

The Warden considered that compensation together with conditions on the operation of the mine would protect the landowners sufficiently and this would accord with the policy of the *Mining Act* to maximise the exploitation of minerals in the State.

This decision merely confirms many previous decisions of the Warden's Court pointing out the strong policy behind the *Mining Act* for mines to go ahead in order to maximise the exploitation of minerals in the State. Any disruption caused by the mine could in most cases be adequately compensated or dealt with appropriately by conditions imposed on the mining operations.

WESTERN AUSTRALIA

APPLICATION FOR TENEMENT BY UNREGISTERED FOREIGN COMPANY*

Deng Lik Assets Co Ltd v East Kimberley Diamond Company Pty Ltd & Hawks ([2003] WAMW 24; Warden G N Calder SM, Perth; 23 January 2004)

Application for tenement by unregistered foreign company carrying on business – Application dismissed

On 12 February 2003 Deng Lik Assets Co Ltd applied for an exploration licence (the Application). The basis of the Objections was that at the time of making the Application neither Deng Lik Assets Co Ltd nor Deng Lik Assets Ltd was a company registered pursuant to the Corporations Act 2001 (Cth).

Relevant evidence accepted by the Warden was as follows:

- (a) *Concerning Den Lik Assets Co Ltd*
- Not registered in Australia under the *Corporations Act* (either as a foreign company or otherwise) either at the time of the Application or at all;
 - Lodged and progressed 24 other tenement applications between September 2002 and February 2003;
 - All but three of such other tenement applications were withdrawn prior to grant.
- (b) *Concerning Deng Lik Assets Ltd*
- Registered in British Virgin Islands on 22 March 1993;
 - Registered as a foreign company pursuant to the *Corporations Act* on 13 June 2003 (namely after the filing of the Application);
 - Briefly the registered holder of two tenements in 1996.

Application was made to amend the name of the Applicant in the Application from Deng Lik Assets Co Ltd to Deng Lik Assets Ltd. The Warden found that:

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- (a) with respect to the Application there was a misnomer of the Applicant;
- (b) the correct Applicant for the other 24 tenement applications in the name of Deng Lik Assets Co Ltd should have been Deng Lik Assets Ltd.

Accordingly, the Warden amended the name of the Applicant in the Application to Deng Lik Assets Ltd pursuant to *Mining Act 1978* (WA), s 142(2) and (4).

In relation to the Objections the Warden considered *Corporations Act*, s 601CD(1), which provides that a foreign company must not carry on business unless it is registered, or had applied to be registered, pursuant to the *Corporations Act*.

The Warden held that:

- (a) in making and progressing the other 24 tenement applications; and
- (b) in making the Application;

there was on the part of Deng Lik Assets Ltd (the correct Applicant in the Application) a “succession of acts designed to advance some enterprise of the company pursued with a view to pecuniary gain”¹ such that Deng Lik Assets Ltd was carrying on business.

The Warden noted that the effect of *Corporations Act*, s 1311, is that it is unlawful for a foreign company to carry on business in Australia which has not been registered, or made application for registration, pursuant to the *Corporations Act*.

The Warden agreed with Warden S Wilson SM in *Jackson Gold Mining Ltd v Murchison Exploration Pty Ltd*² – “The Mining Act contemplates that a person has capacity at the time of applying for an exploration licence. ... An application made otherwise is done so without the legal capacity of the Applicant and is void ab initio.”

As Deng Lik Assets Ltd at the time of making the Application:

- (a) was a foreign company carrying on business in Western Australia; and
- (b) was therefore required to be registered pursuant to the *Corporations Act*; and
- (c) was not registered; and had not made application to be registered;

the Warden concluded that:

- (a) the making of the Application was “an unlawful activity” by Deng Lik Assets Ltd;
- (b) Deng Lik Assets Ltd (the correct Applicant) did not have legal capacity to make the Application;
- (c) the subsequent registration of Deng Lik Assets Ltd as a foreign company (four months after the Application) “did not have the effect of creating a legal capacity in the company which did not exist at the time when the Application was lodged”.

Accordingly, the Warden dismissed the Application.

¹ *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, Gibbs J at 178.

² [2002] WAMW 27 at para 40.