TRIBUTE AGREEMENTS

by W. D. Leslie and A. J. Holland*

The word "tribute" in relation to the mining industry has its foundations in the early days in Cornwall in the Stannaries. However, despite the fact that tribute arrangements have been considered by Australian Courts on numerous occasions, the scope of the term has not been the subject of close scrutiny. In the main, the Courts have accepted it as a customary term. For example, in *Moffat v. Sheppard* (1909) 9 C.L.R. 265 at 271 Griffith C. J. stated:—

> "A licence to work on tribute is a thing well known on mining fields in Queensland and, I suppose, in other parts of Australia."

The High Court, apparently has accepted that a tribute may be a bare licence or a licence coupled with a grant (*Moffat v. Sheppard*) or arrangements where the share of the mineral lessee is "a royalty" *Grundt v. The Great Boulder Proprietary Gold Mines Limited* (1938) 59 C.L.R. 641 at 670.

The Shorter Oxford Dictionary defines tribute in relation to mining as:—

> "a. the proportion of the value of the ore raised, paid by the miners to the owners or lessors of the land or their representatives.
>
> b. the proportion of ore raised or its value paid to the miners by the owners of the mine or land, in payment of their labour.
>
> c. hence *'to work on tribute'* or *'on the tribute system'* on the plan or paying or receiving proportions of the produce."

It can be seen therefore that the term encompasses many kinds of arrangements common in the mining industry and the concept is broad enough to extend to exploration arrangements as well as mining (see reference to Companies Act below).

The meaning of the term was recently the subject of judicial scrutiny in the South Australian case of *Pizzino v. Triplet Industries Nominees Pty. Ltd.* (1980) 26 S.A.S.R. 182. This case concerned the interpretation of the word "tributer" in the Mining Regulations 1972-1977 of the South Australian Mining Act. The word is defined in those Regulations as follows:—

> "A person who works a mine or a portion of a mine under an agreement with the lessee claimholder or proprietor to pay to or receive from such titleholder a proportion or percentage of the produce of the mine or of the value of such produce."

The Appellant, Pizzino, brought an application that the Respondent's mineral claim be forfeited pursuant to S.69 of the Mining Act 1971-78 on the ground that the company had failed to comply with the prescribed labour conditions. Sub-regulation 2 of Regulation 63 of the Mining Regulations provides that work carried out by a tributer shall not for the purpose of compliance with labour conditions, be regarded as work carried out by the holder of a mining tenement unless the tribute agreement is first approved by the Warden's Court.

In this instance, a person, Frazer, as the operator for a group which owned a Caldwell drill, was working on the claim in question in order to earn a 40% interest. The mine, however, was at all times personally operated by the Respondent.

The issue was whether Frazer was a tributer for the purposes of the Mining Regulations. If he was, then as there had not been any approval from the Warden's Court, his work as a tributer could count towards compliance with the labour conditions.

It was argued on behalf of the Appellant that the definition of Tributer in the Mining Regulations was exclusive and that covered the field. Accordingly, there was no room for the historical meaning to apply so as to limit the definition to cases where the Tributer takes over the working of a whole mine or a specified part thereof; nor would this alteration necessarily be implied in the statutory definition.

The Company argued, however, that the historical meaning of Tributer was not inconsistent with the Regulation definition and that the latter could, without straining its language, be construed consistently with the traditional and essential features of that agreement. Where the definition speaks of "works a mine", it was argued that this should be understood as meaning "works after the manner of the Tributer".

Wells J. looked at the traditional role of a Tributer in relation to a mine and concluded that:—

> "To call a man a Tributer says more about him than he pays to or receives from, the owner or lessor a proportion of the produce of the mine: the Tributer has always taken over the running of the mine or an identified part thereof; it is this that principally distinguishes him from the general run of independent contractors and employees who may be remunerated by a range of methods only limited by the imagination."

In the view of Wells J. the traditional meaning of "tributer" is:—

> "A miner who takes over the working of a mine, or of a specified portion of a mine in consideration of paying or receiving a proportion of the produce or of its equivalent value; sometimes the Tributer pays to the owners or lessors of the mine a proportion of the value of the ore won by the former; sometimes the owners or lessors return to the Tributer a proportion of the ore or its value in payment of his labour."

Wells J. stated that he was unable confidently to single out any feature of the regulation definition that is clearly calculated or designed to change the traditional characteristics of the Tributer. Thus he concluded that definition should be interpreted according to traditional meanings in the absence of express and clear alterations by statute. In so doing, he agreed with the Company's arguments that, in the regulation definition the word "works" means in effect "works after the manner of a Tributer" and that the phrase "a portion or percentage of the produce of the mine or the value of such produce" may be applied to "produce from portion of a mine or its value."

One can only surmise that the result of this case may have well been in favour of the Appellant if the arrangement with Frazer's group in earning their 40% interest was found to be a farm-in instead of that of an independent contractor. In our view, many kinds of arrangements such as farm-ins, whereby a person has the right to earn an interest in a mining tenement or mine ore fall within the scope of the term tribute and accordingly are the subject of statutory law governing tributes.

One unexpected, and it is submitted, anomalous use of the term "tribute" is found in the Uniform Companies Act.

Section 333 of the Companies Act 1958 (Victoria) provides:—

333. (1) Without the sanction of a special resolution of the Company the Directors of a no liability Company shall not:—

(a) let the whole or a portion of a mine or claim on tribute; or

(b) make any contract for working any land on tribute.

(2) Sub-section (1) of this section shall not preclude the Directors of a no liability company from letting the whole or portion of a mine or claim on tribute or make any contract for working any land on tribute for any period not exceeding three months, without the sanction of such a resolution if no such letting or contract has been made within the period of two years immediately preceding this proposed letting or contract.

The origins of the section stem from gold mining in the second half of the 19th century where mining under tribute was common and it was thought desirable that shareholders be protected from Directors alienating the right to exploit the main asset of the Company. Whilst this may have been quite desirable and necessary in the early mining days where management was quite often geographically and communicatively divorced from the shareholders, it is submitted that this provision is quite inappropriate today. The word "tribute" is not defined in the Companies Act, and thus one is forced to look to the traditional meaning. If, as the High Court appears to have accepted, licence and royalty agreements may in many instances, be regarded as tribute agreements, Section 333 has a wide application. The consequence is that a no liability company would require a special resolution of members sanctioning a whole range of agreements which fall within the scope of the section.

In view of the uncertainty and apparent broadness of the meaning of the term, there are probably many hundreds of royalty or licence agreements which would be construed as falling within the ambit of Section 333 with the consequence that they are void and the parties have no rights under them. This would be a startling revelation to the parties involved, and furthermore, the idiosyncracy of the section is highlighted by the fact that if its object is to give the shareholders of a no liability company the right to sanction the alienation of a right to mine the Company's property, one would have thought that the section would also extend to a transfer of disposal of the Company's title to the ore body. Such is not the case. In addition, there seems no logical reason why the section, if it is thought to be an appropriate check on the directors, should be confined to no liability companies. Limited companies may enter into an identical agreement without any sanction.

Regrettably, the section has been retained in the National Companies legislation to come into force next year. Hopefully, however, the legislators will before too long recognize the provision belongs to an era long passed and see fit to remove it from the statute books. In the meantime, we would caution anyone involved in the formation or management of a no liability company to procure the passing of a special resolution sanctioning all past and future arrangements which could fall within the scope of section 333. If this is done, the dire consequences of a breach of the section might be avoided.

**Solicitors, Victoria.*