

**IN THE MINING WARDEN'S COURT  
AT LIGHTNING RIDGE**

**J A BAILEY, CHIEF MINING WARDEN**

**THURSDAY 19 AUGUST 2004**

**CASE NO. 2004/24**

**EDWARD RICHARD BLACHUT**

**(Applicant)**

**v.**

**NEWCREST OPERATIONS LIMITED**

**(Respondent)**

**APPLICATION FOR REVIEW OF ARBITRATOR'S FINAL  
DETERMINATION UNDER THE PROVISIONS OF SECTION 155 OF THE  
MINING ACT 1992 CONCERNING EXPLORATION LICENCE 5864**

**APPEARANCES AT HEARING:**

Melody Carr of Temora Mineral Services appears as agent for the Applicant, Edward Richard Blachut.

Mr L Moore, Solicitor of Moore & Company Solicitors, Condobolin, appears for Newcrest Operations Limited.

**HEARING DATES: 3<sup>rd</sup>, 4<sup>th</sup> August 2004 at Temora.**

**DECISION**

**HANDED DOWN IN ABSENCE OF PARTIES**

Newcrest Operations Limited is the holder of exploration licence 5864. The holder of the licence is wishing to enter upon the land owned by Mr Edward Richard Blachut at "Sunnyside", Gidginbung via Temora, for the purposes of exploring for gold.

Following the attempts to reach an agreement with Mr Blachut, the mining company requested the Department of Mineral Resources to appoint an arbitrator, pursuant to the provisions of s 144 of the *Mining Act 1992*, to make a determination of access to Mr Blachut's property.

The arbitrator, Dr P B Mitchell made an interim determination on 12 May 2004 and then gave his final determination on 14 June 2004. The landowner, pursuant to his rights under s 155 of the *Mining Act 1992*, applied to the Warden's Court on 11 June 2004 for a review of the arbitrator's decision.

The review of the arbitrator's decision was undertaken at the Court House, Temora, on 3 and 4 August 2004. The landowner was represented by Ms Melody Carr, agent, of Temora Mineral Services. The mining company was represented by Mr L Moore, Solicitor of Moore & Co, Solicitors, Condobolin. In addition to receiving documentary evidence as well as witnesses being examined and cross-examined under oath, a view was undertaken by the court of Mr Blachut's property.

The procedure which is intended to be adopted by Newcrest Operations Limited under the provisions of exploration licence 5864, was put to the court by Mr Irvine Peter Hay, a senior exploration geologist from Newcrest Operations Limited.

Mr Hay tendered to the court an aerial photograph of the area which is covered by EL5864. Marked thereon are some 10 purple stars. These stars indicate the approximate position, within a metre or two, where the company intends to commence its diamond core drilling. Also adjacent to each of those stars is a purple line. That line indicates the direction in which the drilling will take place. Marked on that plan are two specific places numbered GDB001 and GDB002. It is these two specifically numbered holes that the company wishes to drill in the initial stages.

Mr Hay indicated to the court that it is the intention of the company to drill these two particular holes in the first instance, withdraw its machinery at that point of time and await the scientific results of that particular drilling. Mr Hay indicated that if the results of those two holes were encouraging, the company would then proceed to drill other holes. The continuation of further drilling would only occur if the results of each drill hole were such that it would appear to the company that there may be a viable economic source that could be extracted from the area. Mr Hay informed the court that it would be unlikely that more than 10 drill holes would be utilised in this particular area. It may very well be of course that if the initial results were not promising, that there would be no more than the first two holes drilled.

The average time to drill each hole is approximately three weeks. Mr Hay indicated that the company would be willing to co-operate with Mr Blachut in relation to those occasions when they enter upon his land to undertake the drilling exercise. At present there is a crop which is growing on the land to which they need access. Mr Hay indicated that the company would be willing to wait until that crop is harvested and then move on for that short period of six-seven weeks to drill the first two holes. The

company would then move off the property, await the results of the drill test and then allow Mr Blachut, if he so desired, to plant his next crop. The company would not continue on with further testing until that new crop was subsequently harvested. Notwithstanding the fact that this could very well mean that the 10 test drill holes which are going to be undertaken by the mining company could indeed take a number of years to drill, Mr Hay indicated that the company was not interested in moving on to the land and completing the drilling in one hit. He cited two reasons for that: firstly, it would interfere with Mr Blachut's operations on his land and, secondly, the company did not wish to expend all its drilling allocations for the year on the one project. It was learnt in submissions that each diamond drill hole cost approximately \$100,000 to drill.

