

RIGHTS OF NATIVE TITLE CLAIMANTS AND HOLDERS ON APPLICATIONS FOR MINING TENEMENTS*

Illuka Resources Ltd v Joan Martin, Neil Albert Phillips (Perth Wardens Court, Warden Calder SM 16 August 2004, Wardens Supplementary Report concerning Objections to Applications for the Grant of Mining Tenements)

Application for exploration licence – Procedure on application for miscellaneous licence – Native title – Section 24MD of the Native Title Act – Concurrent operation of Native Title Act and Mining Act – Right to be heard of objector

Applications

The applicant lodged an application for the grant of an exploration license. Objections were lodged that the "area has places of cultural significance" and that the applicant had not attempted to identify them "as required under both the Aboriginal Heritage Act and the Mining Act". The objectors did not appear nor were represented at the subsequent hearings.

The applicant submitted inter alia:

- the objections were without merit and in other cases could be dealt with at an early stage of the proceedings by requiring the particularisation of the objections or by way of a preliminary hearing,
- that in cases where a native title claimant objects under the *Native Title Act* objections under the *Mining Act* should not be heard to avoid duplication of hearings.

The Warden heard the application in the absence of the objectors. He concluded that the objections appear to lack any legal foundation and did not appear, in the absence of any further particulars, to raise any matter which should be a reason for not granting the tenement.

Warden Calder's Reasons in Report

1. A Preliminary Hearing as to Objections

Warden Calder noted that in an appropriate case a Warden, upon an application for the grant of a tenement may conduct a preliminary hearing to determine the nature of a purported objection, its alleged factual and legal basis and whether or not a purported objection is at law an objection for purposes of the *Mining Act* and *Regulations* and, if it is not, then on the basis that the Warden therefore has no jurisdiction in respect of the matter, to cause the application to be placed before the appropriate Mining Registrar to be dealt with under the Act as if there were no objection. In the particular case it was not possible or necessary to decide whether the objection as to aboriginal heritage grounds raised a matter properly the subject of an objection under the *Mining Act*, in particular whether it raised a relevant public interest objection for the purposes of section 111A.

2. Mining Act and the Native Title Act Procedures Can Operate Concurrently

Warden Calder considered that Objectors whose objections are based on "native title grounds" should not be refused a hearing by the Warden for no reason other than that there are other means

* Richard Bartlett, Professor of Law, University of Western Australia.

under the *NTA* whereby their objections may be dealt with or whereby there may be resolution of disputes and other issues by negotiation or agreement. The *Native Title Act* may properly be described as beneficial legislation and can operate concurrently with the Mining Act. Moreover it must be borne in mind that the objects of the *Native Title Act*, and the procedures established thereunder, are very different from the concerns of the *Mining Act* to which objections under the Mining Act must relate. The Warden appeared to disapprove of the contrary decisions of Warden Burton in *Murrin Murrin East Pty Ltd & Ashwin*,¹ and in *Murrin Murrin Holdings Pty Ltd and Glenmurrin Pty Ltd v Ashwin*.²

3. Section 24MD of NTA Procedures Arise when Decided that Tenement to be Granted

The provisions of section 24MD of the NTA suggest that the hearing of an application for a miscellaneous licence to which the provisions of the NTA apply should take place before the Warden and that all relevant evidence be presented to the Warden by the applicant and the objector before it can be said for purposes of section 24MD that the relevant future act “is to be done”. It is only when it has been decided that a miscellaneous license is to be granted that the procedures, including notice and consultation, declared under section 24MD(6B) arise. The Warden referred to his earlier decision in *Quartz Water Leonora Pty Ltd v Ashwin*.³

4. Rights of Native Title Claimants to Notice and Hearing as Freeholders

That the “freehold test created by the *NTA*” (the Warden was referring to section 24MD(6A)) appears to have the effect that native title holders and registered claimants have the same rights as are given by the *Mining Act* to holders of private land, in particular section 33. Therefore, as objectors under the *Mining Act* to the grant of a mining tenement over land the subject of native title or a claim for native title, they may have an entitlement to notice and to be heard which may not be the subject of any discretionary power on the part of the Warden to refuse to hear them.

MINES SAFETY AND MAJOR HAZARD FACILITIES*

The application of the *National Standard for the Control of Major Hazard Facilities* [NOHSC: 1014 (2002)] (National Standard) to mine sites and amendments to the *Mines Safety and Inspection Act 1994* (MSI Act), as proposed by the *Mines Safety and Inspection Amendment Bill 2004* (MSIA Bill), will greatly affect the regulation of mine sites in Western Australia. This article discusses some of the more significant effects these changes will have.

Application of the National Standard to Mine Sites

The National Standard was implemented administratively in Western Australia in September 1997, under the provisions of the *Explosive and Dangerous Goods Act 1961*, to regulate facilities classifiable as a Major Hazard Facility (MHF). The National Standard does not currently apply to mining operations. Nonetheless, specific Major Hazard Facilities regulations which are currently being developed will apply to mine sites and are likely to be in force early in the new year. This section discusses some of the significant effects this will have on mine sites it applies to.

¹ Leonora 12 August 1999.

² Leonora 16 January 2003.

³ (1999) Vol 14 Folio 8.

* Sarah Harrison (Senior Associate), Mark Blandford (Solicitor) and James Wang (Law Clerk), Mallesons Stephen Jacques, Perth.