JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	[2016] WAMW14
CORAM	**:**	WARDEN A MAUGHAN
HEARD	**:**	24-25 November 2015
DELIVERED	**:**	1 July 2016 (published 13 July 2016)
FILE NO/S	**:**	Applications for Exemption numbered 428075,428726, 430588, 430589, 430593, 430585, 430596, 432094, 432098, 433873, 433874, 433880, 433882, 432097, 433887, 433885, 433884, 433883, 433878, 433877, 433876, 432105, 433888,
TENEMENT NO/S	**:**	Mining Leases 51/79, 51/472, 20/70, 20/71, 51/31, 51/203, 51/484, 51/503, 20/45, 20/214, 20/219, 20/444, 20/496, 51/53, 51/62, 51/236, 51/235, 51/233, 51/374, 51/35, 51/33, 51/504, 51/256
BETWEEN	**:**	GMK EXPLORATION PTY LTD (Subject to Deed of Company Arrangement) (Applicant for Exemption) AND BIG BELL GOLD OPERATIONS PTY LTD (Party) AND GLYN THOMAS MORGAN (Objector)

Catchwords: *Exemption, Mining Act s102, Capital Raising, Aggregate Exploration Expenditure, Other Reason, Turns on own facts.*

Legislation: *Mining Act 1878*
Interpretation Act 1984

Cases referred to:

- ***Blackfin P/L v Mineralogy P/L*** [2013] WAMW 19 at [81]
- ***Brosnan & Brosnan v Richmond, St Barbara Ltd (formerly St Barbara Mines Ltd) & Saracen Gold Mines Pty Ltd*** [2007] WAMW 2
- ***Brosnan v Grange Resources NL*** [2002] WAMW 13
- ***General Gold Resources NL v Exmin Pty Ltd*** [2002] WAMW 18
- ***General Gold Resources NL v Exmin Pty Ltd*** [2002] WAMW 18
- ***General Gold v Exmin Pty Ltd*** [2002] WAMW 18
- ***Great Boulder Mines v Bailey*** [2000] WAMW 6
- ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** (2006) 31 WAR 270
- ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [206] WASCA 19
- ***Horizon Mining Ltd and Jindalee Resources Ltd v MPF Exploration Ltd*** [2005] WAMW 11
- ***Horizon Mining Ltd v MPF Exploration Ltd*** [2005] WAMW 11
- ***Kiara Holdings Pty Ltd v Gutnick Resources NL*** *[2003] WAMW 9*
- ***Marymia Exploration NL v Elazac Mining Pty Ltd*** (unreported, Perth Warden's Court, Warden Calder, 5 December 1997)

- ***Morellini v IPT Systems Ltd*** [2003] WAMW 3
- ***Nova Resources NL v French*** (1995) 12 WAR 50
- ***Re Heaney, Ex parte Flint v Nexus Minerals NL*** (unreported, 26 February 1997)
- ***Re Michael*** (2002) 25 WAR 511
- ***Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd and Anor*** 34 WAR 403
- ***Re Warden Calder; Ex parte Lee*** (2007) 34 WAR 289
- ***Re Warden French; ex parte Serpentine-Jarrahdale Ratepayers Association*** (1994) 11 WAR 315
- ***Siberia Mining Corp Pty Ltd v Thompson*** [2014] WAMW 7
- ***St Ives Gold Mining Company Pty Ltd & Ors v Hawks and Western Resources & Exploration Pty Ltd*** [2005] WAMW 19
- ***Turnbull v Australian Metallic Resources NL*** [2000] WAMW 2
- ***Van Blitterswyk v BHP Billiton Nickel West Ltd*** *[2009] WA.MW 5*
- ***Vanstone v Clark*** (2005) 147 FCR 299
- ***WMC Resources Ltd v Ajax Mining Nominees Pty Ltd*** [2001] WAMW 13
- ***WMC Resources Ltd v Ajax Mining Nominees Pty Ltd*** [2001] WAMW

Result:

1. *Application for exemption recommended pursuant to s102(2)(b) and s102(3) of the Mining Act.*

2. *Application for exemption not recommended pursuant to s102(2)(h) of the Mining Act.*

Representation:

Counsel:

Applicant	:	DLA Piper Australia
Respondent	:	Mr Gerus and Ms Shave

Solicitors:

Applicant	:	Mr Jones
Respondent	:	Gilbert & Tobin

Background

1. GMK Exploration Pty Ltd (GMK) at all material times was a wholly owned subsidiary of Reed Resources Limited (Reed) a company listed on the ASX. GMK relied on Reed for funding which was advanced to GMK by Reed in the form of inter-company loans.

2. In July 2011 GMK acquired the Meekatharra Gold Project from the Administrators of Mercator Gold Australia Pty Limited for $26.7 million plus two million Reed shares. The Meekatharra Gold Project consists of approximately 300 tenements.

3. Between July 2013 and October 2013 GMK lodged applications for exemption from expenditure (Exemption Applications) for 23 mining leases held by GMK (the tenements).

4. On 16 August 2013 Darren Weaver and Andrew Staker were appointed voluntary administrators of GMK pursuant to section 436C of the *Corporations Act 2001 (Cth)*. All but two of the exemption applications were lodged by the administrators who were appointed.

5. Between August 2013 and November 2013 Glyn Thomas Morgan (Morgan) commenced proceedings by lodging objections (objections) to the exemption applications.

6. Morgan also lodged applications for forfeiture (forfeiture applications) for each of the tenements, and also mining lease 51/320. There are 24 applications in total.

7. The exemption applications are to be heard and determined first.

8. The question before me at the hearing commenced on 16 November 2015 is whether a recommendation should be made to the Minister that certificates of exemption be granted under section 102(2)(b), section 102(2)(h) or section 102(3) in respect of the tenements for the expenditure years.

9. Amongst the 23 tenements, there are 17 different anniversary dates, and so the exemption applications relate to 17 different expenditure periods of 12 months duration beginning in 2012 and ending in 2013 (the expenditure years).

10. The relevant expenditure years for the tenements are set out in the table below:

Attachment A – Table showing the Expenditure Years

No.	Tenement	Application for Exemption	Expenditure Year
1	M51/472	428726	10.06.2012 to 09.06.2013
2	M51/79	428075	26.06.2012 to 25.06.2013
3	M51/203	430585	12.07.2012 to 11.07.2013
4	M20/70	430588	18.07.2012 to 17.07.2013
5	M20/71	430589	18.07.2012 to 17.07.2013
6	M51/31	430593	26.07.2012 to 25.07.2013
7	M51/484	430596	31.07.2012 to 30.07.2013
8	M51/503	432094	02.08.2012 to 01.08.2013
9	M51/53	432097	19.08.2012 to 18.08.2013
10	M20/45	432098	26.08.2012 to 25.08.2013
11	M51/504	432105	01.09.2012 to 31.08.2013
12	M20/214	433873	02.09.2012 to 01.09.2013
13	M20/219	433874	02.09.2012 to 01.09.2013
14	M51/33	433876	05.09.2012 to 04.09.2013
15	M20/444	433880	21.09.2012 to 20.09.2013
16	M20/496	433882	21.09.2012 to 20.09.2013
17	M51/35	433877	07.09.2012 to 06.09.2013
18	M51/374	433878	11.09.2012 to 10.09.2013

19	M51/233	433883	22.09.2012 to 21.09.2013
20	M51/235	433884	22.09.2012 to 21.09.2013
21	M51/236	433885	22.09.2012 to 21.09.2013
22	M51/62	433887	23.09.2012 to 22.09.2013
23	M51/256	433888	23.09.2012 to 22.09.2013

11. During the expenditure years the tenements were part of the Yaloginda combined reporting group (C44/2006) (Yaloginda reporting group) approved by the Minister in accordance with section 115A(4) of the *Mining Act*.

12. The Applicant tendered the statements of Christopher John Reed, David Alan Hollingsworth, and Darren Weaver, who were not the subject of any cross-examination. I do not propose to set out in great detail the evidence of these three witnesses. It is sufficient for me to say I accept as true their evidence as to past, present, and future exploration or the disputed tenements. I also accept their evidence insofar as it touches upon the operating of the tenement by GMK and the difficulties experienced connected to those operations.

    The evidence of an "expert" from Buckingham is the subject of only minor comment by me in these reasons.

    In the proceeding the objector sought to be heard in relation to the applications for exemption but did not lead any evidence.

13. In the proceedings the objector sought to be heard in relation to the applications for exemption but did not lead any evidence.

Policy of the *Mining Act* in relation to applications for exemption

14. The objects of the *Mining Act* in relation to expenditure and exemption are relevant to the question of whether an applicant for exemption has met the requirements of sections 102(2)(b), 102(2)(h) or 102(3).

15. In ***Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd and Anor*** 34 WAR 403, Pullin JA, at [21] and [22], made the following observations:

> *"Rowland J in **Nova Resources NL v French*** (1995) 12 WAR 50 *said that the "primary" object and aim of the legislation is "to ensure as far as practicable that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration". It is true that this is one of the primary objects of the Act. However, the adjective "primary" used by Rowland J acknowledges that there are other objects and aims. Another object reflected in the Act is, in one sense, contrary to the primary object. This object is found in provisions in the Act which excuse tenement holders in certain circumstances from making land with known potential for mining, or which is worthy of exploration, available for mining or exploration. Some of these provisions have been in the Mining Act 1975 [sic] or its predecessor for a long time, and other provisions have been added more recently, perhaps to reflect the fact that the mining industry in Western Australia has increasingly matured and now involves the investment of billions of dollars.*
>
> *Thus, for example, Div 7 (which has existed for a long time in one form or another) allows for the grant of a certificate of exemption to a tenement holder. This will exempt the tenement from the condition that money be spent on mining, or in connection with mining in relation to it, for certain periods of time. The exemption may be granted for a variety of reasons, including that the tenement contains a mineral deposit which is uneconomic but which may be expected to become economic at some time in the future; or 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 that time is required to evaluate work done on the mining tenement to plan future exploration or mining or to raise capital therefore. See s 102(2).... In 1993, Div 2A was introduced into the Act permitting the Minister to grant the holder of a prospecting licence, exploration licence or mining lease a retention licence, if there is an identified mineral resource in the area in respect of which the licence was sought and the mining of that identified mineral resource is impracticable. Impracticability may be shown by the fact that the resource is uneconomic or subject to marketing problems if the resource may reasonably be expected to become economic or marketable in the future; or because the resource is required to sustain future operations of an existing or proposed mining operation; or if there are existing political, environmental or other difficulties in obtaining requisite approvals. See s 70C. These provisions make it clear that one object or purpose of the Act is to identify circumstances in which a tenement holder will be allowed to hold a tenement without mining or giving it up to others who may wish to actively mine the land".*

16. Further, Buss JA, in ***Ex Parte Cazaly***, stated at [123] (in the context of the expenditure conditions of an exploration licence):

> *"By s 63 of the Mining Act, every exploration licence is deemed to be granted subject to the condition, relevantly, that the holder will explore for minerals. That provision does not, however, stipulate the timing, nature or extent of the exploration which must be carried out. Section 62 imposes an obligation on the holder of an exploration licence to comply with the prescribed expenditure requirements, but the Act makes provision for the holder of a mining tenement (including an exploration licence) to apply for total or partial exemption from the applicable expenditure conditions. See ss 102, 102A and 103. In my opinion, the condition which s 63 imposes, namely, that the holder of an exploration licence will explore for minerals, is subject to the provisions for exemption from the prescribed expenditure requirements. If the holder of an exploration licence is granted a total and, relevantly, unconditional exemption, from the applicable expenditure conditions, for a period, the holder is not obliged during that period to explore for minerals on the land the subject of the licence. As to the power to impose conditions, see s 103".*

17. Warden Wilson held in ***General Gold Resources NL v Exmin Pty Ltd*** [2002] WAMW 18 at [92] - [93] that:

> *"There is no expectation by the provisions of the Mining Act and Regulations that expenditure occur for the sake of expenditure. That is made clear by the exemption provisions of the Mining Act and Regulations.*
>
> *Rather, the exploitation of the mineral wealth of this State requires a planned and methodical approach, compliance with all aspects of both State and Federal legislation and within the existing financial and economic circumstances that prevail at the time."*

18. It is submitted by the Applicant that whilst the objects of the Mining Act are to achieve the exploitation of the State's mineral resources, section 102 recognises that this object is not to be pursued in an inefficient or uneconomic way. So that limited resources of capital available to companies are used astutely, the grounds of section 102 should not be read in an unduly narrow manner.

