

## ROLE OF THE WARDEN IN ASSESSING RELATIVE MERITS OF COMPETING APPLICATIONS FOR MINING TENEMENTS\*

*DFD Rhodes Pty Ltd v FMG Pilbara* [2005] WAMW 23 (Warden Calder SM delivered 22 August 2005)

*Competing Applications For Mining Tenements – Policy Considerations - The Objector’s Right to Be Heard – Role of Warden*

### Background

On 16 June 2004 DFD Rhodes Pty Ltd (“Applicant”) applied for two prospecting licences (“Applications”). FMG Pilbara Pty Ltd (Objector) objected to the Applications (“Objection”). One ground of Objection was that the Applications related to the same land as two exploration licence applications made by the objector on 19 July 2004 (“Objector’s Applications”).

All of the land the subject of the Applications fell within Temporary Reserve 3156H (“Reserve”), which was created in accordance with the *Iron Ore (Mt Goldsworthy) Agreement Act 1964* (WA). No person has any present right of occupancy to the Reserve.

### Issues

The Objector argued that pursuant to clause 1(6) of the Second Schedule to the *Mining Act 1978* (WA) (“Act”), s 105A of the Act does not apply to land temporarily reserved from occupation, so that there is no right in priority in an applicant who first complies with the initial requirement to have his or her application granted. Consequently, the Objector argued that the Applications and the Objector’s Applications should be dealt with at the same time, and that the Warden should make an assessment of their relative merits in the Warden’s report and recommendation to the Minister. Further, the Objector submitted that at the hearings of the Applications, the Objector should be able to cross examine the Applicant’s witnesses and call its own witnesses to demonstrate that it was a more suitable applicant to be granted tenements over the land in question.

The Applicant argued that for an objection to be valid, it must contain some proper reason why the Applications should not be granted — for example, a non-compliance with the Act or a public interest circumstance. In effect, the Applicant argued that the Objection was not valid, and that it was not appropriate for the Warden to conduct a hearing and make a recommendation based upon a submission from each party that that party is, for a variety of reasons, a more suitable applicant.

### Decision

Warden Calder held that the existence of a competing application for a tenement (particularly, but not limited to, when s 105A of the Act does not apply) is a valid “policy” ground of objection. However, it is not the role of the Warden to consider the relative merits of 2 competing applications; other than in terms of the requirements of the Act. Matters of wider policy are matters for the Minister and not the Warden to consider.

Consequently, although the Warden declined to dismiss the objection as invalid, he decided it would be inappropriate for him to hear the Objector as to why the Objector maintained that the

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Objector's Applications were "better" than the Applications. The proposed evidence and submissions in relation to those matters went solely to government policy concerning the administration and implementation of the Act. Warden Calder made the following observation about respective roles of the Minister and Warden in relation to policy considerations:

it is the Minister who knows what the applicable policies are, it is the Minister who knows how those policies will be applied and, in any event, it is open to the Minister on behalf of the government, to at any time change such policies or the are implemented. It is not the role of a Warden to direct or to advise the Minister, in the form of a report and recommendation or otherwise, upon matters such as the implementation of government policy.

Warden Calder noted that there are no guidelines as to how the Warden should exercise the discretion under s 59(4) of the Act to deny an opportunity to be heard to a person who has lodged an objection. The Warden considered it was proper to consider whether the giving of such opportunity would achieve any purpose at all, bearing in mind the Act and the requirements of procedural fairness.

### **Result**

Warden Calder did not dismiss the Objections but decided he should not give the Objector the opportunity to be heard, as it would be an inappropriate and pointless exercise given the role of the Warden in relation to a matter pertaining to government policy.

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The electricity sector has a critical role to play in underpinning the Government's growth and sustainability objectives. Sustainable economic growth will best be supported by an electricity system that:

- Is reliable and resilient
- Is environmentally responsible
- Delivers energy prices that are efficient, fair, and as competitive as possible consistent with these requirements.

New Zealand faces a number of challenges to ensure these objectives are achieved.

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