JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	OPEN COURT
LOCATION	**:**	MEEKATHARRA
CITATION	**:**	HAWKS -v- LUZENAC AUSTRALIA PTY LTD
CORAM	**:**	WILSON SM
HEARD	**:**	15 JANUARY 2003
DELIVERED	**:**	15 JANUARY 2003
FILE NO/S	**:**	PLAINTS FOR FORFEITURE 75 & 76/012 OBJECTIONS 60 & 61/012
TENEMENT NO/S	**:**	APPLICATIONS FOR EXEMPTION ME 495 & 496/012 AFFECTING M52/469 & 471
BETWEEN	**:**	LUZENAC AUSTRALIA PTY LTD (Applicant) AND GRAHAM ALFRED HAWKS (Objector)

Catchwords:

Application/Exemption/Expenditure Conditions
Objection/Application/Expenditure Conditions
Exemption/Aboriginal Heritage Act/Application

Legislation:

Mining Act (WA) 1978 s.102(2)(b), (g), (h), (3)
Aboriginal Heritage Act (WA) s.16

Native Title Act (Cth)

Result:

Recommend that Applications for Exemption from Expenditure be granted

Representation:

Counsel:

Plaintiff-Objector	:	Mr M P Workman
Defendant-Applicant	:	Mr M F Gerus

Solicitors:

Plaintiff-Objector	:	Michael Workman
Defendant-Applicant	:	Clayton Utz

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

Normandy Bow River Diamond Mine Ltd v Clinton Andella [2001] WAMW 19

Case(s) also cited:

Nil

1 I have before me today a number of applications brought by, Luzenac Australia Pty Ltd ("Luzenac") seeking an exemption from expenditure conditions in respect to two mining leases, being M 52/469 and M 52/471 ("the ML's"), located within the Peak Hill Mineral Field. The applications for exemption are respectively ME 495/012 and ME496/012 ("the Exemptions"). There was, until today, in existence Objections 60 and 61/012 to each of the Exemptions, but they have been today withdrawn by leave. Further, there were two plaints in relation to these matters, being 75 and 76/012 ("the Plaints") brought by Mr Graham Alfred Hawks ("Mr Hawks") alleging breaches of the expenditure requirements in relation to the ML's. The Plaints have been dismissed by consent, with no order as to costs.

2 What remains before me is to determine the Exemptions that I have previously referred to should be recommended. Luzenac has produced into evidence a number of exhibits and has also called evidence from Mr Graham Broadbent ("Mr Broadbent") in relation to the Exemptions. The grounds relied upon for the grant of the Exemptions is s.102 (2)(b), s.102 (2)(g), s.102 (2)(h) and s.102 (3) of the *Mining Act (WA) 1979.* In relation to the Exemptions, I will deal with each of the grounds in these reasons.

3 The background to these matters is that, in about mid-December 2001 Luzenac become the registered holders of the ML's having purchased them from Western Mining Corporation ("WMC"). Produced into evidence and contained within the affidavit of David Gibbs is a copy of the sale agreement between WMC and Luzenac. The purchase price was $53.5 million. The tenements purchased relate to talc deposits located near Three Springs ("the Three Springs tenements") and the ML's the subject of the Exemptions are located at Mt Seabrook which is not far from the Mt Gould Pastoral Station to the north-west of Meekatharra.

4 The Three Springs tenements produce about 10 per cent of the world supply of talc. The ML's are located and abut further tenements for a talc deposit owned by an Italian company. The distance between the ML's and the Three Spring tenements is about 500 kilometres.

5 Following the purchase by Luzenac of the Three Springs tenements and the ML's, Luzenac entered into a service agreement with Rio Tinto to conduct exploration activity and to review all of the data that had been supplied to Luzenac. That review took a considerable period of time. The evidence of Mr Broadbent was that a lot of further planning, exploration and evaluation of previous work was required to be done to bring the

material into a form that was, for the purposes of the ongoing proposals by Luzenac, meaningful to them.

6 Mr Broadbent further said that the material that he had received did require interpretation. Further, Mr Broadbent said that he was required to locate some drill samples that were not where they were said to have been and also to compile all of the information that was then handed over to them.

7 In my opinion, it is clear that the purchase of a group of tenements such as the Three Springs tenements and the ML's, with the history that does exist, for the sum of money that is indicated, would clearly indicate that some time is required for work to be done and for the planning of future exploration or mining. It is not the case necessarily that mining companies, on the purchase of mining tenements from another company, will necessarily follow the same path or same proposals that the company who previously held the tenement was embarking upon. The evidence of Mr Broadbent is that the evaluation of the work previously done by Rio Tinto, on behalf of Luzenac, was done for the purposes of re-evaluating and planning the future exploration and also the future direction that the production of talc by Luzenac would follow.

8 The ML's are located a considerable distance away from the Three Spring tenements and produce a slightly different type of talc. The ML's are regarded as good deposits of talc and clearly there was a need by Luzenac to be able to review the work that had been done previously in that area. In my opinion, it was not unreasonable for Luzenac to wish to review all work that had been done on the Three Springs tenements and the ML's to ensure that the future direction of Luzenac would proceed in an economic and logistically possible way.

