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**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : HOLCIM (AUSTRALIA) PTY LTD v. AMG (WA) PTY LTD [2015] WAMW 10

**CORAM** : ZEMPILAS M

**HEARD** : 7 MAY 2015

**DELIVERED** : 26 JUNE 2015

**FILE NO/S** : OBJECTION 444043 TO APPLICATION FOR EXEMPTION 443443 AFFECTING MINING LEASES 70/1248 and 70/1250

**TENEMENT NO/S** : M70/1248 and M70/1250

**BETWEEN** : HOLCIM (AUSTRALIA) PTY LTD  
(Applicant)

AND

AMG (WA) PTY LTD  
(Respondent)

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*Catchwords:*

APPLICATION FOR EXEMPTION – Objection – Time to plan future mining or raise capital – Internal capital

APPLICATION FOR EXEMPTION – Objection – Mineral ore – Existing or proposed mining operation

APPLICATION FOR EXEMPTION – Objection – any other reason – Public interest

*Legislation:*

s. 102, s. 111A *Mining Act* 1978 (WA)  
r. 31 *Mining Regulations* 1981 (WA)

Cases referred to:

*Mineralogy v Blackfin* [2013] WAMW 19

*Siberia Mining Corp Pty Ltd v Thompson* [2014] WAMW 7

*Grange Resources v Lee* [2006] WAMW 8

Result:

1. *I recommend the Minister grant certificates of exemption from expenditure in relation to M70/1248 and M70/1250 in respect of expenditure year 15 February 2013 to 14 February 2014.*

## **Representation:**

*Counsel:*

Applicant	:	Mr T Masson
Respondent	:	Mr T Kavenagh

*Solicitors:*

Applicant	:	Lawton Lawyers
Respondent	:	Hunt and Humphry

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## **Introduction**

1. Holcim (Australia) Pty Ltd (“Holcim”) is a supplier of cement, sand, stone, gravel and concrete in Australia and internationally, and applies for exemption from expenditure in relation to mining leases 70/1248 and 70/1250 (“Application”). Holcim seeks certificates of exemption for the period 15 February 2013 to 14 February 2014.

2. AMG (WA) Pty Ltd (“AMG”) opposes the Application. AMG has also applied for forfeiture of M70/1248 and M70/1250 arising from Holcim’s failure to comply with expenditure conditions.
3. The issue to be determined is whether Holcim has established any of the grounds set out in its Form 18 application, namely:
  - (a) s. 102(2)(b) - that time is required to evaluate work done on the mining tenement, to plan future exploration or mining or raise capital therefor;
  - (b) s. 102(2)(f) - that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation; or
  - (c) s. 102(3) - any other reason which may be prescribed or which in the opinion of the Minister is sufficient to justify such exemption.
4. Holcim submits M70/1248 and M70/1250 are part of a project (“Jandabup project”) which it has planned for several years as a source of sand for supply to the Perth Northern Corridor (“PNC”). It says it was unable to advance the Jandabup project as planned during 2013 largely because of the unexpected illness of the manager responsible for it. As a result it says it could not internally commit or expend the required funds on M70/1248 and M70/1250. Holcim further submits it has advanced the Jandabup project since 2013, has otherwise complied with expenditure requirements on the tenements, and it is in the public interest for it to be able to continue with its proposed mining operation.
5. AMG says the reasons advanced by Holcim do not fall within the grounds raised under s. 102 of the Mining Act 1978 (“Act”), that the evidence of a proposed mining operation is weak and unpersuasive and it is not in the public interest for tenements to remain undeveloped.