Once a hole has been drilled, it is immediately rehabilitated. Rehabilitation can take a couple of days but often, due to weather and delays, it may be two weeks at the most before that drill site is rehabilitated. Mr Hay tendered to the court some photographs of previous sites that had been rehabilitated by the company following drilling on those properties. Mr Hay also indicated to the court that the company was in fact willing to engage Mr Blachut to rehabilitate the site himself, this would be subject, naturally, to an appropriate commercial arrangement being made. However, he indicated that it is generally not the policy of the company to have landowners rehabilitate their own site. The company tendered to the court documentation indicating that the company had a \$50 million public liability insurance and furthermore that the company which they subcontract to do the drilling also has a certificate of currency from an insurance company indicating that that company has a public liability to the extent of \$50 million.

Access to the property would be gained in the same manner in which the court gained access to the property when a view was undertaken. This is the simplest, shortest and most convenient way to enter upon the property and there are certainly no objections from Mr Blachut to the use of this particular route.

In addition to clarifying the time which would be spent by the mining company upon Mr Blachut's land, and the equipment and personnel that would be present during the operations, cross-examination extended into the area of concern of Mr Blachut about the safety of the people coming on to his property and his liability for anyone who may be injured whilst on his property.

It is quite apparent from the questions and answers in cross-examination, together with what was observed by the court when a view of the site was undertaken, that there is a large area of Mr Blachut's property which has previously been subject to mining and which has clearly not been rehabilitated.

In giving his evidence, Mr Blachut outlined the rehabilitation that he himself has undertaken in the area of his land where Newcrest Operations Limited wishes to do its drill testing. It appears that there have been holes drilled there previously by other mining companies and those holes have not been satisfactorily rehabilitated, or indeed not rehabilitated at all. Mr Blachut indicated that in recent weeks he discovered another test hole that had not been filled. He said it would appear that it had merely been covered by leaves or shrubs and that recent weather conditions disturbed the surface, thus exposing the drill hole.

It is quite obvious from documentation that was tendered and the evidence by Mr Blachut, that he has a great concern in so far as his legal liability in relation to people entering upon his property. Notwithstanding the fact that the mining company and its contractors have public liability insurance, Mr Blachut is still concerned that as being the owner of the land, he himself may very well end up in litigation if anything untoward occurs upon his land whilst the mining company is undertaking exploration.

Mr Blachut indicated that he has no public liability insurance, simply because the cost of the same would be prohibitive because of the poor condition that the land is in following the failure of the previous mining company to rehabilitate the site. When Mr Blachut was asked as to why he did not enter an access agreement with Newcrest Operations Limited, he replied: "I won't allow them onto the site because it's a dangerous work site."

When cross-examined Mr Blachut conceded that his main concern was one of safety. He said that the aspect of compensation was not an issue but in addition to the matter of safety he was concerned that the site would be left in the same condition as the previous mining company left his land. The following question was put to Mr Blachut:

Q: As a gesture of goodwill Newcrest are willing to rehabilitate those old holes which have not yet been rehabilitated around the site where they intend to drill, are you aware of that?

A: It is a nice gesture by the company but I decline the offer, I prefer the Department of Mineral Resources to rehabilitate the site.

In his submissions to the court Mr Moore outlined that Newcrest Operations Limited would be willing to accept the arbitrator's final determination except for the aspect that the arbitrator has made provision only for the drilling of the first two holes.

Mr Moore indicated that it was not desirable from anyone's point of view to have continuing litigation and/or arbitration every time the mining company wanted to drill another hole upon Mr Blachut's property. Mr Moore submitted that the diamond core drilling in this instance is a serious and costly exercise by the mining company. It's the type of drilling that's designed to detect the presence and quality of ore. It is not the normal exploration of small holes being drilled to find out whether there is a possibility of mineral in the area.

