BEFORE THE WARDEN
IN OPEN COURT
HELD AT PERTH

HEARD: 7th MAY 1999
DELIVERED: 20th AUGUST 1999
WARDEN: G.N. CALDER SM

IN THE MATTER OF: APPLICATION FOR SPECIAL
PROSPECTING LICENCE 39/3838;
OBJECTION 53/989 TO THE GRANTING
OF APPLICATION 39/3838.

BETWEEN: JAMIE NIELSON LEVY
and
LESLIE EDWARD LOWE (Applicants)

- and -

BRONZEWING GOLD NL (Objector)

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RECOMMENDATION OF THE WARDEN TO THE MINISTER; S.56A

Appearances:
Mr L.E. Lowe, represented himself and the applicant
J.N. Levy

Mr T. Kavenagh instructed by Corser & Corser appeared for
the objector
THE PROCEEDINGS

The Application

Application for special prospecting licence no. 39/3838 was lodged with the mining registrar at Leonora on 29 September 1998. The application sought the grant of the tenement over an area of 10 hectares for a period of 4 years. The primary tenement over which the special prospecting licence ("SPL") application is sought is prospecting licence 39/3133 ("PL 34/3133").

The Objection

Objection no. 53/989 to the granting of SPL 39/3838 was lodged at the Leonora Registry on 30 October 1998. The grounds for objection are as follows:

(C) GROUNDS FOR OBJECTION: SPL 39/3838

1) Ground disturbing activities over the application area would have an adverse affect on Bronzewing Gold's ("Bronzewing") exploration programme, by distorting the results. Machinery and plant on the ground may hinder Bronzewing's future test work.

2) Prospecting Licence 39/3133 over which the Application for SPL 39/3838 ("SPL") has been lodged, is strategically placed. The SPL is located directly between and along strike of Hard Case (old GML 39/938) situated on the southern boundary of Bronzewing's P 39/2533 and Folly (old GML 39/947) situated approximately 1.5km to the north west of the SPL and 200 metres west of Bronzewing's P 39/2534.

   Hard Case produced 10.2 tonnes of gold ore at a recovered grade of 310 g/t. Folly yielded 8 kg of gold from 0.66 tonnes of ore.

   Within the same structural environment Rainbow (old GML 39/611) situated on Bronzewing's P 39/2533, 500 metres east of the SPL, produced 5.6 tonnes of gold ore at a recovered grade of 70 g/t.

3) The gold previously won from the workings, proves high grade ore exists in considerable quantities and the granting of the SPL and the subsequent ground disturbance would adversely affect the exploration results for planned programmes of:

   a) A closed spaced ground magnetic survey.

   b) A closed spaced geochemical survey.

4) The fact that Bronzewing has already applied for mining leases over this ground, confirms the belief and commitment to the discovery of an economic deposit, located within P 39/2533, 2534 and 3133.
5) P 39/3133 is also subject to a tribute agreement between Bronzewing and Minerichie Investments Pty Ltd. This agreement dated September 1997 is valid for 2 years and allows the dozing, detecting and dry blowing of the alluvial top soil for gold. The granting of the SPL would adversely affect this tribute agreement and may cause Bronzewing to be in breach due to the inability of access.

THE PRIMARY TENEMENT

It was not disputed at the hearing before me and, based upon the evidence given by the witnesses who appeared before me, and upon copies of documents from the register kept at the office of the mining registrar in respect of PL39/3133, I make the following findings. The primary tenement consisting of 120 hectares, was first granted on 11 August 1993 to R.F. Crewe and A.W. Vaughan jointly. In March 1995 the shares of those two persons in the tenement were transferred to Roehampton Developments Pty Ltd and on 9 May 1997 all shares in the tenement were transferred to Bronzewing Gold NL ("Bronzewing"). The expiry date of PL39/3133 would have been 10 August 1997, however, on 7 July 1997 the tenement holder, pursuant to section 49(1) of the Mining Act 1978 ("the Act") made application for the grant of a mining lease over the ground covered by the prospecting licence and, by virtue of the provisions of section 49(2) the term of PL39/3133 was extended beyond that expiry date and, the Minister having not yet finally determined the application for the mining lease, continued in force up to and including the date of the hearing of this application. In respect of the application for the mining lease (application 39/530) the objector tendered in evidence a letter dated 5 November 1997 from the Director, Mineral Titles, in which it was stated by the Director that the application for the mining lease "...is now ready to be approved, however before doing so the provisions of the Commonwealth Native Title Act 1993 need to be complied with." (Exhibit F). I proceed on the basis that that is the present status of that application.