**Background and law**

6. Holcim (via earlier corporate entities) applied for M70/1248 and M70/1250 in 2005, at which time the *Mining Act* 1978 (“Act”) did not require the lodgement of a mining proposal at the time of the application. M70/1248 and M70/1250 were not granted until 15 February 2012 due to delays arising from deforestation issues. The minimum annual expenditure on M70/1248 is \$17,500 and on M70/1250 is \$29,400. During the first expenditure year (15 February 2012 to 14 February 2013) Holcim exceeded the minimum expenditure by \$5,622 in respect of M70/1248 and \$9,106 in respect of M70/1250.
7. Certificates of exemption are sought in relation to the second expenditure year (15 February 2013 to 14 February 2014) during which Holcim under-expended by \$12,801 on M70/1248 and by \$22,832.06 on M70/1250.
8. During the third expenditure year (15 February 2014 to 14 February 2015) Holcim exceeded the minimum expenditure by \$4,810 on M70/1248 and by \$11,183.72 on M70/1250.
9. Holcim has operated in the Perth sand market for several decades and has concrete plants throughout the metropolitan area. It supplies a range of sand products such as concrete sand, fill sand and brickie’s sand to customers or its own plants. It currently services customers in the Perth Southern Corridor (“PSC”) through the Baldivis Sand Quarry, the largest operation in the PSC, and intends to service the PNC via the Jandabup project.
10. The Jandabup project comprises M70/1248 and M70/1250 as well as applications for mining leases M70/1247, 1249, 1251 and 1252, which are pending. The area is classified as State Forest, known as the Gnangara Pine

Plantation, requiring consent of various government departments prior to mining operations being undertaken.

11. On 15 April 2014 AMG made an application to the Minister pursuant to s.111A of the Act (“s.111A submission”) in relation to applications for mining leases M70/1247, 1249, 1251 and 1252, submitting the Minister should refuse the applications in the public interest. A decision from the Minister on this matter is still outstanding.
12. Prescribed expenditure conditions are found in r. 31(1) *Mining Regulations* 1981 (“Regulations”). Section 102(1) of the Act provides the holder of a mining tenement may be granted a certificate of exemption from compliance with prescribed expenditure conditions. Pursuant to s. 102(2), such a certificate may be granted for a number of reasons, including:

(b) that time is required to evaluate work done on the mining tenement, to plan future exploration or mining or raise capital therefor;...

(f) that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation;

Section 102(3) provides a certificate of exemption may also be granted for;

any other reason which may be prescribed or which in the opinion of the Minister is sufficient to justify such exemption.

13. Section 102(4) provides:

When consideration is given to an application for exemption regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder thereof.

14. Holcim bears the onus of proving the grounds for granting a certificate of exemption have been made out: *Mineralogy v Blackfin* [2013] WAMW 19.

### Holcim's case

15. Holcim says 2013 was a challenging year for the company in terms of its operations and some events adversely effected and delayed its planned work on the Jandabup project. Primarily these arose from the protracted illness of the manager responsible for developing the Jandabup project.
16. Anthony Nicholson was the manager for North West operations in 2012. In early 2013 he was appointed Business Development manager with the principal responsibility of developing the Jandabup project. He relocated to Perth in March 2013, although a replacement for his previous role had not yet been found. At the end of March 2013, Mr Nicholson was confined to bed, diagnosed with Congenital Heart Disease. He had major cardiac surgery in July 2013 and was not able to return to work until October 2013. The likely length of his absence was not known at the commencement of his illness. During this time Mr Nicholson's role was performed by Fred Adams, General Manager Aggregates, who had a number of other responsibilities.
17. Holcim was also unable to fill a number of management roles, including manager of North West operations and WA Operations manager, until September 2013.
18. Further, between May and October 2013, the manager of Mid-west operations was also absent due to unexpected complications arising from minor surgery.
19. Cyril Giraud, Planning and Environment Manager at Holcim gave evidence about the process by which the company would give approval to proceed with a project, including by allocating funds to be spent. He said a budget would be submitted by his department every year to the board (in approximately August) outlining what needs to be done and what it will

cost. The following January to March the board would indicate how much had been allocated to that project. In respect of the Jandabup project, this process resulted in an “allocation” of \$100,000 at the commencement of 2013. Mr Giraud said to then proceed to the “spending” phase, a briefing paper must be prepared in order for the board to commit to the full amount of expenditure required, which in the case of the Jandabup project would obviously be well over \$100,000. He said the “allocation” of \$100,000 does not mean \$100,000 can be spent; it is a provisional commitment which depends on the second step being successful. In the case of the Jandabup project, because Mr Nicholson was unavailable to prepare the briefing paper until late 2013/early 2014, the \$100,000 originally allocated by the board to that project was subsequently allocated and spent elsewhere on projects that were ready to proceed.

