[2018] WAMW 13

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	MH GOLD PTY LTD and OTHERS v PHOENIX RISE LTD AND ANOR [2018] WAMW 13
CORAM	**:**	WARDEN J O'SULLIVAN
HEARD	**:**	14-16 November 2017
DELIVERED	**:**	12 September 2018
FILE NO/S	**:**	Applicants for Exemption: 481393, 476644, 478718, 484196, 486716, 472593, 478521 and 485613 Objections: 481474, 481757, 477741, 478978, 484544, 486736, 479230, 478975, 485815 and 481475
TENEMENT NO/S	**:**	E77/1361, E77/1582, E77/1772, E77/2011, E77/2167, E77/2188, M77/0477, M77/0522, M77/0523, M77/1066, M77/1067, M77/1068 and M77/1080
BETWEEN	**:**	**MH GOLD PTY LTD** (First Applicant) **MONTAGUE RESOURCES AUSTRALIA PTY LTD** (Second Applicant) **ST BARBARA LIMITED** (Third Applicant) AND **PHOENIX RISE LTD** (First Objector) **JEFFREY HULL** (Second Objector)
Catchwords:		*Applications for certificates of exemption from expenditure; sections 102(2)(b), (f) and (h) and section 102(3) of the Mining Act. Meaning of "mineral ore" and "expenditure on, or in connection with exploration for minerals". Turns on own facts.*

Legislation:

- *Mining Act 1978 ss8, 102, 115A*
- *Mining Amendment Bill 2004 (WA)*
- *Mining Regulations 1981 (WA) regs54, 58A, 96C*
- *Corporations Act 2001 (Cwth) s435A*

Result:

1. *It is recommended that the Minister refuse applications for exemption 481393, 476644, 478718, 484196, 486716, 472593, 478521 and 485613.*

Representation:

Counsel:

First Applicant	:	Mr T O'Leary & Ms LA Shave
Second Applicant	:	Mr T O'Leary & Ms LA Shave
Third Applicant	:	Mr T O'Leary & Ms LA Shave
First Objector	:	Mr J Garas
Second Objector	:	Mr G Lawton

Solicitors:

First Applicant	:	Gilbert & Tobin
Second Applicant	:	Gilbert & Tobin
Third Applicant	:	Gilbert & Tobin
First Objector	:	Ensign Legal
Second Objector	:	Lawton Lawyers

Cases referred to:

- ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] 31 WAR 270
- ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd & Anor (***2007) 34 WAR 403
- ***Siberia Mining Corporation Pty Ltd v Wilson*** [2015] WASC 322
- ***Staltari v Pharmacy Restructuring Authority*** (1995) 36 ALD 555
- ***Grange Resources Ltd v Lee*** [2006] WAMW8
- ***Mohammadi v Bethune*** [2018] WASCA 98
- ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153
- ***Blackfin Pty Ltd v Mineralogy Pty Ltd*** [2013] WAMW 19
- ***General Gold Resources NL v Exmin Pty Ltd*** [2002] WAMW 18
- ***Inca Minerals Limited v Brewer*** [2018] WAMW 9
- ***Oz Youanmi v Gold Pty Ltd v St Clair Resources Pty Ltd*** [2018] WAMW 5
- ***Sportview Pty Ltd v Lingchip Pty Ltd*** [2004] WAMW 14
- ***Brewer v O'Sullivan No.2*** [2017] WASC 269
- ***Re Heaney: Ex parte Flint*** Unreported; FCt SCt of WA; Library No.970065; 26 February 1997
- ***Re Calder; Ex parte St Barbara Mines Ltd*** (1999) WASCA 25
- ***Re Calder; Ex parte Lee*** [2007] WASCA 161
- ***Collector of Customs v Pozzolanic Enterprises Pty Ltd*** (1993) 43 FCR 280
- ***R v Toohey; Ex parte Northern Land Council*** (1981) 151 CLR 170
- ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (1986) 162 CLR 24
- ***Nova Resources NL v French*** (1995) 12 WAR 50
- ***La Perouse Local Aboriginal Land Council v The Minister Administering the Crown Lands Act*** (1991) LGRA 176
- ***Re Warden Calder; Ex parte Brosnan [No.2]*** [2012] WASC 214

- ***Rose v Goldtime Australia Pty Ltd*** [2004] WAMW 8
- ***Newmont Duketon Pty LTd & Ors v Angelopoulos*** [2006] WAMW 20
- ***Pawson v Northwestern Mining Co P/L and Anor*** [2013] WAMW 8
- ***Brosnan v JSW Holdings P/L*** [2011] WAMW 8
- ***Berkeley Resources Ltd & Anor v Limelight Industries Pty Ltd*** [2013] WAMW 2

1. MH Gold Pty Ltd, Montague Resources Australia Pty Ltd and St Barbara Limited (the applicants) have applied for exemptions from expenditure conditions for 13 tenements; 7 mining leases and 6 exploration licences (the Tenements). Phoenix Rise and Mr Hull (M77/1066 only) have objected to certificates of exemption being granted and also applied for forfeiture of the Tenements.

2. The Tenements form part of the Mt Holland Gold Project which in turn is part of the Mt Holland Project which now includes the Earl Grey Lithium Project. The Mt Holland Project comprises 56 tenements held by MH Gold or Montague (in its own right or with St Barbara) extending over an area of 284 square kilometres.

3. The Mt Holland Goldfield is located approximately 120 km south-southeast of Southern Cross and some 360 km east of Perth in the Eastern Goldfield region of Western Australia.[1]

4. The tenement numbers and expenditure years for each of the tenements are set out in the table below. The anniversary dates for all of the Tenements fall between 18 June 2014 and 14 March 2016.[2]

No.	Tenement	Reporting Group	Application for Exemption	Expenditure Year	Registered Holder
1.	E77/1361	Van Uden	486716	15.03.2015 to 14.03.2016	Montague 80% St Barbara 20%
2.	E77/1582	Van Uden	484196	01.02.2015 to 31.01.2016	Montague 80% St Barbara 20%
3.	E77/1772 (dead)	Mt Holland	481391	14.12.2014 to 13.12.2015	MH Gold
4.	E77/2011	Mt Holland	485613	08.10.2014 to 07.10.2015	MH Gold
5.	E77/2167	Mt Holland	472593	18.06.2014 to 17.06.2015	MH Gold
6.	E77/2188	Mt Holland	478521	07.10.2014 to 06.10.2015	MH Gold
7.	M77/0477	Van Uden	476644	31.08.2014 to 30.08.2015	Montague 80% St Barbara 20%
8.	M77/0522	Van Uden	478718	11.10.2014 to 10.10.2015	Montague 80% St Barbara 20%

[1] Montague Annual Report; November 2014; Applicant's Dropbox folder; Vol 1 at 331
[2] Ex 1; Affidavit of Martin James Donohue sworn 6 April 2017 at [22] & [23]

9.	M77/0523	Van Uden	478718	11.10.2014 to 10.10.2015	Montague 80% St Barbara 20%
10.	M77/1066	Mt Holland	481393	13.12.2014 to 12.12.2015	Montague
11.	M77/1067	Mt Holland	481393	13.12.2014 to 12.12.2015	Montague
12.	M77/1068	Mt Holland	481393	13.12.2014 to 12.12.2015	Montague
13.	M77/1080	Mt Holland	481393	13.12.2014 to 12.12.2015	Montague

5. Exemptions are sought in accordance with the following sections of *the Mining Act 1978 (WA)*:

   (1) Section 102(2)(b) – all the Tenements.

   (2) Section 102(2)(f) – M77/0477, M77/1066, M77/1067, M77/1068 and M77/1080.

   (3) Section 102(2)(h) – E77/1772, E77/2011, E77/2188, M77/1066, M77/1067, M77/1068 and M77/1080.

   (4) Section 102(3) – all the Tenements.

6. Until 2016 the Tenements were beneficially held by Convergent Minerals Limited.[3] MH Gold and Montague were at the relevant time subsidiaries of Convergent.[4]

7. Throughout the expenditure years Convergent endeavoured to raise capital to develop Blue Vein (M77/1065) to production with a view to using the revenue derived from Blue Vein to ultimately fund the development of the Tenements. No exemption is sought for Blue Vein.

8. On 30 April 2014 Convergent announced that it had executed a bridging finance agreement with Capri Trading Pty Ltd comprising an initial $2.5m with an additional $2.5m conditionally committed to a larger planned Project Finance Facility. If Convergent succeeded in raising the balance of $43m to commence

[3] Ex 7: Affidavit of David William Price; sworn 30 March 2017 at [7]

[4] Montague Annual Report; November 2014; Applicant's Dropbox folder; Vol 1 at 331; Ex 1: Affidavit of Martin James Donohue; sworn 6 April 2017 at [46]

mining at Blue Vein, then Capri would lend Convergent a further $2.5m. Convergent immediately drew down the initial $2.5m as the funds were required to continue and finalise the feasibility work at Blue Vein. [5]

9. Convergent was ultimately unable to repay the initial loan of $2.5m to Capri and in a complex set of arrangements Capri became the registered shareholder, an ultimate holding company of MH Gold. All of Convergent's shares in Montague were then purchased by MH Gold.[6]

10. On 29 February 2016, Kidman Resources Limited acquired all the Tenements from Convergent. The Tenements are held by either Montague in its own right or with St Barbara Limited or by MH Gold. Kidman became the parent company of MH Gold and Montague.[7] MH Gold is a subsidiary of Kidman and Montague is a subsidiary of MH Gold.[8]

11. Montague and St Barbara hold M77/0477, M77/0522, M77/523, E77/158 and E77/1361 in 80:20 shares pursuant to a Tenement Acquisition Agreement between St Barbara, Montague and Convergent dated 7 April 2010.[9]

12. For present purposes Kidman's acquisition of the Tenements is central to the applicants' argument that the discovery of lithium after the expenditure years is a relevant consideration with respect to applications for exemption in accordance with s102(2)(f) and s102(3).