Law regarding exemptions from expenditure

19. Sections 102 and 103 of the *Mining Act* provide that the holder of a mining lease may apply for the grant of a certificate of exemption, the effect of which, if granted, is to relieve the holder from the obligation of meeting the minimum

amount of expenditure prescribed by regulation 31. S102 and 103 of the *Mining Act* provide;

> ***"102. Exemption from expenditure conditions***
>
> *(1) Subject to this Act, on an application (an **application for exemption**) made, as prescribed, by the holder of a mining tenement (other than a retention licence) or his authorised agent prior to the end of the year to which the proposed exemption relates, or within the prescribed period after the end of that year, the holder may be granted a certificate of exemption in the prescribed form totally or partially exempting the mining tenement to which the application relates from the prescribed expenditure conditions relating thereto, in an amount not exceeding the amount required to be expended —*
>
> *(a) in respect to any mining tenement other than a mining lease, in any one year; and*
>
> *(b) in respect to a mining lease, subject to subsection (7), in a period of 5 years.*
>
> *(1a) An application for exemption may relate to more than one mining tenement.*
>
> *(2) A certificate of exemption may be granted for any of the following reasons —*
>
> *(a) that the title to the mining tenement is in dispute; or*
>
> *(b) that time is required to evaluate work done on the mining tenement, to plan future exploration or mining or raise capital therefor; or*
>
> *(c) that time is required to purchase and erect plant and machinery; or*
>
> *(d) that the ground the subject of the mining tenement is for any sufficient reason unworkable; or*
>
> *(e) that the ground the subject of the mining tenement contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future or that at the relevant time economic or marketing problems are such as not to make the mining operations viable; or*
>
> *(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*
>
> *(g) that political, environmental or other difficulties in obtaining requisite approvals prevent mining or restrict it in a manner that is, or subject to conditions that are, for the time being impracticable; or*

(h) that —

*(i) the mining tenement is one of 2 or more mining tenements (**combined reporting tenements**) the subject of arrangements approved under section 115A(4) for the filing of combined mineral exploration reports; and*

(ii) the aggregate exploration expenditure for the combined reporting tenements would have been such as to satisfy the expenditure requirements for the mining tenement concerned had that aggregate exploration expenditure been apportioned between the combined reporting tenements.

(2a) In subsection (2)(h) —

***aggregate exploration expenditure** means expenditure —*

(a) on, or in connection with, exploration for minerals on the combined reporting tenements; and

(b) worked out in a manner specified in the regulations.

(3) Notwithstanding that the reasons given for the application for exemption are not amongst those set out in subsection (2), 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.

(4) 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.

(5) An application for exemption —

(a) where an objection to the application is lodged, shall be heard by the warden; but

(b) otherwise, shall be forwarded to the Minister for determination by the Minister.

(6) The warden shall as soon as practicable after the hearing of the application transmit to the Minister for his consideration the notes of evidence and any maps or other documents referred to therein and his report recommending the granting or refusal of the application and setting out his reasons for that recommendation.

> *(7) Where the warden finds that the reasons given by the holder of the mining lease are sufficient to justify the granting of a certificate of exemption and so recommends, or if the Minister is satisfied whether or not a recommendation is made by the warden, the Minister may grant a certificate of exemption in an amount not exceeding the amount required to be expended in respect of the mining lease in the period of 5 years from the commencement of the year to which the application relates.*

103. Effect of exemption

> *Upon the granting of a certificate of exemption pursuant to section 102 or section 102A the holder of a mining tenement to whom it is granted shall be deemed to be relieved, to the extent, and subject to the conditions specified in the certificate, from his obligations under the prescribed expenditure conditions relating to the mining tenement".*

20. If an application for exemption is objected to, proceedings are commenced under the *Mining Regulations* and the Warden must hear the application and objection and make a recommendation to the Minister on whether a certificate of exemption ought to be granted (sections 102(5)-(7) of the *Mining Act*). The Minister may grant an exemption for up to 5 years if he is satisfied that the reasons given are sufficient, whether or not the Warden recommends grant of an exemption.

21. The Warden has a "filtering" role akin to that when hearing tenement applications that have been objected to (see ***Re Warden French; ex parte Serpentine-Jarrahdale Ratepayers Association*** (1994) 11 WAR 315 at p. 317, line 12). In this role, "*as many matters as may subsequently be brought to the attention of the Minister as it is reasonable and practical to do so should be aired before the Warden*" (see *Great Boulder Mines v Bailey*, unreported, Perth Warden's Court, 24 March 2000, per Warden Calder at p. 12).

22. The following relevant principles concerning the legislative objectives of the *Mining Act* and appropriateness of granting certificates of exemption are not disputed:

(a) the exploitation of the mineral resources of the State is to be achieved in an efficient and economical manner;

(b) the exploitation of the mineral resources of the State requires a planned and methodical approach within the financial and economic circumstances that prevail at the time; and

(c) the holder of a tenement within a project is entitled to expect to be able to retain that tenement until it plans to conduct activities on or with respect to it, so long as the holder is working towards continuous and effective mineral exploitation.

(See ***WMC Resources Ltd v Ajax Mining Nominees Pty Ltd*** [2001] WAMW 13 per Warden Calder at [44], [48] and [55].)

23. GMK, as the applicant for exemption, has an onus to persuade the Warden that it has established the grounds of exemption claimed in the Exemption Applications, and that certificates of exemption ought to be granted.

24. By section 102(4), the Warden must consider the grounds of previous exemptions as well as the work done and the money spent by the holder on the mining tenement. Therefore evidence relating to the circumstances of GMK and Reed during the Expenditure Years, including the history of substantial expenditure and the mining operations proposed to be carried out at the Meekatharra Gold Project is relevant: ***St Ives Gold Mining Company Pty Ltd & Ors v Hawks and Western Resources & Exploration Pty Ltd*** [2005] WAMW 19; ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** (2006) 31 WAR 270 at [61].

The Applicant's grounds for exemption from expenditure during 2012/2013

25. GMK relies on the following grounds in support of each of the exemption applications under the *Mining Act* 1978 (WA) (Mining Act).

(a) Section 102(2)(b) – **that time** (my emphasis) is required to evaluate work conducted on the mining tenement, to plan future exploration and mining or raise capital therefore;

(b) Section 102(2)(h) – the mining tenement was part of a combined reporting group. C44/2006 during the expenditure year and the **aggregate exploration expenditure** (my emphasis) for the combined reporting tenements would have been such as to satisfy the expenditure requirements for the mining tenements concerned, had that aggregate exploration expenditure been apportioned between the combined reporting tenements; and

(c) Section 102(3) – notwithstanding that the reasons given for the application for exemption are not amongst those set out in subsection (2), a certificate of exemption may also be granted for any **other reason** (my emphasis) which may be prescribed or which in the opinion of the Minister is sufficient to justify exemption.

The Time argument

The applicant's submissions:

26. This ground of exemption is relied on insofar as GMK says that:

(a) GMK required time to raise capital during the Expenditure Year for each tenement; and

(b) time was required by the Administrators to consider any funding options and preserve the assets comprising the Meekatharra Gold Project in order to effect a sale.

27. In ***Brosnan & Brosnan v Richmond, St Barbara Ltd (formerly St Barbara Mines Ltd) & Saracen Gold Mines Pty Ltd*** [2007] WAMW 2, Warden Auty recommended the grant of an exemption from the expenditure conditions of an

exploration licence, in circumstances where the company that held the exploration licence was in administration for part of the expenditure year.

28. Warden Auty held at [17] – [20]:

> *"The applicant urges me to also accept that, given the history of Regulation 102(2) and the establishment of voluntary administration provisions subsequently in the Commonwealth Corporations Act 2001, I should also accept that the situation in this case is analogous to that where Regulation 102(2) would permit non-exploitation of the tenement.*
>
> *It is also submitted that given the voluntary administration of the original tenement holder in these proceedings I should accept that any action taken to exploit the tenement during that time would be counterproductive to the requirements of the commonwealth legislation and in effect defeat the provisions which are set in train in that legislation for the protection of companies and their shareholders.*
>
> *I am urged to accept that the recommendation of a grant of exemption will ensure that the objectives of Part 5.3A of the Corporations Act 2001 are met as divestment will occur at a non-discounted price as the assets of the company will have been protected by taking that course.*
>
> *I am also urged to accept that the objectives of the Mining Act will be met by recommending the exemption application as adopting this course will result in this case in the sale of an asset to a tenement holder (Saracen) which company intends exploiting the resource and which has a comprehensive plan to that effect".*

29. In ***Brosnan & Brosnan*** the applicant claimed exemption under section 102(2)(b), 102(2)(d) and 102(3). Warden Auty held at [50]:

> *"Having regard to all the matters put by the parties in this case I am of the view that applicant has made out a case for the recommendation of a grant of exemption from expenditure on the basis of all three grounds as argued".*

30. In ***Horizon Mining Ltd and Jindalee Resources Ltd v MPF Exploration Ltd*** [2005] WAMW 11, Warden Auty recommended the grant of an exemption under section 102(2)(b) on the basis that capital was being sought for "mining related exploration" in circumstances where desktop evaluation of old data and mapping had been undertaken and the tenement holder was actively seeking to gain a capital influx to facilitate the complex exploration necessary for the exploitation of the tenements. Her Honour held:

> *"This is not a case where there was a totally cynical attempt made to retain mining assets by a company which had no intention of exploiting them except to shore up the company's value. There was no cavalier disregard of the Mining Act or Regulations by the holder of the tenement".*

31. Christopher Reed, a Director of GMK, attested to the fact;

    a) At all relevant times, until GMK entered into Administration on 16 August 2013, the tenements the subject of the Meekatharra Gold Project were GMK's sole asset and ultimately Reed's primary asset.

    b) The fundraising efforts by Reed were primarily to raise capital in order to recommence operations on the tenements comprising the Meekatharra Gold Project, including the Mining Leases.

    c) The Fundraising involved:

        i) a Bank Feasibility Study completed in February 2012;

        ii) Being able to establish cashflow through the generation of gold by upgrading the Bluebird Process Plant;

        iii) An equity raising of $40 million by deed in May 2012 which fund were then loaned to GMK inter alia to upgrade Bluebird Processing Plant;

        iv) In July 2012 the securing of a debt financing facility with Barclays Bank in the sum of $23 million which was not drawn down.

        v) In September 2012 Credit Suisse provided a debt facility of $19 million for the working capital requirements of the Meekatharra Project.

32. It is submitted that as at the date the Exemption Applications were lodged, variously between July and October 2013, it was plainly apparent that time had been required in the respective Expenditure Years to raise capital to continue mining and exploring.

