JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : EXTENSION HILL PTY LTD v CRIMSON METALS PTY LTD [2017] WAMW 22

CORAM : WARDEN J O’SULLIVAN

HEARD : 18 July 2017

DELIVERED : 6 November 2017

FILE NO/S : Applications for Exemption: 498276; 500553 and 503062; Objections: 498742; 498743; 498744; 498745; 498746; 498747; 501363 and 503096

TENEMENT NO/S : Mining Leases: 59/11; 59/13; 59/14; 59/15; 59/16; 59/17; 59/217; 59/304; 59/305; 59/308; 59/309

BETWEEN : EXTENSION HILL PTY LTD
Applicant

AND

CRIMSON METALS PTY LTD
Objector

Catchwords: Application for Exemption from Expenditure Requirements; Aggregate Expenditure.
Legislation:

- Mining Act 1978 (s102(2)(b), s102(2)(h), s102(3), s102(2)(h), s102(1), s102(2), s102(4), s103)
- Mining Regulations 1981(r.31(1))

Cases referred to:

- Forrest & Forrest Pty Ltd v The Honourable William Marmion, Minister for Mines and Petroleum [2017] WASCA 153
- Nova Resources NL v French (1995) 12 WAR 50
- Blackfin Pty Ltd v Mineralogy Pty Ltd [2013] WAMW 19
- General Gold Resources NL v Exmin Pty Ltd [2002] WAMW 18
- GMK Exploration Pty Ltd and Big Bell Gold Operations Pty Ltd v Morgan [2016] WAMW 14
- Newmont Dukeston Pty Ltd & Ors v Angelopoulos [2006] WAMW 20
- Extension Hill Pty Ltd v Calegari [2016] WAMW 18
- Great Boulder Mines Ltd v Bailey [2000] WAMW 6;
- Johnson Well Mining NL & Ors v Angelopoulos [2005] WAMW 19
- St Ives Gold Mining Company Pty Ltd, Mincor Resources NL and Australian Nickel Mines NL v Hawks and Western Resources & Exploration Pty Ltd [2005] WAMW 19
- Drake v Minister for Immigration and Ethnic Affair No2 (1979) 2 ALD 634
- Re Calder; ex parte St Barbara Mines Ltd (1999) WASCA 25
- Berkeley Resources Ltd & Anor v Limelight Industries Pty Ltd (2013) WAMW 2
- Mawson West Ltd & Anor v Saruman Holdings Pty Ltd (2010) WAMW 10
Result:

It is recommended that Applications for Exemption 498276; 500553 and 503062 be refused.

Representation:

Applicant : Mr B Dalitz
Objector  : Mr D Chandler

Solicitors:

Applicant : DLA Piper Australia
Objector  : All Mining Legal Pty Ltd
Introduction

1 The Applicant holds 66 tenements located in the Mt Gibson Ranges which are the subject of combined reporting group C303-1995 (“the Mt Gibson Tenements”).

2 Included in the Mt Gibson Tenements are M59/11, M59/13-17, M59/217, M59/304, M59/305, M59/308 and 59/309 (“the Gold Tenements”).

3 On 8 December 2016 the Applicant lodged Application for Exemption 498276 (“Exemption 498276”) with respect to M59/11 and M59/13-17 for the reporting year ending 11 November 2016.

4 On 12 December 2016, the Objector lodged an objection to Exemption 498276 and an application for forfeiture of M59/14-17.

5 On 23 December 2016, the Applicant and Minjar Gold Pty Ltd (“Minjar”) executed an agreement for the purchase by Minjar of some of the Mt Gibson tenements including M59/11, M59/13-17 and M59/217.

6 On 31 January 2017, the Applicant lodged Application for Exemption 500553 (“Exemption 500553”) with respect to M59/217 for the reporting year ending 3 December 2016.