Mr Moore submitted that the company is not interested in interfering with Mr Blachut's operations, it is not asking for an open-ended arrangement where they can go in there and occupy the land for the full period of time in which it may take to drill their 10 holes. The company is willing to take years to complete the drilling so that Mr Blachut can go about his normal farming activities.

Although the court hasn't been told by Mr Blachut as to how he utilises his land, it was submitted by Mr Moore that in this particular area of NSW there is often a requirement for rotational cropping. Consequently land can indeed lay fallow for a season for two. If this procedure is adopted by Mr Blachut it may very well be that the company can proceed with its drilling and complete its project in a much shorter

period of time. Indeed it may be that the results of the first two holes could indeed mean that the program would be curtailed at that point of time, or at any time after the drilling of any other hole.

“What we are asking for”, submitted Mr Moore, “is permission to drill the 10 holes over an indefinite period of time to allow for the landholder to undertake his activities with a minimum of disturbance.”

Mr Moore submitted that the company was not happy with the manner in which the arbitrator determined the aspect of compensation, in particular that aspect which provided for a sum of \$1,000 per annum to be given as a lump sum to the landholder. Mr Moore indicated that this was contrary to all other compensation arrangements and it was concerned that it may be seen as setting a precedent. But, Mr Moore submitted, Newcrest is willing to accept that. “It acknowledges the inconvenience to the owner and we don’t seek a variation but we don’t want this lump sum to be a precedent in the industry.”

Whilst on site, Mr Blachut indicated that he did not want any personnel to move into the areas which he perceived to be dangerous, that is the areas of the previous mine site which have not been rehabilitated and some other areas where he perceived there are contaminated waters and other dangerous areas. Mr Moore, in his submission, indicated the company won’t and need not enter those zones which have been affected by the previous mining and is willing for a clause to be inserted in any access determination to that extent.



Mr Moore submitted that the concerns of Mr Blachut in relation to other people entering upon his land to perform exploration have been concerns which have been heightened to an impossible degree. He concedes that a landowner must ensure that his workplace is a safe place, he indicated that this applies to every landowner within NSW. He further submitted that the landholder in this particular instance is not responsible for the work being performed by Newcrest. He submitted that Newcrest and its subcontractors do not intend to enter upon Mr Blachut's land with his permission. Newcrest Operations Limited is able to enter upon that land pursuant to its own title, subject to an assessment being made by the court as to compensation and other access arrangements. Newcrest Operations Limited will enter upon the land under its own legal title which is distinct and different from the title which Mr Blachut holds under the provisions of the *Real Property Act*. Drilling sites will not be under the control of Mr Blachut but under the control of the mining company. Mr Blachut, it was submitted, has no authority over the mining company, he can't decide how they can operate, he can't interfere with them so long as they operate under the conditions of their exploration licence. Indeed, it was submitted, that if Mr Blachut does interfere with the mining company, he may very well be guilty of an offence under the *Mining Act 1992*.

Mr Moore submitted that Mr Blachut is labouring under a misunderstanding and that his concerns are such that he must object to all mining or may very well be exposed to litigation.

Finally, Mr Moore submitted that Mr Blachut can't simply lock up his land from mining because some of his land is unsafe.

In her submissions to the court Ms Carr indicated that Mr Blachut is a person who is aggrieved due to the fact that a prior mining company has operated upon his land and has failed to rehabilitate the area. Mr Blachut, she submitted, should be able to operate his property without any interference from the mining company. He will not agree to any access arrangement until all the past mining problems have been addressed and completed. His property, she submitted, is hazardous and a very high risk area. It is deemed to be unsafe and he has fenced off an area. Such fencing, she submitted, is not man-proof but simply a cyclone fence. Mr Blachut's concerns are that people may enter into that area and he will be liable if they are injured.

Ms Carr submitted that Mr Blachut does not want to be the recipient of any proceedings as a result of unsafe work practices of Newcrest, over which he has no control. She submitted to force Mr Blachut to agree to an arrangement would be grossly unfair to him. He has been unable to obtain public liability insurance on his property because of prohibitive premiums, due to its current state. She submitted to the court that the rights of a freehold landholder are being denied if the mining company is allowed onto his land.