THE REPORT OF THE DIRECTOR, GEOLOGICAL SURVEY

In accordance with the provisions of section 56A(4) I was furnished with a report of the Director, Geological Survey. The report said (where relevant):

"OBSERVATION 112/978
DGS REPORT TO THE WARDEN PURSUANT TO SECTION 56A(4)

Application for P 39/3838 S (J.N. Levy, L.E. Lowe) affecting P 39/3133 (Bronzewing Gold NL)

This report is provided to the Warden of the Mt Margaret M.F. in accordance with Section 56A(4).

The affected licence P 39/3133 lies within an area which is prospective for gold and nickel mineralisation. No primary mineralisation is known from within the tenement area, but prospecting for alluvial gold seems to have been common."
No mineral-exploration reports for PL 39/3133 have been submitted to the Department. Information from the Form 5 Expenditure reports suggests that work on the licence during the five years of tenure consisted of about 80 days of metal detecting. It is not known where on the licence metal detecting occurred, or how much gold might have been recovered.

The tenement was transferred to the current holder, Bronzewing Gold NL, in April 1997. No systematic exploration has been carried out so far. Without more detailed information in regard to the location of the proposed exploration program, it is difficult to make an assessment of the possible impact. A geochemical survey may be adversely affected depending on the type of prospecting activity. It is quite likely that the tenement area has been previously disturbed as the Form 5 Expenditure report for the first year of tenure states that a dozer has been used.”

THE EVIDENCE

The Witnesses

Evidence was given by two witnesses on behalf of the applicants, namely, the applicant Mr Lowe and Mr D.H. Smith. Mr Lowe did not give any evidence as to his knowledge or experience of any aspect of prospecting, exploration or mining. I was satisfied from his evidence that he was familiar with the ground covered by both SPL application 39/3838 and by PL39/3133.

I am satisfied that Mr Smith has the qualifications and experience which he described in his evidence. He is a qualified geologist holding a PhD in geochemistry from Melbourne University which he obtained in 1967 and he has been employed in mining since that year. I find that he is familiar with and has a knowledge of the geology of the ground applied for.

Only one witness was called by the objector. That was Mr Noel Taylor who is a director of Bronzewing. Mr Taylor obtained a Bachelor of Science (Geology) at London University in 1977. He has worked extensively in the mining industry since then and has had continuous experience in gold mining and exploration activities in Western Australia since 1993. He became a director of Bronzewing in July 1997. I accept that he is a very experienced geologist and that he is familiar with the area covered by PL39/3133 and with all of the other adjoining tenements which were referred to in evidence and which were either held by Bronzewing or in respect of which Bronzewing has an interest.
The Ground Applied For

The area of the SPL which is applied for is 10 hectares which is 1/12th of the size of the primary tenement and lies approximately in the centre of that tenement. I am satisfied that the area of particular interest to the applicants which is within the ground applied for is as described by Mr Lowe in his evidence and is as depicted in the diagram which he tendered in evidence (exhibit D). I accept Mr Lowe's evidence which was to the effect that the area in which the applicants wish to undertake prospecting for gold pursuant to the special prospecting licence is surrounded by an eroded basalt ridge and that entry to it is gained through a break in that ridge which is located more or less to the north-west of the area of interest to the applicant. That area could, in broad terms, be roughly described as being shaped like an inverted "T". In the leg of that "T" shape in the plan of the area tendered by the applicant is marked "alluvium proposed area of our earthmoving." Immediately beneath that and running parallel to the horizontal section of the "T" is written: "shallow creek". Beneath that and occupying the remainder of the area of the inverted "T" is a section designated "bulldozed area with earth dumps." No evidence was given by either party as to the dimensions of the area of interest. I am therefore unable to make any finding as to the size of the area and therefore as to its relativity, in terms of size, to the whole of PL39/3133. On the basis of the evidence of Mr Lowe I am satisfied that in the area of interest to him and his co-applicant there is very little top soil and that what top soil there is appears to be constituted mainly by decomposed basalt.

In the past there has been heavy bulldozing in the creek and adjacent to the creek. A considerable amount of spoil has been pushed up to form the dumps to which I have previously made reference. Those dumps cover an area of approximately 1½ hectares. I am satisfied that the objector has not done any work on the ground in the area which is of interest to the applicants.

The Primary Tenement

As previously mentioned, P39/3133 consists of 120 hectares and the ground applied for by the applicants is located roughly in the centre of the primary tenement. The form 5 which was lodged for PL39/3133 for the year ended 10 August 1998 (exhibit C3) indicates very little expenditure was incurred by the objectors on the ground on the tenement itself during that year. In that regard what is shown is an amount of $700 under the heading "general prospecting" beneath which it is stated:

"Geological reconnaissance and mapping. Locate and confirm position of corner and boundary marks. General prospecting metal detecting."

