

FINDING DELIVERED AT GOULBURN
ON 24TH JANUARY, 1986
BY J.L. McMAHON,
CHIEF MINING WARDEN.

INQUIRY UNDER SECTION 117A(3)
AS TO A PERMIT ISSUED TO MEHILO PTY. LTD.

WARDEN:

On 27th December, 1985 I conducted an administrative Inquiry under Section 117A(3) of the Mining Act in respect of a permit issued under Section 117A.

Section 117A provides that the Warden may issue a permit to enter land for the purposes of the examination or assessment of the likely effect on the environment of the activities to be carried out in connection with a proposed authority. It is common ground that a company called Mehilo Pty. Ltd. (herein called Mehilo) is an applicant for an authority, namely, a mining lease which has been given the title No. 84 Goulburn and that part of the area of land the subject of the application for the lease is occupied by the respondents, Miss Owen and Mr. Broomham. It is further not in dispute that on 11th September, 1985 I granted a permit under Section 117A to Mehilo. That grant occurred following the holding of an earlier administrative inquiry at Goulburn when the parties had been given an opportunity to discuss their relative situations and had freely agreed on the conditions which by virtue of Section 117A(4) may be included in a permit.

Upon such agreement the permit issued.

Mehilo now claims that it has been denied reasonable and convenient entry into land occupied by Miss Owen and Mr. Broomham notwithstanding the earlier agreement and the existence of the permit.

When I conducted a further Inquiry on 27th December, evidence was given by Mr. Cudahy, the public officer of Mehilo, who deposed of having been on the land prior to 10th December, 1985, without encountering any problems in accordance with the permit that had been issued. However, on 10th December

when he attended with a Mr. Chandler, the Managing Director of Mehilo, and a Dr. Grace and his assistant, he found a newly erected electric fence blocking the way on the track leading to the section of the river where it was apparently intended Dr. Grace, a marine biologist, would be making some examination for the purposes of the Environmental Planning and Assessment Act. Mr. Cudahy deposed that Mr. Chandler had earlier that day in accordance with Clause 8 of the permit, attempted to contact by telephone Miss Owen or Mr. Broomham but without success. There is evidence from Miss Owen that on that day she and Mr. Broomham were absent from the house where the telephone is and were apparently working on the construction of the very fence, the erection of which lead to the contention by Mehilo that its way had been blocked. So Miss Owen and Mr. Broomham are unable to refute the evidence by Mr. Cudahy and Mr. Chandler that an attempt had been made to comply with Clause 8 of the permit.

Mr. Cudahy has sworn that having found the new fence blocking the track, he had tried to gain access by traversing an area of land roughly parallel to the new fence, thereby to find a way through it, but a tyre had been spiked, that is punctured, on his vehicle. He is now unwilling to either risk damage again or to carry out any manual work to make the area of land parallel to the track more passable for his vehicle. He says that the track across which the new electric fence has been erected is the only reasonable access to the area where it was intended the examination and assessment take place.

Miss Owen disputes this. She says that access can be gained by means of a passable track to a position in the fence where it is proposed to erect a new gate in a length of the fence which has the advantage of being built especially to facilitate stock movements and mustering and which is also in the view of higher land to facilitate supervision of anyone who is passing through to the river. There was evidence before the court of a considerable number of unauthorised persons entering the land and it is for this reason plus the need which Miss Owen and Mr. Broomham felt to keep in and conveniently handle their stock which led to the erection of the fence.

The accessibility or otherwise of a newly made track from the proposed gate back to a position roughly where the fence crosses the track is in conflict. However in this regard I am inclined to accept the evidence on behalf of Mehilo that the proposed new track back is not readily accessible; and in any case there has been a satisfactory track which has been fenced off. I would add that I viewed the original track, the position where the new fence crosses it, the remainder of most of the new fence, the track leading passed the point where the track is now crossed by the new fence to the site of the proposed gate and then part of the alternative track back to the original crossing, on 22nd January, 1986, more fully to understand the evidence.

