JURISDICTION	:	MINING WARDEN
LOCATION	:	PERTH
CITATION	:	HAWTHORN RESOURCES LIMITED v GERARD VICTOR BREWER [2018] WAMW 18
CORAM	:	WARDEN J O'SULLIVAN
HEARD	:	16 April 2018
DELIVERED	:	10 December 2018
FILE NO/S	:	Applications for Exemption 487994 & 487995 Objections 496160, 496083 & 496161
TENEMENT NO/S	:	Exploration Licences 31/781 & 31/882
BETWEEN	:	**HAWTHORN RESOURCES LIMITED** (Applicant) AND **GERARD VICTOR BREWER** (Objector)

Catchwords: *Application for certificates of exemption; ss102(2)(b) & s102(3) Mining Act; turns on own facts.*

Legislation:

- *Mining Act 1978 (WA)* ss62, 63A, 98, 102 & 103

Result:

1. *It is recommended that the Minister grant applications for exemption 487994 & 487995.*

Representation:

Counsel:

Applicant	:	Mr T I Masson
Objector	:	Mr G Lawton

Solicitors:

Applicant	:	Ensign Legal
Objector	:	Lawton Lawyers

Cases referred to:

- ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd*** (2007) 34 WAR 403
- ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153
- ***Mohammadi v Bethune*** [2018] WASCA 98
- ***Nova Resources NL v French*** (1995) 12 WAR 50
- ***MH Gold v Phoenix Rise*** [2018] WAMW 13
- ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** (2006) 31 WAR 270

Background

1. Hawthorn Resources Limited was granted Exploration Licences 31/781 and 31/882 on 6 April 2010 (the Tenements).[1]

2. Both tenements are located on the northern margin of Hawthorn's Trouser Legs Joint Venture Project Area (TLJVP).

3. The Anglo Saxon Gold Deposit in the TLJVP is approximately 9 km to the south of E31/781 and 6.8 km to the south of E31/882.[2]

4. The Anglo Saxon Gold Deposit is located approximately 140 km north-east of Kalgoorlie Boulder within the Shire of Menzies.[3]

5. Hawthorn seeks certificates of exemption for the Tenements. The reporting year for both E31/781 and E31/882 runs from 5 April 2015 to 5 April 2016 (the Expenditure Year).[4]

6. The Anglo Saxon Project required the construction of a haul road on L31/65 which passes through E31/882.[5]

7. A draft Mining Proposal was provided to Tisala Pty Ltd, the registered holder of the adjacent Pinjin Pastoral lease, on 11 August 2014 which, among other things, identified the location of the proposed haul road.[6]

8. On or about 6 May 2015 Hawthorn and Tisala came to an agreement concerning the construction of the haul road.[7]

9. A Mining Proposal for the Anglo Saxon project was submitted to the Department of Mines and Petroleum (DMP) [8] on 18 June 2015.[9]

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[1] Ex 1; Affidavit of Ian William Moody; sworn 16 May 2017 (First Moody Affidavit) at [32] & [33]
[2] First Moody Affidavit at [28]
[3] First Moody Affidavit [32] & [33]
[4] First Moody Affidavit at [37] & [34]
[5] Ex 2; Affidavit of Ian William Moody; sworn 27 March 2018 (Second Moody Affidavit) at [15] & [16]
[6] First Moody Affidavit at [87]
[7] Second Moody Affidavit at [16]
[8] Now the Department of Mines, Industry Regulation and Safety
[9] First Moody Affidavit at [41]

10. The DMP's target timeframe for the assessment of Mining Proposals is to complete 80% of decisions within 30 business days.[10]

11. Subsequent to the haul road agreement, Tisala installed a mobile plastic water tank in proximity to the proposed haul road.[11]

12. A revised Mining Proposal was submitted on 25 November 2015 following queries from the DMP arising from the objection from Tisala.[12]

13. Tisala had objected on the basis that the Mining Proposal contravened s20(5) of the *Mining Act* with respect to water infrastructure and stockyards at the junction of E31/882 and M31/78.[13] Section 20(5)(e) of the *Mining Act* provides that mining cannot take place within 400 m of water infrastructure without the consent of the occupier.

