THE WARDEN'S COURT
HELD AT PERTH
WESTERN AUSTRALIA

DATE HEARD: 6 AUGUST 1997 & 10 SEPTEMBER 1997
DATE DELIVERED: 30 OCTOBER 1997

OBJECTION NO. 256H/967

BEFORE: WARDEN P M HEANEY S M

TRANSLAND ENTERPRISES PTY LTD
objector

- and -

PERMLEN PTY LTD
applicant

REASONS FOR DECISION

Mr M Hunt appeared for the objector.

Mr D Johnston appeared for the applicant.

This is an Application for Exemption No. 254H/967 in respect of Exploration Licence 69/535. The application is by the tenement holder Permlen Pty Ltd (Permlen). The applicant seeks a total exemption of $32,400 pursuant to Sections 102(2)(g) and 102(3) of the Mining Act. Section 102(2) provides that:

> 'A certificate of exemption may be granted for any of the following reasons:
>
> 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 impractical.'

Section 102(3) provides that:

> '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'.

The applicant has indicated on the application form that the 'Tenement (holder) is in negotiation with the Aboriginal Community and no access has been granted to work the land'.

The exemption sought is for the year ending 22 December 1996.

Objection No. 256H/967 has been lodged by Transland Enterprises Pty Ltd (Transland) for the following reasons:

1. The applicant has held this mining lease for over three years. In the first two tenement years total exemption from expenditure conditions were sought and granted. In respect of the third tenement year (expiring 22 December 1996) partial exemption is sought.

2. The objector understands that the applicant will not be permitted access to the ground and therefore says that it is futile to grant any further exemption from expenditure conditions.

3. The objector says that the applicant in the three years since the grant could have conducted exploration by means other than entry onto the ground but has failed to do so.

4. In all the circumstances the exemption should not be granted.

5. The objector is the plaintiff in Plaint 10H/967 and says that the plaint should be permitted to go to trial on the basis that the tenement should be forfeited on the ground that the applicants failure to comply with the expenditure conditions, which is of sufficient gravity to justify forfeiture.

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As indicated in (5) above Transland has also lodged Plaint 10H/967 seeking forfeiture of the tenement on the grounds that the tenement holder has not expended or caused to be expended the minimum expenditure requirement.

The application for objection and the plaint were heard together.

A search of the title of Exploration Licence 69/535 reveals that the tenement was granted to Permlen on 23 December 1993 for a five year period to 22 December 1998. This licence is subject to numerous conditions and the relevant one for these proceedings is the last condition mentioned in the second schedule of conditions. This condition provides as follows:

> 'No mining on use and benefit of Aboriginal Inhabitant Reserve 'A' 17614 without the prior written consent of the Minister for Mines'.

Division 2 of Part III of the Mining Act 1978 deals with 'Public Reserves etc.'.

Section 23 provides that:

> 'Subject to this Act a mining tenement may be applied for in respect of any land, or land of a class, to which Section 24 or Section 25 applies ... but -
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> a) No mining shall be carried out on or under any such land otherwise than in accordance with a relevant consent obtained in relation to that land under Section 24 or Section 25.

Section 24 is headed 'Classification of Reserves' Section (1)(f) provides for a class of land defined as:

> 'land to which Part III of the Aboriginal Officers Planning Authority Act 1972 applies'.

Section 24(7) provides that:

> a) Mining may be carried out on any land referred to in subsection (1)(f) with the written consent of the Minister who may refuse his consent or who may give his consent subject to such terms and conditions as are specified in the consent.
>
> b) Before giving his consent, ... the Minister shall first consult the responsible Minister with respect thereto and obtain his recommendation thereon.

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In this case pursuant to Section 24(7)(b) the Minister for Mines must consult the Minister for Aboriginal Affairs and obtain his recommendation thereon.