33. GMK and Reed submit they had a clear plan to develop the Meekatharra Gold Project, by:

    (a) raising enough capital to refurbish the Bluebird Processing Plant and bring the Bluebird open pit back into production; (Stage 1)

    (b) generating cashflow, and become self-funding, by producing up to 134,000 ounces of gold over a 21 month period of mining from the Bluebird, Surprise, Batavia and Whangamata open pits; (Stage 2) and

    (c) utilise the cashflow from the initial period of open pit mining to fund exploration and the development of further deposits which could be mined and processed at the Bluebird Processing Plant. (Stage 3)

34. The Bluebird Processing Plant refurbishment was completed in December 2012 and commenced production from October 2012.

35. From October 2012 until the appointment of Administrators to GMK in August 2013, GMK was mining at the Bluebird open pit and producing gold from the Bluebird Processing Plant.

36. In the first quarter of 2013, the mine began to underperform. The reasons for the underperformance of the mine were according to Reed foreseen by GMK and was due in part on its reliance upon information purchased from Mercator as to the location of gold within the Bluebird Plant, which information proved incorrect.

37. The underperformance of the mine had two major effects on GMK's cashflow:

    (a) first, GMK had to spend money trying to address the reasons for the underperformance of the mine; and

    (b) second, GMK's mining activity was not translating into the expected quantity of gold.

38. The sale of gold from the Bluebird Processing Plant was critical to GMK's ability to continue funding its mining and exploration operations at the Meekatharra Gold Project.

39. The price of gold also began to decline steadily from January 2013 until August 2013, when Administrators were appointed to GMK.

40. In March 2013, the boards of GMK and Reed put all exploration at the Meekatharra Gold Project on hold, due to a shortage of funds.

41. By the end of May 2013, approximately 20,500 ounces of gold had been produced from the Bluebird open pit. The ore reserve had forecast production of 22,600 ounces for the same period.

42. GMK submits it had a clear plan to explore and develop the Meekatharra Gold Project which, in March 2013, which was postponed until the reasons for mine underperformance could be established and addressed. GMK, submits it did not have infinite funds such that it could both address the mine underperformance and continue exploration. GMK faced the practical reality of having to stop exploring and address the issues with the underperformance of the mine before it could continue with its Staged Strategy.

43. This was a case where GMK submits it "*was not appropriate… to embark upon a campaign of spending for the sake of it*",

44. GMK responded to the mine underperformance by undertaking an investigation and implementing cost-saving measures, and by seeking to raise funds. These included:

    (a) the GMK board commissioned an external and independent review of both the grade control processes and reconciliation processes to ascertain the reasons why the mine-to-mill ounces reconciliation and head grade had declined materially;

(b) GMK revised the mining schedule for the Bluebird open pit to expose richer parts of the ore earlier;

(c) GMK reduced staff numbers; and

(d) GMK deferred further planned development at the Meekatharra Gold Project until the price of gold increased and market sentiment improved.

45. The strategies implemented by GMK contributed to an improved performance for July 2013.

46. Reed testified that mine production underperformed again in early August 2013. No reason is proffered.

47. The Boards of GMK and Reed undertook exhaustive attempts to explore opportunities for funding.

48. In April 2013, the Reed Group of companies (including GMK) took advantage of the falling gold price and closed out its hedge facility with Credit Suisse, yielding $27,135,000. GMK arranged to repay Credit Suisse all amounts owing under a $19 million debt facility established in November 2012. The repayment resulted in the release of Credit Suisse's security over the Reed Group. The closure of the hedge book increased Reed's working capital by approximately $7.7 million. These funds were loaned to GMK on a week by week basis to fund operations at the Meekatharra Gold Project.

49. As of 31 March 2013, Reed had cash on hand and at bank of $7,029,000.

50. In the financial year to 30 June 2013, GMK incurred trading losses of $10 million.

51. As at 30 June 2013, Reed had cash on hand and at bank of $7,164,000. At that time Reed had current liabilities totalling $17,985,281, and non-current liabilities totalling $9,836,692.

52. As at 16 August 2013, GMK owed approximately $87 million to its creditors, including Reed, Minepower, Maroomba Airlines, VM Drilling Pty Ltd, Australian Gold Reagents Pty Ltd, Shell and KPS Power Generation. Gold production at the Meekatharra Gold Project in the June 2013 Quarter was adversely affected by lower than expected head grade and by the lower than expected mine-to-mill ounces reconciliation. Specifically, GMK was mining areas of the Bluebird open cut pit where ore was thought to be, but the mined material was not producing the expected ounces at the Bluebird Processing Plant. Consequently, less gold was being produced than expected, and this had a negative effect on GMK's cash flow.

53. Whilst carrying out Stage 1 of the Staged Strategy, the boards of Reed and GMK assessed the development potential of the Stage 2 and Stage 3 operations by evaluating future potential ore sources. In June 2013, the board of GMK postponed the development of Stage 2 operations until the Meekatharra Gold Project was cash flow positive.

54. As at 9 July 2013, GMK estimated that approximately 58,500 ounces of gold remained to be mined from the Bluebird pit. GMK estimated that it would cost $1,000 per ounce to mine the remaining gold from the Bluebird pit, at a total cost of $58.5 million.

55. Given the prevailing market sentiment and adverse gold price environment (the price dropped from $1607.00 USD/ounce in January 2013 to $1429 USD/ounce in August 2013) and the absence of a significant cash buffer, Reed could not resolve to apply funds for Stages 2 and 3 at that time.

56. On 21 July 2013 the board of Reed resolved to defer the further assessment and development of operations until there was a sustained increase in the prevailing gold price, and an improvement in market sentiment.

57. In July 2013, Reed became one of the first companies to opt in to the Mining Rehabilitation Fund, as a means of obtaining access to funds that had previously been held as environmental bonds.

58. Consequently, in July 2013, the DMP retired all of the environmental bonds pertaining to the Meekatharra Gold Project, which released approximately $3million previously held in restricted use term deposits as security for the bonds.

59. Also in July 2013, the management of Reed and GMK independently approached several financiers to discuss the potential for a debt and/or hedging facility for the Meekatharra Gold Project. None of these approaches were successful.

60. On 10 July 2013, Reed attempted to raise further funds by engaging a consultant, Scott Hill of Noah's Rule Pty Ltd (Noah's Rule) to assist GMK in raising capital for the Meekatharra Gold Project. None of the entities approached by Noah's Rule agreed to provide funding.

61. In July 2013, the board of Reed also attempted to obtain funding through various avenues, as follows:

    (a) the board of Reed attempted to negotiate a sale of Reed's Comet Vale Gold Project to Norton Goldfields Limited (Norton Goldfields), to raise approximately $5 million for the Meekatharra Gold Project, alternatively, to negotiate a debt facility with Norton Goldfields up to an amount of $5 million;

    (b) the board of Reed approached GE Financing about a possible sale of the Bluebird accommodation camp with a view to leasing the camp back from GE Financing;

    (c) the board of Reed approached Barclays Bank and, separately, Macquarie Bank, about the possibility of entering into a gold hedging agreement;

(d) the board of Reed approached National Australia Bank about the possibility of obtaining a $3 million overdraft facility; and

(e) the board of Reed approached two Canadian companies, Sprott Asset Management and Waterton Global Resources Management, about the possibility of obtaining a debt financing facility.

62. Ultimately, none of Reed's approaches were successful because none of the entities approached directly by Reed or through Noah's Rule agreed to provide funding.

63. The board of Reed also explored the possibility of a share placement to raise $1.5 - 2 million for the Meekatharra Gold Project, but formed the view that a placement would not be successful as M&G Investment Limited (a substantial shareholder of Reed) had indicated that it would not support further capital raisings under the prevailing market conditions – that is, the low gold price and general poor market sentiment in relation to gold mining companies - and that Reed was unlikely to attract a new investor or broker.

64. The board of Reed also considered offering an accelerated rights issue to shareholders to raise an amount in excess of 15% of Reed's market capitalisation (approximately $2.5 million) but, again, formed the opinion that a placement would not be successful given Reed had lost the support of its major shareholder (M&G Investment Limited), and had the view that there was no support in the market for companies exposed to gold.

65. On 15 and 16 August 2013, the boards of Reed and GMK decided that it was not in the best interests of either company for GMK to continue to operate the Meekatharra Gold Project without significant further funding.

66. On 16 August 2013, the directors of Reed advised the directors of GMK that Reed would no longer provide funding to GMK for the Meekatharra Gold Project.

67. On 16 August 2013 the board of GMK resolved to place GMK into administration by way of the voluntary appointment of Administrators.

68. On 16 August 2013, the Administrators of GMK assumed control and management of GMK's tenements (including the Tenements), due to the circumstances which arose during the Expenditure Year (explained above), including:

    (a) mining and processing issues;

    (b) weaker gold prices;

    (c) short term cash flow issues; and

    (d) failure to secure alternative sources of funding (other than Reed).

69. The Administrators preserved the assets of GMK and conducted an orderly sale to ensure maximum returns to creditors.

70. After their appointment on 16 August 2013, the Administrators continued to operate the mine until 4 November 2013. When the Administrators decided to cease mining operations and transition the Meekatharra Gold Project into care and maintenance, based on:

    (a) the risks and costs versus the financial benefits of continuing to mine until a sale had been concluded;

    (b) the financial benefits to creditors of crystallising the stockpiles prior to completion of any sale; and

    (c) the preferences of the parties interested in purchasing the Meekatharra Gold Project.

71. The Administrators processed the stockpiles until 20 December 2013. The residual gold left in the processing circuit was recovered and a final gold pour

completed on 21 January 2014. GMK employees then began placing the plant into care and maintenance mode.

72. Once mining had ceased, the Administrators:

(a) notified all key contractors, suppliers and employees;

(b) continued to process stockpiles;

(c) adhered to all statutory and mining regulations;

(d) terminated the employment of staff who were no longer required once mining ceased; and

(e) continued to hold weekly meetings with key staff.

73. Big Bell Gold Operations Pty Ltd (Big Bell), a subsidiary of Metals X Ltd, purchased the Tenements from the Administrators of GMK pursuant to sale agreements dated 14 May 2014 and 23 December 2014.

74. From August 2013 until the second sale agreement was executed with Big Bell in December 2014 the Administrators undertook confidential and comprehensive processes for the sale of the Meekatharra Gold Project.

75. On 6 February 2014, the Administrators delivered a Report to Creditors.

76. Metals X Ltd plans to develop the Tenements as part of the Central Murchison Gold Project (CMGP), has integrated the Meekatharra Gold Project tenements into the CMGP, and has already completed exploration drilling on the newly acquired tenements.

The Objector's submission:

77. The respondent says the time was not required to raise capital for future exploration and mining in circumstances where:

(i) GMK did not have a concrete plan for future exploration and mining of the tenements in question; and

(ii) GMK have already had adequate opportunity prior to the reporting year to raise capital for future exploration and mining of the tenements in question.

78. With regard to the circumstances relied upon by GMK it is submitted by the Objector:

a) the total minimum expenditure commitment for the subject tenements for the reporting year was appropriately $6 million;

b) by the time the earliest expenditure year had commenced, Reed had raised appropriately $40 million through an equity raised;

c) the funds were loaned by Reed to GMK for the purpose of the recommencing mining;

d) GMK directed the funds towards Stage 1 of which involved the commencement of mining operations on M51/132, M51/211, MSl/187, MSl/805, MSl/738, M51/325 and MS l/280 and entailed the following work:

i) the preparation of a bankable feasibility study in relation to the recommencement of mining operations;

ii) refurnishing the Bluebird Processing Plant; and

iii) in-pit exploration and development at the Bluebird open pit located on MS l/132:

e) the conduct of exploration and mining on the other tenements comprising the Meekatharra Gold Project as part of Stage 2 and Stage 3 of the strategy was entirely dependent on the generation of profit from the mining operations conducted as part of Stage 1; and

f) there is no evidence that GMK had even developed a concrete plan to conduct exploration or mining in respect of the other tenements comprising the Meekatharra Gold Project.In circumstances where GMK did not have a concrete proposal to conduct exploration or mining in respect of the other tenements comprising the Meekatharra Gold Project, it cannot be concluded that time was required to raise capital for future exploration or mining on those tenements.