7 On 1 February 2017 the Objector lodged applications for the forfeiture of M59/11 and M59/13.

8 On 17 February 2017 Warden Maughan granted leave for the Applicant to amend Exemption 498276 so as to no longer rely on ss102(2)(b) and 102(2)(h) of the Mining Act 1978 (the Act) and instead rely on s102(3) of the Act. The Applicant made the application to amend because the Applicant accepted that it was ineligible for an exemption based on s102(2)(h) given the way aggregate expenditure was calculated in GMK Exploration Pty Ltd and Big Bell Gold Operations Pty Ltd v Morgan.1

1 [2016] WAMW14
9 On 20 February 2017 the Objector lodged an objection to Exemption 500553 and an application for the forfeiture of M59/217.

10 On 24 February 2017 the Applicant filed and served particulars of the amended Exemption 498726 and Exemption 500553.

11 Exemption 498726 (as amended) now reads:

“Section 102(3)

(i) Extension Hill Pty Ltd owns 47 tenements in the Mt Gibson Ranges which are the subject of combined reporting group C303-1995 (Mt Gibson Tenements).

(ii) Since 1995, Extension Hill Pty Ltd has been exploring for and assessing the feasibility of mining magnetite located on the Mt Gibson Tenements and in doing so has incurred expenditure of approximately $255 million, including approximately $35 million during the relevant reporting year.

(iii) Extension Hill Pty Ltd has agreed to sell some of the Mt Gibson Tenements (including the tenements the subject of this application for exemption) to Minjar Gold Pty Ltd.

(iv) The grant of an exemption will enable the sale to Minjar Gold Pty Ltd to proceed and thereby provide:

A. Extension Hill with additional funds to continue to explore for and assess the feasibility of mining magnetite on the Mt Gibson Tenements that continue to be held by Extension Hill; and

B. Minjar Gold Pty Ltd with the opportunity to explore for and assess the feasibility of mining gold on the Mt Gibson Tenements held by Minjar.

(v) Extension Hill had a reasonable expectation that it would be granted an exemption in respect of the tenements the subject of this application for exemption for the relevant reporting year under s 102(2)(h) of the Mining Act 1978 (WA) on the basis that its aggregate exploration expenditure of $1,835,121 as calculated in accordance with the Department’s Policy Guidelines: Exemption from Expenditure Condition, exceeded the aggregate minimum commitment of $1,192,047.

12 The grounds in support of the applications for exemption in relation to M59/217 (500553) and M59/304, M59/305, M59/308 and M59/309 (503062) are the same as those advanced Exemption 498276 as amended.
In the course of these proceedings the following documents were received:

- Affidavit of Dean Alan Vallve sworn 21 April 2017 (Ex 1);
- Affidavit of Satish Nair Unnikrishnam (“Mr Nair”) sworn 21 April 2017 (Ex 2);
- Affidavit of Sarah May Sharp affirmed 15 June 2017 (Ex 3);
- Affidavit of Janet May Procak sworn 25 May 2017 (Ex 4).

The Statutory Framework

Prescribed expenditure conditions are found in r.31(1) Mining Regulations 1981 (“the Regulations”). Section 102(1) of the Act provides that the holder of a mining tenement may be granted a certificate of exemption from compliance with prescribed expenditure conditions. Section 102(2) enumerates a number of reasons upon which a certificate may be granted including:

“(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”.

Sections 102(3) provides:

“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”.

16 Section 102(4) says:

“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”.

17 Section 103 stipulates:

“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”.

The Law: General Principles

18 In Forrest & Forrest Pty Ltd v The Honourable William Marmion, Minister for Mines and Petroleum 2 the Court of Appeal observed that:

“One of the recognised primary objects of the Mining Act 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 subject to reasonably stringent conditions. However, that is not its only object. Other objects or purposes identified by the courts include:

1. identifying circumstances in which a tenement holder will be allowed to hold a mining tenement without mining or giving it up for others who may wish to actively mine the land.

2. protecting tenement holders who have defaulted in compliance with the Act in some minor respect, or because of some circumstances beyond the control of the tenement holder, against loss of the tenement.

3. providing that, in general, the holder of a mining tenement should carry out the relevant mining activity on the tenement.”

19 In WMC Resources Ltd v Ajax Mining Nominees Pty Ltd Warden Calder 3 summarised the legislative objectives of the Act so far as the granting of certificates of exemption are concerned:

2 [2017] WASCA 133 at [96]-[97] (footnotes deleted)
(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 its plans to conduct activities on or with respect
to it, so long as the holder is working towards continuous and effective
mineral exploration.