One of the witnesses called by the applicant was a Mr John Lindsay Merity a solicitor acting on behalf of the applicant Permlen. He gave evidence that when the tenement was granted with a 'no mining' provision he was advised by the Minister for Mines and the Minister for Aboriginal Affairs that the procedure was for Permlen to obtain consent of the Ngaanjatjarra Council, to reach a co-operation agreement with that Council. Accordingly the applicant contacted the Council and on the 31 May 1996 wrote to the Minister for Aboriginal Affairs seeking an entry permit. On the 25 June 1996 the Minister responded and the last paragraph of his letter states:

> 'On the basis of the above advice I am unable to accede to your request that an entry permit be issued. However I would urge you to contact the Ngaanjatjarra Council outlining your proposals with a view to attempting to reach an agreement which is acceptable to all parties'.

Further contact was made with the Council by way of letter dated 28 June 1996 and the Councils response dated 4 July 1996 indicated that the Council had no intention of proceeding with its dealing with Permlen and that 'the matter is at an end'.

The above is of course just a very basic sketch of what occurred but the end result was the Minister for Aboriginal Affairs was not prepared to give his recommendation to the Minister for Mines and accordingly the Minister for Mines was not prepared or able to give his written consent to allow 'mining' which includes exploration on the said tenement.

The above situation in reality is the end of the matter. This application for exemption from expenditure is based on Section 102(2)(f) which provides that a certificate of exemption may be granted if a tenement holder has difficulties in obtaining requisite approvals which prevent mining. This tenement holder namely Permlen is clearly having difficulties in obtaining the requite approval in this case the Minister for Mines written consent for mining.

I would not have thought that an applicant seeking an exemption in the circumstances before this Court would be entitled automatically to an exemption. An applicant would need to show that he has made a reasonable effort to obtain the relevant entry permit.

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This case demonstrates the difficulties that face a tenement holder who requires the approval of 'traditional owners before they can enter the tenement to conduct their exploration or mining programmes'.

The first difficulty would appear to be locating the traditional owners of the land. It is not uncommon for there to be different people competing for the title of 'traditional owner and where the tenement is extensive in size there may be different' traditional owners in respect of different areas of the tenement. This difficulty became obvious in this case where we heard that there was a dispute as to who where the rightful traditional owners.

Another difficulty is ascertaining what is a legitimate grant of approval by traditional owners. In this case the applicants put into evidence an approval dated Thursday 24 September 1992, requesting the Minister for Mines to issue an entry permit to Permlen in respect of Exploration Licence 69/535. The letter on the face of it clearly indicates that the permission was granted by the appropriate traditional owners. But this approval was found to be worthless as the grant was not given in accordance with the requirement of the Aboriginal Community.

A further difficulty confronting the applicant in this case was the behaviour of an associate of the objector. Even though the applicant was the sole tenement holder it appears that a company called Commercial and General Capital Ltd, an associate of the objector had also entered into negotiations with the Aboriginal Community even though it had no interest whatsoever in the tenement. It would be disastrous for the mining Industry generally if this practice was allowed to become the norm. A tenement holders efforts to obtain the necessary approval from the traditional owners could be constantly undermined by other parties offering more than the tenement holder is offering.

I would have thought that the mining industry generally would benefit by adopting a policy of encouraging competition for the grant of the tenement but once, the grant was made subject to the 'no mining ... without the prior written consent of the Minister for Mines' condition, then the tenement holder should be allowed to negotiate with the Aboriginal Community without its efforts being undermined by other mining companies with no standing (ie. no tenement holding) offering more. I would also have thought that the Aboriginal Communities would be better of confining their negotiations to the tenement holder. It could well be a waste of their time negotiating with parties who may well never be able to deliver on their promises by virtue of the fact that they may never become the tenement holders.

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In this case I am satisfied that the applicant has under difficult circumstances, been making reasonable efforts to obtain the necessary approvals. It has so far not been successful in obtaining the approvals but it is difficult to see what else it can do given that at the moment approval is being denied on cultural rather than commercial grounds. Presumably all other applicants would for the same reason, be likewise unsuccessful in obtaining the approval.

Accordingly I will be recommending to the Minister that this application for exemption be granted.

Paul M Heaney

PAUL HEANEY SM
WARDEN