13. It is not in dispute that Convergent went to considerable lengths to raise capital during the expenditure years. Phoenix Rise argues, however, that any capital raising was to develop a mine at Blue Vein, a tenement for which no exemption is sought.

14. Phoenix Rise contend that raising capital in accordance with s102(2)(b) must be for the tenements for which exemption is sought. Phoenix Rise says further that

[5] Ex 7: Affidavit of David William Price; sworn 30 March 2017; at [140]-[142]
[6] Ex 1: Affidavit of Martin James Donohue; sworn 6 April 2017 at [42], [46] & [53]
[7] Ex 7: Affidavit of David William Price; sworn 30 March 2017 at [2]
[8] Ex 1: Affidavit of Martin James Donohue; sworn 6 April 2017 at [23]
[9] Ex 1: Affidavit of Martin James Donohue; sworn 6 April 2017 at [30] & Applicants' Book of Documents; Vol 8; 182

expenditure directed to developing a mine at Blue Vein cannot be characterised as expenditure on, or in connection with exploration for the purposes of s102(2)(h).

15. With respect to s102(2)(f), Phoenix Rise says that it has not been demonstrated the tenements in question contain "mineral ore" or that there is any "existing or proposed mining operations". Phoenix Rise also disputes that the acquisition of the Tenements by Kidman and the discovery of lithium after the expenditure years is a relevant consideration in considering the applications for exemption in accordance with s102(2)(f) and s102(3).

16. Mr Hull has objected to the application for exemption for M77/1066. Other than to provide written submissions at the commencement of the hearing, Mr Hull did not otherwise participate in the hearing. Mr Hull accepts that his fortunes are tied to those of Phoenix Rise.[10]

The Statutory Framework

17. Mining leases and exploration licences are subject to a condition that the tenement holder shall comply with the prescribed expenditure conditions [11] unless a partial or total exemption is granted.

18. Section 102 of the *Mining Act* deals with applications for exemptions:

> **"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*

[10] t/s 14/11/17 at 3

[11] ss82(1) & 62(1) of the *Mining Act*

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.*

19. Section 102(4) requires that 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.

20. Where an objection has been lodged to an application for exemption it is to be heard by the Warden who in turn makes a recommendation to the Minister.[12] Ultimately, it is the Minister who determines whether or not to grant an exemption.[13]

21. In the event that the Minister grants an exemption, the tenement holder is relieved, to the extent, and subject to the condition specified in the certificate, from compliance with the prescribed expenditure conditions relating to the mining tenement [14] and the tenement is therefore not liable for forfeiture.

22. In the event that an exemption is not granted, the subject tenement is liable to forfeiture.[15] Whether an order for forfeiture is made by the Minister will depend

[12] s102(5) *Mining Act*
[13] s102(7) *Mining Act*
[14] s103 *Mining Act*
[15] ss63A(b) & 82(1)(g) *Mining Act*

on whether the failure to comply with the expenditure obligations is of sufficient gravity to justify the forfeiture of the mining tenement.[16]

23. Only if an exemption is not granted will separate proceedings be held to consider the applications for forfeiture.

The Law: General Principles

24. In ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd***[17] Pullin JA observed:

> *"21 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 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.*
>
> *22 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). A special provision - s 102A - was inserted into the Act in 1982, authorising the Minister to grant exemption in relation to the holder of an exploration licence who has been authorised by the Minister under s 111 to explore for iron on the*

[16] s98(1) & (5) *Mining Act*
[17] (2007) 34 WAR 403 at [21]-[25]

land. 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.

23 *There is a further purpose reflected in the Act. That is, that a tenement holder who has defaulted in compliance with the Act in some minor respect or because of some circumstance beyond the control of a tenement holder, should not risk the loss of the tenement. Thus s 98(7) provides that an exploration licence or mining lease should not be forfeited if there has been non-compliance with expenditure requirements because of a strike. Section 96(2) provides that no order for forfeiture of a mining tenement shall be made unless the warden is satisfied that non-compliance with the Act is "material" and that the "matter" is of "sufficient gravity" to justify forfeiture of the tenement. No recommendation for forfeiture of an exploration licence or mining lease may be made by a warden unless the non-compliance with the Act is of "sufficient gravity" to justify forfeiture. See s 98(5).*

24 *Title to a mining tenement is not as secure as title to real property. This relative lack of security sits uneasily with the fact that very large amounts of capital may be expended on mining infrastructure. Miners desire as much security of title as possible if they are to make such investment. The State also has an interest in ensuring reasonable security of title so that investment will be encouraged. If this happens, the chance that greater royalties may be earned for the benefit of the State is enhanced. Parliament has demonstrated that it intends that the relative insecurity of title should be balanced out by provisions in the Act which reduce the risk that a tenement may be lost due to error or inadvertence.*

25 *In my opinion, these provisions which show that one of the purposes of the legislation is to protect tenement holders from loss of title due to minor non-compliance with the Act or error or inadvertence, means that, by analogy, it was open to the Minister under s 111A to conclude that reasonable grounds exist in the public interest to terminate an application, if to do so is to benefit or protect a tenement holder who*

> *has, by some slip or minor accident, failed to apply to extend the term of an exploration licence."*

25. In ***Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum*** [18] the Court of Appeal, referring to ***Nova Resources,*** summarised the position:

> *"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".*
>
> *(footnotes omitted)"*

Principles of Statutory Construction

*"26. In **Mohammadi v Bethune**[19] the Court of Appeal neatly summarises the principles of statutory construction:*

> *"The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context. Statutory construction, like any process of construction of an instrument, has regard to context. As Kiefel CJ, Nettle and Gordon JJ recently explained in **SZTAL**:*
>
> > *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context*

[18] [2017] WASCA 153 at [96]
[19] [2018] WASCA 98 at [31]-[35]

> *and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*
>
> *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.*
>
> *The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.*
>
> *Discernment of statutory purpose is particularly significant in cases, commonly encountered, where the constructional choice presented is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural'. In such a case, the choice 'turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies'. As we will explain later in these reasons, we think this is such a case.*
>
> *Thus, the material provisions of the Act must be understood, if possible, as parts of a coherent whole."*
>
> *(footnotes omitted)"*

Section 102(2)(b)

26. Certificates of exemption for all of the Tenements is sought under s102(2)(b).

27. Section 102(2)(b) of the *Act* provides that a certificate of exemption may be granted on the basis:

> *"that time is required to evaluate work done on the mining tenement, to plan for future exploration or mining or raise capital therefor …"*

Is s102(2)(b) confined to the tenement(s) for which an exemption is sought?

28. As I foreshadowed earlier the applicants argue that extensive efforts were undertaken by Convergent to raise capital. This is not in dispute. What is in dispute, however, is the purpose to which that capital raising was directed.

29. The applicants contend that while the focus of the capital raising was to develop Blue Vein (3-5 years) that was the first step of a broader plan. Once Blue Vein was brought to production, the revenue realised from Blue Vein would then be used to develop the Tenements (5-20 years).[20] As I understand the applicants' contention, the fact that time was required to raise capital to develop Blue Vein to production which in turn would fund the tenements, constitutes a sufficient nexus for the purposes of s102(2)(b).[21]

30. Phoenix Rise argue that the capital raising undertaken by Convergent was for the purpose of paying the debt to Capri and solely to develop Blue Vein. According to Phoenix Rise the fact that Convergent intended to use the proceeds from Blue Vein to develop other Mt Holland deposits does not change the characterisation of the capital raising as solely for the mine development of Blue Vein.

31. A central issue in the competing views advanced by the parties is whether the operation of s102(2)(b) must relate to the tenement the subject of the application for exemption. Blue Vein is not the subject of an application for exemption.

32. The applicants argue that the words "*on the mining tenement*" or "*of the mining tenement*" appear throughout s102(2) although not in relation to each ground. Subsections 102(2)(a), (d), (e), (f) and (h) use one or other of those phrases while subjections 102(2)(c) and (g) do not. This, they say, reflects that the legislature carefully considered the use of the phrase in s102(2)(b) and demonstrates that the phrase only applies where it is expressly used.

33. According to the applicants the words "*on the mining tenement*" in s102(2)(b) are confined in their operation to "*the evaluation of work done*" (the first limb).

34. While the applicants suggest that there is no basis in the text of s102(2)(b) for the planning or capital raising to be for "that mining tenement" the subject of an application for exemption, they do, however, concede that:-

[20] Ex 7: Affidavit of David William Price; sworn 30 March 2017; at [55]
[21] t/s 16/11/17 at 52

> *"Plainly, the fact that 'time is required' for that planning or that capital raising must bear on the tenement the subject of the exemption application in a meaningful way. It is for the tenement holder to establish how those purposes bear on the application for exemption for the tenement in question."*

35. In my view, s102(2)(b) does require that the time "*to plan future exploration or mining or raise capital therefore*" relates to the tenement the subject of the exemption application for the following reasons.