There is nothing in the evidence given by Mr Taylor, nor in the form 5 to which I have made reference, nor in any other documentation before me which suggests that the objectors have any particular plans or interest in the ground applied for by the applicants. There is no evidence before me of the results of any metal detecting done on the tenement either by the objectors or by any previous holders.
I find that, as indicated by the applicants' witness, Mr Brian Smith (including his report which was submitted into evidence (Exhibit E) that "a large proportion of the area of the SPL application 39/3838 is covered by topsoil that has been considerably disturbed by bulldozing.

The Applicants' Plans

I am satisfied that if the SPL is granted the applicants plan to carry out the work indicated in the evidence of Mr Lowe and Mr Smith.

The operation which is planned is to bulldoze the existing dumps aside, analyse the contents of the dumps and the ground beneath them. It is proposed to investigate the creek-line with metal detectors and upon analysis of the results of the detecting, if the results suggest that it should be done, it is then proposed to initially remove soil using a bobcat and, if results of that appear promising, to then use heavier machinery such as a bulldozer or a large front-end loader. In his evidence, which I accept, Mr Smith said that if the area previously mentioned was bulldozed that would have very little effect on any future magnetic survey which the objectors may wish to undertake because such a survey relies on signals from primary rocks and does not rely upon signals from oxidised surface or near-surface material. In his report, Mr Smith said that "the magnetic signals that are measured are due to the magnetic properties of the rocks at depth and there is only a slight influence of surface material. The magnetic signatures are determined by a much larger volume of rock which may extend to many metres in depth. Such a survey can be carried out with no impact on the surface and it only requires any large metal components on the surface, such [sic 'as'] earthmoving machinery to be removed while the survey is in progress. This would not normally constitute any problems." In his evidence Mr Smith said that the previous bulldozing of the area in question would be disastrous for any geo-chemical survey conducted in the future over that area because in doing such a survey one is looking for anomalies which are indicative of gold at the surface at distributions of parts per billion, and there is likely to have been contamination from the previous bulldozing which would invalidate any results obtained. Mr Smith also said that the alluvial work proposed by the applicants would have no impact on future drilling into primary rock layers for exploration purposes.

The Primary Tenement Holder's Plans

Mr Taylor, who was called on behalf of the objectors, produced in evidence a copy of a tribute agreement dated 19 September 1998 between the objectors and Minerichie Investments Pty Ltd (Exhibit G). Where relevant, the recital contained in the tribute agreement says:

"1(a) Bronzewing will grant Minerichie a tribute agreement on the tenements for the sole purpose of dozing, detecting and dry-blowing of the alluvial top soil for a period of no less than 24 months from the signing of this agreement with an option for a further 12 months on agreeance of both parties."
2(a) Minerichie has the right to take machinery onto the leases and detect and dryblow the top soil to a maximum depth of 3 metres.

2(b) Minerichie will rehabilitate all areas on the tenements disturbed by themselves or others associated to Minerichie to Mines Department standards.

2(c) Minerichie will deliver 10 per cent of all gold won by Minerichie on the tenements within 30 days of completion of the job.

2(d) Minerichie shall indemnify Bronzewing against any costs, claims, losses, liabilities caused directly or indirectly by Minerichie's activities on the tenement.

2(e) Minerichie will supply all details relating to work, expenditure and gold won within 30 days of request from Bronzewing.

2(f) Minerichie will not interfere with any exploration work being conducted by Bronzewing."

In evidence, Mr Taylor said that it was his understanding that no work had been done on PL39/3133 by Minerichie pursuant to the tribute agreement. He did not give any evidence which indicated that it was his understanding or belief that in the near future Minerichie would be commencing work on the primary tenement pursuant to the tribute agreement. Mr Taylor said that Bronzewing had been trying to negotiate other agreements in respect of the group of tenements and that it had also been trying to float a junior exploration company. He produced in evidence a draft prospectus which he said had been produced for that purpose. In that draft prospectus, at page 39, reference is made to the Windsor Well prospects, which I am satisfied includes the subject primary tenement. There is brief commentary about old mine workings in the vicinity and "the occurrence of a number of significant signs of gold mineralisation in the vicinity." The draft prospectus also states (page 39) that "A comprehensive program to explore this ground for larger lower-grade zones of mineralisation is considered to be fully justified." There is then some reference to proposed exploration programs in the general area consisting of interpretation of existing aero-magnetic data, drilling programs, geological mapping and geochemical sampling.

