JURISDICTION: MINING WARDEN
LOCATION: PERTH
CITATION: WAMW
CORAM: WARDEN K. TAVENER
HEARD: WRITTEN SUBMISSION
DELIVERED: 2014 WAMW 23
FILE NO/S: APPLICATION FOR PROSPECTING LICENCES 08/673 & 08/674 AND APPLICATION FOR EXPLORATION LICENCES 08/2580-2584 & 08/2588-2590 BY RICHCAB PTY LTD (APPLICATIONS).

OBJECTIONS 439418, 439446, 439420, 439421, 439443 & 4411261-441263 BY FORREST AND FORREST PTY LTD.

OBJECTIONS 438947 & 438111 BY BILLITON PETROLEUM (AUSTRALIA) LTD

APPLICANT: RICHCAB PTY LTD

Catchwords:
Exploration Licences – Prospecting Licences – Legal Capacity – Superannuation trustee proprietary company – Private ATO Rulings – Need for Certainty

Legislation:
Mining Act 1978 (WA) s58 (3)

Result
Recommendations to the Minister that exploration licences applied for by Richcab Pty Ltd are refused.

Orders made that prospecting licences applied for by Richcab Pty Ltd are refused.
Representation:

Counsel: 

Applicant: Mr C Davies  
General Counsel  
Austwide Mining Tenement Management Pty Ltd
1. Richcab Pty Ltd, the applicant for both prospecting and exploration licences, is a superannuation trustee proprietary company with no prior exposure to mineral exploration. Its applications, generally, are opposed by Forrest & Forrest Pty Ltd and BHP Billiton Petroleum (Australia) Pty Ltd.

2. The subject exploration Licences affect the Minderoo pastoral lease held by Forrest & Forrest Pty Ltd, which covers land previously the subject of mining tenure held or applied for by FMG Pilbara Pty Ltd; Forrest & Forrest had objected to those exploration licences. The FMG Pilbara leases were granted following hearings conducted over three years.

3. The tenures were surrendered by FMG Pilbara before the first anniversary of the grant. The majority of the surrendered area was immediately applied for by Richcab.

4. Before consideration can be given to the applications, and the objections, a preliminary question must be answered that being whether superannuation trustee proprietary company can engage in mining activities, including prospecting and exploration. Pursuant to section 58(3) Mining Act 1978\(^1\), further information was requested from Richcab as to its capacity to effectively explore the land.

5. Richcab has provided an extensive, detailed written response to that question. Richcab emphasised its capacity, under its Trust Deed and investment strategy, to conduct mining activities with the intention of developing a mining business. On the material provided I am satisfied the Trust Deed allows for involvement in mining activities.

6. Any investment by a superannuation trust entity needs to be made with the intention that it will appreciate in value or receive ongoing income to provide for the retirement or death of a member. Such an outcome requires constant management to ensure it does not breach superannuation rules.

7. Reference was made, in the applicant’s submission, to the Self-managed Fund Ruling (SMSFR 2009/4) issued by the Commissioner of Taxation. In particular, paragraphs 7, 8 and 9 of that Ruling covered the Commissioner’s view in regard to the meaning of asset as defined by section 10(1) of the Superannuation Industry (Supervision) Act 1993. In summary, the Commissioner’s view was that the phrase “any form of property” has a very wide meaning. Examples included “a mining exploration licence” or a “mining lease”.

8. It was further submitted the Trust Deed and the Richcab Investment Strategy allowed Richcab wide discretion in deciding in which investments and assets the fund can invest. I also accept that the

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\(^1\) 58(3) An applicant shall at the request of the mining registrar or warden furnish such further information in relation to his application, or such evidence in support thereof, as the mining registrar or warden may require but the mining registrar or warden shall not require information or evidence relating to assays or other results of any testing or sampling that the applicant may have carried out on the land the subject of his application.
proposed engagement with mining activities could satisfy the requirements of the described ‘arm’s length’ rules and the sole purposes test.

9. However, as noted in the Richcab Trust Deed, investments must be considered appropriate by the Trustee and acceptable to the Commissioner. A Superannuation fund, generally, is required to generate income and therefore confirmation is needed as to whether a superannuation fund can engage in prospecting and exploration.

10. Taking into account the Commissioner’s ruling (a guide) and the practical implications of engaging in the proposed activities, it is objectively challenging for a fund to satisfy the above requirements. In my view, where the circumstances are that a superannuation trustee proprietary company with no prior exposure to mineral exploration is seeking to engage in activities under the Mining Act it must seek approval from the ATO, by way of a private ruling, to confirm its acceptability.

11. It is understood that should the tenements prove viable, Richcab intends to develop those assets into a mining business, using a different legal entity or a combination of legal entities. The present legal entity, without ATO approval, is not a suitable vehicle for conducting activities under the Mining Act.

12. The subject land belongs to the State and as such any applicant cannot initiate any activities until certain of, amongst other matters, its legal capacity to so do; uncertainty is anathema to the Mining Act. In this instance, a private ruling should have been obtained prior to seeking the exploration, and prospecting, licences to confirm the requisite degree of certainty.

13. Consideration was given to allow further time for a private ruling but that would be unfair to the Objectors, especially in the light of the previous dealings with the land.

14. The issue as to the relationship between the principals of Forrest & Forrest, FMG Pilbara and Richcab may yet need to be addressed, depending on the response from the ATO.

Decision

15. Recommendation to the Minister that exploration licences applied for by Richcab Pty Ltd are refused.

16. Orders made that prospecting licences applied for by Richcab Pty Ltd are refused.

17. Consequently, the Objections are dismissed.