36. First, the natural meaning of the words used in s102(2)(b) clearly convey the intention that the three limbs relate to the tenement for which an exemption is sought. This is consistent with the approach adopted by Warden Calder in ***Sportview Pty Ltd v Lingchip Pty Ltd***.[22]

37. Second, when s102 is considered as a whole it is apparent that it is confined to the tenement the subject of the application for exemption. Section 102(1) refers to an application by the holder of "*a mining tenement*". Further, s103 provides that if granted an exemption the tenement holder is relieved of the "obligations … relating to the tenement".

38. Third, as is clear from the context in which s102(2) operates, that subject to s102(2)(h), a tenement holder is required to spend the prescribed expenditure amount on each tenement every year. It is instructive that an applicant for a tenement is required to demonstrate that it has the financial capacity to explore or exploit the ground before the application for each tenement is granted.

39. Fourth, as Phoenix Rise says, if time is not required to plan future exploration or mining or raise capital therefor on the subject tenement, why is an exemption under s102(2)(b) being sought? Absent some other ground of exemption, there is no reason the prescribed expenditure requirement was not met.

[22] [2004] WAMW 14 at [76] & [78]

40. Fifth, the construction of s102(2)(b) advanced by the applicants that involves the words "*on the mining tenement*" being confined to "*the evaluation of work done*" and not the other limbs of s102(2)(b) does not make sense grammatically.

41. It presupposes that the repetition of the words "on the mining tenement" would be required if those words are to apply to the second and third limb. That would produce an unwieldy and over-complicated sentence.

42. Moreover, those additional words would be unnecessary. On a plain reading of the words used, applying ordinary grammatical principles, it is clear that the second and third limbs are not at large and relate to the subject tenement.

43. Sixth, contrary to the applicants' submissions, ***Siberia Mining v Wilson*** [23] does not support the construction of s102(2)(b) for which the applicants contend. Allanson J [24] found that the Warden concluded that Siberia Mining, having received capital as a consequence of a transaction, had sufficient funds to meet the expenditure requirements for the tenements for which exemptions were sought but directed those funds elsewhere.

44. Allanson J [25] held that that conclusion was based on an incorrect characterisation of the transaction. Hence the question as to whether an exemption under s102(2)(b) had been made out remained to be determined.

45. Nothing said by Allanson J supports the general proposition that planning or raising capital in s102(2)(b) is not confined to the subject tenement.

46. Seventh, s102(1a) is obviously concerned with making it clear that separate applications for exemption are not required for each tenement for which an exemption is sought. As Phoenix Rise observe, this is an administrative provision and it does not affect the substantive operation of s102(2) of the *Mining Act*.

[23] [2015] WASC 322
[24] At [50]
[25] At [66]

47. Eighth, in enacting s102(2)(h) it is apparent that the legislature turned its mind to the circumstances in which it is legitimate for expenditure to be focused on one tenement in preference to others. The restrictive conditions that apply to s102(2)(h) militate against the broad construction of s102(2(b) advanced by the applicants. As a general proposition focusing resources on one tenement at the expense of others is inconsistent with the object of the *Mining Act*, namely, that the minimum expenditure commitment for each tenement must be met each year. The question as to whether focusing capital raising on one tenement promotes the objects of the *Mining Act* is considered in more detail in relation to s102(3).

48. Ninth, the applicants rely on the Court of Appeal of Western Australia decision in ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd & Anor***.[26]

49. In particular, the applicants point to the following passage from Pullin JA:-

> *"some of these provisions [s102(2)] have been in the Mining Act 1975 [sic] of 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."*

50. The applicants [27] interpret this passage to mean:

> *"…, mining endeavours are more likely to relate to more than one mining tenement, it is more likely that extensive planning for future exploration or mining will be needed (such that time will be required to enable that to occur) and that time will be required to raise capital for that future exploration or mining."*

51. Nothing said by Pullin JA suggests that s102(2)(b) is not confined to the tenements the subject of the applications for exemption. His Honour's comments are directed to the inclusion of additional grounds upon which an exemption can be granted.

Was There a Plan?

[26] (2007) 34 WAR 403 at [21]-[22]
[27] Applicants' submissions; 4 December 2017

52. In the event that the correct construction is that s102(2)(b) must relate to the tenement for which an exemption is sought, the applicants face another problem.

53. In my view, the word "*therefor*" in s102(2)(b) makes it clear that any capital raising must be "*to plan future exploration or mining*". Were it otherwise the word "*therefor*" would have no work to do.

54. If, as the applicants say, the capital raising was to develop Blue Vein with a view to planning future exploration or mining on the Tenements, there must be evidence of a plan for the Tenements.

55. As Warden Wilson observed in ***Berkley Resources Ltd & Anor v Limelight Industries Pty Ltd***: [28]

> *"To plan is the method or course of action to do something."*

56. In my view, a general aspirational statement that once Blue Vein is up and running, the proceeds will be directed to developing the Tenements is not enough. An intention to carry out exploration or mining of an unspecified nature at some time in the future does not constitute a plan.

57. In my view, the applicants are not entitled to an exemption in accordance with s102(2)(b) of the *Mining Act*.

Section 102(2)(f)

58. Exemptions are sought for M77/0477, M77/1066, M77/1067, M77/1068 and M77/1080 based on s102(2)(f) of the *Mining Act*.

59. Section 102(2)(f) provides:

[28] [2013] WAMW 3 at [41]

> *"(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;"*

60. Section 102(2)(f) poses two questions:

    (1) Does the ground the subject of the mining tenement for which an exemption is sought contain mineral ore? and

    (2) Is that mineral ore required to sustain the future operations of an existing or proposed mining operation?

Is there mineral ore on the tenements?

61. A central controversy between the parties is the meaning to be attributed to the term "*mineral ore*".

62. It is relevant to observe that s102(2)(e) provides that an exemption can be granted on the basis:

> *"(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 operation viable." (my emphasis)*

63. Subparagraph (e) provides some context in considering s102(2)(f) in that it refers to a "mineral deposit which is uneconomic".

64. The word "*minerals*" is defined in s8 of the *Mining Act*, however, neither "*ore*" nor "*deposit*" are defined terms.

65. The terms "*ore reserve*" and "*mineral resource*" are used in the JORC Code,[29] however, neither term is defined in the *Mining Act* nor are they used in s102(2)(e) or (f).

[29] JORC Code means the Australasian Code for Reporting of Exploration Results, mineral Resources and Ore Reserves prepared by the Joint Ore Reserves Committee of the Australasian Institute of Mining and Metalurgy, the Australian Institute of Geoscientists and the Mineral Council of Australia as in force from time to time (see s74(7) *Mining Act*)

66. Phoenix Rise argue that the term "*mineral ore"* equates with the term "*ore reserve*" which means the economically mineable part of a measured and/or indicated mineral resource. The applicants, on the other hand contend that the reference to mineral ore in s102(2)(f) means a "*mineral resource*", which may or may not be economic.

67. The applicants acknowledge that an "ore reserve" describes a mineral resource in relation to which there exists sufficient confidence in the modifying factors to serve as the basis for a decision on the development of the deposit. The applicants concede that if "*mineral ore*" means an "*ore reserve*", then that level of confidence did not exist at the relevant time in relation to those tenements for which an exemption is sought under s102(2)(f).

68. In ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd*** [30] Buss JA observed that:

> *"Section 102(2)(f) contemplates, for example, that it may not be economic for the holder of a mining tenement to undertake "mining operations" (see the definition in s8(1)) separately in relation to a particular mineral deposit, but it may become economic at a later stage to carry out mining operations on that deposit in conjunction with mining operations on other mineral deposits of the holder. Another example contemplated by s102(2)(f) is that although it may be economic for the holder of a mining tenement to undertake "mining operations" immediately, a better use of existing infrastructure and vast reserves over time may require that mining operations in relation to the* ***mineral deposit*** *in question be deferred" (emphasis added)."*

69. The applicants rely on this passage in support of the proposition that a mineral deposit is all that is required and that it need not be economic.

70. In my view, this passage contemplates two scenarios in which s102(2)(f) applies. The first relates to a mining tenement that is presently uneconomic that may become so if sustained by other tenements, namely, those for which an exemption is sought.

[30] [2007] WASCA 133 at [154]

71. The second relates to the tenements for which exemptions are sought being currently economic but a better outcome in the longer term is to be achieved by deferring their development.

72. I assume, in the second scenario, that the deferral of the tenements' development is because they are required to sustain the future operations of an existing or proposed mining operations, thereby producing a better long term outcome.

73. I am disinclined to draw too much from this passage from Buss JA for four reasons.

74. First, when the passage is understood in the way I have just explained, the tenement said to be uneconomic in the first scenario is the tenement to be sustained by mineral ore from the tenements for which exemption is sought, not the tenements for which exemption is sought.

75. Second, there is no indication from the surrounding passages that Buss JA was directed to the distinction between the terms "*mineral resource*" and "*mineral ore*" or that his Honour otherwise set about to resolve whether "mineral ore" as used in s102(2)(f) means "*mineral resource*".