Mr Taylor said that it was proposed for the future that there be intensive and extensive sampling of the whole tenement and that 20 by 20 grid sampling was planned.

The Provisions of the Mining Act 1978

The relevant provisions of the Act are as follows.

Section 56A(1) provides that at any time after the expiry of 12 months from the date on which a prospecting licence ("the primary tenement") was granted an application may be made for the grant of a prospecting licence for gold. An SPL may only be applied for by, granted to or held by a natural person (section 56A(1a). If the holder of the primary tenement, after being served with a notice of the application for a special prospecting licence,
objects to the granting of the special prospecting licence the application is to be determined by a Warden. The Warden is required (section 56A(4)) “to obtain a report from the Director, Geological Survey, in respect of the prospecting carried on by the holder of the primary tenement on the land to which the application relates.” That report “is to be based solely on information contained in reports filed by or on behalf of the holder of the primary tenement under section 51” (i.e. the form 5 prescribed by Regulation 16) or under section 115A.

Section 56A(5) says:

"After hearing an objection referred to in subsection (4), the Warden may refuse the application for the special prospecting licence concerned on the ground that prospecting for gold on the land to which that application relates would result in undue detriment to the prospecting being carried on by the holder of the primary tenement or he may recommend that application to the Minister, who may -

(a) refuse that application; or
(b) subject to this Act, grant that application as provided in subsection (6),

but, if the Warden refuses an application under this subsection, the applicant may within the time and in the manner prescribed appeal to the minister against that refusal and the Minister may dismiss that appeal or uphold that appeal and grant that application as provided in subsection (6)."

Section 56A(6) says:

"Subject to this section, the Mining Registrar, the Warden or the Minister may grant an application for a special prospecting licence on such terms and conditions as he thinks fit, but a special prospecting licence so granted -

(a) shall not exceed 10 hectares in area;
(b) shall authorise the holder thereof to prospect only for gold;
(c) shall not, unless the Minister otherwise directs, prevent the holder of the primary tenement from prospecting for minerals other than gold in or on the land the subject of the special prospecting licence;
(d) does not authorise the holder thereof to excavate, extract or remove during the period for which the tenement remains in force a total amount of earth, soil, rock, stone, fluid or mineral bearing substances in excess of 500 tonnes, except in so far as the prior written approval of the Minister may otherwise permit; and
(e) does not authorise mining to be carried out in any portion of the land that is -

(i) below a depth specified in the terms and conditions of the special prospecting licence, and any depth so specified shall be less than 50 metres below the lowest part of the natural surface of the land the subject of the special prospecting licence; or

(ii) if a depth is not so specified, 50 metres or more below the lowest part of the natural surface of the land the subject of the special prospecting licence, except in so far as both the prior written consent of the holder of the primary tenement and the prior written approval of the Minister may otherwise permit.

Subsection 6(aa) says that an SPL "may be granted for a period of 3 months or for any period which is a multiple of 3 months but which does not exceed 4 years."

Section 56A(8) provides that the holder of an SPL which has been granted for a period of 4 years may apply for and be granted a mining lease for gold in respect of all or part of the area the subject of the SPL where the primary tenement holder does not object to such a grant or where the Minister is satisfied "that gold exists in payable quantities on or in the land to which that application relates." Unless the Minister approves otherwise, mining pursuant to such a mining lease for gold is limited to a depth of 50 metres from the natural surface. Upon the grant of such a mining lease for gold the area of that lease is excised from the primary tenement. The holder of such a lease may not, without the consent of the primary tenement holder and of the Minister, remove more than 750 tonnes per annum of material from the tenement.

From the abovementioned provisions of the Act it can be seen that the grant of an SPL, particularly one for a term of 4 years, gives considerable rights, present and future, to the holder which would not otherwise be available in respect of land already the subject of grant of a mining tenement as the land would not otherwise be open for mining (section 18). A special prospecting licence has the potential to diminish the current and future value of a primary tenement which is a prospecting licence, which may not exceed 200 hectares in size and to prevent or interfere with present or planned future prospecting or exploration or mining on the land the subject of the primary tenement. In my opinion, section 56A(6)(c) has the effect of preventing the holder of the primary tenement from prospecting for gold on the land the subject of a special prospecting licence. It thus gives exclusive rights to the SPL holder to prospect for gold on the area the subject of that licence. That is consistent with section 48 of the Act which sets out, according to its heading, the rights conferred by a prospecting licence, but which expressly says that what section 48 of the Act authorises the holder of a prospecting licence to do is "subject to this Act".
A literal reading of subsections (5) and (6) of section 56A exposes what appears to be a contradiction concerning the powers of the Warden after hearing an application for the grant of a special prospecting licence and objection thereto. Subsection (5) appears to give the Warden a discretion to do only one of two things, namely, to either refuse the application on the ground of undue detriment to the prospecting being carried out by the primary tenement holder or, alternatively, the Warden may "recommend" the application to the Minister. Subsection (5) does not say expressly, nor in my opinion impliedly, that the Warden may grant a special prospecting licence.

