CITATION: *Henwood v Northern Land Council [2003] NTMC 043*

PARTIES:	PAVALINA HENWOOD Applicant v NORTHERN LAND COUNCIL Objector
TITLE OF COURT:	WARDENS COURT
JURISDICTION:	*Mining Act*
FILE NO(s):	MLN 1048
DELIVERED ON:	5 September 2003
DELIVERED AT:	Darwin, by post
HEARING DATE(s):	10 May 2003
DECISION OF:	Mr VM Luppino, Warden

CATCHWORDS:

Mining – Application for Mineral Lease – Whether application made by "a traditional owner" – Express and implied repeal or amendment of Territory laws by the Commonwealth.

Northern Territory v GPAO (1998) 196 CLR 553.
Mining Act (NT) ss 139(1) and (2); *Interpretation Act (NT)* ss 3(3), 24
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ss 3, 40, 48, 74, 77A.

REPRESENTATION:

Counsel:

Applicant:	In person
Objector:	Mr Levy

Solicitors:

Applicant:	Not Represented
Objector:	Northern Land Council

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 043
Number of paragraphs:	32

IN THE MINING WARDENS COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. MLN 1048

BETWEEN:

PAVALINA HENWOOD

Applicant

AND:

NORTHERN LAND COUNCIL

Objector

REASONS FOR RECOMMENDATION

(Delivered 5 September 2003)

Mr V M LUPPINO:

1. This is an application under the *Mining Act* ("the Act") by Pavalina Henwood in relation to an area of land in the vicinity of McCallum Creek.

2. The application is based on section 139 of the Act which relevantly provides as follows:

> **139. Applicant for mineral lease to hold exploration licence, &c.**
>
> (1) Subject to subsection (2), a person shall not apply for or be granted a mineral lease in respect of Aboriginal land unless, at the time of the application for that lease he was the holder of an exploration licence or exploration retention licence or had made an application for the grant of an exploration retention licence in respect of that land.
>
> (2) The provisions of subsection (1) shall not apply to or in relation to –

(a) a person who is, in relation to the land, a traditional Aboriginal owner within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* of the Commonwealth;

(b) …

3. Certain provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* ("the Land Rights Act") are also relevant to the application. Firstly from section 3, the definitions of "intending miner" and "mining interest". These definitions are as follows:

intending miner, in respect of Aboriginal land, means:

(a) a person who makes application, under a law of the Northern Territory relating to mining for minerals, for the grant of a mining interest in respect of that land, while the person:

(i) holds an exploration licence under that law in respect of that land; or

(ii) being a person who has held an exploration licence in respect of that land, holds under that law an exploration retention lease or exploration retention licence, or has made an application for the grant of such a lease or licence, in respect of that land or a part of that land; or

(b) .....

mining interest means:

(a) any lease or other interest in, or right in respect of, land granted under a law of the Northern Territory relating to mining for minerals (other tan a lease or other interest in land, or a right, relating to the mining or d~ve1opment of extractive mineral deposits); or

(b) .....

4. Also relevant are sections 40, 48 74 and 77A of the Land Rights Act. In summary form section 40 provides that a mining interest as defined was not to be granted in respect of Aboriginal land absent the written consent of

both the Minister and the relevant Land Council and agreement between the Land Council and the grantee as to the terms and conditions to which the licence will be subject.

5. Section 48 in turn sets out provisions relating to the terms and conditions and the procedure to be followed, the information to be provided and applicable time limits to reach agreement as to terms and conditions. Importantly, subsection (4) requires the Land Council to firstly consult the traditional owners of the land and any other Aboriginal community or group that may be affected by the grant of the mining interest concerning the terms and conditions, and secondly, to be satisfied that the traditional Aboriginal owners understand the nature and purpose of the terms and conditions and consent to them as a group. There is also an overriding obligation on the Land Council to satisfy itself that the terms and conditions are reasonable. The section also sets out the procedures to be followed in relation to the consultation process are set out and finally there are provisions and procedures to resolve the matter where agreement cannot be reached.

