IN THE MATTER of an Application for Exemption by B.H.P. MINERALS LIMITED in respect of Exploration Licence No. 29/14

B.H.P. MINERALS LIMITED Applicant

Mr. C. Stevenson instructed by Stephen Jacques Stone James appeared for the applicant.

REASONS FOR DECISION

D.J. REYNOLDS S.M. WARDEN

I have before me many applications for exemptions from various applicants and the question arising in each of them is whether the Warden has jurisdiction to consider them and make a recommendation to the Minister. I have decided to give these reasons for this one application and as the question is common to all, a copy of these reasons should be made available to all applicants.

B.H.P. MINERALS LIMITED ("B.H.P.") is the registered holder of Exploration Licence No. 29/14. The tenement was granted for a term of five years commencing on the 28 December, 1984.
At 9.15 a.m. on the 31 January, 1986 B.H.P. lodged an application for exemption No. 251/856 relating to the Exploration Licence for the year ending 27 December, 1985 ("the Application").

The Application is in the prescribed form and there have been no objections lodged against it.

It is necessary for me to decide a preliminary issue and that is whether the Warden has jurisdiction to hear the Application in view of the time limit imposed by s.76 of the Mining Amendment Act 1985 ("the Amending Act") for lodging an application for exemption.

Prior to the 31 January, 1986, Section 102(1) of the Mining Act 1978 provided:

"Subject to this Act, on an application made, as prescribed, by the holder of a mining tenement, such holder may be granted a certificate of exemption in the prescribed form totally or partially exempting the mining tenement to which the application relates, from the prescribed expenditure conditions relating thereto, in an amount not exceeding the amount required to be expended in any one year in respect of that mining tenement."

It should be noted that s.102(1) as it was, provided no time within which an application for exemption should be made. On some occasions when a plaint for forfeiture was lodged, the tenement holder would respond by lodging an application for an exemption that was retrospective. Such an application by the tenement holder was clearly an attempt to defeat the plaint for forfeiture. This was an undesirable practice and Recommendation 5.7 (4) of the HUNT INQUIRY was that such applications for exemptions that were retrospective
should not be permitted. Clearly s.76 of the Amending Act is the Legislative response to that recommendation.

No. 100 of 1985, A Bill for an Act to amend the Mining Act 1978, the Amending Act, was released to the public on the 14 March, 1985. It was assented to on the 4 December, 1985 (see s.24 of the Interpretation Act 1984) and s.2 of the Amending Act came into force on the 4 December, 1985 (see s.22 of the Interpretation Act 1984).

Section 2 of the Amending Act provides:

"The several provisions of this Act shall come into operation on such day as is, or days as are respectively, fixed by proclamation."

The Government Gazette of the State of Western Australia published on the 31 January, 1986 provided:

"MINING AMENDMENT ACT 1985

PROCLAMATION

WESTERN AUSTRALIA ) By His Excellency Professor Gordon
GORDON REID ) Reid, Governor in and over the State
Governor (L.S.) of Western Australia and its Dependencies in the Commonwealth of Australia.

Under Section 2 of the Mining Amendment Act 1985, I, the Governor, acting with the advice and consent of the Executive Council, do hereby fix the day that this proclamation is published in the Government Gazette as the day on which the provisions of that Act, other than Sections 31, 34, 38, 59, 63, 68, 69, 70, 71, 77, 78, 79, 80, 88, 90, and 96 shall come into operation.
Given under my hand and the Public Seal of the said State, at Perth, this 28th day of January, 1986.

By His Excellency's Command.

DAVID PARKER
Minister for Minerals and Energy.

GOD SAVE THE QUEEN!

Section 76(a)(i) of the Mining Amendment Act 1985 provides:

"Section 102 of the Principal Act is amended in sub-section (1) by deleting "tenement, such" and substituting the following:

"tenement or his authorized agent prior to the end of the year to which the proposed exemption relates, the."

(the Mining Act 1978 is the Principal Act).

(my underlining)

Section 76 of the Mining Amendment Act 1985 provides other amendments to section 102 of the Mining Act but for the purpose of this exercise, Section 76(a)(i) is the important one.