## **RELEVANT LEGISLATION**

### ***Mining Act 1992***

- 140** ***Prospecting to be carried out in accordance with access arrangement***  
*The holder of a prospecting title may not carry out prospecting operations on any land otherwise than in accordance with an access arrangement:*
- (a) agreed (whether orally or in writing and whether before or after the prospecting title was granted) between the holder of the title and each landholder, or*
  - (b) determined by an arbitrator in accordance with this Division.*

**141 Matters for which access arrangement to provide**

*(1) An access arrangement may make provision for or with respect to the following matters:*

- (a) the periods during which the holder of the prospecting title is to be permitted access to the land,*
- (b) the parts of the land in or on which the holder of the prospecting title may prospect and the means by which the holder may gain access to those parts of the land,*
- (c) the kinds of prospecting operations that may be carried out in or on the land,*
- (d) the conditions to be observed by the holder of the prospecting title when prospecting in or on the land,*
- (e) the things which the holder of the prospecting title needs to do in order to protect the environment while having access to the land and carrying out prospecting operations in or on the land,*
- (f) the compensation to be paid to any landholder of the land as a consequence of the holder of the prospecting title carrying out prospecting operations in or on the land,*
- (g) the manner of resolving any dispute arising in connection with the arrangement,*
- (h) the manner of varying the arrangement,*
- (i) such other matters as the parties to the arrangement may agree to include in the arrangement.*

*(2) An access arrangement that is determined by an arbitrator must specify the compensation, as assessed by the arbitrator, to which each landholder of the land concerned is entitled under Division 1 of Part 13.*

Division 2 of part 8 of the *Mining Act 1992* provides that if an agreement to access is not forthcoming, an arbitrator may be appointed to make a determination as to access arrangements. Once that determination is made, there is a right to a review of the determination by a Warden's Court.

**155 Review of determination**

*(1) A party to a hearing who is aggrieved by an arbitrator's final determination (other than a determination referred to in section 147 (2)) may apply to a Warden's Court for a review of the determination.*

....

*(6) In reviewing a determination under this section, a Warden's Court has the functions of an arbitrator under this Division in addition to its other functions.*

*(7) The decision of a Warden's Court on a review of a determination is final and is to be given effect to as if it were the determination of an arbitrator.*

## CONCLUSION

Part 3 of the *Mining Act 1992* sets out the provisions for exploration licences in NSW. To summarise those provisions, there are certain restrictions placed upon the Minister as to the areas over which an exploration licence may be issued. Once an exploration licence is issued it is then subject to the conditions of that particular licence. Under s 29 of the Act, the holder of that licence then has the rights to explore for the group or groups of minerals specified in the licence in accordance with the conditions therein.

The only restrictions which are placed upon an exploration licence are outlined in s 31 of the Act. May I say at this point of time that there was nothing in the evidence before the court, nor obvious when a view of the site was undertaken, which would place any restrictions upon the holder of EL5864 in accordance with the provisions of s 31 of the *Mining Act 1992*.

The *Mining Act 1992* makes provision for a landholder to object to the granting of, for instance, mining leases and mineral claims under the Act, I refer to part 5 and part 9 of the Act in relation to those provisions. There is no similar provision, however, in relation to the granting of an exploration licence.

The landowner in this instance, Mr Blachut, is principally objecting to the mining company coming upon his land on the basis that he is concerned as to his possible liability if injury occurs to anyone as a result of those mining activities.

Notwithstanding those concerns of Mr Blachut, the *Mining Act 1992* provides that once an exploration licence is issued, the mining company is entitled to go upon his land and explore, subject to access arrangements being put in place.

As Mr Moore submitted to the court, Mr Blachut's obligation as a landowner is no different to any other landowner within the state. Both the mining company and the contractors it intends to employ, have extensive public liability insurance which will cover any incident which may arise as a result of the exploration work being done upon Mr Blachut's land.

I do not see Mr Blachut's concern as being one wherein an access determination ought not to be made.