79. The Objector further submits that in order for section 102(2)(b) to be applied in a manner which is consistent with the policies and objectives of the *Mining Act 1978* (WA), it is necessary to construe the requirement that "time is required" as meaning objectively required by GMK acting reasonably. This has the consequence that an exemption will not be available where, it is submitted, GMK

a) had an opportunity to raise capital prior to the reporting year but failed to make a reasonable effort to do so; or

b) has otherwise brought about its own inability to meet the expenditure conditions.

80. In support of this proposition the objector relies upon ***Siberia Mining Corp Pty Ltd v Thompson*** [2014] WAMW 7, wherein Warden Wilson considered whether to recommend granting an exemption under s 102(2)(b) of the *Mining Act 1978* (WA), and held at [47] and [48]:

> *In both **Kiara Holdings Pty Ltd v Gutnick Resources NL** [2003] WAMW 9 and **Van Blitterswyk v BHP Billiton Nickel West Ltd** [2009] WA.MW 5 the wardens considered applications for exemption that demonstrate the holders of the mining tenements has prioritised expenditure on some mining tenements but not others such that they created their own predicament in failing to meet expenditure obligations. The warden's in the above decisions have held the view that commercial decisions made for the prioritising of expenditure or work upon some mining tenements and not others by the holders of mining tenements is done so at their own peril and should not, in appropriate*

> *circumstances, be the basis upon which a recommendation for exemption should be made.*
>
> *I agree with the principle in those decisions that 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 to money or that money or capital is deliberately diverted or used in some other way other than meeting the prescribed minimum expenditure conditions a recommendation for the for the grant of an exemption should not be made to the Hon. Minister unless it can be demonstrated some other ground of exemption exists.*

81. In the present case, it is submitted the non-compliance with the expenditure conditions in respect of the tenements occurred because GMK adopted a strategy which was contrary to the policies and objectives of the *Mining Act 1978* (WA) and which involved:

    a) "warehousing" the tenements in Stage 2 and Stage 3; and

    b) relying on the profitable conduct of mining operations on Stage 1 tenements to fund future exploration and mining on the Stage 2 and Stage 3 tenements.

82. The Objector's position is that the warehousing of the tenements as part of a project so that they are exploited consecutively is not consistent with the policies and objectives of the *Mining Act 1978* (WA) and is only authorised in limited circumstances:

    a) in accordance with section 102(2)(h), where the implementation of systematic project-wide exploration justifies the deferral of tenement exploration; or

    b) in accordance with sections 102(2)(e) and 102(2)(f), where exploration of the tenement has progressed to the point where a resource has been identified and it is appropriate that mining be deferred until it is economic or can occur in conjunction with a systematic project-wide mine plan.

83. The administration of GMK and the efforts made by the administrator to

consider funding options does not constitute grounds for the grant of an exemption under section 102(2)(b) because:

a) the Applicant went into administration on 16 August 2013 which was (depending on the tenement in question) either after the end of the relevant reporting year or less than 37 days before the end of the reporting year; and

b) these matters do not justify the failure to conduct exploration or mining on the tenements which was by that time inevitable.

Finding

84. Contrary to the assertions by the Objector I find:

a) that the applicant for exemption had a concrete plan for systematic project-wide exploration of the tenements;

b) the plan required the commencement of mining operations, the refurbishment of the Bluebird Processing Plant and Exploitation of the Bluebird Open Pit to raise funds;

c) the funds raised were to be used as part of the ongoing strategy to exploit the Meekatharra Gold Project as part of Stages 2 and 3.

85. Due to the unforeseen circumstances, including:

a) the drop of the price of gold; and

b) the unforeseen difficulties with the Bluebird pit.

it was necessary to raise capital from external sources. The efforts of the Applicant to do so are contained in submissions set out above which were not challenged and which I accept.

86. I accept the Objector's submission set out in paragraph 82 hereof insofar as it relates to the efforts of the Administrators to raise capital.

87. In my view, exemption ought to be granted on this ground.

The Agregate Exploration Expenditure Argument

The applicant's submissions:

88. During the Expenditure Years, the tenements held by GMK, including the subject tenements made up the Yaloginda Reporting Group, which made it eligible to apply for "project exemption".

89. Section 102(2)(h) enables a tenement holder to apply for exemption from expenditure for a tenement in a combined reporting group, on the basis of the expenditure incurred over the combined reporting group as a whole.

90. Expenditure, in this context, has a peculiar definition under section 102(2a) and must be properly construed by reference to the other relevant provisions of the Mining Act and Regulations.

91. The effect of the relevant provisions of the *Mining Act* and *Regulations* is that the "aggregate exploration expenditure" for the combined reporting group must exceed the sum of the minimum expenditure requirements for all of the tenements in the combined reporting group.

92. The relevant point of reference when calculating project expenditure is the most recently filed Form 5 for each tenement in the Yaloginda Project, as at the date of each of the Exemption Applications.

93. Regulation 58A(2) provides that the aggregate exploration expenditure is to be worked out by adding together **the total exploration expenditure** (my emphasis) shown in each relevant operations report (that is, the most recently filed Form 5s).

94. Under the *Mining Act* and *Regulations*, the expenditure to be included when calculating "aggregate exploration expenditure" under Regulation 58A(2) includes three types of expenditure, being expenditure incurred on:

(a) activities conducted in search of minerals or mineralisation (exploration activities);

(b) among other things, Aboriginal heritage surveys, tenement rent and local government rates, administration and land access costs up to 20% of the minimum commitment, or 20% of the total expenditure on the mining tenement, and aerial surveys, as those expenses are allowed under Regulation 96C as expenditure "on or in connection with mining" (which by definition includes exploring for minerals); and

(c) any other activity which is not carried out in search of minerals, where the purpose of the activity is to assist, investigate, assess or facilitate exploration, and where the activity is reasonable capable of contributing to such assistance, investigation or facilitation (activities in connection with exploration).

This construction, it is said, follows from the provisions referred to below.

95. Under section 102(2), a certificate of exemption may be granted for any of the following reasons:

> *"(h) that –*
>
> *(i) the mining tenement is one of 2 or more mining tenements (combined reporting tenements) the subject of arrangements approved under section 115A(4) for the filing of combined mineral exploration reports; and*
>
> *(ii) the aggregate exploration expenditure for the combined reporting tenements would have been such as to satisfy the expenditure requirements for the mining tenement concerned had that aggregate exploration expenditure been apportioned between the combined reporting tenements."*

96. Section 102(2a) provides:

> *"In subsection (2)(h) —*
>
> ***aggregate exploration expenditure** means expenditure —*

(a) on, or in connection with, exploration for minerals on the combined reporting tenements; and

(b) worked out in a manner specified in the regulations."

97. "Exploration" is not defined in the *Mining Act*, and so must be given its plain and ordinary meaning in the context of the *Mining Act* and *Regulations*.

98. Exploration, in this context, is a term used to describe activities conducted in search of minerals, as can be deduced from related provisions. It is apparent from these provisions that, for the purpose of the *Mining Act* and *Regulations*, an activity will be carried out in search of minerals (and therefore on exploration) if its purpose is to identify minerals or mineralisation.

99. Section 115A of the *Mining Act* provides that "mineral exploration report" means a report containing records of the progress and results of:

(a) programmes involving the application of one or more of the geological sciences;

(b) drilling programmes; and

(c) activities involving the collection and assaying of soil, sock, groundwater and mineral samples, that have been carried out *in search of minerals*.

100. The holder of a mining lease is required to submit an operations report annually. The operations report shall be in the form of Form 5. Form 5 is located in Schedule 1 to the Mining Regulations and is titled "Operations Report – Expenditure on Mining Tenement". Form 5 provides, on page 3, instructions for completion of the Form 5. The instructions also provide useful guidance as to what activities may comprise exploration. These include geological activities, geochemical activities, geophysical activities, aerial surveys, aerial photography and remote sensing images, drilling, costeaning, field work, drafting, travel, environmental studies, field camp activities feasibility study activities and rehabilitation activities. In other words, activities conducted in search of minerals or mineralisation.

101. "Mining" is defined to include "exploring for minerals", and so it is not helpful to attempt to define "exploration" by distinguishing it from the statutory definition of mining. Rather, one must look to the nature and purpose of the relevant activity and determine whether that activity was conducted in search of minerals.

102. The *Mining Act* and *Regulations* seek to encourage the exploitation of the mineral wealth of the State. That objective is met by tenement holders identifying minerals, extracting minerals in economic quantities, and processing them efficiently. That objective is also met by tenement holders continuing to identify minerals and devise plans to optimise the mineral wealth of a tenement, or project, after initial extraction and processing has commenced. The extraction and processing of minerals need not, and generally does not, signal the end of activities conducted in search of minerals.

103. If an activity is conducted to extract minerals in economic quantities for processing, that particular activity is not conducted in search of minerals. But the question of whether exploration is occurring on a tenement, or at a project, is a separate question to whether extraction and/or processing of minerals is occurring on the tenement or at that project. That is, mining and exploration are not mutually exclusive activities.

104. Exploration, then, can occur where no mining activities (in the sense of extracting and processing minerals) are being conducted, where there is planned mining or where there is active mining at a project. Exploration activities may indeed facilitate mining, but that does not, of itself, deprive exploration activities of their character.

105. Under section 102(2a)(b), "aggregate exploration expenditure" is to be worked out in a manner specified in the regulations.

Regulation 58A(2) states:

> *For the purposes of the definition of **aggregate exploration expenditure** in section 102(2a), the expenditure is to be worked out by adding together the total exploration expenditure shown in each relevant operations report.*

(original emphasis)

106. Regulation 58A confirms that the intention is to exclude mining activities, but is otherwise unhelpful in determining what is, in fact, "exploration expenditure".

107. In calculating the aggregate exploration expenditure incurred by a tenement holder for the purposes of section 102(2)(h), it is not only expenditure on exploration which is to be included. "Aggregate exploration expenditure" is an inclusive definition: it also refers to expenditure "in connection with" exploration.

108. In ***Re Heaney, Ex parte Flint v Nexus Minerals NL*** (unreported, 26 February 1997) the Full Court of the Supreme Court of Western Australia held:

> *The words "on or in connection with" are words of wide import and, as with the words "connected with", and, subject to the context in which the words are used, are capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote…"*

109. The Western Australian Court of Appeal considered the phrase "in connection with" In *Re Warden Calder;* ***Ex parte Lee*** (2007) 34 WAR 289:

> *It is apparent from the authorities to which I have earlier referred that the expression "in connection with" can readily extend to expenditure on matters subsequent to and matters consequential upon the specified thing (in this case, mining operations). I see no basis in the language or purpose of the Act and Regulations to read down the expression "in connection with" to exclude such matters.*

110. The policy behind expenditure conditions and the system of forfeiture for non-compliance therewith is that a minimum level of expenditure must be incurred on or in connection with the mining tenement in each year of its term.

111. Under Regulation 96C, a tenement holder is entitled to claim, among other things:

(a) the costs of Aboriginal heritage surveys;

(b) annual tenement rent and local government rates;

(c) administration and land access costs up to 20% of the minimum commitment, or 20% of the total expenditure on the mining tenement; and

(d) aerial surveys,

in the calculation of expenditure expended on, or in connection with, mining on the mining tenement.