Subsection (6) of section 56A says (where relevant) that subject to section 56A "the Mining Registrar, the Warden or the Minister may grant an application for a special prospecting licence on such terms and conditions as he thinks fit...". It should be noted that paragraph (b) of subsection (5) provides that the Minister, having received a recommendation from the Warden pursuant to subsection (5) may, subject to the Act, "grant that application as provided in subsection (6)". Insofar as the powers of the Minister in respect of special prospecting licences are dealt with by subsection (5) of the Act, I consider that it is the intention of the legislation that, subject to the Act as a whole, subsection (5) is to vest in the Minister the power to grant or refuse the application for a prospecting licence where the Warden has not previously refused the application and that is the intention of the legislation that subsection (6) then gives to the Minister the power to impose conditions upon the grant by the Minister of the licence which power to impose conditions is, however, subject to the qualifications and limitations contained within paragraphs (a) to (e) inclusive of subsection (6). I am of the view that subsection (6) does not give a power to grant it merely gives the power to impose terms and conditions upon the licence upon grant.

It should also be noted that, pursuant to section 56A(3) of the Act, if there is no objection from the primary tenement holder to the grant of the SPL then the Mining Registrar is empowered to grant the application but that power of the Registrar to make such a grant is expressly made subject to the provisions of subsection (6). In my opinion, if it is the case that Parliament intended that the Warden were to have power to grant an SPL after hearing an objection to the grant thereof, then such a power would have been expressly referred to in subsection (5) or another subsection other than subsection (6) as was done in respect of the Registrar in subsection (3) and the Minister in subsection (5)(b).

Section 56A was added to the Act by Act 122 of 1982. It has been amended several times. In Act No. 58 of 1994 Parliament amended the legislation to empower the Mining Registrar, pursuant to subsection (3) of the Act, to grant an SPL where there was no objection thereto by the primary tenement holder. Prior to that amendment being made, it had been the Warden, and the Warden alone who had the power to grant a special prospecting licence where there was no objection. Subsection (6) of the Act was also amended by Act No. 58 of 1994. That amendment expressly included the Mining Registrar as being a person who was empowered, subject to S.56A, to grant an SPL on such terms and conditions as he thinks fit. I am of the opinion that when subsections (3) and (6) were so amended the draftsman overlooked the fact that upon the commencement of those amendments to
the Act, the Warden was no longer empowered under subsection (3) to grant an SPL where there was no objection from the primary tenement holder and that the Warden's powers as set out in subsection (5) did not include an express power to grant a special prospecting licence.

For the above reasons, it is my view that I do not have any power to grant a special prospecting licence and that my powers are to either refuse, where I find undue detriment as contemplated by subsection (5) or, in the alternative, where I do not find that undue detriment would result from a grant, to make a recommendation to the Minister.

It is my opinion that, in the context in which it is used within section 56A, subsection (5) of the Act should be interpreted as meaning that the Warden may recommend the grant or refusal of the application for an SPL where the Warden has not concluded that the grant of such a licence would result in undue detriment to the prospecting being carried on by the primary tenement holder, and that the Warden is not limited to merely recommending that the special prospecting licence be granted. I am aware that in other provisions in the Act where the Warden is given the power to make recommendation to the Minister that power is expressed as being to recommend “the grant or refusal (see section 59(5)(c) (exploration licence), section 70D(5)(c) (mining lease), section 102(6) (expenditure exemption). I do not consider, however, that the absence of the words "grant or refusal"” after “recommend” in section 56A(5) should be read to mean that only a grant can be recommended by the Warden. In the Macquarie dictionary “recommend” is defined, (inter alia) as:

“(2) to represent or urge as advisable or expedient,

(3) to advise (a person etc to do something).

I consider that “recommend” as it appears in section 56A(5) should be interpreted and applied in that way.