6. Sections 74 and 77A of the Land Rights Act provide as follows:-

> **74 Application of laws of Northern Territory to Aboriginal land**
>
> This Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act.
>
> **77A Consents of traditional Aboriginal owners**
>
> Where, for the purposes of this Act, the traditional Aboriginal owners of an area of land are required to have consented, as a group, to a particular act or thing, the consent shall be taken to have been given if:
>
> (a) in a case where there is a particular process of decision making that, under the Aboriginal tradition of those traditional Aboriginal owners or of the group to which they belong, must be complied with in relation to

decisions of that kind- the decision was made in accordance with that process; or

(b) in a case where there is no such process of decision making- the decision was made in accordance with a process of decision making agreed to and adopted by those traditional Aboriginal owners in relation to the decision or in relation to decisions of that kind.

7. This application has a very long history. The reasons for this are not entirely clear. The original application was made by the applicant by document filed 10 July 1987. The basis of the objection was that the land the subject of the application was "aboriginal land" within the meaning of the Land Rights Act and that consequently, section 139 of the Act applied to the application. The objection then alleges that as the applicant does not satisfy the prerequisites in section 139(1) and did not fall within any of the exempted categories set out in section 139(2), consequently the application was "invalid".

8. The advertisement required by the Act was duly placed and the objection of the Northern Land Council was duly made on 2 September 1987. The matter first came on for mention in the Warden's Court on 17 October 1991. On that occasion the matter was set for hearing on 16 March 1992. On that latter date the notation on the court file is that the matter was adjourned sine die apparently at the request of the objector. No directions were then made at that time in relation to the relisting of the matter. Presumably the Warden intended that the parties would arrange for the matter to be relisted when a hearing was required.

9. Subsequently, by letter dated 6 September 2002 filed at the office of the Mining Registrar on 11 September 2002, the applicant asked for the matter to be listed for hearing in this court. The matter was listed for hearing before me originally on 9 December 2002. At that time Mr Levy appeared on behalf of the objector and the applicant appeared in person. Mr Levy gave a detailed outline of the grounds of the objection and as a result of that I considered that the unrepresented applicant was at a distinct disadvantage

given the technical legal nature of the objection. At my suggestion the applicant decided to seek an adjournment of the matter to consider her position and to consider having legal representation. The matter was finally heard on 6 May 2003.

10. The evidence before me consisted of:-

    1. An affidavit of Robert Graham, an anthropologist then employed by the Northern Land Council, sworn 9 December 2002;

    2. An affidavit of Michael Reynolds, also an anthropologist employed by the Northern Land Council, sworn 2 May 2003;

    3. Sworn evidence of Michael Reynolds;

    4. Sworn evidence of a Linda Daiyi;

    5. Sworn evidence of April Bright;

    6. Sworn evidence of the applicant;

11. The affidavit of Mr Graham put in evidence a report accepted by the Full Council of the Northern Land Council regarding the identity of the traditional Aboriginal owners of Wagait. The Full Council accepted this report on 12 July 1995. The land the subject of the mineral lease falls within the Wagait area. Mr Reynolds referred to that report in his affidavit and in his evidence. In relation to the specific land comprising the area of the subject mineral lease the report and evidence of Mr Reynolds shows that the mineral lease falls within the area claimed by the Marranunggu and Werat groups. Mr Reynolds explained that the effect of the Full Council decision is that the area comprised within the subject mineral lease to the south of McCallum Creek is Werat land and the area to the north is Marranunggu land. A plan was put in evidence (Exhibit 1) which depicted the area of the subject mineral lease and the location of McCallum Creek. Describing it as best I can in words, the area of the mineral lease is roughly the shape of a

square and is bounded by straight lines. McCallum Creek intersects the boundary lines of the square at the bottom left hand corner. The area to the south of McCallum Creek comprises, on my own estimation, approximately 5 percent of the entire area of the mineral lease.

12. Mr Reynolds then gave evidence in relation to the genealogy of the Werat and the Marranunggu people. This establishes, and I do not think it was in dispute, that the applicant is a member of the Marranunggu group. Incidentally I note that the Marranunggu people including the applicant, do not accept the Full Council's finding and claim that the land south of McCallum Creek is also Marranunggu land. However, other than to state her disagreement with that decision she produced no evidence to the contrary. Based on the unchallenged evidence before me I find that the land covered by Mineral Lease 1048 is mostly Marranunggu land but that the portion on the south side of McCallum Creek is Werat land.