112. As noted above, "mining" is defined to include "exploring for minerals". The *Mining Act* therefore contemplates that the costs of Aboriginal heritage surveys, tenement rent and rates, administration and land access costs, and aerial surveys may be claimed as expenditure on or in connection with exploration for minerals. This is entirely consistent with the context in which the words "on or in connection with exploration" are used in section 102(2a), and the scope and purpose of the Mining Act, particularly in relation to the policy behind expenditure conditions and exemption from expenditure.

113. In *Re Warden Calder;* ***Ex parte Lee*** (2007) 34 WAR 289, it was submitted (in the context of expenditure incurred on or in connection with mining) that if the purpose of an activity is to assist, investigate, assess or facilitate future possible mining and the nature of the activity is such that it is reasonably capable of contributing to such assistance, investigation or facilitation, then that purpose and nature will supply the nexus between the expenditure and the mining. The Court noted that there was merit in this approach, but it was unnecessary in that case to determine its correctness.

114. The Applicant submits that this test can be readily applied to assist in determining when an activity is "in connection with" exploration. That is, an activity will be "in connection with" exploration where the activity is not (itself) carried out in search of minerals, but the purpose of the activity is to

assist, investigate, assess or facilitate exploration, and where the activity is reasonably capable of contributing to such assistance, investigation or facilitation.

115. GMK reported expenditure of approximately $14 million in connection with the Meekatharra Gold Project for the Expenditure Years.

116. GMK seeks exemption from expenditure under section 102(2)(h) of the *Mining Act* on the basis that the expenditure recorded and incurred on the most recently lodged Form 5s – excluding expenditure claimed under "Mining Activities" – for every tenement in the Yaloginda Reporting Group (as at each Anniversary Date) exceeded the total minimum expenditure commitment for the Yaloginda Reporting Group at at each Anniversary Date (but for M51/53 and M20/45. The objector denies that GMK is entitled to an exemption. Consequently, it is necessary for GMK to prove, on the balance of probabilities, that:

(a) GMK did in fact incur the expenditure reported on its Form 5s; and

(b) the "aggregate exploration expenditure" for the tenements in the Yaloginda Reporting Group exceeded the total minimum expenditure commitment for the Yaloginda Reporting Group as at each Anniversary Date.

117. It is therefore necessary for GMK to verify the reported expenditure across all the tenements in the Yaloginda Reporting Group by reference, for example, to invoices, employee payment records and bank statements, over the 17 different Anniversary Dates (that is, 17 different, but overlapping, periods of 12 months' duration).

118. The total minimum expenditure commitment for the Yaloginda Project for the Expenditure Years was, on average, approximately $6 million.

119. On average, GMK incurred expenditure of approximately $6.4 million on rent and rates, overheads and expenditure on or in connection with exploration on

the Yaloginda Project for the Expenditure Years (save during the Expenditure Years in respect of M51/53 and M20/45).

120. Once the Warden has determined the nature of the expenditure that may be included in "aggregate exploration expenditure", it is submitted the Warden will be able to draw on the relevant expenditure sub-totals in the Expert Report of Mr Buckingham to determine GMK's aggregate exploration expenditure for the Expenditure Years.

The Objector's submissions:

121. In reliance upon s102 *Mining Act* and Regulations 58(A) of the *Mining Regulations* it is submitted that in order to be included in the calculation of aggregate exploration expenditure, expenditure must be both:

a) incurred *"on, or in connection with exploration for minerals"* as required by section 102(2a)(a) of the *Mining Act 1978* (WA); and

b) reported as *"exploration expenditure"* in a relevant Form 5 Operations Report as required by section 102(2a)(b) of the *Mining Act 1978* (WA) and regulation 58A(2) of the *Mining Regulations 1981* (WA).

122. With regard to the requirement that aggregate exploration expenditure is expenditure "on, or in connection with exploration for minerals":

a) it is necessary for the Warden to have regard to the nature and purpose of the activity in respect of which the expenditure was incurred: *Re His Honour Warden Calder SM and Anor; Ex Parte Lee & Anor* [2007] WASCA 161 at [41]; ***Blackfin P/L v Mineralogy P/L*** [2013] WAMW 19 at [81];

b) for the purpose of section 102(2)(h), there is a distinction between expenditure incurred in respect of activities carried out for the purpose of:

i. identifying the mineral composition of the land (ie exploration); and

ii. extracting and processing minerals from the land (ie mining);

c) only expenditure incurred in relation to activities carried out for the purpose of identifying the mineral composition of the land may be included in the calculation of aggregate exploration expenditure in s 102(2)(h) of the *Mining Act 1978* (WA);

d) to the extent that the instructions contained in the prescribed Form 5 Report in the *Mining Regulations 1981* (WA) suggest otherwise, they are inconsistent with the *Mining Act 1978* (WA), void and should be disregarded: section 43 of the *Interpretation Act 1984* (WA); and ***Vanstone v Clark*** (2005) 147 FCR 299 at [127];

e) to the extent that the Department's Policy Guidelines on Exemption from Expenditure Conditions suggest otherwise, they are inconsistent with the *Mining Act 1978* (WA), void and should be disregarded: ***Morellini v IPT Systems Ltd*** [2003] WAMW 3 at {18], [19] and [46]; and ***Blackfin P/L v Mineralogy P/L*** [2013] WAMW 19;

f) that section 102(2)(h) requires a purposive distinction between exploration expenditure and mining expenditure can be discerned from the legislative history of the provisions:

i. section 102(2)(h) of the *Mining Act 1978* (WA) previously provided that a certificate of exemption may be granted on the grounds:

> *that the mining tenement is comprised within a project involving more than one tenement, and that expenditure on a tenement or tenements comprised in that project would have been such as to satisfy the expenditure requirements in relation to the tenements concerned had that aggregate expenditure have been apportioned in respect of the various tenements comprised in the project.*

ii. the Departmental guidelines previously provided that mining expenditure could not be utilised in calculating aggregate expenditure for the purpose of section 102(2)(h);

iii. in 1999, the Court of Appeal determined that the Departmental guidelines (as then drafted) were inconsistent with section 102(2)(h) of the *Mining Act 1978* (WA) (as then drafted) and that mining expenditure could be utilised in calculating aggregate expenditure: *Re Calder; **exparte St Barbara Mines Ltd*** (1999) WASCA 25;

iv. to overcome this consequences of this decision, Parliament introduced the *Mining Amendment Bill 2004* (WA) which, amongst other things, amended section 102(2)(h) and introduced section 102(2a);

v. during the second reading speech for the *Mining Amendment Bill 2004* (WA), the Honourable Ken Travers explained the amendments as follows:

> *With regard to the expenditure exemption under the project status provisions of section 102(2)(h) of the Mining Act 1978, this Bill contains a key amendment that will provide for only legitimate exploration expenditure to be considered as acceptable aggregate expenditure on the project. This will correct the undesirable situation that has existed since a Supreme Court decision in 1999, under which expenditure on productive mining on one or two tenements in project could be included as part of the aggregate expenditure on all the tenements in that project. That resulted in ground continuing to be held for long periods under licenses in the project area, effectively w ithout being explored;*

123. The Applicant's contrary construction which permits aggregate expenditure to be calculated using expenditure incurred in respect of activities carried out for the purpose of extracting and processing minerals from the land (ie mining) is based on:

a) the logical fallacy (being the fallacy of the undistributed middle) that because:

i. exploration is included in the definition of mining; and

ii. certain expenditure is deemed to be expenditure in connection with

mining;

then that expenditure must also be expenditure in connection with exploration;

b) A wide interpretation of the words "on or in connection with" which undermines the intended legislative distinction between exploration expenditure and mining expenditure; and

124. Warden Wilson commented in in ***Blackfin P/L v Mineralogy P/L*** [2013] WAMW 19 at [110] that section 102(2)(h) must be strictly applied:

> *In my opinion, the provisions of s. 102(2)(h) of the Act provides a significant advantage to the holder of an exploration licence that forms part of a group of exploration licences approved for an arrangement under s. 115A(4) of the Act in that it allows the holder of the exploration licence to focus its exploration expenditure all a specific exploration licence or licences within the group and in essence ignore any expenditure obligations on any other of the exploration licences within the group but later take advantage of the aggregation of the expenditure by apportioning between all exploration licences within the combined reporting group. Accordingly, because the advantage under the provisions of s. 102(2)(h) of the Act is significant the provisions of that section should be, in my opinion, applied strictly to ensure the policy that underlies the Act, to exploit any mineral wealth that may be within the ground that comprises the exploration licence, is not abused.*

125. With regard to the requirement that aggregate exploration expenditure be reported as "exploration expenditure" in a relevant Form 5 Operations Report:

a) the term "exploration expenditure" refers to the sum reported in the Fonn 5 Report as Item A: "Mineral-Exploration Activities" under "Mineral-Exploration and/or Mining Activities"; and

b) to the extent that the Department's Policy Guidelines on Exemption from Expenditure Conditions suggest otherwise, they are inconsistent with the *Mining Act 1978* (WA) and *Mining Regulations 1981* (WA), void and should be disregarded: ***Morellini v IPT Systems Ltd*** [2003] WAMW 3 at (18], (19] and [46]; *and* ***Blackfin P/L v Mineralogy P/L*** (2013] WAMW 19.

126. It is necessary to analyse each of the sums of expenditure relied upon by the Applicant in calculating aggregate exploration expenditure and verify that the expenditure was both:

a) incurred in respect of activities carried out for the purpose of identifying the mineral composition of the land (ie exploration); and

b) reported as "exploration expenditure" in the Form 5 Report under Item A: "Mineral-Exploration Activities".

127. The objector submits the following in relation to particular classes of expenditure claimed by the Applicant;

a) Expenditure in respect of Bankable Feasibility Study

128. In relation to the sums claimed in respect of the bankable feasibility study, it should be noted that:

a) the bankable feasibility study was directed at Stage 1: Witness Statement of David Hollingsworth at [93]; Witness Statement of Christopher Reed at [42]; Annual Financial Report for year ended 30 June 2013 (BE353 at 2942)]; bankable feasibility study at [1.8] (BE324 at 311);

b) Stage 1 involved activities which were carried out for the purpose of extracting and processing minerals from the land: Witness Statement of David Hollingsworth at [88];

c) Stage 1 only concerned MSl/132, MS I/211, MSl/187, MS I/805, M51/738, M51/325 and M51/280;

d) any decisions to commence Stages 2 and 3 would be based on separate bankable feasibility studies;

e) Stages 2 and stage 3 were indefinitely deferred and ultimately not commenced by the Applicant: ASX Announcement dated 22 July 2013

(BE356); and

f) the reference to "feasibility study activities" in the Form 5 Report instructions in the *Mining Regulations 1981* (WA) must be read subject to the overarching requirement that the expenditure must be incurred in respect of activities carried out for the purpose of identifying the mineral composition of the land (ie exploration).

129. Expenditure in respect of employees and consultants

In relation to the sums claimed in respect of employees and consultants, it should be noted that:

a) expenditure incurred in respect of employee salaries and consultancy fees may only be included in the calculation of exploration expenditure to the extent the Applicant establishes that the salaries or fees are attributable to work which was undertaken by the personnel for the purpose of identifying the mineral composition of the land; and

b) the Applicant has not lead any admissible evidence from which it can be inferred that any of the employee salaries and consultancy fees were incurred for the purpose of identifying the mineral composition of the land.