It follows from what I have just concluded that I consider that the primary tenement holder is not limited to the ground of undue detriment when objecting to the grant of a special prospecting licence. I see no reason why the primary tenement holder should not be permitted to object to the grant of a special prospecting licence where, for example, the provisions of section 41(1)(a) have not been complied with, or where the provisions of section 105 have not been complied with bearing in mind that subsection 56A(1) makes specific reference to marking out and to making the application in accordance with S.41. I am of the opinion, however, that it is only the primary tenement holder who may object pursuant to the provisions of section 56A of the Act and that it is only an objection made by a primary tenement holder which enables the Warden or the Minister to act pursuant to subsections (5) or (6) of S.56A of the Act.
Although section 56A does not expressly state that the Warden shall or may give the objector an opportunity to be heard (as, for example, is provided in section 42(3)) of the Act and although subsection (5) of the Act does not (as does, for example, section 42(3)) expressly state that the Warden is to "hear and determine the application" for the special prospecting licence, I am of the opinion that it is implied that the Warden must "hear" the objector and that the Warden must also "hear" the applicant. Subsection (5) begins with the words: "After hearing an objection..." and I conclude from the use of those words that "hearing" in that context means that the Warden is to conduct a hearing at which the parties must be given the opportunity to give evidence themselves and to call witnesses and produce exhibits and to challenge any evidence produced. The rules of natural justice require that.

Before it was amended by Act No. 54 of 1996, section 56A(4) of the Act required the Warden to obtain from the Director, Geological Survey, a report as to whether prospecting for gold on the primary tenement in the area the subject of the SPL application could be carried on "without detriment to the prospecting being carried on by the holder of the prospecting licence". Subsection (4) as it appeared in the Act at the time of the making of the present application, which is after the time when the amendment became operative, requires the Director, Geological Survey, to provide a report "in respect of the prospecting carried on" by the primary tenement holder on the land the subject of the SPL application and no longer requires only that the report be directed towards the question of whether the gold prospecting could be carried on without detriment. That is not to say, however, that it would not be open to the Director and proper for the Director to draw to the attention of the Warden matters about the prospecting carried on by the primary tenement holder which may either self-evidently indicate that there would be undue detriment or which may provide a basis for the Warden coming to that conclusion. Given that there is no express requirement for the applicant for an SPL to furnish as part of the application or as an accompaniment to the application for the grant any information at all about the proposed gold prospecting operations and given that it is at least arguable that subsection (3) of section 41 (which enables the Warden to request information or evidence from the applicant, does not operate by virtue of the provisions of section 56A(1) in respect of an application for a special prospecting licence because such a request would not be part of the application itself, it is likely that in many cases that the Director, Geological Survey, because of the absence of relevant information about the proposed work to be done on the SPL if granted, would not be in a position to comment upon the likelihood or otherwise of there being any undue detriment to the prospecting being carried on by the primary tenement holder. The amendment in 54 of 1996 is consistent with that situation.

In my opinion it is not particularly helpful in determining whether or not to refuse or recommend the grant of a special prospecting licence under section 56A, and where both sides have presented evidence and argument, for the Warden to consider whether it is the applicant who has the onus of establishing that there will be no undue detriment or it is the objector who has an onus to establish that there will be undue detriment. I consider that the correct approach is for the Warden to simply ask, after having heard all of the evidence and after having taken into account any other material properly before the Warden, including the report of the Director, Geological
Survey, to, firstly, ask the question whether or not the granting of the special prospecting licence, with appropriate conditions, could be made without the prospecting which that grant would allow resulting in undue detriment to the prospecting being carried on by the primary tenement holder, and if the answer to that question is in the negative the Warden should refuse the application. I do not consider that the word "may" where first used in subsection (5) gives the Warden a discretion as to whether or not the Warden should refuse the application for the special prospecting licence where the Warden concludes that it would not be possible to grant the special prospecting licence upon such terms and conditions as would result in there being no undue detriment to the primary tenement holder's prospecting then being carried on. I perceive it to be the intention of the legislation in that respect that if there would be such undue detriment upon the grant being made that a grant should not be recommended by the Warden. It appears that it is the intention of the legislation, however, that the Minister is to have a discretion to make such a grant even in circumstances where the Warden considers that there would be undue detriment (S.56A(5)).

The words "undue" and "detriment" are not defined in the Act either individually or as a composite term. In the Shorter Oxford Dictionary "undue" is defined as:

"2. Not appropriate or suitable; improper; unreasonable.
3. Unjustifiable, illegal, late ME. 4. Going beyond what is appropriate, warranted, or natural; excessive."

In the Macquarie Dictionary "undue" is defined as:

"1. unwarranted; excessive; too great: 2. not proper, fitting, or right; unjustified;"

In the Shorter Oxford Dictionary "detriment" is defined as:

"1. Loss or damage done to, or sustained by, any person or thing; that which causes a loss."

