CITATION: *Petherick v Daiyi* [2004] NTMC 061

PARTIES:	DAISY PERTHERICK
	v
	NANCY DAIYI
TITLE OF COURT:	Warden's Court
JURISDICTION:	Mining Act
FILE NO(s):	9701108
DELIVERED ON:	15 September 2004
DELIVERED AT:	Darwin
HEARING DATE(s):	11 August 2004
JUDGMENT OF:	Mr H B Bradley - Warden

CATCHWORDS:

Mining – Application for mineral claim – Whether an application by a single traditional owner is validly made – Compliance with the provisions of the *Mining Act*

Mining Act 1980 (NT) s 83, s 139

Henwood v Northern Land Council [2003] NTMC 043

REPRESENTATION:

Applicant:	In person – no appearance
Objector:	In person – no appearance

Judgment category classification:	B
Judgment ID number:	[2004] NTMC 061
Number of paragraphs:	11

IN THE WARDEN'S COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 9701108

BETWEEN:

DAISY R M PETHERICK
Applicant

AND:

NANCY DAIYI
Objector

REASONS FOR RECOMMENDATION

(Delivered 15 September 2004)

Mr H B BRADLEY CM:

1. This is an application under the Mining Act 1980 (the Act) by Ms Daisy Petherick for a mineral claim which has been identified with the number 5120. This application has received an objection from Nancy Daiyi. At the hearing of the matter, notice of which had been given to all parties, neither the Applicant nor Objector appeared. The court was advised that both Applicant and Objector were ladies in their senior years and had indicated an unwillingness or inability to attend at the Court on 11 August 2004 in accordance with the Court's notice. In the event the only person appearing to assist the court was a Mr Alan Holland the Manager of Customer Services in the Titles Division of the Department of Business, Industry and Resource Development. He had little direct knowledge of the factual matters and circumstances surrounding the background of the claim and appeared as a courtesy to the court which is acknowledged.

2. Mr Holland drew the Courts' attention to some of the provisions of the *Mining Act* and to the decision of a fellow Warden, Mr Luppino SM in *Henwood v Northern Land Council* [2003] NTMC 043.

3. The matter has had a long history in that it was considered by the court initially in 1997 and adjourned sine die at that time since it seems the parties weren't interested in pursuing it. For some reason the matter was resurrected earlier this year and it seems appropriate that the matter should be finally disposed of.

4. The non appearance by the Applicant herself on the hearing date would, it seem, be enough to recommend that the application not be granted in any event, however there are some other matters which also are worthy of comment.

5. An application for a mineral claim is made pursuant to part VII of the *Mining Act* and s 82 provides that a miner may at any time apply to the Minister to be granted a mineral claim in respect of any land. S 83 provides however that an application shall not be made unless the Applicant has, prior to making the application, obtained the approval of a Warden to enter the land the subject of the proposed application for the purpose of marking out that land in the prescribed manner. My review of the files produced to the court reveal that no such permission was obtained.

6. My attention has also been drawn to the provisions of s 139. That section so far as relevant provides:

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 a 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".

7. It is apparent from the application that the proposed mineral claim area is within the Wagait Aboriginal Reserve which is now aboriginal land. The Applicant is a single aboriginal person with some claims to traditional ownership in respect of that land. It is therefore necessary to consider whether the Applicant is a person to whom the exclusion provided for in section 139(2)(a) applies. If the matter were argued before the court it would no doubt be argued that the Applicant is an aboriginal person who is a traditional owner of the relevant land. However as indicated above my attention has been drawn to the decision of His Worship Mr Luppino SM in *Henwood v Northern Land Council* supra. That decision at [25] – [29] concludes:

> 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 Ac*t 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* this 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 A*ct sets out a statutory scheme in relation to mining on aboriginal land. Whereas before the 1987 amendments the consent of traditional aboriginals 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 that extent that it is not expressly overridden then it would be impliedly amended to that extent by the *Land Rights Act*".

8. The exception to the prohibition would therefore not seem to allow this single applicant to succeed.

9. Further it seems to me that a mineral claim is within the meaning of a "mining interest" as defined in the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Section 45 of that Act provides that a mining interest shall not be granted to an intending miner in respect of aboriginal land unless the relevant Land Council and the intending miner have entered into an agreement and the Minister has consented in writing. As Mr Luppino has concluded the *Commonwealth Act* is paramount and therefore in the absence of evidence to establish the agreement of a Land Council or the Ministerial consent the application must also fail.

10. For this reason also the application must fail.

11. For each of the above reasons it appears appropriate that the application should fail and I therefore recommend to the Minister that the application for the mineral claim be refused. I will transmit to the Minister the relevant documents in compliance with section 59 of the Act.

Dated this 15 day of September 2004.

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H B Bradley
WARDEN