14. On 2 December 2015 the DMP put the Mining Proposal on hold pending written consent from Tisala.[14]

15. On 4 December 2015, the DMP agreed to seek internal legal advice on the definition of "*water works*" in s20(5)(e).[15]

16. On 22 December 2015, the Minister for Mines and Petroleum wrote to Hawthorn confirming that there was no power to grant the revised Mining Proposal until consent was provided by Tisala.[16]

17. On 8 January 2016, the DMP sought advice from the State Solicitor's Office with respect to water infrastructure and stockyards.[17]

18. Tisala had also objected to the grant of clearing permit C6634/1 which included portions of L31/65 that pass through E31/882.[18]

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[10] First Moody Affidavit IWM8 at [491]
[11] First Moody Affidavit at [88]
[12] First Moody Affidavit at [42]
[13] First Moody Affidavit at [86]
[14] First Moody Affidavit [89]
[15] First Moody Affidavit at [90]
[16] First Moody Affidavit IWM18 at 1025
[17] First Moody Affidavit at [92]
[18] First Moody Affidavit at [94]

19. On 29 January 2016, the Minister for Environment dismissed the objection to Clearing Permit CC6634/1.[19]

20. The Anglo Saxon Project Revised Mining Proposal was ultimately approved on 12 February 2016.[20]

21. Ian William Moody, Hawthorn's Exploration Manager summarised Hawthorn's position as follows:

> *"51. As part of mining operations at the Anglo Saxon Project, HAW would have equipment and personnel, including drilling equipment that would allow for the efficient and cost effective exploration of E31/781 and E31/882.*
>
> *52. HAW always had a plan to conduct exploration activities on E31/781 and E31/882 upon commencement of mining operations at the Anglo Saxon Project.*
>
> *53. For example, the proposed haul road to the Anglo Saxon Project on L31/65 (which overlays E31/882) would be the subject of sterilisation drilling prior to the construction of the haul road. Consequently, adjacent drilling on E31/882 will be more efficient and cost effective if carried out at the same time."*

22. Mr Moody further testified that:

- Hawthorn always had a plan to conduct exploration activities on 31/781 and 31/882 on commencement of mining operations at the Anglo Saxon Project.[21]
- The Plan was formulated in 2013/14 and was scheduled and budgeted for in the 2015/16 year.[22]
- The Board document said to evidence the plan had not been produced and that the plan was merely "an intention of what might happen".[23]
- During the 2016/17 expenditure year Hawthorn had been active on E31/781 carrying out field activities including mapping, sampling and drilling site

[19] First Moody Affidavit at [94]
[20] First Moody Affidavit at [46] & [93]
[21] First Moody Affidavit at [52]
[22] Mr Moody t/s 16/4/18 at [26]
[23] Mr Moody t/s 16/4/18 at [26] & [27]

surveys.[24] Similar activities including drilling had occurred on E31/882 during the 2016/17 expenditure year.[25]

- Because of the uncertainty concerning whether the Mining Proposal for Anglo Saxon Project would be approved, exploration of the Tenements was put on hold.[26] A lack of money was not the reason further exploration of the Tenements did not occur during the Expenditure Year.[27]

- The delay to the Anglo Saxon Project created significant uncertainty. Hawthorn remained hopeful that the impasse on the approval of the Mining Proposal would be overcome to enable the commencement of mining operations at the Anglo Saxon Project and further exploration programs on the Tenements to identify potential satellite ore systems as potential ancillary operations to the Anglo Saxon Project. Hawthorn did not consider it economically viable to conduct drilling on the Tenements until the equipment and personnel were on site at the Anglo Saxon Project to conduct such work.[28]

- Access to the Tenements was via the Edjudina-Pinjin Road which is around 8 km from E31/882 and 12 km from E31/781. There is no access tracks into the area. E31/781 is very densely wooded. To bring a drill rig into that area a road needed to be constructed on L31/65. A haul road costs between $40,000 – $45,000 per kilometre. In this case it would need to be between 7-12 km.[29]

The Grounds of Exemption

23. Hawthorn rely on two grounds of exemption:

[24] First Moody Affidavit at [64]; t/s 16/4/18 at [27]
[25] First Moody Affidavit at [77]; t/s 16/4/18 at [29]
[26] Mr Moody t/s 16/4/18 at [28]
[27] Mr Moody t/s 16/4/18 at [29]
[28] Ex 1; First Moody Affidavit at [95]
[29] Mr Moody t/s 16/4118 at [31]

(a) Pursuant to s102(2)(b) time was required during the Expenditure Year to plan future exploration or mining on E31/781 and E31/882; and

(b) Pursuant to s102(3) due to the significant delay to the Anglo Saxon Project caused by Tisala.

The Legislative Framework

24. Exploration licences are subject to a condition that the tenement holder shall comply with the prescribed expenditure conditions [30] unless a partial or total exemption is granted.