13. Mr Reynolds said that he conducted meetings and made enquiries of the traditional owners of both groups for the purposes of section 77A of the Land Rights Act. He was not able to consult with all relevant persons. Some could not be located, others accepted the position of other members of the group and others again took no interest at all. Mr Reynolds gave expert evidence to put all this into context. I am satisfied from the evidence that he gave, which was also not challenged by the applicant, that he was therefore in a position to give evidence as to the views of the traditional owners of both groups.

14. Mr Reynolds' evidence was that he considered it appropriate to determine the position of both groups separately in relation to the land separately identified for which they are traditional owners, logically so in my view. This is in contrast to the position of a combined group because under Aboriginal traditional law, each group is responsible for speaking for and making decisions regarding their own country and not that of others.

15. He said that on the basis of those consultations it is his view that the Werat group is opposed to the proposed mineral lease to the extent that it relates to Werat land. In coming to this conclusion Mr Reynolds took into account the fact that Daisy Majar, a senior member of the Werat people who has raised some concerns regarding the proposed mining, ultimately reserved her position in relation to the application. He therefore took the view that she has not approved of the proposal. Again this logically follows and I agree.

16. In relation to the Marranunggu people, the position was slightly more complex. The present Marranunggu people comprise descendants of a person known as Gjaekaboi through his first and his second wife. There is a dispute among the Marranunggu according to their line of descent between the first and the second wife.

17. The evidence of Mr Reynolds establishes that the members of the group descendant through Gjaekaboi's second wife are opposed to the application. The applicant is a descendant through Gjaekaboi's first wife. Although the applicant obviously supports the proposal, the other members of the group descendant from Gjaekaboi's first wife appear somewhat indifferent and can best be described as not opposing the application. For current purposes I would treat them as being in support of the application.

18. The nett result according to Mr Reynolds' evidence is that the Marranunggu people also have not, as a group, made a decision to support the proposal in so far as it relates to Marranunggu land. The evidence of Linda Daiyi and April Bright elaborated on their respective positions to a certain extent and set out their concerns. Their evidence however did not change the foregoing conclusion. Some environmental heritage and cultural issues were raised none of which in my view appeared to be insurmountable or which could not be easily addressed with appropriate conditions. This was quite apparent given the apparent concessions prepared to be made by the applicant as confirmed by her in the course of her evidence.

19. I now consider the application in the context of the foregoing. I think it is very apparent that the fate of the application turns on the meaning of "a traditional Aboriginal owner" in section 139(2)(a) of the Act and the interrelationship with the Land Rights Act.

20. The subject land has been aboriginal land at all relevant times. It was granted to the Delissaville/Wagait Land Trust as a consequence of the Lands Rights Act and prior to that the land was part of an aboriginal reserve known as the Wagait Reserve.

21. It is not in dispute and, I think is conceded by the applicant that at the time that she made her application she was not the holder of an exploration license, or an exploration retention license or was an applicant for an application retention license. Section 139(1) sets this status out as a prerequisite to an application for a mineral lease under that section.

22. Accordingly the applicant could only make the application if she came within the exemption contained in section 139(2)(a) of the Act. This section is set out in detail above but in essence provides that "a person who is….a traditional Aboriginal owner…" (ie in the singular) "…within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* of the Commonwealth" can make the relevant application without having to satisfy the requirements of section 139(1).

23. It is in this context that the full impact of the evidence of Mr Graham and Mr Reynolds is apparent. That evidence establishes that that the mineral lease comprises both Marranunggu land and the Werat land. Despite the applicant pointing out that the Marranunggu group dispute that the land to the south of McCallum Creek and forming part of the subject mineral lease is Werat land, I am satisfied that the traditional owners of subject land are both the Marranunggu and Werat people. Consequently in any event the applicant cannot be a "traditional owner" of the entire land the subject of the

mineral lease. At best she can only be said to be a traditional owner of the Marranunggu land.