20 As Warden Wilson explained in Blackfin Pty Ltd v Mineralogy Pty Ltd ⁴:

“The measure of the exploitation of a mining tenement is achieved by the imposition of
an obligation upon the holder of a mining tenement to annually expend or cause to be
expended, in mining on or in connection with mining on the mining tenement a
minimum amount of expenditure.

The requirement to expend the prescribed minimum amount of expenditure upon a
mining tenement is not fixed and immovable. As noted in General Gold Resources
NL v Exmin Pty Ltd [2002] WAMW 18 a [92]-[93] the Warden said:

“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 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.””

21 The Applicant bears the onus of establishing that the grounds for granting a
certificate of exemption have been made out. ⁵

22 So far as s102(3) of the Act is concerned the role of the warden is to report to
the Minister on whether an applicant for exemption has raised any other reason

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³ [2001] WAMW 13 at [44], [48] and [55] see also GMK Exploration Pty Ltd v Big Bell Gold Operations Pty Ltd and Morgan (2016)
WAMW 14 at [22]
⁵ Blackfin at [19]
sufficient to justify granting an exemption in what has been described as a “catch all provision of the Act”.6

23 In Morgan7 Warden Maughan, in referring to s102(3) said:

“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 granted”.

24 His Honour went on to observe 8 that although the applicant had not pursued the application under s102(2) of the Act, that would not preclude factors relevant to one or other of the grounds in s102(3) being pursued under s102(3). Although a stand-alone application pursuant to one or other of the sub-paragraphs of s102(2) may not have succeeded, those matters may still prove to be relevant considerations as part of a combination of factors justifying an exemption in accordance with s102(3) of the Act.

The Grounds of Exemption

25 The Applicant relies on 3 grounds, which it says, are capable of falling within s102(3) of the Act:

Reasonable Expectation of Exemption

26 According to the Applicant it developed an exploration programme directed to exploring M59/339 and the surrounding iron ore tenements. The expenditure on these tenements contributed to an aggregate exploration expenditure which exceeded the aggregate minimum commitment (if calculated in accordance with the Department of Mines and Petroleum (“the DMP”)9 Guidelines (“the Guidelines”).

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6 Newmont Dukeston Pty Ltd & Ors v Angelopoulos [2006] WAMW 20 and Blackfin at [147]  
7 [2016] WAMW 14 at [147]  
8 At [180]  
9 Now the Department of Mines Industry Regulation and Safety
Against that background, the Applicant says it had an expectation that the Exemption Applications would be granted in accordance with s102(2)(h). The Applicant asserts that this expectation was reasonable in circumstances where:

1. the Gold Tenements are part of combined reporting group C303-1995;
2. it calculated an aggregate minimum commitment for the Mt Gibson Tenements during the reporting years of approximately $1.2m;
3. in reliance on the Guidelines, the Applicant calculated an aggregate exploration expenditure for the Mt Gibson Tenements during the reporting years of approximately $1.8m; and
4. since the Applicant’s acquisition of the Gold Tenements, the DMP has granted the Applicant exemptions for the Gold Tenements under s102(2)(h) on the basis of aggregate exploration expenditure calculated in accordance with the Guidelines on around 40 occasions.

The Applicant says further in paragraphs 12 and 13 of its written submissions:

“12 Extension Hill's entitlement to an exemption under s102(2)(h) if aggregate exploration expenditure is calculated in accordance with the Guidelines is verified by the decision of the Minister (acting by his delegate, the Registrar) to grant an exemption under s 102(2)(h) for M59/328 in respect of the reporting year ending 11 October 2016 (which is a similar period to the relevant reporting years for M59/11, M59/13-17 and M59/217) on the basis that aggregate exploration expenditure of approximately $1.7 million exceeded the aggregate minimum commitment of approximately $1.2 million.

13 Extension Hill's current reliance on s 102(3) for the Exemption Applications is a product of a highly unsatisfactory state of affairs in which the Department administers s 102(2)(h) in accordance with the Guidelines which are inconsistent the Mining Act”.