Concerning compensation, as Mr Blachut takes no issue with the compensation that was set by the arbitrator, and having regard to the comments of Mr Moore, I see no reason to alter the arbitrator's determination in respect of compensation rates.

In respect of the question of rehabilitation of the site where exploration will take place, the company has indicated it is willing to enter into a contractual arrangement with the landowner to rehabilitate the sites, subject to a satisfactory commercial arrangement being struck. I have some reservations at the moment as to whether Mr Blachut is willing to enter into such an arrangement or whether he would prefer the licence holder to rehabilitate the site. I am aware that the landowner would prefer the Department of Mineral Resources to rehabilitate the old mine site, rather than Newcrest rehabilitating it, but I am not sure as to the rehabilitation of the area which

will be subject to the exploration by Newcrest Operations Limited. To that end I propose to insert a clause in the access determination which will make it possible for Newcrest to enter into contractual arrangements with Mr Blachut, if Mr Blachut so desires, for rehabilitation of the site.

The conditions of the access arrangement will be principally along the lines of the conditions which are set out in the Rural Land Access Agreement for Mineral Exploration, 1997 edition, with appropriate amendments having regard to the matters that have been raised before me.

**ACCESS ARRANGEMENT FOR MINERAL EXPLORATION  
EXPLORATION LICENCE 5864**

This access arrangement is between the Landholders and the Exploration Licence Holder (The "Explorer") described below.

Landholders: EDWARD RICHARD BLACHUT

Address: "Sunnyside", GIDGINBUNG via TEMORA NSW 2666

Property Address: As above.

Explorer: NEWCREST OPERATIONS LTD

Address: 1460 Cadia Road, via ORANGE NSW 2800

Field Supervisor's Name: Irvine Hay  
Phone: 02 6360 7400  
Fax: 02 6360 7499

Duration of Access Arrangement: Upon completion of 10 drill holes or the expiration of EL5864, whichever first occurs.

Prospecting Areas: Are indicated by purple coloured stars and lines marked upon a plan dated 2/8/2004 and named "Gidginbung Project EL5864 and proposed core holes". Such plan marked EXHIBIT 2 at the Warden's Court hearing – a copy is attached to this arrangement. The first two holes to be in the vicinity of the points marked GDB001, GDB002, on the plan.

Path of Entry: Along existing tracks after entering from Schmidts Lane.

Periods of Permitted Access: From 7 am to dusk.

Insurance Details: Company: Lloyds London  
Policy No: B0509/DR087703(2)  
Liability Limits: \$50 million

Prospecting Methods: Diamond drilling.

**1. ACCESS**

1.1 The Explorer may only conduct prospecting on the prospecting area mentioned in its application and facts given to the court and bring on to or remove from the prospecting area by way of the path of entry such equipment, vehicles, employees and contractors as may reasonably be required to conduct such prospecting only during the period specified above.

- 1.2 If the Explorer contravenes this Access Arrangement the Landholders may deny the Explorer access to the property until the Explorer ceases the contravention and the contravention is remedied to the reasonable satisfaction of the Landholders.
- 1.3 The Explorer acknowledges that the Access rights conferred by this Access Arrangement are non-exclusive to the normal use by the Landholders and that prospecting on part of the property under crop may need to be deferred until a date specified by the Landholders.

## **2. PROSPECTING METHODS**

The Explorer will only conduct those kinds of Prospecting operations specified on the application and permitted under the conditions of the Authority Exploration Licence.

## **3. CONDITIONS TO BE OBSERVED BY THE EXPLORER**

- 3.1 The Explorer will ensure that its employees, personnel, agents and contractors will at all times:
  - (a) Leave gates as found – open or shut and not use water on the property except with the landholders' permission.
  - (b) Ensure that prospecting is conducted in such a manner so as to cause minimum damage to:

the surface of the land comprised in the property, crops, grasses or other vegetation, if any, on the property, buildings and improvements on the property

and so as to cause minimum disturbance to stock on the property.
  - (c) Ensure that to the best of its ability and whenever possible, all vehicles and equipment being driven across "Sunnyside" utilises existing tracks.
- 3.2 When, in the opinion of the landholders weather conditions render the path of entry temporarily unsuitable for the passage of such vehicles or equipment, the Explorer will ensure that no vehicles or equipment are brought on to the prospecting area.
- 3.3 The Explorer will effect and maintain at all times, and verify if requested by the Landholders, a public liability insurance policy in respect of its activities on the property.
- 3.4 The Explorer and its contractors will indemnify and keep indemnified the landholders, their agents and contractors for all loss or damage arising from its prospecting on the property. The Explorer further acknowledges that it enters on and uses the property entirely at its own risk.