24. That essentially finalises the application as I am of the view that I cannot recommend the grant of a mineral lease in relation to only that part of the land comprised within the area of the mineral lease as is to the north of McCallum Creek ie, solely Marranunggu land. In the event however that the question of the interpretation of the term "a traditional owner" in section 139(2)(a) of the Act becomes relevant, I turn to consider the status of the applicant in the context of that term.

25. The evidence clearly establishes that the applicant is one of the traditional owners, hence "a traditional owner", of the Marranunggu land. The question is whether this is sufficient for the purposes of section 139(2)(a).

26. The section is anomalous in that it refers to the term "a traditional Aboriginal owner within the meaning *Aboriginal Land Rights Northern Territory Act* 1976 of the Commonwealth". Perusal of the Land Rights Act shows that there is no separate definition of the term "traditional Aboriginal owner" in that act. The precise term defined under that act is "traditional Aboriginal owners" ie the plural. The principles of statutory interpretation in essence are means to ultimately determine the intention of the legislature.

27. In my view the deliberate use of the singular coupled with a reference to the apparent term as it is described in the plural in the Commonwealth legislation, indicates to me that it was in fact intended that individuals who were also one of the number of the traditional Aboriginal owners of Aboriginal land were entitled to make application for a mineral lease under the Act. I consider that the use of the words "…a person…" at the commencement of subparagraph (a) of subsection 139(2) reinforces this. In my view this also amounts to "…an intention to the contrary…" as referred to in section 3(3) of the *Interpretation Act* thus negativing the application of the principle that ordinarily the singular number includes the plural as

prescribed by section 24 of that act. I think that all that indicates that such an interpretation was intended by the Territory Parliament notwithstanding that this is now contrary to the scheme which now gives rights to traditional Aboriginal owners as a group and not individually.

28. The matter however is not a simple matter of the interpretation of one act in isolation as section 74 of the Land Rights Act provides that a law of the Northern Territory can only apply to Aboriginal land where it can operate concurrently with the Land Rights Act. Moreover the decision of the High Court in *Northern Territory v GPAO* (1998) 196 CLR 553 confirms in any event that any law of the Territory, deriving as it does necessarily from the *Northern Territory (Self-Government) Act 1978 (Cth)*, is subject to express or implied repeal or amendment by subsequent Commonwealth laws. The right of the Commonwealth to expressly override a territory law was also confirmed therein. In this regard the Land Rights Act sets out a statutory scheme in relation to mining on aboriginal land. Whereas before the 1987 amendments the consent of traditional aboriginal owners was required both at the exploration stage as well as at the mining stage, the current statutory scheme in a nutshell provides that although consent is only required at the exploration stage, an agreement must be negotiated between Northern Land Council and a miner before actual mining occurs. Importantly the Land Rights Act contains many references which makes it clear that consultation must occur by Northern Land Council with traditional owners before consent can be given. Moreover, the Act specifically recognises that consent of traditional owners must be given as a group.

29. In my view if section 139(2)(a) is to be interpreted as referring to an individual traditional owner as opposed to the traditional owners as a group, then the Northern Territory legislation cannot be said to be operating concurrently with the Land Rights Act as in that case it denies the group rights which the Land Rights Act seeks to entrench. Therefore, despite that I think that the Northern Territory Parliament intended that section 139(2)(a)

could apply to an individual traditional owner, that is now expressly overridden by section 74 of the Land Rights Act. To the extent that it is not expressly overridden then it would be impliedly amended to that extent by the Land Rights Act.

30. In my view therefore the application would also have to be declined on that basis in any event.

31. Therefore, having regard to the foregoing I recommend to the Minister that the application be refused and I give the parties liberty to apply as to any necessary consequential orders or directions. I will transmit to the Minister the following documents in compliance with section 59 of the Act namely:

1. Application for mineral lease;

2. Notice of objection;

3. Affidavit of John Graham sworn 9 December 2002;

4. Affidavit of Michael Reynolds sworn 2 May 2003;

5. Ex 1, Ex 3 and Ex 4 tendered in the hearing before me.

Dated this 5th day of September 2003.

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V M LUPPINO
WARDEN