76. Third, the fact that Buss JA, in relying on what was said by Malcolm CJ in ***Re Plutonic Operations Ltd; Ex parte Roberts,***[31] uses the term "*mineral deposit*" instead of "*mining operations*" (the term used by Malcolm CJ) with no explanation as to why, suggests that the precise terminology used was not especially significant.

77. Fourth, the second scenario begins with the premise that the tenement for which an exemption is sought is economic.

78. The applicants also rely on the following extract from ***Grange Resources v Lee***: [32]

[31] [1999] WASCA 133 at [50]
[32] [2006] WAMW 8 at [154]

> *"adequate identification of resources in order that reserve classification may be achieved."*

79. In my view, when that sentence is read in context, it is clearly a reference to identifying the proposed mining operation to which s102(2)(f) is concerned. It is not a reference to the tenement for which an exemption is sought.

80. The applicants also referred to the following passage from ***General Gold Resources NL v Exmin Pty Ltd***:[33]

> *"… the focus for the year 2000 was to develop resources in the Minjar North Project into bankable reserves …"*

81. According to the applicant this passage was accepted as the basis for an exemption under s102(2)(f).

82. While it is clear that Warden Wilson draws a distinction between a "*resource*" and a "*reserve*", once again I am disinclined to conclude it is significant. This is so because Warden Wilson ultimately concluded that the tungsten and gold deposits had become economically viable.[34]

83. For the same reason ***Brosnan v Grange Resources NL*** [35]needs to be viewed with caution. It is the tenement upon which proposed mining operations are to take place that is referred to as a resource that is uneconomic, not the tenement for which an exemption was sought.

84. Where, as here, the terminology used is somewhat ambiguous, recourse to the context in which those terms are used and the objects of the *Mining Act* is required.

85. Section 102(2)(f) provides that mineral ore is "*required to sustain*" an existing or proposed mining operation.

[33] [2002] WAMW18 at [47]
[34] At [95]-[97]
[35] [2002] WAMW 13 at p4

86. The word "*required*" means "*essential, needed or necessary*".[36] The word "*sustain*" means "*to cause or allow something to continue for a period of time*".[37]

87. In order for mineral ore to be "*required to sustain*" a mining operation, it must be economic. If the mineral ore cannot be extracted economically, how then could it be said that that it could sustain a proposed mining operation?

88. Furthermore, the use of the word "*required*" conveys the clear intention that some assessment has been made as to the tenement's capability to sustain future mining operation.

89. This construction is consistent with the approach adopted by Warden Calder in ***Grange Resources Ltd v Lee***:[38]

> *"In respect of paragraph 102(2)(f) Grange has failed to establish that Thaduna contains mineral ore that is required to sustain future operations of any existing or proposed mining operations. There is insufficient evidence to enable a conclusion to be properly arrived at that … the mineral resource on Thaduna could be mined for the purpose of sustaining any other operation in the future."*

90. The alternate construction would involve a tenement, even if it is uneconomic, being exempt on the basis it is "*required to sustain*" future mining operations, absent any evidence of its capacity to do so. The fact that a tenement contains a mineral deposit does not of itself establish that it can be extracted economically.

91. It follows that if the tenement is currently uneconomic it may be eligible for an exemption under s102(2)(e). Viewed in this way ss102(2)(e) and (f) operate harmoniously.

92. Support for this construction is also apparent when a comparison of the language used in s102(2)(e) and (f) is undertaken. Significantly, although s102(2)(e) and (f) deal with similar subject matter, different terminology is used. Section 102(2)(e) refers to "*mineral deposit*" whereas (f) refers to "*mineral ore*".

[36] Collins Online Dictionary
[37] Cambridge Online Dictionary
[38] [2006] WAMW8 at [153]

93. As a general rule where different words are used in a statute it is because the legislature intended those words to have different meanings. Put simply, if a "*mineral deposit*" was all that was required for the purposes of s102(2)(f), then there is no obvious reason why that term was not used instead of "*mineral ore*".

94. The ordinary meaning of the term "ore" is consistent with the view that "*mineral ore*" denotes economic viability. The Oxford Online Dictionary defines ore as "*a naturally occurring solid material from which a metal or valuable material can be extracted profitably*".[39] This is consistent with the evidence of Mr Trevor Bradley, a geologist, as to the meaning of that term in the mining industry. It is also consistent with the JORC Code which defines an "*ore reserve*" as the economically mineable part of a measured or indicated mineral resource. In this instance there is no inconsistency between the ordinary meaning of the term "*ore*" and the meaning attributed to that term in the mining industry.[40]

95. The applicants argued that as s102(2)(f) is in the same terms as it was when the *Mining Act* was enacted in 1978, then s102(2)(f) is not amenable to interpretation by reference to the JORC Code which was first published in 1989.

96. I do not understand Phoenix Hill to suggest that s102(2)(f) takes its meaning from the JORC Code. On the contrary, to the extent that the JORC Code is representative of industry practice the term "*mineral ore*" in s102(2)(f) is consistent with the term "*ore reserve*" as used in the JORC Code.

97. As I observed earlier the applicants concede that there was at that time insufficient confidence in the modifying factors to serve as the basis for a decision on the development of the deposits.[41]

98. That being the case, in my view, it cannot be said that the applicants have established that these five tenements contain mineral ore.

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[39] See also Macquarie Dictionary

[40] ***Staltari v Pharmacy Restructing Authority*** (1995) 36 ALD 555

[41] Applicants' Submissions; 16 November 2017; [45]

Is the mineral ore required to sustain the future operations of an existing or proposed mining operation?

99. Even if I am wrong about the meaning of the term *"mineral ore"*, the applicants are also obligated to establish that the mineral ore is *"required to sustain the future operations of an existing or proposed mining operation"*.

100. It follows that there must be evidence of some decision made during or before the expenditure year that the development of the tenements said to contain mineral ore is to be deferred because the mineral ore on those tenements is *"required to sustain"* future operations of an identifiable existing or proposed mining operation.

101. This is to be contrasted with a decision made after the expenditure year that an exemption will be sought on the basis that mineral ore on tenements that are under expended **could** be used to sustain future operations.

102. The evidence does not support the conclusion that a strategic decision was made by Convergent to defer development of the subject tenements for the expenditure year in question because mineral ore from those tenements was required to sustain future operations on an existing or proposed mining operation.

103. In reality these tenements were under expended because Convergent's focus was to spend what capital it had on developing Blue Vein.

104. As Warden Wilson observed in ***Berkeley Resources Ltd & Anor v Limelight Industries Pty Ltd***:[42]

> *"… for an exemption from compliance with the minimum expenditure conditions on a mining tenement to be granted under a particular ground it must be the case that the reason expressed was in fact the reason for not complying with the expenditure obligations."*

[42] [2013] WAMW 2 at [90]

105. The applicants rely on the following statement from Mr David William Price, the Chief Executive Officer of Convergent from November 2011 to October 2015 as to his expectation following the completion of the scoping studies in October 2013:[43]

> *"In line with this strategy [the development of Blue Vein], I expected that Convergent would drill and develop the Bush Pig, Earl Grey, Darjeeling and other mines within the Mt Holland Project, while the initial mining operation and deeper exploration were occurring at Blue Vein. On that basis, I expected the Blue Vein mine life to extend considerably, possibly beyond five years."*

106. In my view Mr Price's statement amounts to nothing more than a general proposition that other tenements that are yet to be developed may be used to extend the life of the Blue Vein mine.

107. Mr Price's expectation that some tenements would be available to support Blue Vein is merely incidental to Convergent's strategy of developing a mine at Blue Vein. It does not involve the identification of specific tenements on which mineral ore is said to exist or a deliberate strategic decision that the development of those tenements is to be deferred because the mineral ore on those tenements is *"required to sustain"* Blue Vein.

108. Section 102(2)(f) calls for a determination that mineral ore is *"required to sustain"* future mining operations not merely that the tenement holder desires to use it for that purpose.[44]

109. Section 102(2)(f) also calls for the identification of the existing or proposed mining operation that is to be sustained. As is already apparent the applicants rely on the development of a mine at Blue Vein. As explained by Warden Calder in ***Grange***, the word:

> *"'proposed' in par 102(2)(f) means more than a mere expression of intention or hope or expectation … it means at least an identified or planned or recognisable operation that includes activities such as exploration on the ground, desk studies, feasibility studies, adequate identification of*

[43] Ex 7: Affidavit of David William Price; sworn 30 March 2017 at [125]

[44] ***La Perouse Local Aboriginal Land Council v The Minister Administering the Crown Lands Ac***t (1991) LGRA 176 at 182-183

> *resources, in order that reserve classification may be achieved and necessary capital-raising activity. That is not an exhaustive list. I mention those things merely to demonstrate the context in which the activities of Grange concerning Thaduna are to be judged for purposes of determining whether or not there is any proposed mining operation for which the resource of Thaduna is required. It has not been established that there is any proposed mining operation to be undertaken on any of Thaduna, Green Dragon or Horseshoe. It cannot be said that there is a likelihood that there will ever be any such operation carried out by Grange or by any other person. It cannot be said that there is anything beyond a mere possibility that there will be a future operation. That is not sufficient to justify the granting of an exemption for purposes of par 102(2)(f). Paragraph (f) does not say that the resource "may" be required."*

110. Phoenix Rise argues that the pre-feasibility study determined that no ore reserve estimate could be made for the Blue Vein deposit. According to Mr Bradley:

> *"… there was no ore reserve at Blue Vein as at the end of 20115, and no mineral ore. Given that the studies showed that the open pit mining scenarios considered did not add any significant value there could be no future operation for the leases that are the subject of this report to sustain."*

111. Phoenix Rise's submissions in this case, particularly with respect to s102(2)(h), are predicated on the proposed development of a mine at Blue Vein. There is also considerable evidence that supports that conclusion. As I have already explained whether or not Blue Vein is a proposed mining operation is largely irrelevant if sustaining it was not the reason these tenements were under expended.