Incorporating all of the amendments to s.102(1) of the Mining Act 1978, s.102(1) of the Mining Act 1978 as amended now reads as follows:

"102(1) Subject to this Act, on an application made, as prescribed by the holder of a mining tenement or his authorized agent prior to the end of the year to which the proposed exemption relates, the holder may be granted a certificate of exemption in the prescribed form totally or partially exempting the mining tenement to which the application relates from the prescribed expenditure
conditions relating thereto, in an amount not exceeding the amount required to be expended -

(a) in respect to any mining tenement other than a mining lease, in any one year;
and
(b) in respect to a mining lease, subject to subsection (7) of this section, in a period of 5 years.

(my_underlining)

In the present case the end of the year to which the proposed exemption relates is midnight on the 27 December, 1985. The application was made on the 31 January, 1986 and so not prior to the end of the year to which the proposed exemption relates.

It is submitted on behalf of B.H.P. that the Warden has jurisdiction to hear the Application on its merits. It is also submitted that it follows ipso facto that the Warden may hear any application for exemption provided the anniversary date of the tenement to which the proposed exemption relates is prior to the commencement of the Amending Act, i.e. prior to the 31 January, 1986. It is submitted that the critical date is not the date that the application is lodged but the anniversary date of the tenement.

I propose to first examine the issue in the light of common law principles applying to the interpretation of amending statutes. I will then touch briefly on the provisions of s.37 of the Interpretation Act 1984. I will only touch briefly on s.37 because in my view it does not matter in the final analysis whether s.37 applies or not.
In this instant it is submitted that to refuse to hear the Application because it was not lodged prior to the 31 January, 1986 is to give the Amending Act retrospective operation.

The approach by the Courts was summarised by Dixon C.J. in *Maxwell v Murphy* (1957) 96 C.L.R. 261 at p.267:

"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed."

At page 270, Dixon C.J. went on to state:

"Perhaps there could be no more practical summary of the principle, which was as said, emerges from the English and
Canadian cases, than the following:

'Unless the language used plainly manifests in express terms or by clear implication a contrary intention

(a) a statute divesting vested rights is to be construed as prospective;

(b) a statute merely procedural, is to be construed as retrospective;

(c) a statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.'"

DIXIE v ROYAL COLUMBIAN HOSPITAL (1941) 2 D.L.R. 138
per Sloan J.A. at p.139.

In CARR and ANOTHER v FINANCE CORPORATION OF AUSTRALIA LTD.
42 A.L.R. 29, Mason, Murphy and Wilson J.J. referred to a number of cases involving the relevant principles and at page 37, they set out the operation of the rule:

"If the time allowed for instituting an action has already expired when an amending Act extends the time, that amendment will not operate to revive the extinguished cause of action or render it capable of enforcement. Conversely, if the time within which an action may be taken, or a step taken in proceedings, is abridged, the amending law will not apply so as to place a party out of time. On the other hand, so long as there is yet time for the action to be instituted or the step taken, an abridgment of time will apply; it is then no more than a procedural statute affecting the future conduct of the proceedings. It seems to us that this line of cases
reflects the care of the common law for vested rights and its concern to avoid injustice."

The basis of the distinction between amendments being procedural (retrospective) on the one hand and those effecting substantive rights (prospective) on the other, was stated by Mellish L.J. in *Republic of Costa Rica v Erlanger* (1876) 3 Ch. D. 62 at p.69:

"No suitor has any vested interest in the course of procedure, nor any right to complain, if during litigation the procedure is changed, provided, of course, that no injustice is done."

It is perhaps worthwhile to look at the facts of two relevant cases to see how the general rule of common law applies.

In *Vrttiaho v The Public Curator of Queensland* (1971) 125 C.L.R. 228 the facts were briefly as follows. Until 12th February, 1966 0.90, r 9 of the Rules of the Supreme Court of Queensland provided that when six years had elapsed from the time when the last proceeding was taken in a cause, no fresh proceeding should be taken therein without the order of the Court or a judge. The rule was amended as from the 12th February, 1966 so as to reduce the period of six years to three years. An action commenced in the Supreme Court of Queensland on 22nd May, 1963. A step therein was taken on 24th June, 1963. No further step was taken in the action before 24th June, 1966. The plaintiff applied on 15th August, 1967 for leave to proceed. It was assumed in the application that the amendment applied to the action and the judge refused leave to proceed.
On appeal it was held that in its application to the events which had occurred, the amendment to 0.90, r 9 was only of a procedural character and hence according to the rules of common law concerning the retrospective operation of amending statutes, the presumption that the amendment ought not be understood as applying to events which occurred before the amendment was displaced. The amendment did not impair the appellant's right or bar his cause of action. There was still time after the amendment for the appellant to have proceeded with his cause of action. The decision in the first instance was upheld.