- 3.5 The Explorer will during such period as the Explorer utilises the path of entry, maintain and keep in repair the path of entry having regard to its condition at the commencement of this Access Arrangement.
- 3.6 The Explorer will ensure that all vehicles and equipment that have been previously operating outside the immediate region, are cleaned of all accumulation of dirt, mud and vegetable matter to the satisfaction of the Landholders.
- 3.7 In the absence of negligence or wilful damage caused by the landholders, the landholders will have no responsibility or liability for any loss or damage to personal property of the Explorer.
- 3.8 The Explorer will not use or permit to be used the prospecting area or path of entry for any purpose other than prospecting and access respectively, unless with the written permission of the landholders.
- 3.9 The Explorer will restore all damage to the property caused by the Explorer as soon as practicable in such a manner that soil erosion will be minimised as far as practicable.
- 3.10 The Explorer is to ensure that all rehabilitation is carried out in accordance with the conditions of the exploration licence. However, nothing in the access arrangement will prevent the Explorer from entering into a contractual agreement with the landowner, wherein the landowner will undertake those rehabilitation obligations on behalf of the Explorer.
- 3.11 The Explorer will ensure that a representative of the Explorer is available at all reasonable times to liaise with the Landholders concerning the provisions of this Access Arrangement.
- 3.12 The Explorer will give at least 48 hours notice to the Landholders of the dates the Explorer will be on the property.
- 3.13 The Explorer will ensure that all of its employees, servants, agents and contractors remain at all time within the area where exploration work is being undertaken and do not enter those fenced zones which are un-rehabilitated previously mined areas.

#### **4. DUTIES OF THE LANDHOLDERS**

So long as the Explorer duly observes the terms and conditions of the Access Arrangement, the Landholders will not impede, restrict or interfere with the carrying out of prospecting by the Explorer.

## **5. COMPENSATION**

- 5.1 The Explorer must fully and promptly restore all damage by the Explorer to the surface of the property and compensate the landholders if need be in accordance with Part 13 of the *Mining Act 1992*.
- 5.2 Compensation terms setting out payments to be made by the Explorer to the landholders are included as Schedule 1 of this Access Arrangement.

## **6. REPAIR**

If the Explorer does not carry out repairs which are the Explorer's responsibility under this Access Arrangement within 30 days of that damage being caused, the landholders may execute the required repairs and all reasonable costs and expenses of such work will be payable by the Explorer on demand.

## **7. EVENTS OF DEFAULT**

- 7.1 Each of the following events or circumstances is called an Event of Default in this Agreement:
- (a) if the compensation payable pursuant to any provision of this Agreement remains unpaid for a period of 14 days after the date of notification to the Explorer; or
  - (b) if the Explorer commits any breach or default in the due and punctual observance and performance of any of its obligations contained in this Agreement and where the failure is capable of remedy, the failure is not remedied within 30 days after notification is served upon the Supervisor.
- 7.2 Upon reaching an agreement as to the remedy or removal of the Event of Default, the Explorer and the Owner/Occupier will duly and punctually observe the terms and conditions of such agreement.

## **8. DISPUTE RESOLUTION**

- 8.1 If any claims or disputes arise between the Explorer and the Landholders in connection with this Access Arrangement they will endeavour to settle such claims or disputes in good faith.
- 8.2 In the event that the landholders believe in good faith, at any time, that any such claim or dispute cannot be settled, the landholders may (a) notify the Explorer of the claim or dispute and (b) suspend entry on to the property.
- 8.3 In the event that the Explorer or the landholders believe in good faith, at any time, that any such claim or dispute cannot be settled, either party may refer the matter to the Mining Warden for resolution.