20. Holcim says the Jandabup project has now progressed, following the preparation of the briefing paper in late 2013/early 2014. Mr Giraud said Holcim is taking a cautious, sustainable and proactive approach in preparing its mining proposal because of constraints on M70/1248 and M70/1250; in particular with respect to forestation issues, “bush forever” sites and the presence of Priority 1 Public Drinking Water. Mr Giraud acknowledged there has been no drilling done on M70/1248 and M70/1250, other than for water bores, but stated there has been a basic resource assessment and pit design completed albeit not in sufficient detail to sustain a mining proposal. Mr Giraud stated the final resource assessment and pit design would depend on results of testing and discussions with the Department of Water in respect to buffer zones around the Gngangara mound and production wells/bores.
21. Holcim says it intends to commence operations in the Jandabup project on M70/1248 and M70/1250 and progress to the other tenements if/when

mining leases are granted. Holcim submitted a “Timeline for Mining Operations” as part of its submissions in support of the Application. It declined to lodge documents in support of this timeline, for example a copy of the briefing paper, by virtue of the commercially sensitive nature of the information contained in such documents. It says its intentions and objectives are clear and unequivocal based on the following evidence:

- The evidence of Cyril Giraud contained in witness statements dated 17 October 2014 and 6 May 2015, consistent with his statutory declaration dated 30 April 2014, as to Holcim’s intended future planning and operations and what has been achieved to date,
- The content of detailed letters sent on behalf of Holcim to the Minister in response to the s.111A submission outlining Holcim’s intended future planning and operations and what has been achieved to date in respect of the Jandabup project, and
- The fact Holcim has now allocated and expended funds on developing the Jandabup project on M70/1248 and M70/1250 as evidenced by the Form 5 in its third expenditure year.

22. Holcim says but for the confluence of circumstances during 2013 it would have at least met the minimum expenditure for that year on M70/1248 and M70/1250. It submits those circumstances meant it required more time to evaluate and plan the Jandabup project and prepare a briefing paper which would give rise to an allocation of capital to the project.
23. Holcim also submits there is ample evidence to conclude the ground on M70/1248 and M70/1250 contains mineral ore, including an assessment by AMG in its s.111A submission that the Jandabup project contains 55 million tonnes of sand, which is required to sustain the future activity of a proposed mining operation, the Jandabup project.

24. Holcim says further it is the public interest to allow it to retain and develop the tenements because the company is an established and proven operator in mining sand and the Jandabup project will allow it to compete in the market for supply of sand in the PNC.

**AMG's case**

25. In respect of the ground raised pursuant to s.102(2)(b), AMG says Holcim's case is simply that it was unable to complete internal processes required to obtain capital investment for the Jandabup project because of the illness of Mr Nicholson, so made a commercial decision not to expend money on the tenements and instead spent it elsewhere.

26. AMG relies on the following comments of Warden Wilson in *Siberia Mining Corp Pty Ltd v Thompson* [2014] WAMW 7 [48]:

“where sufficient funding or capital is available to meet the prescribed minimum expenditure conditions on a mining tenement and deliberate commercial decisions are made by the holder of the mining tenement not to expend money or that money or capital is deliberately diverted or used in some other way...a recommendation for the grant of any exemption should not be made to the Hon. Minister unless it can be demonstrated some other ground of exemption exists.”

27. AMG also says a reference in s. 102(2)(b) to “raise capital” is a reference to raising capital from external sources only and, in any event, the sum of \$100,000 had been allocated and could have been expended on the tenements.
28. In relation to s. 102(2)(f), AMG says there is insufficient evidence to show there is mineral ore or a proposed mining operation on M70/1248 and M70/1250. It points out there has been no geological investigation, ground disturbing or physical work on either tenement other than the drilling of monitoring bores. In those circumstances it says it is difficult to see how Holcim has anything more than a “mere expression of intention, hope or

expectation”, as opposed to “an identified or planned or recognisable operation” which is envisaged by the word “proposed”: *Grange Resources v Lee* [2006] WAMW 8 [154].

29. AMG submits little or no weight should be given to the evidence relied on by Holcim to show what work has been done during 2014 and 2015 because it is unsupported by documentary evidence, lacking in detail, inconsistent with Holcim’s stated intentions in letters to the Minister in respect of the s. 111A submission and provided late in the day.
30. In respect of s. 102(3) AMG says Holcim’s inaction has prevented another operator from exploiting the tenements which is counter-productive to encouraging competition in the Perth sand market. It maintains another operator could develop the tenements which would have the same effect of encouraging competition within that market.