The Applicant says it only became aware the Guidelines were apparently inconsistent with the Act in or around September 2016 after Warden Maughan handed down Morgan and Extension Hill Pty Ltd v Calegari. Morgan was published on 13 July 2016 and Calegari on 2 September 2016.
The Applicant says that consistent with the approach set down in *Morgan* and *Calegari*, it recalculated aggregate exploration expenditure for the Mt Gibson tenements during the reporting years as only approximately $800,000. It then revised its exploration programme in compliance with the method set down by Warden Maughan to ensure that in the future it would be entitled to exemption under s102(2)(h).

According to the Applicant there was insufficient time to implement the revised exploration programme so that exemptions could be obtained under s102(2)(h) for the reporting years the subject of these applications. Furthermore, had it endeavoured to do so, expenditure would have been incurred for the sake of it.

The Applicant maintains that it would be unfair to penalise it for complying with the Guidelines that have only recently been found to be wrong.

The Objector takes issue with the legitimacy of this ground of exemption. It points to the apparent contradiction between the Applicant applying for an exemption under s102(2)(h), allegedly in the hope it would be granted by the Registrar if unopposed, and the abandonment of that ground once an objection was lodged.

In effect, the Objector contends that the Applicant applied for exemption under s102(2)(h), notwithstanding it knew that it was ineligible. While the Applicant may have had an expectation that the exemptions would be granted, (if no objection was lodged) that expectation was not reasonable.

Even if, as the Objector says, the Applicant did not have a reasonable expectation it was entitled to an exemption at the time it applied, that does not mean that at the time the Applicant devised its expenditure strategy for the reporting year (i.e. before *Morgan* and *Calegari* were handed down) it did not harbour a reasonable expectation that the exemption applications would be treated in the same way as in previous years.

I accept that having previously been granted exemptions on the basis set out in
the Guidelines, the Applicant would have (until Morgan and Calegari) had no reason to believe it could not rely on s102(2)(h). In the absence of information to the contrary it was not unreasonable for the Applicant to have believed it could continue to follow the Guidelines. I also accept that by the time the Applicant became aware that the Guidelines were found to be wrong, it was difficult to re-arrange the expenditure strategy it already had in place.

37 Given the number of tenements involved and the amount of money required to meet the expenditure requirements, it would have been unreasonable to expect the Applicant to have cobbled together a strategy on the run when to do so could reasonably have involved the Applicant spending money for the sake of it. That would be inconsistent with the principle that the exploitation of the mineral wealth of the State should be planned and methodical.

38 That is, however, not the end of the matter. In order to have held a reasonable expectation that it was entitled to an exemption based on the application of the Guidelines, the Applicant not only needs to establish it relied on the Guidelines but must prove it met the minimum aggregate expenditure in accordance with the Guidelines.

As Warden Wilson observed in Blackfin: 12

“One of the prerequisites for the holder of an exploration licence to claim an exemption pursuant to s102(2)(h) of the Act is to demonstrate the amount of aggregate expenditure reported for a combined reporting group exceeds the amount of combined minimum expenditure. When challenged on such an application by an objector the obligation rests with the applicant to satisfy the warden on the balance of probabilities that the amount of expenditure reported has been spent on or in connection with exploration for minerals on the combined reporting tenements and in accordance with the calculations in the Regulations.”

39 Although the Applicant relies on s102(3) of the Act, its “reasonable expectation” ground is premised on the basis that if the Guidelines were valid, it had met the combined minimum expenditure for the combined reporting group in accordance with s102(2)(h).

12 At [142]
As Warden Maughan remarked with respect to s102(2)(h) in *Morgan*:

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

40 In my view, notwithstanding s102(3) of the Act is a catch all, where as in this case the Applicant says it would have satisfied s102(2)(h) but for the Guidelines being found to be invalid (at the time), it is not thereby relieved of the burden of establishing that if the Guidelines had been valid it met the minimum commitment. While s102(3) permits other grounds of exemption being considered in combination with the “reasonable expectation” ground, the Applicant so far as that ground is concerned should not be better off than it would have been had s102(2)(h) been relied on.

41 In this case the Applicant has not descended into sufficient detail to prove the claimed expenditure for the current reporting years. Evidence of the kind described by Warden Maughan in *Morgan* (see [39] above) has not been tendered.