In CARR and ANOTHER v FINANCE CORPORATION OF AUSTRALIA LTD the facts were briefly as follows. Amendments to ss. 57, 58 and 58A of the Real Property Act 1900 (N.S.W.) came into effect on 1 July, 1978. In respect of a mortgagor defaulting in the payment of money, the amendments introduced a requirement of non-compliance with a prescribed notice of demand as a precondition to a mortgagee exercising the statutory power of sale and any power to call up principal. The appeal challenged a decision that the amendments did not apply where default under a mortgage occurred prior to 1 July, 1978 although notices were given and the property sold after that date.

It was held that the amendments dealt with matters of substantive right rather than procedure, and did not effect the mortgagees power of sale, which had occurred prior to the amendments and upon the default of the mortgagor.
Before proceeding to apply these principles to the facts in this instant, it is necessary to examine whether B.H.P. has any right and if so what is it.

ABBOTT v. MINISTER FOR LANDS (1895) A.C. 425 is authority for the proposition that the mere fact that the law was something one could avail oneself of had it remained unchanged is not an accrued right. The cases since that case that I have referred to reflect the care of the common law for vested rights and its concern to avoid injustice.

In CARR and OTHERS v. FINANCE CORPORATION OF AUSTRALIA LTD in the joint judgment of Mason, Murphy and Wilson J.J. at page 38 they stated:

"The common law presumption against imputing to the legislature an intention to interfere retrospectively with rights which have already accrued does not call for a narrow conception of a right. If it were otherwise, the essential justice of the rule would be eroded."

In this instant I am of the view that B.H.P. does have a right and that right is to make an application for exemption in respect of its Exploration Licence if it believed it would not comply with the expenditure requirements for that tenement or come the anniversary date, the 27 December, 1985, it failed to comply with the expenditure requirements.

Prior to s.76 of the Amending Act coming into force, s.102(1) of the Mining Act 1978 provided no time within which an application for exemption had to be made. The holder of a mining tenement could lodge an application for exemption at any time. The application
for exemption could be made for any one year. Therefore it was open to the holder of a mining tenement to apply for an exemption prior to the end of the year to which the proposed exemption related.

It was submitted on behalf of B.H.P. that the right to apply for an exemption was created by its failure to comply with the expenditure conditions attaching to the Exploration Licence by the anniversary date, the 27 December, 1985. In my view this is incorrect.

At all times that B.H.P. was the holder of the Exploration Licence it had the right to lodge an application for exemption in respect of that tenement. As holder of the Exploration Licence from its date of grant, B.H.P. had a right to apply for an exemption in respect of the year ending 27 December, 1985 at any time prior to the 27 December, 1985. Whether it would have been granted an exemption is of course another matter. Certainly no plaint for forfeiture could have succeeded against B.H.P. claiming non compliance with the expenditure provisions for the year ending 27 December, 1985 if that plaint was lodged prior to the 27 December, 1985 and certainly no prosecution pursuant to s.154(1) of the Mining Act 1978 could have been successfully instituted against B.H.P. prior to the 27 December, 1985 complaining of non compliance with the expenditure provisions for the year ending 27 December, 1985, however that does not mean that B.H.P. did not have the right to apply for an exemption for the year ending 27 December, 1985 prior to that date.

In this instance it doesn’t matter whether the right to apply arose at any time prior to the 27 December, 1985 or immediately
upon the expiration of the 27 December, 1985 and B.H.P. having failed to comply with the expenditure provisions. The Application was lodged subsequent to the 27 December, 1985, namely the 31 January, 1986 and so the right had arisen in any event. Immediately prior to s.76 of the Amending Act coming into force i.e. at midnight on the 30 January, 1986, B.H.P. had an unrestricted right to make an application for exemption for the year ending 27 December, 1985. If s.76 was construed to operate retrospectively then B.H.P.'s right to make the Application was extinguished and the Application is incompetent. If such was the case it would be my duty to proceed no further (see R v ZEMPILAS; EX PARTE COX 1970 W.A.R. 197).

Accordingly it would be improper for me to consider the merits and I would not proceed to make any recommendation whatsoever.

