longer wanted to receive the money.

39 I am satisfied that in whatever way the consideration that Korab was to receive a payment of the sum of money arranged by Mr Williamson is characterised, nevertheless, the consideration was not the surrender of the ground the subject of the tenement held by ABM. I find that the surrender was always going to occur whether or not the amount Korab took up the surrendered ground and whether or not Korab paid the money in question. That is evidenced by the fact that the surrender occurred without the money having been paid, that, ultimately, the money was never sought by ABM and that, when Korab's application for E09/1397 was objected to, ABM instructed Mr Williamson that it did not want to receive the money.

40 I find that the agreement between ABM and Korab to pay the $1500 to $2000 was not an agreement that had the effect or was intended to have the effect of creating any legal or equitable interest in any tenement. In any event, as the agreement was not in writing, subs 119(2) would have prevented the creation, assignment, affecting or dealing with any interest in the surrendered tenements. That is not to say, however, that it necessarily follows that no enforceable legal rights arose out of what was discussed and agreed through Mr Williamson concerning the proposal that was accepted by ABM and Korab that some money be paid to ABM by Korab. I am satisfied that at the time when the two exploration licences were surrendered and when application E09/1397 was lodged, it was the intention of both ABM and Korab that there be a payment of money by Korab to ABM. Essentially, it may be said that the consideration for the intended payment was the exclusive advantage that Korab was given arising from its knowledge, through its agent, of the precise time when the subject ground would be forfeited and arising from the exclusive ability of its agent, Mr Williamson, to apply for E09/1397 at a time when no other person was aware that the ground had become available for mining.

41 There is nothing in the evidence that suggests in any way that, for purposes of par 69(1) (c) of the Act, Korab and ABM are a "related person" as defined in subs 8(4) of the Act. Subsection 8(4) says that a person is related to a body corporate if the person is a related entity as defined in s 9 of the *Corporations Act* in relation to the body corporate. Such a relationship was not argued by the Objector. I am satisfied that no such relationship existed.

42 I find that prior, to surrender of its exploration licence by ABM, Korab had no interest, for purposes of subs 69(1) of the Act, in the tenement. In my opinion, the ground turnover principle has not been circumvented. A subsequent and, in every legal and factual sense, independent applicant now seeks the grant of a tenement over the land the subject of a surrendered tenement. I find that in no way, directly or indirectly, has ABM or any of its public officers ever had any control over or interest in or rights in respect of Korab or Korab's assets or activities. I am satisfied that ABM will have no future role to play in what happens to E09/1397 if it is granted to Korab. There is nothing in the evidence that could justify any conclusion that Korab or any person connected with Korab has ever had any rights or powers or interests in ABM or ABM's assets or activities.

43 It is in the context of the above findings of fact that consideration must be given to whether the provisions of s 111A can properly be brought to bear upon the circumstances of this case. In my opinion, the Minister could not lawfully exercise his discretion to terminate the application for E09/1397 or to refuse it. The Act does not prohibit a tenement holder from informing any one or any number of persons of the holder's intention to surrender a tenement. The notifying of such an intention to one person exclusively does not, *per se*, defeat the ground turn-over principle. What s 69 is aimed at was clearly identified in the case of ***Devant***. As Steytler J said (11):

> "*It seems to me to be plain that the underlying purpose of* (s 45(2)) *is ... when a prospecting licence is surrendered, forfeited or expires, someone other than the holder of the prospecting licence should have the opportunity of applying for a prospecting licence or an exploration licence in respect of the land the subject thereof and that, in order to facilitate this, the original tenement holder should not mark out the tenement or apply for a prospecting licence or an exploration licence in respect of that tenement within a period of three months from the date of the surrender, forfeiture or expiry.*"

44 His Honour did say (13) that it was plain that the "collusion" to which the Minister had referred was that between Devant and its director and comprised of the knowledge on the part of Devant that its director, the surrendering tenement holder, was to surrender the tenements at a particular time and Devant was therefore able, itself, to apply for the tenements immediately thereafter. His Honour said that it was difficult to imagine that Devant could have advanced any evidence to defeat the

conclusion that there had been "collusion" in that sense. There was by no member of the Court any comment at all as to whether or not such "collusion" was contrary to the public interest. It appears that that issue was put before the Court in that Steytler J said (14) "(Devant) *attempted to suggest that this did not amount to 'collusion' and that there was no policy reason why Devant should not have taken advantage of the opportunity so provided to it*".