25. Section 102 of the *Mining Act* deals with applications for exemptions:

> **"102. Exemption from expenditure conditions**
>
> *(1) Subject to this Act, on an application (an **application for exemption**) made, as prescribed, by the holder of a mining tenement (other than a retention licence) or his authorised agent prior to the end of the year to which the proposed exemption relates, or within the prescribed period after the end of that year, 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), in a period of 5 years.*
>
> *(1a) An application for exemption may relate to more than one mining tenement.*
>
> *(2) A certificate of exemption may be granted for any of the following reasons —*
>
> *(a) that the title to the mining tenement is in dispute; or*
>
> *(b) that time is required to evaluate work done on the mining tenement, to plan future exploration or mining or raise capital therefor; or*

[30] 62(1) of the *Mining Act*

(c) that time is required to purchase and erect plant and machinery; or

(d) that the ground the subject of the mining tenement is for any sufficient reason unworkable; or

(e) that the ground the subject of the mining tenement contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future or that at the relevant time economic or marketing problems are such as not to make the mining operations viable; or

(f) that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation; or

(g) that political, environmental or other difficulties in obtaining requisite approvals prevent mining or restrict it in a manner that is, or subject to conditions that are, for the time being impracticable; or

(h) that —

*(i) the mining tenement is one of 2 or more mining tenements (**combined reporting tenements**) the subject of arrangements approved under section 115A(4) for the filing of combined mineral exploration reports; and*

(ii) the aggregate exploration expenditure for the combined reporting tenements would have been such as to satisfy the expenditure requirements for the mining tenement concerned had that aggregate exploration expenditure been apportioned between the combined reporting tenements.

(2a) In subsection (2)(h) —

***aggregate exploration expenditure** means expenditure —*

(a) on, or in connection with, exploration for minerals on the combined reporting tenements; and

(b) worked out in a manner specified in the regulations.

(3) Notwithstanding that the reasons given for the application for exemption are not amongst those set out in subsection (2), a certificate of exemption may also be granted for any other reason which may be prescribed or which in the opinion of the Minister is sufficient to justify such exemption."

26. Section 102(4) requires that when consideration is given to an application for exemption regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder.

27. Where an objection has been lodged to an application for exemption it is to be heard by the Warden who in turn makes a recommendation to the Minister.[31] Ultimately, it is the Minister who determines whether or not to grant an exemption. [32]

28. In the event that the Minister grants an exemption, the tenement holder is relieved, to the extent, and subject to the condition specified in the certificate, from compliance with the prescribed expenditure conditions relating to the mining tenement [33] and the tenement is therefore not liable for forfeiture.

29. In the event that an exemption is not granted, the subject tenement is liable to forfeiture. [34] Whether an order for forfeiture is made by the Minister will depend on whether the failure to comply with the expenditure obligations is of sufficient gravity to justify the forfeiture of the mining tenement. [35]

30. Only if an exemption is not granted will separate proceedings be held to consider the applications for forfeiture.

The Objects and Purpose of the *Mining Act*

31. In ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd*** [36] Pullin JA observed:

> *"21 Rowland J in **Nova Resources NL v French** (1995) 12 WAR 50 said that the "primary" object and aim of the legislation is "to ensure as far as practicable that land which has either known*

[31] S105 (2) *Mining Act*
[32] S102 (7) *Mining Act*
[33] S103 *Mining Act*
[34] S63A(b)
[35] S98(1) & (5) *Mining Act*
[36] (2007) 34 WAR 403 at [21]-[25]

potential for mining or is worthy of exploration will be made available for mining or exploration". It is true that this is one of the primary objects of the Act. However, the adjective "primary" used by Rowland J acknowledges that there are other objects and aims. Another object reflected in the Act is, in one sense, contrary to the primary object. This object is found in provisions in the Act which excuse tenement holders in certain circumstances from making land with known potential for mining, or which is worthy of exploration, available for mining or exploration. Some of these provisions have been in the Mining Act 1975 or its predecessor for a long time, and other provisions have been added more recently, perhaps to reflect the fact that the mining industry in Western Australia has increasingly matured and now involves the investment of billions of dollars.