In CARR and ANOTHER v FINANCE CORPORATION OF AUSTRALIA LTD at page 35, Mason, Murphy and Wilson J.J. all stated that:

"The key to the problem is to identify clearly the relevant effect of the amending Act."

In YRTTIANGO v THE PUBLIC CURATOR OF QUEENSLAND the amending Act was held to be procedural. In the words of Gibbs J. (as he then was) at page 241:

"The amendment did not impair the appellant's right or bar his cause of action. After the amendment took effect the appellant remained entitled to continue with his action and enforce his right."

In this instance, if the Amending Act is construed retrospectively then it has impaired B.H.P.'s right to apply for an exemption. It would no longer be entitled to apply for an exemption for the year

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ending 27 December, 1985. In this instance the following passages are clearly appropriate.

"In our opinion, the amending Act deals with matters of substantive right. Its effect is much greater than merely inserting a temporal impediment to the exercise of a power of sale. Assuming its application, rights which were immediately exercisable prior to the coming into operation of the amendments were no longer capable of such exercise, and might never be capable of exercise."

(See Mason, Murphy and Wilson J.J. at page 36 of Carr and Another v Finance Corporation of Australia Ltd).

and

"A law which has the effect of taking away such a right or immunity could not be classed as merely procedural."

(See Williams J. at page 280 of Maxwell v Murphy).

I have previously mentioned two very important reasons why a tenement holder would wish to apply for an exemption if it believed it would not comply or had failed to comply with the expenditure provisions. First, it would be seeking to protect itself from a plaint for forfeiture. Upon such a plaint it is open to forfeit the tenement from the holder or fine the holder (see s.s. 98 and 99 of the Mining Act 1978). An exemption for any shortfall in expenditure would protect the holder from such plaint. In my view it would not be open to a plaintiff seeking forfeiture to attack a decision of the Minister to grant an exemption. To allow this would create uncertainty in the minds of tenement holders.
Having obtained an exemption, a tenement holder should be entitled to feel secure so that it can get on with expending funds on exploration of its tenement or tenements.

Secondly, an exemption would provide a ready defence to any prosecution pursuant to s.154(1) of the Mining Act 1978. In this instance see s.s. 62 and 154(1) of the Mining Act 1978.

In my view, in this instance, s.76 of the Amending Act deals with a substantive right and could not be classed as merely procedural. If it was construed as having a retrospective effect then it would not simply restrict B.H.P.'s right to make the Application, it would extinguish such right and this in turn would produce an unfair, harsh and unjust result.

Having concluded at this stage of my analysis of the Amending Act that it is to be construed as effecting substantive rights and therefore being prospective in nature, I must now examine whether a contrary intention appears from the amending provision. Such contrary intention must appear with "reasonable certainty" (see Dixon C.J. at page 267 in MAXWELL v MURPHY).

The following passage was adopted by Gibbs J. (as he then was) in YRTIAHO v PUBLIC CURATOR OF QUEENSLAND at page 246:

"In In re Athlumney; Ex parte Wilson, Wright J. said:
'One exception to the general rule' (that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, other than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment) 'has sometimes been suggested, namely,
that where, as here, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended. But this exception seems never to have been suggested except in relation to statutes affecting procedure, such as Statutes of Limitation, and even in relation to them it is questioned in Moon v Durden."

In this instance, members of the mining industry had no warning that s.76 of the Amending Act was going to be proclaimed on the 31 January, 1986. It was proclaimed to come into operation on the day it was published in the Government Gazette. The first the industry became aware that it was in the Government Gazette on the 31 January, 1986 was when that Gazette was published at 3.30 p.m. on that date.

That fact that s.76 of the Amending Act was assented to on the 4 December, 1985 does not make it law. Such assent should not be taken as putting the industry on notice. To support this view one need only look to this very instance. The Application was made at 9.15 a.m. on the 31 January, 1986, the very morning that the Government Gazette was published. At the time the Application was lodged, B.H.P. would have had no knowledge that the proclamation was to be published that afternoon. From 9.15 a.m. to 3.30 p.m. it had good reason to believe that it had lodged a competent application for exemption.
Section 21 of the Interpretation Act 1984 provides that:

"Where any written law, or portion of a written law, comes into operation on a particular day, it shall come into operation at the beginning of that day."

