INFORMATION SERVICE

WESTERN AUSTRALIA*

LEGISLATION

MINING AMENDMENT REGULATIONS (No. 6) 1991

These regulations were published in the *Government Gazette* of 8 November 1991 and commenced operation on that day. Amendments are made to certain fees payable to a bailiff.

WARDEN'S COURT DECISIONS

IN THE MATTER OF APPLICATION FOR PROSPECTING LICENCE 77/2628 (THE LICENCE) BY JEREMY O'BRIEN (THE APPLICANT) (Southern Cross Warden's Court, 31 October 1991)

In this case the applicant applied for the Licence over ground "identical to the late PL77/990".

Prospecting Licence 77/990 had itself been applied for over the area formerly covered by Machinery Area 77/49 granted under the *Mining Act* 1904 (the Old Act). That machinery area, granted pursuant to s. 26(2) of the Old Act and reg. 84 of the regulations made under that Act, was granted as to the surface only of the land.

Prior to the expiry of the machinery area Prospecting Licence 77/815 had been applied for over a larger area including the land covered by the machinery area. That tenement was granted subject to the "complete excision of any portion enroaching on . . . machinery area 77/49".

The Warden had to decide whether Prospecting Licence 77/815, when it was granted, was granted in respect of the sub-surface of the land covered by Machinery Area 77/49, given that the machinery area only related to the surface of the land. The Warden also had to decide whether Prospecting Licence 77/990 was only granted in respect of the surface of the land formerly covered by the machinery area.

After considering the general scheme and provisions of the *Mining Act* 1978 (the New Act), the Warden held that there was no intention (with some specific and limited exceptions) that there be more than one tenement granted in respect of a discrete area of land. He noted that, in any event, under the Old Act the concept of "surface only" tenements was a difficult concept since in many cases at least some sub-surface rights were implied.

It was clear, in his view, that under the New Act there is no concept of "surface only" tenements. Further, there is no provision in the New Act for the automatic amalgamation into surrounding or otherwise adjoining tenements of any tenement which expires or is surrendered. Examples of amalgamation of surface rights and sub-surface rights arise only upon further grant following the application of the holder of the sub-surface rights.

Accordingly, the Warden found that Prospecting Licence 77/815 was not granted in respect of either the surface of the land the subject of the machinery

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area, or the sub-surface of that land. Prospecting Licence 77/990, however, was granted in respect of the surface and sub-surface of that land and, accordingly, the application for the Licence was an application in respect of that surface and sub-surface area. Having so found, the Warden granted the Licence in accordance with the application.

LESLIE ELLEN SKIPP v. THE PUBLIC TRUSTEE
(Perth Warden's Court, 13 September 1991)

This case involved an application for forfeiture of a mining lease. The Warden delivered an ex tempore judgment.

The Public Trustee, by devolution, became the lessee under the mining lease in mid-1987 as a result of the death of the prior lessee. The Public Trustee obtained an exemption in respect of the entire expenditure requirement for the year ending 31 December 1987 ($10,000). The Public Trustee also obtained an exemption for the entire expenditure requirement for the year ended 31 December 1988 and obtained an exemption in respect of roughly half the expenditure requirement for the year ended 31 December 1989. In respect of the expenditure year ended 31 December 1990, no expenditure was incurred and no application for exemption was made.

The Public Trustee outlined various attempts to sell the mining lease. A number of proposals were rejected because the Public Trustee was unwilling to accept the purchase price offered.

The Public Trustee argued that the fact that the tenement had passed into the hands of the Public Trustee would be a good ground for seeking exemption. The Warden said that that may be so if an application for exemption had been made, but noted that in this case no application had been made. The Warden noted that without an application for exemption there was no opportunity for others to object to that application.

The Warden rejected that the Public Trustee could claim inexperience on the part of its staff for failure to comply with the requirements of the *Mining Act* 1978 (the Act) (presumably, in this instance, failure to lodge an application for exemption).

In relation to gravity of non-compliance (which, pursuant to s. 98(5) of the Act, must be proved before forfeiture may be recommended), the Warden doubted whether the South Australian case of *Pacminex (Operations) Pty Ltd v. Australian (Nephrite) Jades Mine Pty Ltd*[1] was entirely relevant (although he noted that it had been applied in the case of *Craig v. Spargos Exploration NL and Queen Margaret Gold Mines NL*)[2] because the wording of the South Australian legislation and Western Australian legislation was, in his view, different.

Nevertheless, the Warden held that, in this case, the Public Trustee had set the reserve price too high in respect of any attempted sale of the mining lease and was holding it without achieving the object of the Act, namely, that the land be worked. Given the minimal amount of expenditure undertaken on the tenement in a four-year period, the non-compliance was certainly of sufficient gravity to recommend forfeiture, and the Warden recommended accordingly.

1. (1974) 7 S.A.S.R. 401.
2. Unreported, Kalgoorlie Warden's Court, 22 December 1986.

HENRY JOSEPH JONES v. BLACK SWAN QUARRIES PTY LTD
(Perth Warden's Court, 26 September 1991)

Here the defendant held an exploration licence over an area in the Yalgoo Mineral Field. The expenditure requirement for the first year up to 31 December 1990 was $20,000.

The plaintiff lodged a plaint alleging a failure by the defendant to spend the required amount and sought forfeiture of the licence. The defendant then lodged its report claiming expenditure of $27,457 for that year.

The defendant's claim was based on money spent on the transporting, cutting and marketing of orbicular granite and on sending a three-man working party to the area to prepare a report on mining engineering aspects. Later a geologist prepared a report for the company which was included in the claim.