22 *Thus, for example, Div 7 (which has existed for a long time in one form or another) allows for the grant of a certificate of exemption to a tenement holder. This will exempt the tenement from the condition that money be spent on mining, or in connection with mining in relation to it, for certain periods of time. The exemption may be granted for a variety of reasons, including that the tenement contains a mineral deposit which is uneconomic but which may be expected to become economic at some time in the future; or that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation; or that time is required to evaluate work done on the mining tenement to plan future exploration or mining or to raise capital therefore. See s 102(2). A special provision - s 102A - was inserted into the Act in 1982, authorising the Minister to grant exemption in relation to the holder of an exploration licence who has been authorised by the Minister under s 111 to explore for iron on the land. In 1993, Div 2A was introduced into the Act permitting the Minister to grant the holder of a prospecting licence, exploration licence or mining lease a retention licence, if there is an identified mineral resource in the area in respect of which the licence was sought and the mining of that identified mineral resource is impracticable. Impracticability may be shown by the fact that the resource is uneconomic or subject to marketing problems if the resource may reasonably be expected to become economic or marketable in the future; or because the resource is required to sustain future operations of an existing or proposed mining operation; or if there are existing political, environmental or other difficulties in obtaining requisite approvals. See s 70C. These provisions make it clear that one object or purpose of the Act is to identify circumstances in which a tenement holder will be allowed to hold a tenement without mining or giving it up to others who may wish to actively mine the land.*

> *23 There is a further purpose reflected in the Act. That is, that a tenement holder who has defaulted in compliance with the Act in some minor respect or because of some circumstance beyond the control of a tenement holder, should not risk the loss of the tenement. Thus s 98(7) provides that an exploration licence or mining lease should not be forfeited if there has been non-compliance with expenditure requirements because of a strike. Section 96(2) provides that no order for forfeiture of a mining tenement shall be made unless the warden is satisfied that non-compliance with the Act is "material" and that the "matter" is of "sufficient gravity" to justify forfeiture of the tenement. No recommendation for forfeiture of an exploration licence or mining lease may be made by a warden unless the non-compliance with the Act is of "sufficient gravity" to justify forfeiture. See s 98(5).*
>
> *24 Title to a mining tenement is not as secure as title to real property. This relative lack of security sits uneasily with the fact that very large amounts of capital may be expended on mining infrastructure. Miners desire as much security of title as possible if they are to make such investment. The State also has an interest in ensuring reasonable security of title so that investment will be encouraged. If this happens, the chance that greater royalties may be earned for the benefit of the State is enhanced. Parliament has demonstrated that it intends that the relative insecurity of title should be balanced out by provisions in the Act which reduce the risk that a tenement may be lost due to error or inadvertence.*
>
> *25 In my opinion, these provisions which show that one of the purposes of the legislation is to protect tenement holders from loss of title due to minor non-compliance with the Act or error or inadvertence, means that, by analogy, it was open to the Minister under s 111A to conclude that reasonable grounds exist in the public interest to terminate an application, if to do so is to benefit or protect a tenement holder who has, by some slip or minor accident, failed to apply to extend the term of an exploration licence."*

32 In ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [37] the Court of Appeal, referring to ***Nova Resources,*** summarised the objects of the *Mining Act*:

> *"One of the recognised primary objects of the Mining Act is to ensure, as far as practicable, that land which has either known potential for mining or is worthy of exploration will be made available for mining*

[37] [2017] WASCA 153 at [96]

or exploration subject to reasonably stringent conditions. However, that is not its only object. Other objects or purposes identified by the courts include:

1 identifying circumstances in which a tenement holder will be allowed to hold a mining tenement without mining or giving it up for others who may wish to actively mine the land;

2 protecting tenement holders who have defaulted in compliance with the Act in some minor respect, or because of some circumstances beyond the control of the tenement holder, against loss of the tenement.

3 providing that, in general, the holder of a mining tenement should carry out the relevant mining activity on the tenement".

(footnotes omitted)"

The Principles of Statutory Construction

33 In ***Mohammadi v Bethune*** [38] the Court of Appeal neatly summarises the principles of statutory construction:

*"The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context. Statutory construction, like any process of construction of an instrument, has regard to context. As Kiefel CJ, Nettle and Gordon JJ recently explained in **SZTAL**:*

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.

[38] [2018] WASCA 98 at [31]-[35]

> *The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.*
>
> *Discernment of statutory purpose is particularly significant in cases, commonly encountered, where the constructional choice presented is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural'. In such a case, the choice 'turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies'. As we will explain later in these reasons, we think this is such a case.*
>
> *Thus, the material provisions of the Act must be understood, if possible, as parts of a coherent whole."*
>
> *(footnotes omitted)*

Is Hawthorn entitled to certificates of exemption?