112. The applicants also rely on the fact that lithium deposits were discovered after the end of the expenditure years. It is said that the proposed mining of the lithium deposits constitutes a *"proposed mining operation"* for the purposes s102(2)(f).

113. As discussed earlier s102(2)(f) calls for the tenement holder to make a decision to defer expending money on some tenements because mineral ore on those tenements is required to sustain the development of other tenements. This requires a decision to be made that the tenement holder's resources are best utilised by such a course of action.

114. To somehow suggest that the identification of lithium after the expenditure year explains a decision purportedly taken during the expenditure year is implausible.

115. To state the obvious, if the circumstance did not exist at the time, then it could not have informed the decision, if in fact there was such a decision, not to develop some tenements with a view to sustaining others in the future.

116. With respect, the applicants' reliance on the lithium deposits has all the hallmarks of an attempt to retrospectively justify under expenditure upon discovering there is a shortfall.

117. The discovery of lithium had no bearing on any strategy not to develop these tenements because they were required to sustain future mining operations if in fact there was any such strategy.

118. The discovery of lithium may have a bearing on the gravity of any breach for the purposes of determining the question of forfeiture. It does not, however, explain any of the decisions taken during the expenditure year that may support the various grounds of exemption.

119. The same can be said of the evidence concerning the deal between Kidman and SQM and the Government of Western Australia's decision to back the project.

120. None of this evidence provides any basis whatsoever for an exemption as it does not explain the under expenditure during the relevant expenditure years.

121. In my view, the applicants are not entitled to an exemption in accordance with s102(2)(f)

Section 102(2)(h)

122. An exemption is sought under s102(2)(h) for E77/1772, E77/2011, E77/2188, M77/1066, M77/1067, M77/1068 and M77/1080, all of which form part of the Mount Holland Combined Reporting Group. Blue Vein (M77/1065) is included in the group and as a consequence expenditure on, or in connection with exploration for minerals on Blue Vein is included when calculating aggregate exploration expenditure.

123. Section 102(2)(h) of the *Mining Act* provides:

> *"(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."*

The meaning of "on, or in connection with exploration for minerals"

124. The first thing to notice is that s102(2a) provides that only expenditure on, or in connection with exploration for minerals can be claimed.

125. The ***Re Calder; Ex parte Lee*** [45]the Court of Appeal considered the meaning of the term "*in connection with mining*". McClure JA said:

> *"As stated by Kennedy J in* ***Flint*** *[46] what is a sufficient connection depends upon the context in which the words are used and, I would add, the scope and purpose of the Act."*

126. McClure JA also referred with approval to the following statement by the Federal Court in ***Collector of Customs v Pozzolanic Enterprises Pty Ltd***:[47]

> *"The range of relationships to which the words [in connection with] apply for the purpose of the Act depends upon a judgment about that purpose."*

[45] [2007] WASCA 161 [38]

[46] ***Re Heaney; Ex parte Flint*** (unreported; WASC; Library No.970065 at 4 (Malcolm CJ & Pidgeon agreeing)

[47] (1993) 43 FCR 280 at 288-289

127. More recently in ***Brewer v O'Sullivan No. 2***, [48] Pritchard J considered the meaning of "*in connection with exploration*". Her Honour concluded that the phrase "*in connection with*", subject to the context in which it is used, is capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote.[49]

128. Pritchard J [50] remarked that:

> *"The words "or in connection with" therefore confirm that the expenditure which can be taken into account for the purposes of s102(2)(h) need not be expenditure on activities which themselves constitute, exploration for minerals. Rather, the expenditure encompasses all expenditure on activities with, or related to, exploration for minerals."*

129. Pritchard J also referred to ***Re Heaney: Ex parte Flint*** [51] in remarking that there may be an overlap between mining activities and exploration activities. This is not surprising given the definition of "mining" in s8 of the *Mining Act* includes "exploration".

130. The term "*exploration*" is not defined in the *Mining Act*. Its ordinary meaning is "the activity of searching or finding out about something".[52]

131. As r58A(2) makes clear aggregate expenditure is to be worked out by adding together the total exploration expenditure shown in each relevant operation report.

132. According to Pritchard J[53] the phrase "*total exploration expenditure shown in each relevant operations report*" refers to the total (that is, the sum) of the various kinds of exploration expenditure which are shown (that is, displayed or made known) in the operations report.

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[48] [2017] WASC 269
[49] At [162]
[50] At [165]
[51] Unreported; FCt SCt of WA; Library No.970065; 26 February 1997 at 4 (Kennedy J, Malcolm CJ & Pidgeon J agreeing)
[52] Cambridge English Dictionary Online+
[53] At [171]

133. Her Honour rejected the contention that only expenditure attributed to "*Mineral – Exploration Activities*" (Part A) in the Form 5 operations report may be used to calculate total exploration expenditure.[54]

134. Regrettably, in ***Brewer v O'Sullivan No.2***[55] Pritchard J was only called upon to address "*the very narrow question*" as to whether aggregate exploration expenditure, for the purposes of s102(2)(h) of the *Mining Act*, is only the total of that expenditure which is attributed to Mining – Exploration Activities in the Form 5 operations report submitted for each tenement in the combined reporting group.

135. Except for rent and rates and preparatory work relevant to exploration for minerals (such as the cost of obtaining expert reports or native title authorisations),[56] ***Brewer v O'Sullivan No.2*** does not address what particular activities can properly be characterised as "*in connection with exploration activities*", for the purposes of calculating aggregate exploration expenditure in accordance with s102(2)(h). Having expressly acknowledged it was not necessary to decide the point, Pritchard J observed that perhaps the only expenditure which is arguably not capable of constituting expenditure in connection with exploration may well be expenditure on mining operations themselves (as defined in s8 of the *Mining Act*).[57]

136. Her Honour went on to say that having regard to potential overlap between expenditure undertaken in connection with exploration and expenditure in connection with mining, it is apparent that what was intended to be excluded from the calculation of expenditure for the purposes of qualification for an exemption in s102(2)(h) was expenditure in connection with mining operations.[58]

137. In ***Re Warden Calder v Lee***,[59] McClure JA in considering the words "in connection with mining" endorsed the comment in ***Flint*** that in the present

[54] At [171]
[55] [2017] WASC 269 at [154]
[56] At [173]
[57] At [177]
[58] At 188
[59] [2017] WASCA 269 at [36]

context, the words "in connection with" can readily extend to matters leading up to mining.

138. If, as Pritchard J suggests, expenditure in connection with mining operations is to be excluded, then this would extend to matters leading up to mining operations.

139. However, given the inevitable overlap between activities in connection with exploration and those in connection with mining operations, s102(2)(h) must be interpreted as excluding activities that can only be described as in connection with mining operations.

140. Section 8 defines *"mining operations"* to mean:

> **"mining operations** *means any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted combusted or refined or dealt with for the purpose of obtaining any mineral or processed mineral resource therefrom whether it has been previously disturbed or not and includes —*
>
> *(a) the removal of overburden by mechanical or other means and the stacking, deposit, storage and treatment of any substance considered to contain any mineral; and*
>
> *(b) operations by means of which salt or other evaporites may be harvested; and*
>
> *(c) operations by means of which mineral is recovered from the sea or a natural water supply; and*
>
> *(da) operations by means of which a processed mineral resource is produced and recovered; and*
>
> *(d) the doing of all acts incident or conducive to any such operation or purposes."*

141. McClure JA in ***Re Calder; Ex parte Lee*** [60]observed that the matters in pars (a), (b) and (c) concern particular aspects of an active mining operation and (d) should be read ejusdem generis with the preceding paragraphs. That is the acts to which par (d) refers must be incidental or conducive to existing (active) mining operations as that expression is generally defined.

[60] [2007] WASCA 269 at [43]

142. For present purposes the final point that emerges from ***Brewer v O'Sullivan No.2*** is that Pritchard J is unable to discern any rationale for adopting a narrow construction of "expenditure on or in connection with exploration for minerals in s102(2a)(a).[61]

143. In confining an exemption under s102(2)(h) to expenditure on or in connection with exploration activities, the legislature has acknowledged the expenditure is only to be aggregated where the focus is on exploration.

144. As a consequence as long as sufficient expenditure on, or in connection with exploration is taking place on at least one tenement within a combined reporting group to meet the minimum aggregate expenditure for the entire group, an exemption may be granted.

145. That s102(2)(h) is confined in this way, suggests that the legislature acknowledges that it is legitimate to focus on one or some of the tenements in a combined reporting group where exploration is concerned but not otherwise.