45 Kennedy J also observed (5) that in the hearing before the Full Court Devant had claimed that knowledge of the filing of the surrenders was something of which Devant was entitled to avail itself. His Honour said, "*That may well be so, but it does not follow that the Minister is not then entitled to intervene so that interests associated with Mr Chitty did not secure the prospecting licences ... immediately after Mr Chitty had held them ...*". As the Court determined that the relationship between Devant and its director was such that there was an interest for purposes of s 45(2) of the Act, it was not necessary for the Court to determine whether or not that prior knowledge of Devant was, of itself, a matter that enlivened the power of the Minister under s 111A to terminate or refuse the application by Devant. What did enliven the Minister's power to exercise the discretion under s 111A was the collusive arrangement that was intended to circumvent the ground turnover principle manifested in the Act in s 45 and also in s 69.

46 The Objector said that it is not only the exclusion of all other persons but Korab of the opportunity to apply for the surrendered ground but, in addition, it is the agreement for the payment of money by Korab to ABM because of the exclusionary opportunity that was given to Korab that would enable the Minister to exercise his discretion under s 111A of the Act. It is thus, in effect, the position of the Objector that there are two elements to the conduct of Korab that are of such impropriety that it is in the public interest that Korab not be granted the tenements.

47 The first of those limbs is the giving of an exclusive opportunity to Korab to apply for the ground. In considering the weight and the validity of the Objector's arguments, it is reasonable and, in my opinion, necessary to ask what the logical extension may be of such a proposition. The first question that arises from such a proposition is whether it is improper and not in the public interest to let any person know of the intention to surrender or, if it is improper to provide only one person with exclusive knowledge of a pending surrender, how many people must be made aware before the disclosure is not one that would lead to termination or refusal under s 111A? Further, by what means would such disclosure have to be

made? Would the disclosure only be improper if it is made to a person or persons that are or simply might be interested in applying for a tenement over the surrendered ground?

48 There is nothing in the Act or the Regulations that requires a surrendering tenement holder to notify any person of the intention to or the fact of lodgment of a surrender. There is no requirement that the Minister or any officer of the Department notify any person or advertise or otherwise publicise the fact of a surrender beyond it being recorded in the public register. The only exception I am aware of to that is where pursuant to subs 96(3)(a) or s 100 surrender occurs after an application for forfeiture has been lodged and before the application is finally determined. There is nothing in the legislation that expressly or impliedly prohibits a tenement holder from informing any person at any time of an intention to surrender. There is nothing in the legislation that expressly or impliedly prohibits an applicant for grant of a tenement from making such an application having been told by the surrendering holder or any other person or class of persons of the pending surrender and of the precise time and date that the surrender will be lodged.

49 I agree with the submission made on behalf of the Applicant, namely, that s 111A does not provide a mechanism by which the Minister or the Warden can, in effect, step into the shoes of the legislature and prohibit or penalise conduct that is not contrary to the Act or its underlying principles. As the Objector also submitted, the Act does not prescribe any period of time for which ground must remain open after the surrender of a tenement.

50 Concerning the additional element that the Objector argued was present and which went significantly to the public interest argument, namely, the agreement that Korab would pay money to ABM, it is my view that such an agreement is not contrary to the public interest for purposes of s 111A. Every tenement holder is entitled to keep secret an intention to surrender a tenement. There may be many commercial reasons for doing so. Tenements may be sold or otherwise dealt with in order to make a profit or obtain other commercial benefits or advantages. I see no reason why for a commercial consideration a tenement holder should not be able to disclose to another party its intention to surrender a tenement. Knowledge and information in various forms is something that is regularly bought and sold and I consider that information concerning a pending surrender is something that a tenement holder is entitled to trade

for valuable consideration. That is what was agreed in this case although the agreement was subsequently abandoned. There is nothing in the legislation which makes an agreement of that nature unlawful and, in my opinion, nothing which makes it contrary to the public interest as contemplated in s 111A. Both Korab and ABM were fully aware of what was taking place and both agreed that the consideration that each was to receive was fair and reasonable.

## RECOMMENDATION

51 I recommend that the Minister grant exploration licence 09/1397 with standard conditions and endorsements and subject to compliance with the provisions of the *Native Title Act 1993* (Cth).