34 Hawthorn argues that time was required during the Expenditure Year to plan future exploration or mining on the Tenements (s102(2)(b)). Alternatively, Hawthorn says the delay in exploring the Tenements was due to Tisala's objection and the DMP's deliberations in approving the Revised Mining Proposal for the Anglo Saxon Project (s102(3)).

35 In my view, whether Hawthorn's argument is framed in accordance with s102(2)(b) or s102(3), the real question is whether the delay in the approval of the Anglo Saxon Project provides a sufficient explanation for why the Tenements were under-expended.

36 I have some doubt that the circumstances confronting Hawthorn can properly be characterised as falling within those contemplated by s102(2)(b). This was not a situation in which Hawthorn used the Expenditure Year to plan future exploration or mining. On the contrary, according to Hawthorn it was unable to complete its plan for the Tenements because of the delay in the Anglo Saxon Project receiving approval. Ultimately, nothing turns on whether Hawthorn's

contention is characterised as consequent upon a delay in completing its plan or implementing it.

37 As I understand Hawthorn's position, there were two impediments to its plan for the Tenements. First, it needed to access the Tenements via a road and the approval process for the haul road was tied up with the approval of the Mining Proposal for the Anglo Saxon Project. Second, the Tenements are satellite tenements to the Anglo Saxon Project. It follows that if the Mining Proposal did not receive approval, Hawthorn may need to re-think the viability of further developing the Tenements.

38 Mr Brewer argues that Hawthorn could have carried out the exploration ultimately conducted in 2016/2017 during the Expenditure Year as it did not require a haul road.

39 Having regard to the evidence I am satisfied that Hawthorn had a plan for the Tenements that it intended to implement during the Expenditure Year. The fact that Hawthorn took steps towards implementing its plan the following year supports the conclusion that such a plan was in existence.

40 In my view, a number of factors support Hawthorn's application for exemption.

41 First, Hawthorn had a plan for the Tenements that was to be finalised and implemented during the Expenditure Year. That plan was delayed through no fault on Hawthorn's behalf.

42 Had Hawthorn's Mining Proposal for the Anglo Saxon Project been approved in accordance with the DMP's target timeframe or thereabouts, it is likely the plan for the Tenements would have to be realised during the Expenditure Year.

43 This is a situation in which Hawthorn's plan to develop the Tenements was derailed by the actions of a third party. As was pointed out in ***Nova Resources NL v French*** [39] a further purpose (other than the primary object) of the *Mining*

[39] (1995) 12 WAR 50

Act is that a tenement holder who has defaulted should not risk loss of the tenement because of some circumstance beyond its control.

44 Second, the construction of the haul road to service the Anglo Saxon Project would also have provided access to the Tenements. Having regard to the cost of constructing the road and the fact that the Tenements are satellites, had the Anglo Saxon Project not received approval, Hawthorn may have reconsidered whether to proceed with the planned exploration of the Tenements.

45 I accept that Hawthorn could have engaged in further exploration that did not involve drilling during the Expenditure Year. However, given the precarious position in which it found itself, any further exploration may have been money wasted in the event the Mining Proposal for Anglo Saxon Project did not receive approval.

Section 102(4)

46 Section 102(4) provides:

> *"When consideration is given to an application for exemption regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder thereof."*

47 In ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor***,[40] the Court of Appeal considered the meaning of s102(4). Having examined three possible constructions Steytler P [41] concluded:

> *"I can see nothing untoward in a construction which requires that, in considering an application for exemption, regard must be had to current grounds which have previously resulted in exemptions. The legislative may well have thought that the fact of a prior exemption on the same ground was especially relevant.*
>
> *So for example, it might, depending on the circumstances, indicate that, as a matter of consistent decision making, a similar exemption should again be given. Alternatively, the fact of repeated applications based upon the same ground might cast doubt on the ability, or willingness,*

[40] (2006) 31 WAR 270

[41] At [60] with whom Wheeler & Pullin JA agreed

of the tenement holder to satisfy the prescribed conditions attaching to the grant of the tenement."

48 Mr Brewer points to the fact that Hawthorn was refused an exemption for both tenements two years before the Expenditure year. He also conceded that if there is a good reason to grant an exemption, that history is of limited relevance.[42]

49 In my view, consideration of the matters in s102(4) would not, in the circumstances of this case, result in a different outcome.

Conclusion

50 I recommend that certificates of exemption be granted with respect to E31/781 and E31/882 for the expenditure year 5 April 2015 to 5 April 2016.

Warden J O'Sullivan

10 December 2018

[42] t/.s 1614/18 at [54]