**Section 102(2)(b)**

31. I first need to determine whether Holcim has established the ground raised pursuant to s. 102(2)(b). Holcim relies on the second limb, namely “*that time is required... to plan future exploration or mining or raise capital therefor*”. These are expressed in the alternative and there is no qualification on the nature of the capital to be raised. The essence of the provision is that time is required to do certain things. This might arise for any number of reasons; for example, change in ownership of the tenement holder, delay caused by natural disasters, economic issues. There is no stated qualification on the type of time required; it is not expressed as “*reasonable time is required*.”
32. The evidence of Mr Giraud and Mr Adams as to the events of 2013 which delayed progression of the briefing paper in respect of the Jandabup project was persuasive. Mr Nicholson was appointed in March 2013 specifically to

advance the Jandabup project. I accept the delay caused by the illness of Mr Nicholson was not anticipated, and was exacerbated by Holcim's inability to fill key management roles in other areas and the unexpected illness of another manager during that same period which meant others could not step into his position. I am satisfied this meant more time was required to fully explore and develop the detail surrounding the Jandabup project after October 2013 and that, until that occurred, the board was not in a position to allocate funds which could be spent on the project. This process is consistent with sound commercial practice within a multinational corporation dealing with a project of this size.

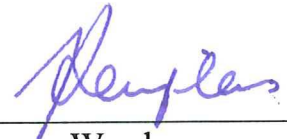
33. I am also satisfied Holcim has used that time to plan future mining. The witness statements of Mr Giraud dated 17 October 2014 and 6 May 2015 outline expected progress of phases and phases completed. This is consistent with the expenditure of \$15,523.17 on M70/1248 and \$29,154.32 on M70/1250 in respect of mining activities during the third expenditure year. While I acknowledge Holcim has not provided documentary evidence such as the briefing paper, commercial agreements with contractors or contractors' reports, I accept the reason advanced by Holcim for this is that it is concerned about commercial sensitivity, rather than because those documents would not support its case.
34. The details contained in Holcim's letters to the minister in relation to the s.111A submission are also consistent with the evidence of Mr Giraud. The fact Holcim expressed to the Minister in July 2014 that it would not progress preliminary operations until applications in relation to M70/1248 and M70/1250 had been determined, and subsequently changed its mind given the expected delay in resolving both the applications for exemption and forfeiture, does not cause me to doubt the reliability of Mr Giraud's evidence.

35. The evidence in its entirety clearly supports the position that Holcim is actively planning future mining on M70/1248 and M70/1250 and that it required more time to do so because of the unforeseen events of 2013.
36. In any event, I am also satisfied Holcim required time to raise capital for future mining. I do not accept the submission a reference to capital in s.102(2)(b) is a reference to external capital only. There is no such express qualification on the term and the intent of the provision is to take into account that time is required to do certain things.
37. Again there is no objective qualification of “reasonableness” on the time required. The provision requires the warden be satisfied that subjectively the applicant for exemption requires more time to do certain things. Such a requirement might arise in respect of raising external capital, but equally in respect to often complex and lengthy internal processes in relation to the allocation of capital, necessary for transparency and accountability to shareholders, ASIC, ASX or other stakeholders.
38. I accept the evidence of Mr Giraud and Mr Adams that formal allocation of funds, able to be legitimately expended on M70/1248 and M70/1250, could not occur until after a briefing paper had been prepared and approved by the board of Holcim. Accordingly, whether to spend \$100,000 provisionally allocated to the tenements, or any other amount, was not a commercial decision Holcim was in a position to make until late 2013/early 2014, which resulted in more time being required within the second expenditure year.
39. I am therefore satisfied on the basis of the grounds raised pursuant to s.102 (2)(b) that I ought recommend to the Minister a certificate of exemption be granted.
40. As a result I do not need to consider the remaining grounds.

**Orders**

41. I make the following order:

1. I recommend the Minister grant certificates of exemption from expenditure in relation to M70/1248 and M70/1250 in respect of expenditure year 15 February 2013 to 14 February 2014.

  
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Warden