9 In my opinion, the time that was taken, as explained by Mr Broadbent, clearly indicates that there is a well-structured plan to exploit the talc that exists and that the time taken was subject to certain requirements on the part of people not specifically associated with Luzenac or Rio Tinto and that the time sought was not, in my opinion, unreasonable. In my opinion, pursuant to s. 102(2)(b) of the Act the exemption has been made out by Luzenac.

10 Luzenac further seeks exemption from expenditure pursuant to s. 102(2)(g) of the Act. That section makes provision for an exemption to be granted on the basis that there is some political, environmental or other difficulties in obtaining requisite approvals that prevent mining or restrict

it in a manner that is or subject to conditions that are for the time being impractical.

11 What has specifically been raised in relation to the ML's is the application of the *Aboriginal Heritage Act* to some approvals required and work that was required to be carried out on the ML's. Mr Broadbent said that it was Rio Tinto's role to engage people of interest to the area where the ML's are located, in particular the native title claimants or holders of that area, and for there to be a heritage survey conducted within that area so that Rio Tinto, on behalf of Luzenac, could identify areas to which the *Aboriginal Heritage Act* is applicable.

12 The consequence of that requirement was that one of Rio Tinto's employees, liaison officer, Mrs Penny Joyce, engaged the native title claimants for the area through the Yamatji Land and Sea Council. A meeting and a heritage survey conducted. There were some difficulties in putting together a suitable time for the meeting to take place, given cultural reasons and also given other commitments of various people who would need to take note of these clearances. That eventually occurred in or about mid-2002. Certain rock holes within the area of the ML's were identified as being places of interest. As a consequence, that area has been excluded from exploration at this time.

13 The matter that has been raised by Luzenac is whether the *Aboriginal Heritage Act* is an Act to which an approval is required and as such, is it a reason under s. 102(2)(g) of the Act to which an exemption can be granted. There apparently exists, no authority that specifically deals with the issue of whether compliance with the provisions of the *Aboriginal Heritage Act* is an applicable ground of exemption for expenditure conditions.

14 I have had the opportunity to briefly review various sections of the *Aboriginal Heritage Act* and it would seem to me that this Act is intended to provide protection to places and objects of significance to Aboriginal culture. Breaches of that Act provides for penalties of fines and imprisonment or the imposition of both. It would seem to me that the *Aboriginal Heritage Act* in itself is not an Act that establishes an approval process for certain aspects of the Act. However, it would appear to me that one cannot ask for approval to conduct mining or, as the Act refers to in section 16, "excavation or otherwise interfering with sites, places or objects of significance" without there first being some form of survey or review conducted before the specific approval can be sought.

15 It would seem to me that before one can make such an application pursuant to section 16 of the *Aboriginal Heritage Act* and seek approval from the Registrar of Sites, one must firstly identify where those sites are. The general terms of the grant of the ML's have by way of endorsement that the holder must comply with the provisions of and draws to the attention of the holder to the *Aboriginal Heritage Act.* Whilst it is not a condition that there must be compliance, it is my opinion that in this time and age, given various other Acts of Parliament, particularly the *Native Title Act* that has come into being, that mining companies would act at their own peril if they were not to conduct or at least make the appropriate inquiry to identify places of significance and that would fall under the provisions of the *Aboriginal Heritage Act*.

16 As I previously indicated, it is my opinion, that to conduct an Aboriginal heritage clearance in an area of interest would be a prerequisite for a mining company to seek approval pursuant to s 16 of the *Aboriginal Heritage Act* to excavate or otherwise interfere with such sites. It is the case that it is, and would be, impossible for people who are not trained or who are not the traditional owners of the land to be able to identify matters of significance that occur in and around specific areas. It is clear that Aboriginal people may simply identify an area of significance by the placement of stones in certain patterns which may not appear to the untrained eye to be an area any different to those areas that surround it. Therefore, for a person to comply with the *Aboriginal Heritage Act*, they must firstly know what they are looking for and are dealing with. If an approval to excavate is required, then, as I have indicated, it is a prerequisite that one must know what exists on the ground in the first place.

17 I note the comments of Warden Calder in relation to the matter of ***Normandy Bow River Diamond Mine Ltd v Clinton Andella*** [2001] WAMW 19 which has been referred to in an outline of submissions in which it was said that it would be proper for the tenement holder to take time to ensure that it would not infringe the provisions of the *Aboriginal Heritage Act* and it would not attempt to ignore or override the interests and claims of traditional landowners.

18 Accordingly, in my opinion, compliance with the *Aboriginal Heritage Act* would be a basis upon which approvals to excavate would be required, and it would seem to me that to ask for approval to excavate, one must know precisely what is there in the first place. That would require there to be investigation by the traditional owners or anthropologists to identify those places to which the *Aboriginal Heritage*

Act would apply. Whilst that does not require approval, it is nonetheless, part of the approval process and it would therefore be, in my opinion, a basis upon which an exemption from expenditure conditions would apply pursuant to s 102(2)(g) of the Act. However, having said that, it would also be the case that one would expect that a tenement holder would make inquiry through the Register of Sites to identify any work previously done in the area so as to minimise the time required for such approvals and for such clearances to occur.