**Sale to Minjar**

42 The Applicant contends that on 1 December 2016, it accepted a binding offer from Minjar dated 30 November 2016 to acquire the Mt Gibson Gold Project, which is part of the Mt Gibson Tenements and includes the Gold Tenements.

43 According to the Applicant, as the first of the objections were lodged on 9 December 2016, Minjar had no notice of the objections at the time the Applicant accepted the offer. Completion of the sale is, however, subject to the grant of the Exemption Applications and Minjar will not proceed with the sale if the Gold Tenements are forfeited.

44 The Applicant, in paragraphs 21 and 22 of its submissions, sets out the implications for the Mt Gibson Gold Project, the Kirkalocka Gold Project and the Extension Hill Magnetite Project in the event that the sale to Minjar goes
ahead and if it does not. In summary, the Applicant says that if the sale to Minjar does not go ahead these projects will be put at risk. It says further, that:

“Only the grant of the Exemption Applications will serve the primary object of the Mining Act to encourage and promote mining and exploration”.

45 The Objector argues that underpinning the sale to Minjar is the fact that the tenements the subject of these proceedings have been neglected.

46 The Objector says, further, that Minjar’s claim that the Gold Tenements are crucial to its mid-west strategy and it has budgeted expenditure of nearly $5m is questionable for a number of reasons:

(i) the surrounding evidence suggests that leases are not a priority for Minjar and it could take them or leave them; and

(ii) there is no evidence Minjar has the necessary personnel or financial resources to exploit the mining leases.

47 The Objector says further that there is no proper reason to believe that the sale of the mining leases would promote the objects and purpose of the Act.

48 The manner in which tenements have been managed, will be managed in the future and by whom is relevant. Any sale should be bona fide and not a sham the objective of which is to achieve nothing more than to relieve the tenement holders of the burden imposed by the minimum expenditure requirements because no other ground of exemption can be justified. 13

49 In Johnson Well Mining NL & Ors v Angelopoulos14, Warden Calder accepted that a mere change of ownership should not constitute a sufficient reason for the granting of a certificate of exemption. His Honour’s comments were made in a context where the purchaser had failed in the course of acquiring an interest in the tenements to make due and proper inquiries about the status of the tenements.

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13 Great Boulder Mines Ltd v Bailey [2000] WAMW 6; Morgan at [176]
14 [2005] WAMW 19 at [201]
In *St Ives Gold Mining Company Pty Ltd, Mincor Resources NL and Australian Nickel Mines NL v Hawks and Western Resources & Exploration Pty Ltd* 15 the assertion that the complexity of the sale process was a sufficient reason to ground an exemption from expenditure obligations was rejected.

An agreement that non-expenditure was planned as part of a commercial arrangement whereby the tenement holder intended to divest itself of ownership of the tenement has also been rejected. 16

In *Morgan* 17, Warden Maughan held that a legitimate sale could form the basis of an application for exemption under s102(3) of the Act:

“...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”.

In *Horizon Mining Ltd and Jindalee Resources Ltd v MPF Exploration Ltd*, 18 Warden Auty granted a certificate of exemption under s102(3) of the Act on the basis of a bona fide sale to a party with a plan in place to develop the tenements.

The Applicant contends that the sale to Minjar is legitimate and promotes the objects of the Act because Minjar has a plan to develop the tenements. The Objector says that the sale to Minjar should be viewed in a context where the tenements have been neglected. The Objector also questions the legitimacy of Minjar's commitment and capacity.

The submission that these tenements have been neglected must be considered in light of the fact that they are part of a combined reporting group for which exemptions have previously been granted.

15 [2005] WAMW 19 at [201]
16 *IPT Systems Ltd v Morellini* [2003] WAMW 5 per Warden Calder at [76]
17 At [177]
18 [2005] WAMW 18 at [81]-[84]
Subject to the expenditure commitment for the combined reporting group meeting the minimum requirements (a matter the Objector disputes), the Applicant was relieved of the obligation to expend on each and every tenement in the combined reporting group.