146. As Pritchard J [62] observed ordinarily, the holder of a mining tenement is required to file a mineral exploration report in conjunction with an operation report for the tenement.

147. Section 115A defines a "mineral exploration report" to mean:

> *"a report containing records of the progress and results of –*
>
> *(a) programmes involving the application of ore or more of the geological sciences;*
>
> *(b) drilling programmes;*
>
> *(c) activities involving the collection and assaying of soil, rock, ground water and mineral samples,*
>
> *that have been carried out in search for minerals."*

[61] at [179]

[62] ***Brewer v O'Sullivan*** [2017] WASCA 269 at [156] see also s115A(2)(a) *Mining Act*

148. Section 115A(4) permits the Minister to approve a tenement holder filing a single combined mineral exploration report for two or more mining tenements notwithstanding the ordinary requirement that such a report be filed in conjunction with the operations report for each tenement.

149. In determining the scope of s102(2)(h) the essential question is why has the legislature chosen to confine the operation of s102(2)(h) to expenditure, in connection with exploration activities?

150. As a consequence of the Full Court decision in ***Re Calder; Ex parte St Barbara Mines Ltd***[63] holding that s102(2)(h) was not confined to expenditure in connection with exploration, the *Mining Act* was amended in 2004.

151. In the second reading speech to the *Mining Amendment Bill 2004 (WA)* the Honourable Ken Travers explained:

> *"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 a 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 licences in the project area effectively without being explored."*

152. The distinction between mining and exploration seems to be based on an appreciation that during the exploration phase it may not be practical or efficient to simultaneously explore each tenement in a combined reporting group. The exploration of one or two tenements in the group may provide a sufficient indication as to the mineralogy that exists on the other tenements in the group. This is particularly so where the tenements in the group are contiguous. The fact that a single combined mineral exploration report can be filed for a combined reporting group supports this conclusion. Mining operations, on the other hand, takes place after exploration has occurred. By then the tenements holder should know what tenements can and cannot be productively mined.

[63] (1999) WASCA 25

153. Against that background, were s102(2)(h) to apply to mining activities it would encourage the warehousing of tenements on the basis that one or other of the tenements in the group are being exploited. This is inconsistent with the object of the *Mining Act*, that expenditure occur on each tenement annually. Section 102(2)(h) operates as an exception to the general rule.

Calculating expenditure on, or in connection with exploration for minerals

154. As I have already foreshadowed, rent and rates for all the tenements the subject of a combined reporting group must be included.[64]

155. The next step is to determine what expenses can be verified. For example, even if expenditure can be characterised as on, or in connection with exploration, it can only be included if legitimately expended.

156. Mr Stephen Richard Hurlihy the principal of accounting firm Ledgia, provided a report verifying the expenditure claimed.

157. Mr Hurlihy was not tasked with examining how various items of expenditure were characterised (ie Part A or B). On the contrary, Mr Hurlihy's sole task was to examine whether there was evidence to support the amounts claimed.[65]

158. Only where sufficient and appropriate evidence was available from which a reasonable conclusion could be drawn that a cost had been incurred, would Mr Hurlihy deem it to be verified.[66]

159. Mr Hurlihy's evidence was not seriously challenged in cross-examination nor was it contradicted by another expert.

160. It was put to Mr Hurlihy that he did not include an invoice for $20,200.00 (DMMS40) issued by Dujolan Mine Management Services in the figure of

[64] ***Brewer v O'Sullivan No. 2*** [2017] WASC 269 at [156] at [173]
[65] t/S 15/11/17 at 33
[66] t/s 15/11/17 at 33

$484,418, being verified exploration expenditure on Blue Vein for the year ending 12 December 2015.

161. Mr Hurlihy was unable to confirm whether this invoice had been accounted for without looking through the records provided to him. He pointed out that if it was not verified it should have appeared in the unverified expenditure in either column B or D of his report.[67]

162. It is apparent when examining Mr Herlihy's report that when all the deductions in columns B, C, D, E are added together they equal $172,632.00. When that figure is deducted from $657,049 (claimed expenditure), it equals $484,417.00 (verified expenditure). But for $1, this is consistent with Mr Hurlihy's calculations. It follows that if the invoice for $20,200.00 was not verified by Mr Hurlihy then it would appear in either of columns B, C, D or E. If it was included in column B, then that was an adjustment made by Kidman. Column C sets out expenditure for which no data was provided, however, all of those expenses relate to tenements other than M77/1065.

163. That leaves column D (unverified expenditure) as the only other option. However, both items in that column have been particularised. Of the $33,432.00, $582.00 related to consultant costs and $32,850.00 related to Regional Geologist (Edward Fry).[68]

164. To summarise, if $20,200.00 was claimed by Convergent but not verified by Mr Hurlihy or accounted for in column B, C, D, or E, then the figures would not add up.

165. I accept Mr Hurlihy's evidence. Accordingly, I find that only $484,418.00 of the $598,486.00 claimed as exploration expenditure for Blue Vein for the year ending 12 December 2015 was verified. I have also included the Part A

[67] t/s 15/11/17 at 36
[68] Ex 13: Affidavit of Stephen Richard Hurlihy; sworn 28 July 2017 at 11

expenditure for M77/1066 ($4585) for the expenditure year ending 12 December 2014 as Mr Hurlihy did not suggest it could not be verified.

166. Ms Skye Stewart, Executive Manager at Kidman Resources testified that she reviewed the Form 5 Operations Reports for each of the Tenements for the relevant expenditure years.[69] Ms Stewart was cross-examined as to the apportionment of administration costs across the Mt Holland Combined Reporting Group based on Convergent's records. Administration costs were purportedly distributed across the tenements according to how much on the ground work had been conducted in relation to each tenement.[70]

167. As Ms Stewart conceded, in reality there was no correlation between the work done on the ground and the apportionment of administration costs. A number of tenements with respect to which no work on the ground had been carried out had administration costs allocated to them.[71] Moreover, with respect to some tenements where Part A expenditure was claimed it could not be verified by Mr Hurlihy as there was no data.[72]

168. Ms Stewart testified that Hamlet Hacobian, the former Chief Financial Officer of Convergent, was responsible for collating the expenditure information for the purpose of the Form 5 Operations Reports and providing that information to Austwide (tenement managers) so that it could complete and submit the Reports.[73]

169. With respect to verifying the expenditure information Ms Stewart said:

> *"it was my estimation of what I thought Hamlet had been thinking as the way he had applied the costing of the administration towards the licences".*[74]

170. Mr Hacobian was not called to give evidence nor was any explanation offered as to his non-attendance.

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[69] Ex 9: Affidavit of Dominique Skye Stewart; sworn 5 April 2017 at [24]
[70] t/s 14/11/17 at 83
[71] t/s 14/11/17 at 85
[72] Ex 13: Affidavit of Stephen Richard Hurlihy; sworn 28 July 2017 at 6
[73] Ex 9: Affidavit of Dominique Skye Stewart; sworn 5 April 2017 at [30]
[74] t/s 14/11/17 at 84

171. In addition, there was also a practice of allocating administrative costs on the basis of a formula whereby 20% of the minimum expenditure requirement was attributed to administration costs for each tenement in the group.[75]

172. Regulation 96C(3) of the *Mining Regulations 1981 (WA)* provides:

> *"(3) Administration and land access costs relating to land which is the subject of a mining tenement may be used in the calculation of expenditure expended on, or in connection with, mining on the mining tenement, but only up to 20% of the minimum commitment, or 20% of the total expenditure on the mining tenement, whichever is the greater amount."*

173. 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 reg 96C(3) is to ensure that mining takes place and that administration costs are not over represented in the total amount claimed. Regulation 96C(3) does not sanction the practice of allocating 20% towards administration expenses automatically without recourse to what was actually expended on administration.

174. This is consistent with Warden Calder's remarks in ***Mawson West Ltd & Anor v Saruman Holdings Pty Ltd*** [76]

> *"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".*

[75] Phoenix Rise; Aide Memoire; MFI 8
[76] (2010) WAMW 10 at [52-[53]

175. The applicants argue that Phoenix Rise's submission that all claimed administration costs must be excluded because there is no *"on the ground work"* is based on a false proposition that on the ground work is required.

176. While I agree that administration costs may be derived from work other than that done on the ground, that is not the issue.

177. The applicants advanced evidence in support of the proposition that Convergent based its allocation of administration costs on the basis of work done on the ground when a proper analysis of Convergent's records would have revealed that that proposition could not be maintained.

178. That being the case it is not for the Warden to search the expenditure records with a view to identifying an alternate basis on which the expenditure claimed can be justified.