Thus s.76 of the Amending Act came into force immediately after midnight on the 30 January, 1986 and accordingly at 9.15 a.m. on the 31 January, 1986 it was in force. If s.76 was construed as procedural and operating retrospectively then the Application would be incompetent. In my view this would clearly be unfair, harsh and unjust.

If it was provided in the Government Gazette on the 31 January, 1986 that s.76 of the Amending Act would come into operation on some future specified date e.g. 28 February, 1986, then I would hold that the Legislature intended s.76 to operate retrospectively. However the Government Gazette contained no such provision.

At the outset I mentioned that I would refer briefly to s.37 of the Interpretation Act 1984. It provides as follows:

"37 (1) Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears -

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;"
(c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;

(d) affect any duty, obligation, liability, or burden of proof imposed, created, or incurred prior to the repeal;

(e) subject to section 11 of the Criminal Code, affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against that enactment;

(f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture.

and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made.

(2) The inclusion in the repealing provisions of an enactment of any express saving with respect to the repeals effected thereby shall not be taken to prejudice the operation of this section with respect to the effect of those repeals."
Section 37(1) deals with repeals of an enactment. The first question that arises is whether s.76 amends or repeals. Section 5 of the Interpretation Act 1984 defines "repeal" as:
"to include rescind, revoke, cancel or delete."

The term "amend" is also defined in Section 5 and it is not defined to include repeal. Section 76 of the Amending Act states that s.102 of the Mining Act 1978 "is amended," however the insertion of the new limitation is as a result of a stated "deletion."

Assuming rightly or wrongly that s.76 repealed the position as it previously existed then one would go on to examine the effect, if any, of s.s. 37(1)(c) and 37(1)(f) of the Interpretation Act 1984. Section 37(1)(f) includes in its premise the supposition that at the time of the amendment there was a proceeding on foot. Even if an application for exemption is a proceeding, because of the provisions of s.21 of the Interpretation Act 1984, it was not on foot at the time that s.76 of the Amending Act came into operation.

If s.37(1)(c) of the Interpretation Act 1984 applied, then it would produce the same conclusion as reached when applying the common law rules.

In conclusion, it is my view that s.76 of the Amending Act operates prospectively. It applies to the anniversary dates of grants or renewals for years ending after the commencement of the Amending Act.
I believe that there should be further and prompt legislative change to s.102 of the Principal Act to remove the time within which the application should be made from the Act to Division 7 of the Regulations. Regulation 104 would then apply. The time within which exemption applications should be made should correspond with the reporting provisions for the different types of tenements, in this instance Regulation 22.

Regulation 22 provides as follows:

"22. The reports required under section 68 (2) of the Act shall be a report on operations on the mining tenement in the form No.5 in the First Schedule to be filed within 60 days after—
(i) each anniversary date of the commencement of the term of the licence;
(ii) the surrender, forfeiture, expiry or other cancellation of the licence;
(iii) the surrender of any portion of the licence, relating to all work done during the tenure of the licence on that surrendered portion.

or within such further period as the Minister may approve prior to the date due for filing of the report.

A tenement holder may not be aware that an application for exemption should be made until such time as the report is completed. It may then wish to utilise information collated during the preparation of the report to support the application for exemption. The legislation in its present form could result in a tenement holder completing and filing its report within the time allowed but on ascertaining a shortfall in the expenditure from the report it would not be able to apply for an exemption for that shortfall.
If the legislation stays in its present form then tenement holders will be forced to make applications for exemption when they do not really know whether the expenditure provisions have been complied with or not.

There are two obvious disadvantages arising from this:

(a) applications may later be found to have been unnecessary and so
   (i) a waste of the applicants time and money and
   (ii) a waste of the Warden's and the Minister's time.

(b) the applicant may not be able to fully support its application for exemption because an exploration report was not to hand.

Having concluded that the Application is competent, it now remains for me to consider the Application on its merits.

I am satisfied as to the bona fides of B.H.P. in respect of its exploration of this Exploration Licence. This tenement forms part of a project known as the Tertiary Channels Project. Substantial expenditure has been incurred on exploration of the tenements comprising the project to justify the exemption sought in respect of this particular tenement.

CONCLUSIONS:

1. The Application is competent.

2. The Application is recommended for approval for 6/12ths of
expenditure, equivalent to $11,550.00 from the expenditure conditions relative to the year ending 27 December, 1985.

D.J. REYNOLDS S.M. WARDEN

22 April, 1986