In my view, there is nothing in the evidence given by Mr Vallve to suggest that Minjar is ambivalent about the gold tenements. Minjar had previously shown an interest in the gold tenements but its offer was rejected. Minjar has also spent $134,000 carrying due diligence on the Mt Gibson Gold Project. Furthermore, Mr Vallve reiterated that:

“The Mount Gibson gold project was the most attractive for processing at Kirkalocka or alternatively moving the facilities at Kirkalocka down to Mount Gibson. So there’s a natural synergy between the resources at Mount Gibson and the infrastructure at Kirkalocka”.

It was put to Mr Vallve that even today Minjar is looking at other projects? Mr Valve’s agreement with that proposition was hardly surprising given the Gold Tenements are the subject of applications for forfeiture. Nor is it indicative that the Gold Tenements are not a priority for Minjar. The fact that Minjar is considering other projects is consistent with Mr Vallve’s evidence that Minjar wants to expand and does not necessarily mean that Minjar would forego the Mount Gibson tenements in the event it made further acquisitions.

Furthermore, there was no evidence to suggest that Minjar lack the personal or financial resources to exploit the gold tenements. Minjar is a wholly owned subsidiary of STH, a company listed on the Shanghai Stock Exchange. Minjar has been involved in gold mining and exploration in Australia since 2009 and has acquired the Golden Dragon Gold Project in 2009, the Kirkalocka Gold Project in November 2015, the Fields Find Gold Project in late 2015 and Pajingo Gold Project (QLD) in August 2016.

I also accept Mr Vallve’s evidence that Minjar has set aside almost $5m to fulfil its plan for the exploitation of the Mt Gibson Gold Project and will commence immediately in the event the sale proceeds. I draw no adverse
conclusions from the fact that the budget is conditional. Such a course of action is not inconsistent with a planned and methodical approach. Nor is it unreasonable to expect that a diligent tenement holder would not reconsider spending further money on tenements that had not met expectations.

Finally, on the available evidence there is nothing to suggest that the sale to Minjar is other than bona fide. Of particular significance is the fact that both Minjar’s first offer and its most recent offer pre-dates the objections and the applications for forfeiture.

**Past Expenditure**

The Applicant maintains that the aggregate minimum commitment for the Mount Gibson Tenements, during the period the Applicant has held the tenements, is approximately $7.4m. The Applicant says further that the aggregate expenditure incurred by the Applicant during that same period is $256m (based on the Guidelines), this includes approximately $35m during the current reporting years. The Applicant says, therefore, that it has expended 35 times the aggregate minimum commitment.

The Objector characterises the Applicant’s calculations as mathematical gymnastics and relies on what was said by Warden Wilson in Berkeley Resources Ltd & Anor v Limelight Industries Pty Ltd. 19

“In my opinion, mathematical gymnastics with the quantum of expenditure incurred upon a mining tenement is not the basis upon which Parliament intended the policy behind the Act to be administered”.

Warden Wilson’s remarks were made in a context where the Applicant for exemption under s102(3), having not met the expenditure requirements for the current reporting year, sought to rely on the fact that in previous years expenditure was 2.47 times the minimum commitment.

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19 (2013) WAMW 2 at [102]
Warden Wilson’s admonishment of “mathematical gymnastics” is explained by the following passage:\(^\text{20}\):

“The aggregation of the amount of total expenditure upon a mining tenement divided by the years the mining tenement has been granted to the holder is simply no basis upon which an exemption from compliance with the annual minimum expenditure conditions should be granted.

It has, firstly, a capacity to undermine the conditions of grant of a mining tenement to expend a minimum amount on an annual basis. Secondly, it is contrary to the provisions of the Act and Regulations. Thirdly, it would undermine the primary object and policy of the Act as outlined in Nova Resource case and Craig v Spargos case by encouraging holders of mining tenements to fall asleep on their rights and obligations for long periods of time based on one year of substantial expenditure. Fourthly, exemptions granted on the basis of aggregation of expenditure would, in my opinion, undermine the ‘self policing’ of compliance with expenditure conditions by the ‘jealous neighbour’ who would be unable to determine if or when the holder of a mining tenement has complied with the expenditure conditions pertaining to the grant of the mining tenement.”