179. As Warden Wilson made clear in ***Blackfin Pty Ltd v Mineralogy Pty Ltd***:[77]

> *"It is not the role of the Hon. Minister or his delegate or that of the warden to conduct an audit of masses of accounting records in search of the manner in which the applicant for exemption claims to have expended money or carried out work commensurate with expenditure on a mining tenement."*

180. His Honour expressed similar sentiments in ***Pawson v Northwestern Mining Co P/L and Anor:***[78]

> *"The condition of grant of any mining tenement that requires compliance with minimum expenditure conditions and the reporting of that expenditure places upon the holder of the mining tenement an obligation to maintain legible and accurate records sufficient that it can provide in accordance with its obligations an annual report of allowable expenditure that is readily ascertainable, accurate and justifiable. It is not the role of the warden to engage in some form of arithmetic gymnastics to justify an obligation upon the holder of a mining tenement who does not keep records in such a fashion that meets those obligations."*

181. Finally, in ***Brosnan v JSW Holdings P/L*** Warden Wilson observed:[79]

[77] [2013] WAMW 19 at [143]
[78] [2013] WAMW 8 [59]
[79] [2011] WAMW 8 at [10]-[13]

> *"The completion of the Form 5 by the holder of a mining lease is an important task. It is the method prescribed by Parliament by which the Honourable Minister can satisfy him or herself that a condition of grant of a mining lease, to meet a minimum prescribed level of expenditure on the mining lease, has been complied with in each expenditure year. …*
>
> *The task of completing the Form 5, in my opinion, goes further than merely reporting the amount of expenditure in an expenditure year on the mining lease. The registered holder of a mining lease is required to not only show the amount expended in dollar value but must also provide sufficient particulars of the activity undertaken on the mining lease such that the Honourable Minister can determine the amount expended was 'in mining on or in connection with mining operations' on the mining lease.*
>
> *It is not the case, from the plain reading of the Mining Act or Regulations, that the Honourable Minister should be required to speculate or infer whether the expenditure claimed by the holder of a mining lease in a Form 5 was expended 'in mining on or in connection with mining operations' on the mining lease."*

182. In my view, the administration expenses attributed to those tenements on which there was no work on the ground have not been verified and cannot be taken into account.

183. In addition, given the evidence as to the practice of allocating administration costs on the basis of a formula using 20% of the minimum expenditure requirement, the $20,000 allocated to M77/1066 for the year ending 12 December 2014, even though the Part A expenditure was only $4854, is not verified.

184. The final step is to consider what expenses can legitimately be characterised as expenses "*on, or in connection with exploration for minerals*". As I pointed out earlier Pritchard J was not called upon to definitively resolve this question in ***Brewer v O'Sullivan No.2***.[80]

185. A significant portion of the expenditure said to relate to mineral exploration for the Mount Holland Combined Reporting Group is attributed to Blue Vein.

[80] Although ***Brewer v O'Sullivan No.2*** is the subject of an appeal to the Court of Appeal, given the narrow question considered by Prtichard J, there is no guarantee the Court of Appeal will definitively resolve this question.

186. Mr Price[81] was cross-examined at length about expenditure in relation to Blue Vein.

187. Mr Price agreed that during the latter half of 2014 and into 2015[82] Convergent was focused on and spending money on developing the Blue Vein underground mine.[83]

188. Mr Price also agreed that the announcement to the ASX on 30 April 2014 confirmed that the pre-feasibility study was on track for completion in May and that Convergent was undertaking work on designing an underground mine at Blue Vein.[84]

189. On 24 June 2014 Convergent made an announcement to the ASX that:

- the pre-feasibility study into commencing underground mining at the Blue Vein project has been completed;
- processing facilities for the proposed mine were being designed by Sedgman Limited; and
- matters under consideration included how ore was to be delivered from underground mine and how it was to be crushed.[85]

190. In Convergent's Annual Financial Report for the year ended 30 June 2014 the Chairman said:

> *"During the next 12 months, the construction of plant is expected, a mine camp will be established, site infrastructure will be upgraded as required and the underground decline to first ore is expected to be complete."*[86]

[81] Ex 7; Affidavit of David William Price (The Chief Executive Officer of Convergent from November 2011 to October 2015 (now a contract geologist with Kidman); sworn 30 March 2017 at [8]-[9]
[82] Ex 7: Affidavit of David William Price; sworn 30 March 2017 at [8], [9]
[83] t/s 14/11/17 at 38
[84] t/s 14/11/17 at 36-37
[85] t/s 14/11/17 at 37
[86] Applicants' Book of Documents; Vol 2; 56 at 3

191. In a presentation dated August 2014 that was released to the ASX, Mr Price noted that gold production was planned from the proposed Blue Vein mine in 2015 for the first 3 years.[87]

192. On 16 September 2014 Convergent made an announcement to the ASX [88] that:

- advanced studies and permitting work continues on schedule to enable development of the Blue Vein Project to commence in early 2015; and
- the following key development steps have been completed including:
  - site water characterisation
  - flora and fauna surveys
  - landform/landfill assessment
  - third round gravity tests
  - aerial topographic survey
  - initial Tailing Storage Facility (TSF) assessment
  - grind optimisation studies
  - initial Department of Mines and Petroleum consultation
  - initial Department of Environment consultation.
- other key development steps are in progress:
  - tailings geotechnical sample analysis
  - acid mine drainage test work
  - second stage TSF assessment
  - mining proposal documentation
  - mine closure plan.

193. On 9 December 2014 Convergent announced to the ASX [89] that a number of key development steps have been completed including:

[87] t/s 14/11/17 at 38
[88] t/s 14/11/17 at 39
[89] Applicants' Book of Documents; Vol 2; ASX Announcements; 58

- mining proposal submitted
- land clearing permit submitted
- mine closure plan submitted
- fauna management plan submitted
- open cut and underground mining tender documents circulated to potential contractors
- tailings geotechnical sample analysis complete
- acid mine drainage test work complete

194. The announcement goes on to say that all required permits are anticipated to be received by the end of February 2015, with contractor selection due shortly thereafter.

195. On 4 February 2015 Convergent announced to the ASX [90]that:

- Blue Vein Project remains on track for development in 2015;
- Geotechnical drilling underway at the site of the proposed portal;
- Mining Proposal and Mine Closure Plan submitted;
- Proposals received from open cut and underground mining contractors;
- Existing Carbon in Pulp ("CIP") plants in Australia being assessed for acquisition to minimise capital costs.

196. The announcement goes on to explain that diamond drilling has commenced as part of the development phase of the project. The drilling is designed to provide geotechnical information on the walls of the planned open pit, as well as ground conditions at the proposed portal locations and the path of the planned decline for the underground mine.

197. Mr Price explained the portal is where entry to the underground mine occurs and that the drilling was directed at confirming it was a safe site to enter

[90] Applicants' Book of Documents; Vol 2; ASX Announcements; 60

underground.[91] The compression strength testing was undertaken to assess to ground conditions of the void to ensure it was in good condition.[92]

198. On 30 April 2015 Convergent announced to the ASX[93] that it was pursuing a low-capital cost development based on the current resources and pre-feasibility study.

199. On 31 July 2015 Convergent announced to the ASX that the final permit for power allocation is awaited which completes all permitting to commence development at Mt Holland.[94]

200. Mr Price confirmed that that would then complete all permitting to commence development in the sense of construction work.[95]

201. Mr Price also confirmed that the 2014 Annual Report outlined the steps that Convergent planned to take in the 12 months to September 2015. These included:

- construction of the processing plant;
- establishment of an accommodation camp;
- upgrades to site infrastructure; and
- the mining of the first ore from the underground decline at Blue Vein.[96]

202. Against that background Phoenix Hill argues that significant aspects of the expenditure claimed relate to the development of the Blue Vein mine and cannot be characterised as on, or in connection with exploration.

203. This includes expenditure attributed to the pre-feasibility study ($245,352.00) and engineer ($92,143.00) for the year ending 12 December 2015 and the pre-feasibility study ($1,458,004.00), engineer ($353,000.00) and scoping studies ($20,350.00) for the year ending 6 October 2015.

[91] t/s 14/11/17 at 40
[92] t/s 14/11/17 at 42
[93] Applicants' Book of Documents; Vol 2; ASX Announcements; 65
[94] Applicants' Book of Documents; Vol 2; ASX Announcements; 73
[95] t/s 14/11/17 at 43
[96] Ex 7; Affidavit of David Price; 30 March 2017 at [175]

204. The pre-feasibility study involved the engagement of various consultants. This included Sedgman Limited who undertook plant engineering and grinding studies. It also included Entech who carried out the underground mine design.[97]

205. Mr Price agreed that Jon Lilly from Dujolan Mine Management Services was involved in the process of preparing the pre-feasibility study and that all the services provided by Dujolan and the engineers assisting Mr Lilly were in relation to the pre-feasibility study and the planning for the mine development.[98]

206. Mr Price also agreed that the scoping study was the precursor to the pre-feasibility study.[99]

207. On 2 October 2013 Convergent announced to the ASX the results of its scoping studies into the recommencement of mining at the Mt Holland Project.[100]

208. According to Mr Price the scoping studies were conducted to test a number of potential production options, for example –[101]

    (a) underground mining at Blue Vein and open cut mining at Van Uden using heap leach processing;

    (b) underground mining at Blue Vein and open cut mining at Van Uden using trucking to a new processing facility;

    (c) underground mining at Blue Vein and open cut mining at Van Uden using CIP extraction;

    (d) underground mining at Blue Vein and open cut mining at Van Uden using CIP extraction and heap leaching.