Miss Owen has said that the fact that the fence was erected had nothing to do with Mehilo's application but it was simply done and is being done for the purpose of the proper management of the property which carries a large number of cattle and goats. She has agreed that she has taken legal action in the Land and Environment Court against Mehilo and the local council over a planning decision but frankly I am puzzled why the fence was erected across the track without any notice being given to Mehilo as the holder of a permit issued under an Act of Parliament. True it is that there is no legal requirement to give notice but in view of the existence of the permit and the earlier court hearing before me in August last when Miss Owen and Mr. Broomham attended court and which led to the permit being issued on 11th September, 1985, it would be my firm view that as a matter of courtesy and proper business practice, notice should have been given to Mehilo.

The notice of hearing leading to the further inquiry on 27th December suggested that Mehilo had been denied reasonable and convenient access and Mr. Duncan of Counsel who appeared for Miss Owen and Mr. Broomham made appropriate submissions that Section 117A created only a right of entry and did not require that there be reasonable and convenient access. However, it seems to me that if a track exists which both parties knew would be intended to be used as the access track and that blocking it off would cause difficulty of access then the right of entry that a person had under Section

117A can be held to be both reasonable and convenient. To find otherwise would mean that a land occupier could require that a permit holder go for kilometres out of his way in order to gain access.

Mr. Broomham gave evidence of the need to erect an electric fence as against a mesh fence and the cost that would be entailed in the construction of a gateway in the fence at the track. Apart from a square end assembly instead of strainer posts, it would be necessary to run the electricity underground because the gate could not be electrified and as there was a rock shelf in that vicinity there would be some real problem. I had difficulty appreciating this evidence even after the view. The Mining Occupations Officer at Wagga Wagga, Mr. Clout, confirmed that there have been unauthorised entries in the area and as a result some patrols had taken place along the river. He had been aware that a gate had been located on the southern border. Mr. Cole, the Crown Lands Officer at Goulburn and a senior officer of the Department of Lands deposed of having been familiar with the area and was now aware that there had been an electric fence newly erected across the track. This was not contrary to any law and in fact was quite in keeping with the legislation. He expressed the view that a vehicle could safely be driven on an access track which runs from south to north which Miss Owen and Mr. Broomham now suggests Mehilo use if it were of the four wheel drive type at 15 k.p.h. I accept his evidence as to this, however he agreed in cross examination that he had not driven along the fence line where it had been suggested to Mehilo that the alternative access be exercised.

Section 117A carries no sanction or penalty for disobedience of a permit, excepting that which is contained in subsection (9):-

"(9). A person shall not, without reasonable excuse, obstruct or hinder, a person in the exercise of the powers conferred on the person by subsection (7).

Penalty: \$500"

It is obvious that while Miss Owen and Mr. Broomham are within their rights merely as occupiers under the Crown Lands legislation to erect the fence, it was improper for them to do so bearing in mind their knowledge of the existence of the permit, especially when no notice was given of the erection of the fence to Mehilo. So without finding that a formal obstruction has taken place to date, I find that the fence has prevented the entry by Mehilo's representatives and agents into the area of the proposed authority and that access should again be allowed through the fence on the track where it previously existed. That access should again be permitted by Miss Owen and Mr. Broomham and should be at their expense.

I would require that Miss Owen and Mr. Broomham permit Mehilo, their representatives and agents and employees entry onto the land for the purposes of the examination or assessment within fourteen (14) days from today. Such entry should be subject to the provisions of the permit issued on 11th September, 1985, save as to the strict compliance from now on with the provisions of Section 117A(8).

Such right of entry, of necessity, requires that Miss Owen and Mr. Broomham make adequate access available through the fence where it traverses the access track at the point where it is depicted in the photographs exhibit 3.

On the question of other costs, at the close of the case and in his final address, Mr. Duncan sought professional costs and Mr. Chandler replied that there should be some consideration for his company's expenses. I would indicate that I would propose to disallow any requests for costs at this time either professional or otherwise and the parties are to pay their own costs in respect of the Inquiry, even though Section 146 of the Act may allow me to make an order for costs.

I would add this. The predominance of my experience over ten years as Chief Warden has shown that landowners and occupiers do a greater service to their

own interests, in the long term, by co-operating with persons or organisations which have titles or permits granted by the Governor, the Minister, the Warden or the Registrar, under the Mining Act or Coal Mining Act and on the other hand such persons or organisations equally further their own interests best by being respectful to the rights of owners and occupiers. While I sympathise with the feelings of the parties in this matter I sincerely trust that the co-operation which occurred prior to August last which led to the permit being issued will again come into existence and that litigation between the parties can be minimised.