\(^{20}\) At [105]

66 Berkeley Resources is the authority for the proposition that even considerable expenditure over the life of a tenement does not negate the legislative requirement that expenditure is to occur every year and of itself is not a sufficient basis for exemption under s102(3) of the Act.

67 I can see no reason why Warden Wilson’s observations are not applicable to the Applicant’s contention in this case. Moreover, in my view the Applicant faces an additional difficulty given the particular circumstances of this case.

68 As I understand the Applicant’s argument the fact that considerable money has been expended on the Mt Gibson Tenements over the years militates in favour of the grant of an exemption. In essence the Applicant says it would be unfair given all the money that has been poured into the combined reporting group, that tenements that form part of that group be exposed to the risk of forfeiture.

69 The concept of a combined reporting group enables a tenement holder to devote resources to one or some of the tenements in the group at the expense of others. Ultimately, as long as the minimum expenditure commitment for the group is
met, it matters not that some tenements have been under expended.

70 Reliance on expenditure across the combined reporting group is a legitimate means of explaining why the minimum commitment for each tenement has not been met. This is what s102(2)(h) contemplates. It is also consistent with the objects of the Act which acknowledge this as one of the circumstances in which a tenement holder is permitted to hold a tenement without mining or giving it up.

71 So far as this ground of exemption is concerned the Applicant now seeks to rely on the expenditure across the combined reporting group, not as a means of legitimately explaining why some tenements have been under expended in accordance with s102(2)(h) but to suggest it would be unfair that these tenements be exposed to forfeiture given the total expenditure across the combined reporting group for the current reporting year and historically.

72 In my view, to rely on expenditure in relation to a combined reporting group in this way involves a logical fallacy. Just because considerable expenditure has occurred with respect to some of the tenements in the combined reporting group, it does not mean it can be positively asserted that expenditure on those tenements can be attributed to the tenements that have been under expended. This is particularly so in this case where there is no evidence that the work done on the iron tenements has assisted in the future exploration of the Gold Tenements.

73 Other than for the purposes of an application for exemption under s102(2)(h), I have difficulty seeing how the fact that considerable expenditure has occurred with respect to some tenements in a combined reporting group supports the proposition that that expenditure can be attributed to or allocated to those tenements within the combined reporting group that have been under expended.

74 Fundamental to the premise on which the Applicant’s argument is based is the assertion that is unfair to expose a tenement to the risk of forfeiture when it has
been the subject of considerable expenditure, particularly over the life of the tenement.

75 That premise is simply not made out in this case and involves using the concept of a combined reporting group in a way that is inconsistent with the objects of the Act.

76 It is one thing to rely on a combined reporting group as a means of being relieved of the burden of ensuring each tenement in the group has met its mining expenditure commitment. It is altogether different to use the total expenditure across the combined reporting group to suggest that the under expended tenements in the group have been the subject of considerable expenditure.

77 If, as Berkeley Resources says, even considerable past expenditure on a tenement is not of itself a sufficient basis for an exemption, then the position is even more dire for those tenements with respect to which little or no expenditure has occurred.

78 So far as the Gold Tenements are concerned the Applicant has had 40 out of 48 possible exemptions since it has held the tenements.

79 As Mr Nair candidly acknowledged the Applicant has done very little work on these tenements since it acquired them in 2012.21 Furthermore, no activities have been carried out on the Gold Tenements in the current reporting year.22

80 In reality the Gold Tenements have not been the subject of considerable expenditure, either historically or during the current reporting year.

81 To the extent that the Applicant could argue, that past and current under expenditure should not be held against it because the Gold Tenements are part of a combined reporting group, that neither explains why the combined reporting group did not meet the minimum commitment nor does it positively

21 Transcript 18/7/17 at p22 & 23
22 Transcript 18/7/17 at p24
advance the Applicant’s case for an exemption in the circumstances of this case.

82 Section 102 provides for an exemption from expenditure for one of the reasons set out in subsection 2(a)-(h) or some other sufficient reason in accordance with subsection (3).

83 So far as s102(3) is concerned it is for the party seeking an exemption to point to some sufficient reason why the minimum expenditure commitment for that year has not been met. The fact that considerable money has historically been spent on a tenement does not explain why the minimum commitment has not been met for the current reporting year.