130. Expenditure in respect of rent, rates, administration, overheads, land access & native title

In relation to the sums claimed in respect of rent, rates, administration, overheads, land access and native title, it should be noted that:

a) the term "exploration expenditure" m regulation 58A(2) of the *Mining Regulations 1981* (WA) must refer to the sum reported in the Form 5 Report as Item A: "Mineral-Exploration Activities".

b) this expenditure was not reported as Item A: "Mineral-Exploration Activities" in a relevant Form 5 Operations Report but as:

i. Item C: "Annual Tenement Rent and Rates";

ii. Item E: "Administration/Overheads"; or

iii. Item F: "(Other) Land Access Native Title Costs";

c) insofar as the following passage in the Department's Policy Guidelines on Exemption from Expenditure Conditions suggest that these items can be used to calculate aggregate exploration expenditure, the Guidelines are contrary to regulation 58A(2) of the *Mining Regulations 1981* (WA):

> *Aggregate exploration expenditure is calculated by adding the total expenditures reported on the relevant operations reports (Form 5) submitted for all tenements in the group excluding any monies claimed under 'Mining Activities' in those operations reports;* and

d) alternatively, if the Applicant is not limited to relying on expenditure claimed in as Item A: "Mineral-Exploration Activities" in the relevant Form 5 Operations Reports:

i. the expenditure in respect of tenement rent and rates, administration and overheads, and land access *I* other native title costs may only be included in the calculation of the Applicant's aggregate exploration expenditure to the extent that it was incurred for the purpose of identifying the mineral composition of the land (ie exploration);

ii. where both exploration and mining activities have been undertaken, it would be necessary to apportion the expenditure; and

iii. the Applicant has not lead evidence from which it can be inferred that the expenditure was incurred for the purpose of identifying the mineral composition of the land (ie exploration).

Finding

131. I find that the essential issue for me to determine in resolving the different interpretations of the legislation proffered by the Applicant and the Objector is

to determine what is meant by the provisions of Regulation 58A(2a)(2) of the *Mining Regulations 1981 (WA)* which provides:

> *"For the purposes of the definition of aggregate exploration expenditure in s102(2a) the expenditure is to be worked out by adding together the total exploration expenditure shown in each relevant operations report".*

It is of assistance if I include for the Minister's consideration a copy of the Operations Report, otherwise referred to as a Form 5.

Form 5 Operations report — expenditure on mining tenement

WESTERN AUSTRALIA *Page 1*

Mining Act 1978

(Secs. 51, 68, 70H, 82 and 115A)

(Regs. 16, 22, 23E, 32, 96B and 96C)

OPERATIONS REPORT – EXPENDITURE ON MINING TENEMENT

(To be completed in accordance with instructions on pages 3 and 4.)

Annual: ☐ **Final:** ☐

Tenement Type: _____ **Number:** _____/_____

Reporting Period: **From:** __/__/__ **To:** __/__/__

Itemise activities and expenditure on Attachment 1

MINERAL-EXPLORATION AND/OR MINING ACTIVITIES

A.	**MINERAL-EXPLORATION ACTIVITIES:**		$
B.	**MINING ACTIVITIES:**		$
C.	**ABORIGINAL HERITAGE SURVEYS:**		$
D.	**ANNUAL TENEMENT RENT AND RATES:**		$
E.	**ADMINISTRATION/OVERHEADS:**	$	
F.	**(OTHER) LAND ACCESS/NATIVE TITLE COSTS:** *Jointly not to exceed 20% of the minimum commitment or expenditure on the activities shown above, whichever is the greater (see page 4 for instructions).*	$	$
	TOTAL EXPENDITURE:		$

N.B. Full details and results of mineral-exploration activities must be submitted in the annual mineral-exploration report in accordance with section 115A of the Act and the guidelines published under regulation 96B.

OR

Itemise activities and expenditure on Attachment 2

PROSPECTING AND/OR SMALL SCALE MINING ACTIVITIES

TOTAL EXPENDITURE: **$**

(A to E ON ATTACHMENT 2)

A copy of this page of the Operations Report and Attachment 1 titled "Summary of Mineral-Exploration and/or Mining Activities" or Attachment 2 titled "Summary of Prospecting and/or Small Scale Mining Activities" may be obtained by any person on the payment of the prescribed fee in accordance with regulation 96(3).

Full name and address of holder/s.

NAME: .....
ADDRESS: .....
.....

Full name and address of operator/ manager (if mining tenement under option or joint venture).

NAME: .....

ADDRESS: .....

.....

List here details of the related annual mineral-exploration report.

Mineral-Exploration report (for single tenement)
Title:

Combined Mineral-Exploration report (for group of 2 or more tenements)
Title:

Combined reporting number for tenement group: C /

Combined reporting date for group: / /

I certify that the information on pages 1 and 2 and in Attachment 1 "Summary of Mineral-Exploration and/or Mining Activities" or Attachment 2 "Summary of Prospecting and/or Small Scale Mining Activities" constitutes a true statement of the operations carried out and moneys expended on this mining tenement during the reporting period specified.

Signature of holder or agent (if agent, full name and address of agent)

Date: / /

(Tick appropriate box and show expenditure. If more than one commodity sought, tick appropriate boxes and allocate expenditure for each one).

MINERAL COMMODITY SOUGHT ON TENEMENT

☐	Gold	$	☐	Diamond	$
☐	Iron ore	$	☐	Mineral Sands	$
☐	Nickel/Cobalt	$	☐	Other (specify)	$
☐	Copper/Lead/ Zinc/Silver	$		....	

This page is not to be copied in conjunction with regulation 96(3).

Note:

ATTACHMENT 1 — SUMMARY OF MINERAL-EXPLORATION AND/OR MINING ACTIVITIES

OR

ATTACHMENT 2 — SUMMARY OF PROSPECTING AND/OR SMALL SCALE MINING ACTIVITIES

(A) The attachments to the Form 5 are to provide a summary of the activities carried out and the cost of each activity. For Attachment 1 you may either use the pro-forma sheet or a separate sheet with the suggested headings as shown under 4(A) and (B) in the instructions. For Attachment 2 the pro-forma sheet available from the Department must be used.

(B) A copy of Attachment 1 or 2 will be provided together with a copy of the front page of the Form 5 to any person on payment of the prescribed fee.

HEAD OFFICE USE

This operations report received

INSTRUCTIONS FOR THE COMPLETION OF FORM 5

1. The Form 5 "Operations Report" and mineral exploration report are required to be lodged annually for each mining tenement within sixty (60) days from the anniversary or surrender date of the mining tenement (or such further period as may be approved by the Minister prior to the expiry of that period).

These reports should be lodged at any mining registrar's office.

N.B. A mineral exploration report is not required if the general prospecting activities detailed in Attachment 2 are the only activities carried out.

2. The Form 5 and attachments must show expenditure incurred on the activities undertaken during the annual period of the mining tenement or the period up to surrender and may be varied according to the type of activities undertaken —

(a) for mineral-exploration and/or mining activities (see 3 below); and/or

(b) for general prospecting and/or small scale mining activities (see 4 below).

3. For mineral-exploration and/or mining activities, the format of the Form 5 consists of the 2 pages (as shown on this form) plus Attachment 1 to provide details of the cost and description for each activity (see A and B below for examples of the activities to be shown). The full cost of Aboriginal heritage surveys is allowed (see C below). Administration/overheads/land access/native title costs are not to exceed 20% of the minimum expenditure commitment, or the total of expenditure incurred on activities, whichever is the greater (see D and E below for the costs that can be claimed). Full details and results of mineral-exploration activities are required to be submitted in a mineral-exploration report (see 6 to 8 below).

4. For all other general prospecting activities (i.e. non-geoscientific activities such as metal-detecting, loaming, panning, dollying, dry-blowing, trenching, plant and equipment hire, own labour costs) the format of the Form 5 consists of the 2 pages (as shown on this form) plus Attachment 2 to provide details of prospecting and/or small scale mining activities.

A. MINERAL EXPLORATION ACTIVITIES

Geological activities: geological mapping, sampling, drilling supervision, core logging, non-core drill-sample logging, geological data processing and interpretation, petrology, planning of exploration programs, report preparation; where appropriate, general prospecting can be added here.

Geochemical activities: geochemical sampling, analysis of surface geochemical samples or subsurface drilling samples, geochemical data processing and interpretation. ALSO show number of samples collected.

Geophysical activities (surface/subsurface): ground geophysical surveys, downhole logging, geophysical data processing and interpretation.

Airborne geophysical activities: aerial survey costs, geophysical data processing and interpretation.

Remote sensing activities: aerial photography, remote sensing images, photo interpretation, image processing and interpretation.

Mineralogical activities (exploration for diamonds, heavy mineral sands, etc.): bulk sampling, mineral separation, mineralogy and analysis of diamond indicator minerals or other minerals.

Surveying activities: gridding, line clearing, grid tie-in, tenement boundaries, etc.

Core drilling: diamond drilling costs (including pre-collar open-hole non-core drilling), access road and drill-site preparation; ALSO show metres drilled and number of holes completed.

Non-core drilling: drilling costs, access road preparation; ALSO show metres drilled and number of holes completed. Costs for deep geochemical sampling by auger or air-core drilling can also be shown here.
(**N.B**. Specify drilling for groundwater supply.)

Costeaning: plant and equipment hire for trenching and bulk sampling.

Field supplies: exploration equipment, consumables and supplies, plant and equipment hire, fuel, oil, etc., depreciation of direct exploration equipment, wages for non-professional field personnel.

Drafting activities: drafting equipment, consumables and supplies, salaries for drafting personnel.

Travel: travel costs directly associated with mineral exploration activities conducted on the tenement.

Field camp activities: establishment and maintenance of exploration base camps, food and accommodation, vehicle costs, contractor helicopter support.

Environmental: environmental studies.

Feasibility study activities:

Rehabilitation activities:

B. MINING ACTIVITIES (DEVELOPMENT AND PRODUCTION)

Mine planning, open-cut mining, underground mining, shaft sinking, decline construction, underground drilling, pre-blast bench drilling, ore treatment, construction and maintenance of ore stockpiles, waste dumps, tailings dams and dumps, etc. ALSO show tonnes mined or treated. Any costs associated with care and maintenance on an idle mining operation can also be shown here.

[C. deleted]

D. ANNUAL TENEMENT RENT AND RATES

Rental and local government rates, paid in connection with the mining tenement each year.

E. ADMINISTRATION AND OVERHEADS

All non-field activities such as head office costs, accounting, mining tenement management, administration, research, literature studies, training, etc.

F. LAND ACCESS/NATIVE TITLE

All other native title and land access costs including private land access costs but excluding payments for compensation.

N.B. The amount allowed under E and F not to exceed 20% of the minimum expenditure commitment or the total expenditure incurred on activities, whichever is the greater.

NON-ALLOWABLE EXPENDITURE

5. This includes the following —

(a) cost of marking-out of mining tenements; and

(b) acquisition costs of tenements and associated expenses; and

(c) research activities not directly related to a specific tenement; and

(d) compensation payments.

MINERAL EXPLORATION REPORTS

6. The date for lodging a combined mineral-exploration report, on a group of 2 or more mining tenements, can be varied to a common reporting date, if prior written approval has been obtained from the Director of the Geological Survey in accordance with **section 115A(4)** of the Act and the **guidelines.**

7. The format and contents of all mineral-exploration reports must be to the satisfaction of the Minister in accordance with the **guidelines.**

8. All data in mineral-exploration reports will be kept confidential by the Department and may be available for release in accordance with regulation 96.

COPYRIGHT

9. Each mineral-exploration report must show that written authorisation has been provided by the tenement holder(s), or any other person who is the owner of copyright for any data contained in the report, to allow the Minister to release all information in the report in accordance with regulation 96.

EXEMPTION FROM EXPENDITURE CONDITIONS

10. A tenement holder or an authorised agent can apply for an exemption from expenditure on a mining tenement in accordance with section 102 of the Act. Such application should be lodged at any mining registrar's office.

132. It is generally accepted that words take colour from their surroundings and accordingly words of wide significant may well be limited by their context. But at the same time the courts have tended to require such limitations to be demonstrated. If general words are used they will be given their plain and ordinary meaning unless the contrary is shown. ***Cody v JH Nelson Pty Ltd*** (1947) 74CLR 926 per Dixon J at 647.