19 It is not the case that, having said that, compliance with the *Aboriginal Heritage Act* should be regarded as a basis upon which there is to be long delays in obtaining clearances or abstaining from expenditure. Much work could still be done in areas of mining tenements that do not involve the interference with, or excavation of sites of significance to Aboriginal people. The *Aboriginal Heritage Act* clearly is an important Act. It is important because mining, by its very nature, often involves the excavation and permanent disturbance of places of significance to the traditional holders of the land. Accordingly, I am satisfied from the evidence given by Mr Broadbent, that pursuant to s. 102(2)(g) of the Act that that ground of exemption has been made out.

20 A further matter that has been raised is whether the ML's are to be regarded as a project involving more than one tenement and that expenditure on all the tenements comprised in the project would have been such to satisfy the expenditure requirements in relation to the ML's had the aggregate expenses been apportioned to all the various tenements comprised in the project. This ground of exemption is made pursuant to s. 102(2)(h) of the Act by Luzenac.

21 Luzenac, has submitted that it regards the ML's as important tenements in respect to the Three Springs tenements. The ML's are some 500 kilometres from the Three Spring tenements. Mr Broadbent stated that it would be feasible to truck ore from the ML's to the Three Springs tenements for treatment at the treatment plant. Mr Broadbent stated that the because of the specialist nature and the unique type of mining that is involved with the production of talc and as the three deposits appear to be the only talc deposits in Western Australia the deposits are important deposits. The world market for talc is relatively small, but apparently lucrative.

22 Luzenac is a producer of some note in the world talc industry. The technology and intellectual property involved in the mining of talc is

unique. The exchange of information between various competitors is not commonly passed between them.

23 The application and the proposal that the ML's be regarded, as a project is something that is quite different to those matters that are generally seen in the Warden's Court in this State. Hard-rock mining for the gold and other minerals generally sees deposits within a relatively short distance. There are exceptions to such arrangements, particularly when one considers things such as iron ore where distances of hundreds of kilometres are not uncommon between the mine and some of the treatment plants and process areas. However, when one considers the issues of gold, particularly the fluctuating price of gold, it is the price that will dictate the viability of trucking gold bearing ore over long distances.

24 Talc, it would seem, is a completely different scenario. The Three Springs tenements and talc treatment plant appears to be a well developed talc mine. Treatment of talc on the Three Springs mine site is well advanced. The treatment of talc does not require a lot of manual work, but some sorting by hand. It is not the case that it would be necessarily viable for a full treatment plant to be established in the ML's.

25 On the evidence of Mr Broadbent, it would appear that one of the requirements is that the operations at the Three Springs tenements and treatment plant be used to fund the exploration of the ML's and the area surrounding the ML's. Accordingly, given the specialist nature of talc and given the distance between the ML's and the Three Spring tenements, it would appear to be feasible to regard the trucking of talc all from the ML's to Three Springs tenements as a viable proposition. However, it is of note that the area surrounding the ML's has not been well explored or has there been compliance in the past by the previous holder or holders of tenements in the area and that the area is otherwise, if I can use the words, tied up by tenements that have produced, it would seem, little expenditure in that area.

26 I accept the evidence from Mr Broadbent that the operations of Luzenac have their sights firmly set on developing the area where the ML's and that one of the proposals is to consider trucking ore to the Three Springs tenements and treatment plant for treatment. Given the specialist and unique nature of talc and given that there would appear to be only a few people or companies involved in the production of talc in this State and that it would seem to be a relatively boutique market in the world, it would not be unreasonable to consider the ML's and the Mt Seabrook

area as a project that incorporates the Three Springs tenements and treatment plant despite the distance from one another.

27 Perhaps what distinguishes this matter somewhat is that the funding from the Three Springs tenements and treatment plant's production will fund the exploration and production from the ML's and the Mt Seabrook area. In my opinion, the life and existence of the Three Springs tenements and treatment plant mine will, whether now or at some stage in the future, be somewhat dependent on the further production of talc from the ML's and the Mt Seabrook area and, as such, the area should be regarded, in my opinion, as a project area. Accordingly, I find that ground for exemption made out.

28 In respect to the ground of exemption sought pursuant to s 102(3) of the Act, I think I need make only few comments to this matter. The other three grounds have been made out. Certainly it would appear, in my opinion, given the information that has been produced to me in affidavit form and given to me in verbal evidence by Mr Broadbent, that the development of the ML's and the Mt Seabrook area and certainly the development of the Three Springs tenements are will advanced by Luzenac.

29 Accordingly, for those reasons I would recommend to the Honourable Minister that the applications for exemption numbers ME 495 and 496/012 in respect to Mining Leases 52/469 and 471 be granted.