84 In my view, s102(2) and (3) of the Act focuses on the sufficiency of reason the minimum expenditure commitment was not met, not whether it is fair or unfair that a tenement be exposed to forfeiture.

85 To the extent that matters additional to the sufficiency of the reason the minimum commitment was not met are to be taken into account, s102(4) has a role to play. In this case the Applicant can neither point to the money spent nor the work done on the Gold Tenements in support of its application for an exemption.

86 So far as the Gold Tenements are concerned, the Objector also contests the expenditure claimed.

87 The Objector says there is reason to doubt the Applicant’s reported expenditure because the Applicant has claimed “administration/overheads” comprising 21.04% of total expenditure across the eleven tenements for the 2012-2016 period when the maximum allowable is 20% of total expenditure. In addition the Objector says that Mr Nair’s evidence confirms that administration/overheads were calculated solely on the basis of a formula with no account of what expenses were actually incurred.
The cap on administration expenses operates to limit the amount (as a percentage) that can be claimed even if the actual figure exceeds 20%. The object of that provision is to ensure that mining activity or exploration takes place and that administration costs are not over-represented in the total amount claimed.

This is consistent with Warden Calder’s remarks in *Mawson West Ltd & Anor v Saruman Holdings Pty Ltd* 23

“In my opinion, those provisions of the Mining Act and Regulations and the instructions in the Form 5 to which I have made reference do not have the effect that where expenditure on administration and overheads is in fact less than 20 per cent of the minimum prescribed expenditure or less than 20 per cent of the total of allowable expenditure on all other activities the holder is entitled to record in the Form 5, as expenditure on administration and overheads, 20 per cent of either of the minimum prescribed expenditure or the aggregate of allowable expenditure on all other activities.

If there was no expenditure on administration or overheads which can be directly or indirectly attributed to a tenement, then nothing may be claimed. If the actual amount of any such expenditure is less than 20 per cent of the aggregate amount of allowable expenditure on other activities, then 20 per cent of that other expenditure may not be claimed for administration or overheads. The holder may only claim actual expenditure”.

Mr Nair’s evidence as to how administration/overheads were calculated involved the application of a formula whereby an amount based on a percentage was allocated to administration/overheads. It appears that no attempt was made to ascertain what the actual expenses were in relation to each tenement.

As Mr Nair said24 in evidence when asked about the calculation of administration expenses:

“It has not come from accounts, this expenditure. It comes from a calculation that 20 per cent of the minimum commitment can be taken into account”.

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23 (2010) WAMW 10 at [52]-[53]
24 Transcript p25
Mr Nair agreed that the calculation of administration expenses was based only on the minimum commitment.

“If $100,000 was the expenditure, then $20,000 can be taken as administration costs”.

It is clear, based on Mr Nair’s evidence, that administration expense have not been calculated correctly.

**Conclusion**

In my view so far as the three grounds upon which the applications for exemption pursuant to s102(3) rest, only the sale to Minjar is legitimate.

The next question is whether that ground alone affords a sufficient reason for the grant of an exemption.

At face value the transfer of tenements to an entity with a plan to exploit them is consistent with the object of the Act that land suitable for mining should be exploited. However, as I said earlier the focus of s102(2) and (3) is the sufficiency of the reason the minimum expenditure commitment has not been met. In my view the sale to Minjar brokered late in the reporting years does not provide a sufficient explanation for the under expenditure. The Applicant did not advance its case on the basis that there is a causal connection between the sale to Minjar and the failure to meet the minimum expenditure commitment. Nor does s102(4) of the Act assist the Applicant.

While each case will of course depend on its own facts I have difficulty seeing how the sale of tenements without more provides a sufficient reason for an exemption. The granting of an exemption from expenditure in those circumstances has the potential to encourage tenement holders to believe that even though tenements have been under expended as long as there is a legitimate purchaser, the risk of forfeiture can be avoided. This would be contrary to the objects of the Act and undermine the jealous neighbour principle.

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25 Transcript p26
upon which the regulation of the industry relies.

98 For these reasons I recommend that Applications for Exemption 498276, 500553 and 503062 be refused.

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Warden J O’Sullivan

6 November 2017