133. Thus in considering the importance of the word 'exploration' in the context of "total exploration expedition", I find:

a) the word 'exploration' was included in the legislative provision intentionally by the Parliament to overcome the issue identified by Mr Travers in his speech to Parliament;

b) the word should be given its ordinary meaning – as this meaning is not defined by the act.

c) 'exploration', given its plain and ordinary meaning is the act of exploring. Exploring as defined by the Oxford English Dictionary means *"to search into (a country, etc); to go into a range over for the purpose of discovery".*

134. I do not accept the applicant's submission that it is not helpful to attempt to define exploration by distinguishing it from the statutory definition of mining. That definition states that 'mining':

> *"includes fossicking, prospecting and exploring for minerals, and mining operations;"*

That is to say that exploring is s sub-set of mining. All exploration will be mining but not all mining is exploration.

135. The Parliament clearly intended to use the words to cover separate activities hence the provision in the Form 5 for:

A. MINERAL – EXPLORATION ACTIVITIES, and;

B. MINING ACTIVITY

136. In my view it is only those expenses referred to at sub-paragraph "A" and property characterized as 'Mineral-Exploration Activities' which can be used to calculate the aggregate exploration expenditure.

137. The legislative purpose for such a provision is clear. It prevents the holder of multiple tenements, incurring significant expense, mining on one (or more) and aggregating those expenses across tenements which are otherwise not in any way being actively explored.

138. In my view, the clear intent of the legislation is the tenement holder should continue to identify minerals and devise plans to optimise mineral wealth of all tenements held. In order to avail itself of s102(h) the legislation contemplates nexus between the work done on one tenement establishing a real or potential resource on other tenements within the combined reporting group. This, in my view, involves a process of exploration rather than merely mining.

139. I adopt the comments of Warden Wilson in **Blackfin Pty Ltd v Mineralogy Pty Ltd** [2013] WAMW19 and find that to the extent the instructions contained in the prescribed Form 5 report in the *Mining Regulations (WA)* suggest otherwise than in accordance with my finding above, they are inconsistent with the *Mining Act 1978* and void – s43 of the Interpretation Act 1984.

140. It follows from the above reasoning that expenses claimed in the Form 5 under the following headings:

i. B MINING ACTIVITIES

ii. C ABORIGINAL HERITAGE SURVEYS

iii. D ANNUAL TENEMENT RENT AND RATES

iv. E ADMINISTRATION/OVERHEADS

v. F (OTHER) LAND ACCESS THE NATIVE TITLE COSTS ARE NOT CLAIMABLE TO ESTABLISH AGGREGATE EXPLORATION EXPENDITURE.

141. By reference to, inter alia, the tables located at paragraphs 91 and 94 of Mr Buckingham's report once the above non-exploration expenditure is excluded from the calculation of total aggregate exploration expenditure it is clear that the minimum expenditure requirements have not been met.

142. This conclusion having been reached, it is unnecessary for me to further consider individual items of expenditure incurred.

143. A recommendation for exemption under s102(h) cannot be made, in my view.

Other Reasons

The applicant's submission:

144. Section 102(3) of the Act permits the Warden to recommend to the Minister that an exemption application be approved on any ground the Warden or the Minister considers fit (***Marymia Exploration NL v Elazac Mining Pty Ltd*** (unreported, Perth Warden's Court, Warden Calder, 5 December 1997)).

145. In considering an application for exemption under section 102(3), the Warden can have regard to facts which may be relevant in some way to a ground of exemption set out in sections 102(2)(a)-(h) (See ***WMC Resources Ltd v Ajax Mining Nominees Pty Ltd*** [2001] WAMW 13 at [45] and [54]).

146. There may be circumstances where an applicant for exemption has difficulty bringing its conduct and circumstances within the literal meaning of the paragraphs of section 102(2), but was nevertheless within the spirit of section 102(2). Efficient and prudent conduct on the part of a tenement holder which promotes the overall objectives and policy of the Act is however relevant to an

exemption "for any other reason" under section 102(3). Therefore, a certificate of exemption may properly be granted under section 102(3) for reasons which reflect or come within the spirit of the reasons for exemption set out in subsections 102(2)(a)-(h).Wardens have previously concluded that the discretion accorded to the Minister under section 102(3) of the Mining Act to grant a certificate of exemption for "any other reason" ought not be limited or qualified in any manner, and that the role of the Warden is to report to the Minister on whether there is "any other reason" sufficient to justify the granting of a certificate of exemption. That is, section 102(3) is a "catch all" provision. (See N*ewmont Duketon Pty Ltd & Ors v Angelopoulos* [2006] WAMW 20 at para 115, and *Marymia Exploration NL v Elazac Mining Pty Ltd* (Perth Warden, Warden Calder, 5 December 1997, Vol 12 No 25) at p 9).

147. In ***Great Boulder Mines v Bailey*** [2000] WAMW 6, Warden Calder accepted evidence as to past, present and proposed expenditure and exploration, the underlying geological structures and the exploration and analysis of results of mining and exploration and recommended (at [24]) that exemption be granted pursuant to section 102(3), if the Minister were not satisfied that the grant of a certificate of exemption were otherwise justified.

148. In ***Horizon Mining Ltd v MPF Exploration Ltd*** [2005] WAMW 11 Warden Auty recommended exemption under section 102(3) after finding that there were current plans for further exploration to be commenced, and that there was "a planned and methodological process set in train" for exploration. Significantly, her Honour found that it "*was not appropriate given all the circumstances of this matter to embark upon a campaign of spending for the sake of it*".

149. In ***Horizon v MPF*** (supra) Warden Auty said at [10], in reference to a previous decision of Warden Calder in ***Turnbull v Australian Metallic Resources NL*** [2000] WAMW 2:

> *It has been observed that "the circumstances of the case" entitle a Warden to consider the past history of the management of the tenement and expenditure compliance by a litigant/applicant and that future plans may form part of these considerations.*

150. In ***General Gold v Exmin Pty Ltd*** [2002] WAMW 18, in finding that "many other reasons" existed which would justify the Minister granting the exemptions, Warden Wilson held at [101]:

> *The Tenements contain significant ore bodies… Both GGR and Gindalbie have, in my opinion, proper and structured plans to progress the exploitation of both gold and tungsten that exists upon the Tenements. Upon the evidence presented to me by GGR, it would appear that there is likely to be a development of those minerals soon.*

151. In the circumstances of this case, the Applicant submits exemption ought to be recommended under section 102(3) with respect to each of the Mining Leases for the following key reasons (considered together):

(a) the significant expenditure by GMK on the Meekatharra Gold Project as a whole from June 2011 (when GMK acquired the Meekatharra Gold Project) until Administrators were appointed to GMK in August 2013 (paragraphs 204 to 207 below);

(b) to the extent that, for the purposes of section 102(2)(h) of the *Mining Act*, the non-mining expenditure on M51/53 and M20/45 was less than the total minimum expenditure requirement for the Yaloginda Reporting Group for the respective Expenditure Years, GMK and Big Bell seek exemption under section 102(3) on the basis that the non-mining expenditure on M51/53 and M20/45 during the relevant Expenditure Years was nevertheless significant and demonstrates substantial compliance with the Mining Act and/or its purpose, and is within the spirit of the Mining Act;

(c) GMK's lack of funding to conduct exploration on the Tenements;

(d) the prudent and timely conduct of the Administrators of GMK from the date of their appointment on 16 August;

(e) the impending development of the Tenements by Metals X as part of the CMGP; and

(f) the mineral resources located on the Tenements.

152. If, which is denied, there is found to be a shortfall in the aggregate exploration expenditure, the Applicant seeks exemption under section 102(3) on the basis of, amongst other reasons, the significant total expenditure incurred on the Tenements.

153. During the Expenditure Years, GMK incurred expenditure (including exploration and mining expenditure) of approximately $14 million, well in excess of the total minimum expenditure requirement of approximately $6 million.

154. The Warden can recommend grant of the exemptions under section 102(3) on this basis alone.

Mining Leases 51/45 and M51/53

155. The following non-mining expenditure was incurred on Mining Leases 51/53 and 51/45 during the respective Expenditure Years:

(a) on M51/53, GMK incurred non-mining expenditure of $5,928,143 compared with the total minimum expenditure requirement of $5,988,284 for the Yaloginda Reporting Group. That is, there was a shortfall of $60,141; and

(b) on M20/45, GMK incurred non-mining expenditure of $5,943,569, compared with the total minimum expenditure requirement of $5,988,284 for the Yaloginda Reporting Group. That is, there was a shortfall of $44,715.

In each case, the shortfall represents approximately 1% of the total minimum expenditure requirement for the Yaloginda Reporting Group for the relevant Expenditure Year.

To the extent that M51/53 and M20/45 are not eligible for exemption under section 102(2)(h) for the Expenditure Years by reason of this shortfall, GMK and Big Bell seek exemption under section 102(3) on the basis that the non-mining expenditure on M51/53 and M20/45 during the relevant Expenditure Years was nevertheless significant and demonstrates substantial compliance with the *Mining Act* and/or its purpose, and is within the spirit of the *Mining Act*.

Lack of funding for exploration

156. Exploration drilling was planned and conducted at numerous brownfield and greenfield targets to further enhance the resources and reserves to continue the life of the Meekatharra Gold Project. From June 2011 programs of work were lodged with the DMP for GMK to conduct exploration drilling at various tenements, including tenements the subject of these proceedings, being M20/71, M20/219, M20/45, M51/31, M51/33, M51/62, M51/503, M51/256 and M51/79.

157. Most of the funds made available to GMK were applied to production of the BFS and, subsequently, in-pit exploration and mining operations at the Bluebird open pit and processing ore at the Bluebird Processing Plant. The mining operations conducted in the Expenditure Years failed to achieve sufficient cashflow as projected to realise the GMK Strategy.

158. GMK had a clear plan to explore and develop the Meekatharra Gold Project which, in March 2013, was postponed until the reasons for mine underperformance could be established and addressed. GMK did not have infinite funds, such that it could both address the mine underperformance and continue exploration. GMK faced the practical reality of having to stop

exploring and address the issues with the underperformance of the mine before it could continue with its Staged Strategy.

159. As noted above, this was a case where it "*was not appropriate… to embark upon a campaign of spending for the sake of it*", as found by Warden Auty in ***Horizon Mining Ltd v MPF Exploration Ltd*** [2005] WAMW 11. In that case, her Honour recommended exemption under section 102(3) after finding that there were current plans for further exploration to be commenced, and that there was "a planned and methodological process set in train" for exploration.The inability to raise funds resulted in the appointment of the Administrators and the ultimate sale of the Meekatharra Gold Project to Metals X, a company that has already demonstrated its ability and intention to develop the ground.

Administrators' conductIn addition to the matter previously referred to, on 16 August 2013, the Administrators of GMK assumed control and management of GMK's tenements (including the Tenements), due to the circumstances which arose during the Expenditure Year (explained above), including:

(b) mining and processing issues;

(c) weaker gold prices;

(d) short term cash flow issues; and

(e) failure to secure alternative sources of funding (other than Reed).

162. The Administrators preserved the assets of GMK and conducted an orderly sale to ensure maximum returns to creditors, as set out below.

163. After their appointment on 16 August 2013, the Administrators continued to operate the mine until 4 November 2013.

On 4 November 2013, the Administrators decided to cease mining operations and transition the Meekatharra Gold Project into care and maintenance, based on:

(a) the risks and costs versus the financial benefits of continuing to mine until a sale had been concluded;

(b) the financial benefits to creditors of crystallising the stockpiles prior to completion of any sale; and

(c) the preferences of the parties interested in purchasing the Meekatharra Gold Project.