The plaintiff was a pastoralist on whose station this licence was located. He claimed that he or his employees would be able to see if any visitors had been in the area. On this basis, the plaintiff made an application for forfeiture under s. 98 of the *Mining Act* 1978 (the Act). To resolve the case the Warden examined the defendant's claimed expenditure for the year 1990.

The defendant's claim was made up of expenses for general prospecting, ground surveys, overheads and other costs, including travel and accommodation. The total expenditure claimed was $27,457.

The Warden referred to the definitions of "mining" and "mining operations" in s. 8 of the Act. The definition of "mining" includes fossicking, prospecting and exploring for minerals. It also includes "mining operations" for which there is a separate definition. Pursuant to reg. 21 of the *Mining Regulations* 1981 the licence-holder was required to expend the money on "mining" or in connection with it.

The Warden held that in this case the expenditure claimed fell into five separate categories:

(1) cutting and dealing with the orbicular granite to assess its marketability;
(2) marketing the cut product;
(3) assessing the geological formation;
(4) assessing the best method to mine; and
(5) administration expenses such as maintenance of the title, administering the overall operations in the State, and time on the tenement itself.

None of the expenditure claimed fell into the categories of fossicking, prospecting or exploring on the tenement. Therefore, to be valid expenditure under the Act, it had to fall within the definition of "mining operations".

The Warden accepted that expenditure on the reports was legitimate where it directly concerned expenditure on the tenement. This was because it is necessary to properly assess the ground before spending money on exploration. Further, the definition of "mining operations" under item (d) allows "all lawful acts, incident or conducive to any such operation or purposes". Regulation 21 is also wide enough to cover preparatory work connected with mining.

The Warden also allowed reasonable transport expenses to be claimed together with the reasonable expenses relating to the presence of the working party on the tenement. These expenses, together with the costs of mapping and the various reports, totalled $11,230. The Warden was not prepared to include expenses such as cutting, freight or marketing because they were not concerned with "mining" or "mining operations" but with use of the mineral after

production. He also did not allow the overhead claim because he considered that the overheads were not attributable to "mining" or "mining operations".

In conclusion, the Warden found that the defendant had not met the expenditure requirements relating to the licence. The shortfall was 40 per cent of the required amount. Further, the defendant had not made a sufficiently genuine effort to put into effect the purpose of the Act, namely, to explore the licence with a view to mining. In the circumstances of the case, the situation was of sufficient gravity for the Warden to recommend forfeiture and he recommended accordingly.

TAVINGTON PTY LTD v. AFMECO PTY LTD
(Coolgardie Warden's Court, 19 November 1991)

This case concerned applications for restoration of various prospecting licences forfeited for non-payment of rent, the applications for restoration being made pursuant to s. 97A of the *Mining Act* 1978 (the Act).

The grounds in support of each restoration application were that forfeiture occurred during finalisation of option negotiations between the registered holder, Tavington Pty Ltd (the Applicant), and MMC Management Pty Ltd (MMC), that during those negotiations there was a misunderstanding between the parties as to who was to pay the rents and they were not paid, that one of the directors of the Applicant is based overseas and the other is ill, that once MMC discovered that the rents had not been paid it reacted promptly and that MMC has already committed itself to an exploration programme on the tenements for the next 12 months.

The objections were in identical form, were lodged in respect of some of the applications only and claimed that the restoration applications were not made in accordance with the Act and the *Mining Regulations* 1981, that in any event the Applicant had not complied with the minimum expenditure requirements in respect of the tenements for the year ending 17 April 1991 and had not lodged form 5 in respect of that year, that the holder had not applied for exemptions in respect of non-compliance with expenditure requirements, that the rents were paid nearly three months late, that these matters evidenced the Applicant's lack of planning and failure to take its obligations seriously and that the ground had been marked out by Afmeco Pty Ltd (the Objector) before the rental was paid and before the restoration applications were lodged.

When the applications came before the Warden the Objector appeared but no appearance was made on behalf of the Applicant.

The Warden held that it was clear from the provisions of the Act that the Applicant had to make out its case in support of the applications. He held that the failure of the Applicant to appear at the hearing of the contested applications entitled the Objector to succeed, and he accordingly refused all of the contested applications.

The Warden was prepared to assume that the Applicant intended to proceed with the other applications. He referred to the cases of *BRGM Nominees Pty Ltd v. Hake, Saggers and Grabham*;[3] *Dry Creek Mining NL v. Mowana Holdings Pty Ltd*[4] and *Kerr and Reimers v. Solera Pty Ltd, Baillie and Settlers Court Pty Ltd.*[5] The first of those was authority for the proposition that the matters to be

3. Reported in (1989) 8 *AMPLA Bulletin* 17.
4. Reported in (1990) 9 *AMPLA Bulletin* 10.
5. Reported in (1990) 9 *AMPLA Bulletin* 53.

considered in an application of this type are the explanation for non-payment of rent, the degree of care on the part of the holder in attending to payment and the existence of special circumstances.

The Warden found that it was irrelevant whether option negotiations with another party were in progress at the time of the forfeiture, that under the Act there could be no confusion as to who should pay the rent whether or not it was subsequently agreed that moneys should be reimbursed, that basing one director overseas and the unspecified illness of another director were not of themselves in any way persuasive, that the taking of immediate action to seek restoration of the prospecting licences is a relevant but not decisive factor and that the option agreement here (being unexecuted) was irrelevant and therefore no regard should be had to statements that a third party may have had intentions in relation to the tenement. Accordingly, all of the applications were refused.