In the Macquarie Dictionary "detriment" is defined as:

"1. Loss, damage, or injury. 2. Cause of loss or damage."

In the context in which the words "undue detriment" are used in section 56A(5) of the Act I consider the words should be given their ordinary, everyday meaning. There is no need to give them any special meaning or to limit or otherwise qualify their ordinary, everyday usage and meaning when interpreting and applying subsection (5).

I consider that because of the express reference in subsection (5) to "the prospecting being carried on... by the primary tenement holder" and because of the provisions of subsection (4) of section 56A which require that the Director, Geological Survey report "in respect of the prospecting being carried on... by the primary tenement holder" that it is incumbent upon the Warden to give consideration, amongst other things, to the prospecting, if
any, which has been done in the past on the tenement, whether by the current holder or by a previous holder, to the use, if any, which the primary tenement holder has made of the results of such previous prospecting, to the prospecting work which the primary tenement holder has in the past carried out and which the primary tenement holder has planned to carry out in the future on the whole of the primary tenement, to the work, if any, which has previously been carried out and which is planned to be carried out on or in the vicinity of the ground the subject of the SPL application, and to the likelihood or otherwise of the primary tenement holder carrying out any proposed work, all of which matters could properly include a consideration by the Warden of the present or future capacity of the primary tenement holder, both technical and financial, to carry out planned prospecting operations.

The Warden must also necessarily take into account the nature of the application for the SPL in terms of the area applied for, the size of the area applied for relative to the size of the primary tenement, the proximity of the ground applied for to work done or proposed to be done by the primary tenement holder, the nature and extent of the work proposed to be done by the applicant, the bona fides of the applicant, the present and future technical and financial capacity of the applicant to prospect for gold. The foregoing is not an exhaustive list of relevant matters.

I consider that subsection (5) of section 56A requires that before the Warden refuse the application upon the basis of undue detriment, the Warden must be satisfied that the granting of a prospecting licence, even with extensive terms and conditions, would result in undue detriment. That means that it is not enough for the Warden to conclude merely that it would be "likely" that undue detriment would result. The Warden must be satisfied there will be undue detriment.

**Term of SPL**

Section 56A(6aa) says:

"A special prospecting licence may be granted for a period of 3 months or for any period which is a multiple of 3 months but which does not exceed 4 years."

It was introduced by Act 58 of 1994 commencing January 31, 1986. No express guidelines are given by the Act as to when it is appropriate to grant an SPL for a 4 year term or for a lesser term.

If a grant is not made for a term of 4 years then the holder will be denied the opportunity, otherwise given to the holder of an SPL granted for a term of 4 years under the provisions of S.56A(8) and (8a), to apply for and be granted, (if the Minister exercises his discretion in that way), a mining lease for gold.

It is arguable, although not necessary for me to decide in this matter, that although subsection (9)(a) says that subject to S.56A the provisions of the Act relating to prospecting licences apply to special prospecting licences granted under the Act, that the provisions of S.49 which entitle a prospecting licence holder to apply for and be granted a mining lease under the provisions of S.75 of the Act are not available to the holder of a special prospecting licence. If that is so, then a holder of a special prospecting licence granted for less than 4 years, who, after considerable work and
expenditure would be able to "prove to the satisfaction of the Minister by a report from the Director, General Survey, that gold exists in payable quantities" (S.56A(8)(b)) would be denied the right and the opportunity to obtain a mining lease for gold. If the holder were to surrender the special prospecting lease if its term expired, then the provisions of S.45(2), applied by virtue of S.56A(9)(a), appear to mean that the holder could not re-apply for 3 months after surrender or expiry. It may also be the case that subsection 56A(7b) would, in any event, prevent any other SPL being granted at all. Subsection (7b) does not expressly say that the limitation imposed therein means only that no more than one special prospecting licence may "while there is any other special prospecting licence which has not come to an end." That is another matter which I need not resolve in the case now before me.

There is no provision in the Act which enables the term of a prospecting licence or an SPL to be extended, excluding for present purposes. The application of provisions such as S.49(2) or 70D(6), which would appear to mean that the holder of an SPL granted for less than 4 years and who had made such a discovery as is contemplated by S.56A(8)(b) could not have the term extended to 4 years to enable advantage to be taken of S.56A(8) and (8a).

SUBMISSIONS OF THE PARTIES

The Objectors

In written submissions, Mr Kavenagh, on behalf of the objectors, made reference to the tribute agreement between Bronzewing and Minerichie Investments Pty Ltd and, in particular, to clause 1(a) which I have previously mentioned. He also referred to clause 2(a) and noted that, consistently with the evidence of Mr Taylor, that Minerichie had not yet undertaken any work on PL39/3133.