The Administrators processed the stockpiles until 20 December 2013. The residual gold left in the processing circuit was recovered and a final gold pour completed on 21 January 2014. GMK employees then began the process of removing the mill liners, discharging the ball mills, and completing any final maintenance that would minimise any deterioration in GMK's assets and recover any residual gold.

Once mining had ceased, the Administrators:

(a) notified all key contractors, suppliers and employees;

(b) continued to process stockpiles;

(c) adhered to all statutory and mining regulations;

(d) terminated the employment of staff who were no longer required once mining ceased; and

(e) continued to hold weekly meetings with key staff.

From August 2013 until the second sale agreement was executed with Big Bell in November 2014 (discussed below), the Administrators undertook confidential and comprehensive processes for the timely sale of the Meekatharra Gold Project.

On 6 February 2014 the Administrators delivered a Report to Creditors which sets out GMK's operating history and details of the events leading up to the Administrators' appointment.

Development by Metals X

164. Big Bell purchased the Tenements from the Administrators of GMK pursuant to sale agreements dated 14 May 2014 and 21 November 2014.

Big Bell is a wholly-owned subsidiary of Metals X, a company focussed on exploring for and producing gold, nickel and tin.

Metals X plans to develop the Tenements as part of the CMGP.

After acquiring the Meekatharra Gold Project from GMK, Metals X began integrating the Meekatharra Gold Project tenements into the CMGP.

Metals X has re-evaluated its development strategy for the CMGP, as the dynamics and development options for the CMGP changed significantly with the addition of the Bluebird Processing Plant and other operational infrastructure located on the tenements previously held by GMK.

The expanded CMGP contains 72 separate mineral resources that Metals X has identified as mining opportunities.

Metals X has already carried out significant work at the CMGP, including on Tenements the subject of these proceedings, for example M20/45, M20/68, M20/70, M20/71, M51/31 and M51/79.

Mineral resources located on the Tenements

165. In ***Brosnan v Grange Resources NL*** [2002] WAMW 13, Warden Packington recommended that the exemption be granted under section 102(2)(f). In that case the mining lease contained an identified resource which was to be

developed in the future as a satellite of a proposed mine located approximately 110 kilometres away.

166. In ***General Gold Resources NL v Exmin Pty Ltd*** [2002] WAMW 18, Warden Wilson accepted (at [99]) that ore containing gold from the tenements was proposed to supplement and increase the operational life of a nearby treatment plant, and recommended grant of an exemption under section 102(2)(f).

The known resources on the Mining Leases are summarised below. The Mining Leases have the potential to provide significant amounts of ore to be treated at the Bluebird Processing Plant.

The following Mining Leases contain mineral resources and reserves:

(a) Mining Lease 20/70 (Turn of the Tide resource and reserve);

(b) Mining Lease 20/71 (Turn of the Tide resource and reserve);

(c) Mining Lease 20/45 (Rand resource and reserve);

(d) Mining Lease 51/233 (Boomerang resource);

(e) Mining Lease 51/256 (Magazine resource);

(f) Mining Lease 51/504 (Maid Marion resource); and

(g) Mining Lease 51/62 (Aladdin resource and reserve).

167. The mineral resources located on the Mining Leases form part of Metals X's recommencement strategy and/or long term plan to bring the Bluebird Processing Plant into sustainable production.

168. On that basis, GMK seeks exemption from the expenditure conditions under section 102(3) in respect of Mining Lease 20/70, Mining Lease 20/71, Mining Lease 20/45, Mining Lease 51/62, Mining Lease 51/233, Mining Lease 51/256 and Mining Lease 51/504.

Objector's submission:

169. Section 102(3 of the *Mining Act 1978* (WA) provides that a certificate of exemption may be granted for "any other reason" which is, in the opinion of the Minister, "sufficient to justify ... exemption".

The Objector maintains that the Applicant has not established "any other reason" which is "sufficient to justify ... exemption" in circumstances where:

a) the Applicant relies on circumstances arising after the reporting year which are not capable of justifying a decision not to incur expenditure;

b) the Applicant relies on circumstances which fall within the ambit of a sub- sections 102(2)(b), 102(2)(e), 102(2)(f) and/or 102(2)(h) but do not satisfy the relevant criteria stipulated by Parliament as limiting the availability of an exemption under those sub-sections; and

c) the grant of an exemption in the circumstances would permit the Applicant to warehouse the tenements contrary to the policy of the *Mining Act 1978* (WA).

Circumstances arising after reporting year

165. The scheme of the *Mining Act 1978* (WA) reveals that exemption can only be granted under section 102 on the basis of <u>circumstances existing during the reporting year</u> which justify a decision not to incur expenditure:

a. section 82(1)(c) of the *Mining Act 1978* (WA) requires the holder of the mining lease to comply with the prescribed expenditure conditions applicable to the land unless partial or total exemption therefrom is granted;

b. section 102(1) of the *Mining Act 1978* (WA) provides that the holder of a mining lease may apply for an exemption at any time prior to the end of the reporting year or within the prescribed period of time thereafter;

c. section 102(7) of the *Mining Act 1978* (WA) provides that a certificate

of exemption can be granted for a period of up to 5 years;

d. section 103 of the *Mining Act 1978* (WA) provides that upon the grant of a certificate of exemption, the holder of a mining lease is *"deemed to be relieved ... from his obligations under the prescribed expenditure conditions";*

e. the grounds specified in section 102(2) of the *Mining Act 1978* (WA) all relate to circumstances existing during the reporting year which might justify a decision not to incur expenditure: ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [206] WASCA 19 at [76]; and

f. regard can be had to circumstances arising after the reporting year as mitigating factors (rather than grounds for relief) as part of the "circumstances of the case" in assessing the gravity of the non-compliance in any forfeiture proceedings under section 98(5) of the *Mining Act 1978* (WA).

166. Circumstances arising after the reporting year cannot, of themselves, support the grant of an exemption. To the extent that any previous decisions suggest otherwise, those decisions are wrongly decided. Of course, evidence of events occurring after the reporting year may still be relevant in establishing the circumstances that existed during the reporting year which justify the decision not to incur expenditure and therefore the grant of an exemption.

Accordingly, an exemption cannot be granted under section 102(3) of the *Mining Act 1978* (WA) on the basis of circumstances after the reporting year including:

a) the administration of the Applicant;

b) the sale of the tenements to Big Bell Gold Operations Pty Ltd (a subsidiary of Metals X Limited); and

c) the exploration and development work which has been undertaken or proposed by Metals X Limited.

167. Moreover, the exploration and development work which has been undertaken or proposed by Metals X Limited is only relevant to M20/45, M20/68 (which is not the subject of these proceedings), M20/70, M20/71, M51/31 and M51/79: Witness Statement of David Hollingsworth at [366]-[371].

168. The reference in section 102(3) to "any other reason" which is "sufficient to justify ... exemption" makes it clear that the purpose of section 102(3) is to provide a mechanism whereby the Minister can grant a certificate of exemption for a reason that:

    a) falls outside the ambit of a sub-section of section 102(2); but

    b) nevertheless fall within the spirit of section 102(2) in that it justifies the decision not to incur expenditure.

169. Where the reason relied upon falls within the ambit of a sub-section of section 102(2) but does not satisfy the relevant criteria stipulated by Parliament in that sub-section, that criteria cannot be avoided by relying on section 102(3) of the *Mining Act 1978* (WA).

    Accordingly, an exemption cannot be granted under section 102(3) of the *Mining Act 1978* (WA) on the basis that:

    a) the Applicant incurred significant expenditure on the project (including M5 l/45 and M51/53) in circumstances where the requirements of section 102(2)(h) were not satisfied; or

    b) the Applicant and the administrators were attempting to raise funds for exploration and mining of the tenements in circumstances where the requirements of section 102(2)(b) were not satisfied.

170. The non-compliance with the expenditure conditions in respect of the tenements occurred because the Applicant adopted a strategy which was contrary to the policies and objectives of the Mining Act 1978 (WA) and which involved:

a) "warehousing" the tenements in Stage 2 and Stage 3; and

b) relying on the profitable conduct of mining operations on Stage 1 tenements to fund future exploration and mining on the Stage 2 and Stage 3 tenements.

171. The warehousing of the tenements as part of a project so that they are exploited consecutively is not consistent with the policies and .objectives of the *Mining Act 1978* (WA) is only authorised in limited circumstances:

a) in accordance with section 102(2)(h), where the implementation of systematic project-wide exploration justifies the deferral of tenement exploration; or

b) in accordance with sections 102(2)(e) and 102(2)(f), where exploration of the tenement has progressed to the point where a resource has been identified and it is appropriate that mining be deferred until it is economic or can occur in conjunction with a systematic project-wide mine plan.

172. The warehousing of tenements so they can be exploited consecutively sl10u1d not be authorised by the grant of exemptions under section 102(3) of the *Mining Act 1978* (WA) when the criteria specified by Parliament in sections 102(2)(h), 102(2)(e) and 102(2)(f) are not satisfied.

173. In particular; the existence of mineral resources on M20/70, M20/71, i\120/45, M51/233, *M S* 11256, :MSl/504 and M51/62 cannot justify the grant of an exemption unless the criteria m sections 102(2)(e) or 102(2)(*f)* are satisfied.

Finding:

174. I am persuaded by the arguments raised by the applicant for exemption that the Minister consider exemption in view of

I. the significant expenditure by GMK on the Meekatharra Gold Project;

II. the impending development of the tenements by Big Bell (Metals X) as part of the CMGP;

III. the mineral resources located on the tenements.

1. In my view 'any other reason' contemplates a situation where more than one factor can be relied upon to ground a recommendation. A combination of factors, where each viewed individually may not ground a successful application, may nonetheless result in a certificate of exemption being obtained.

2. In ***Greater Boulder Mines Ltd*** [supra] Warden Calder held in considering an exemption application;

> *"The manner in which tenements have been managed and will in the future be managed and by whom is relevant".*

He went on to say, albeit in a different context, that it will be necessary to be satisfied that any arrangements between different registered holder of tenements, here GMK and subsequently Big Bell, should in fact be bone fide and;

> *"not a sham with the objective of delivering nothing more than relieving one of more tenement holders from the burdens imposed by minimum expenditure where no other exemption requirements would be otherwise justifiable".*

3. In my view there is nothing in the evidence to suggest that the sale to Big Bell was other than bona fide. In that circumstance the impact of the risk of forfeiture of the tenements, if exemption is not granted, is a factor which weighs positively in favour of the granting of a certificate. This is more so given the history of significant prior expenditure by the applicant and ongoing exploration by Big Bell.

4. S102(4) provides;

> *"(4) 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."*

5. On any version of the evidence the Applicant spent a significant sum of money of the tenements forming part of the combined reporting group. Notwithstanding my earlier finding as to the proper construction of s102(h) – that expenditure can't, in my view, simply be ignored. It is a relevant factor in considering the grant of exemption.

6. Whilst the Applicant has chosen not to pursue an application, specifically under s102(e) or s102(f), this would not, in my view, preclude factors relevant to consideration of those grounds had it been pursued, being pursued under s102(3). The reason is clear from my earlier comments. Whilst a stand-alone application under s102(e) or s102(f) may or may not have succeeded (I make no finding) it is clear those matters are relevant to consideration as part of a 'combination of factors' which might warrant the granting of a certificate.

7. Clearly here there is evidence that the tenement contains mineral ore which will, if plans come to fruition and economic conditions improve, feed the Bluebird Processing Plant.

Conclusion:

Recommend that the Minister grant exemptions in accordance with s102(2)(b) and s102(3) of the *Mining Act*.

Recommend that the Minister not grant exemption under section 102(2)(h) of the *Mining Act*.

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Warden Andrew Maughan
12 July 2016