Mr Kavenagh also made reference to a number of cases which had previously been decided by Mining Wardens. I have read all of those cases to which he referred and taken into account the findings and comments and conclusions reached by each of the Wardens. They are all helpful, however, it must be taken into account that since all of those decisions were delivered the relevant legislation has changed and, of course, that each case was decided by the Warden upon the basis of the merits of the application, taking into account the situation of the applicant and of the objector primary tenement holder.

In oral submissions, Mr Kavenagh said that in an application for the grant of a special prospecting licence the onus fell upon the applicant to demonstrate that the proposed work on the special prospecting licence could be carried on without detriment to the primary tenement holder. He said that in this case the evidence was insufficient to enable an adequate assessment to be made by the Warden as to whether or not the proposed work would be detrimental to the prospecting being or intended to be carried on by the primary tenement holder. Mr Kavenagh said that what the applicant wanted to do was, in effect, precisely what the objector wanted to do upon the area the subject of the application. Mr Taylor, in his evidence, did not say that.
He did say, however, that the objector intended to do extensive 20 by 20 grid sampling on the tenement. He also said that he believed that the creek which is depicted in the plan submitted by Mr Lowe (Exhibit D) was due to faulting. During cross-examination Mr Taylor had, however, agreed with Mr Lowe that the soil disturbance which had already taken place on the ground applied for would compromise the results of any geo-chemical sampling survey.

**The Applicants**

Mr Lowe argued that the onus was on the objector to establish that there would be detriment if the special prospecting licence were granted. He submitted that it was only the holder who could say what any detriment would be and that, generally, applicants would not be in a position to know whether their proposed prospecting would have such an impact. He submitted that the evidence of Mr Taylor established that Bronzewing did not have sufficient capital to undertake the work suggested by Mr Taylor or suggested in the grounds for objection.

**CONCLUSIONS**

I am not satisfied, after hearing all of the evidence which has been placed before me and after taking into account the report of the Director, Geological Survey, that the grant of an SPL would result in undue detriment to the prospecting being carried on by the objector on the primary tenement. The report of the Director, Geological Survey, is consistent with the evidence given by Mr Taylor on behalf of the objectors in that it appears from both sources that for several years very little prospecting has been done on the primary tenement, consisting (according to the Director’s report) of some 80 days of metal detecting over 5 years with no information available to the Director as to where detecting was done or how much, if any, gold was detected. The evidence of Mr Taylor suggested to me that the primary tenement holder does not have the present financial capacity to undertake extensive prospecting of the type suggested by Mr Taylor on the primary tenement and in coming to that view I have taken into account the fact that the primary tenement is but one of a group of nine other tenements in close proximity to the primary tenement. No evidence was given by Mr Taylor and none emerged otherwise in the proceedings before me as to whether or not the primary tenement holder has any particular interest in the ground applied for by the applicants. Mr Taylor said that no work had yet been done by Minerichie Investments Pty Ltd pursuant to the tribute agreement which, at the time of the hearing, had been in existence for 9 months out of an initial term of 2 years (with an option to extend for 12 months). I was left with the impression after hearing Mr Taylor’s evidence that it was unlikely that Minerichie would commence any work on the primary tenement pursuant to the tribute agreement within the near future. The evidence before me suggested to me that the primary tenement holder had no firm plan to prospect the area the subject of the application.
There was no direct evidence given on behalf of the applicants as to the depth to which an SPL was sought. There was nothing to suggest that the intentions of the applicants extended beyond alluvial prospecting. There is nothing in the evidence to suggest that if the SPL were granted which authorised "mining" (S.56A(6)(d)) up to but not including 50 metres below the lowest part of the natural surface of the ground applied for, any more undue detriment would result to the prospecting of the primary tenement holder than if it were granted for a lesser depth.

RECOMMENDATION

I recommend to the Minister that the special prospecting licence be granted, but that the area of the grant be limited to a rectangular-shaped area which is no greater than the area which the Minister is satisfied will wholly contain the area of land described in the evidence of the applicant, Mr Lowe, and depicted in Exhibit D which was tendered in evidence before me. I recommend that the depth below the natural surface of the ground applied for to which mining is authorised to be carried out should be specified in the terms and conditions of the special prospecting licence as being up to but not including 50 metres but that it should be not less than 3 metres from the natural surface. I recommend that the standard conditions which are normally imposed by the Minister upon the grant of special prospecting licences be imposed.