209. Mr Price confirmed that the scoping studies demonstrated that convergent could commence production by establishing an underground operation at Blue Vein

[97] t/s 14/11/17 at 44
[98] t/s 14/11/17 at 45
[99] t/s 14/11/17 at 45
[100] Ex 7; Affidavit of David William Price; sworn 30 March 2017; at [120]
[101] Ex 7; Affidavit of David William Price; sworn 30 March 2017; at [122]

with an initial two and a half year mine life with throughput to the processing plant at 300,000 tonnes per annum.[102]

210. Mr Price acknowledged that the pre-feasibility study focused upon initial surface underground mining at the Blue Vein deposits and related only to the design and development of the Blue Vein mine. No other pre-feasibility studies were done in 2014.[103]

211. The Form 5 Operations Report [104] for Blue Vein for the period 13 December 2013 to 12 December 2014 includes an amount of $685,968.00 for the pre-feasibility study and $20,380.00 for the scoping study. Mr Price confirmed that the mining engineering costs of $353,009.00 related to development work that was announced to the market in relation to the Blue Vein Gold Mine.[105]

212. The Form 5 Operations Report for Blue Vein for the period 13 December 2014 to 12 December 2015 [106] includes an amount of $245,352.00 for pre-feasibility study and $126,225.00 for "*engineer*".

213. According to Mr Price the pre-feasibility study had actually been concluded before this reporting period in June 2014. However, he agreed that to the extent that the pre-feasibility study had recommended matters, they were being implemented during this period. Mr Price agreed "that was all in the aim of developing the Blue Vein mine".[107]

214. Mr Price also agreed that costs for the item "*engineer*" was a reference to mining engineering costs in relation to the development of the Blue Vein Mine.

[102] Ex 7; Affidavit of David William Price; sworn 30 March 2017; at [124]
[103] t/s 14/11/17 at 46
[104] Drop Box Folder; Vol 4; 1077
[105] t/s 14/11/17 at 47 & 48
[106] Drop Box Folder; Vol 5; 1389
[107] t/s 14/11/17 at 52

215. As at 1 October 2015 Mr Price's employment with Convergent was terminated. As a consequence Mr Price was only employed by Convergent for nine months of the 2014/15 reporting year.

216. Mr Price disagreed that during this period there was no work being done in relation to the pre-feasibility study any more. He referred to comments made by Entech that prompted further drilling with a view to bringing more resources into the measured and indicated category.[108]

217. The invoices relied upon in support of the $245,352 attributed to the pre-feasibility study include liaising with the Department of Water regarding abstractions licensing. Mr Price conceded that this was not exploration but mine development.[109]

218. Mr Price also agreed that the new 630 Kilovolt power supply from Western Power was to secure power to the proposed camp at the mine.[110]

219. Other items of expenditure included underground mine design to effectively establish the mine and the camp design where workers would reside. There is also an item for Lakewood Plant Inspection which involved whether a second hand carbon in pulp plant could be used to process ore at Blue Vein.[111]

220. Mr Price ultimately conceded that all these charges are to do with establishing – developing the mine at Blue Vein.[112]

221. The line between expenditure that is in connection with exploration and expenditure in connection with mining operations is a matter of judgment having regard to the subject matter, scope and purpose of the *Mining Act*.[113]

[108] t/s 14/11/17 at 51
[109] t/s 14/11/17 at 56
[110] t/s 14/11/17 at 56
[111] t/s 14/11/17 at 58 & 59
[112] t/s 14/11/17 at 60
[113] ***Re Calder; Ex parte* Lee** [2007] 161 WASCA [38]

222. In theory, even mining operations could be considered to be in connection with exploration in the sense that exploration is invariably a precursor to active mining. Such a construction, however, would not give effect to the object of the *Mining Act* which seeks to distinguish between matters that are on, or in connection and with exploration and those on, or in connection with mining operations.

223. In my view, s102(2)(h) is directed to including expenditure on exploration together with those activities that are not exploration but have to do with exploration.[114] For example, the setting up of a camp to accommodate those carrying out exploration is incidental to exploration.

224. Exploration does not occur in a vacuum. Those costs associated with exploration are duly recognised by the words "*in connection with*" in s102(2)(h).

225. The applicants contend that all activities that fall short of productive mining ought to be characterised as in connection with mineral exploration.[115]

226. In my view, the fact that s102(2)(h) is confined to expenditure "*on, or in connection with exploration for minerals*" is demonstrative of an intention on the part of the legislature that once there is a shift in focus from exploration to active mining, an exemption under s102(2)(h) is no longer available. Of course, from a practical perspective, further exploration may take place despite the focus shifting from exploration to mining. For that reason, it is not inevitably the case that once mine development is underway, all expenditure thereafter is to be characterised as in connection with mining only.

227. Even acknowledging the potential overlap between mining and exploration and the fact that there is no bright light test, it is difficult to characterise the expenditure on the pre-feasibility study and engineering as expenditure on, or in connection with exploration.

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[114] ***Re Calder; Ex parte Lee*** [2007] 161 WASC [37]
[115] t/s 16/11/17 at 74

228. Where, as in this case, Convergent was in the process of developing a mine at Blue Vein, in my view, costs associated with establishing mining operations are properly to be characterised as expenditure in connection with mining operations only. For example, I have difficulty seeing how getting power connected to enable mining to commence operation or having an engineer investigate the structural integrity of the portal and walls of an open cut mine could be characterised as "*on, or in connection with exploration*". Neither activity is incidental to or is in any way directed to facilitating exploration.

229. I would, however, include expenditure contained in the pre-feasibility study with respect to further drilling at Blue Vein with a view to bringing more resources into the measured and indicated category.[116]

230. Although the cost of drilling is amenable to characterisation as "*on, or in connection with exploration*", the applicants did not lead any evidence as to the extent of the drilling directed to that purpose or what it cost.

231. Also, having examined the information in the scoping studies, I am satisfied that they can properly be charactered as expenditure in connection with exploration for minerals.

232. While the scoping studies are a precursor to the pre-feasibility study, they differ from it in a material respect. The pre-feasibility study was directed to developing a mine at Blue Vein. The scoping studies, however, involved an evaluation of data realised from exploration with a view to determining if mining operations were viable. At that stage no decision had been made to develop a mine at Blue Vein.

233. I appreciate that the Form 5 Operations Report includes instructions that indicate that certain activities fall within mineral exploration activities. One such example is a "*feasibility study activities*".

[116] t/s 14/11 at 51

234. Not only do the instructions as to the completion of the Form 5 have no force in law but whether an activity is characterised as mineral exploration or mining is a question of fact. Expenditure should be characterised based on the nature of the activity not the label ascribed to it.

235. The use of the term "*pre-feasibility study*" suggests that what was occurring was very preliminary or speculative. In reality, it involved steps in preparation for active mining.

236. If combined aggregate expenditure for the Mt Holland Combined Reporting Group is calculated based on the following parameters:

- Mr Hurlihy's verified Part A expenditure for Blue Vein;
- The inclusion of administration costs for Blue Vein;
- The inclusion of Part A expenditure for M77/1066 for the year ending 12/12/14 (for the purposes of E77/2118 and E77/2011 only)
- The inclusion of rent and rates for all the tenements in the group;
- The exclusion of expenditure on the "*pre-feasibility study*" and "*engineer*";

the calculations are as follows:[117]

For M77/1066, M77/1067, M77/1068 and M77/1080 for the year ending 12 December 2015

Pro rata minimum expenditure		$551,933
Verified Part A expenditure Blue Vein	$484,418	
less "pre-feasibility study"	($245,352)	
and "engineer"	($92,143)	

[117] I have relied on the tables annexed to Phoenix Rises' closing submissions. Although the applicants did not agree that some items of expenditure should be excluded, they did not dispute the accuracy of the figures used.

	$280,191[118]	
ADD:		
Administration costs Blue Vein	$ 19,200	
Rent and rates	$149,162	
	$449,162	$449,162
Amount below minimum		$102,771

237. Even if all the drilling expenses claimed during the expenditure year are treated as exploration expenditure, the total is still below the pro rata minimum:[119]

Terra Drilling Pty Ltd

• 21/01/15 – 24/01/15	$19,523.71
• 25/01/15 – 27/01/15	$14,780.62
• 28/01/15 – 1/02/15	$16,037.52
	$50,341.95

For E77/2188 for the year ending 6 October 2015

Pro rata minimum expenditure		$622,000
Verified Part A expenditure Blue Vein	$1,458,004	
less "pre-feasibility study" ($685,968) and "engineer" ($353,009)	$ 419,027	
ADD:		
Part A expenditure M77/1066	$ 4,854	
Administration costs Blue Vein	$ 19,200	

[118] I have used the figure provided by Phoenix Rise. If $245,352 and $92,143 are deducted from Mr Hurlihy's figure of $484.418, then $280,191 is reduced to $146,923.
[119] Dropbox folder, Vol 5; 1566, 1574 & 1582

Rent and rates	$ 154,136	
	$ 597,219	$597,219
Amount below minimum		$ 24,783

For E77/2011 for the year ending 7 October 2015

Pro rata minimum expenditure		$622,000
Verified Part A expenditure Blue Vein	$1,458,004	
less "pre-feasibility study" ($685,968) and "engineer" ($353,009)	$ 419,027	
ADD:		
Part A expenditure M77/1066	$ 4,585	
Administration costs Blue Vein	$ 19,200	
Rent and rates	$ 154,136	
	$ 597,219	$597,219
Amount below minimum		$ 24,783

For E77/1772 for the year ending 13 December 2015

Given the expenditure year for E77/1772 ends the day after that for M77/1066, M77/1067, M77/1068 and M77/1080, the calculations that relate to those tenements provide an accurate indication of the position concerning E77/1772. Accordingly, expenditure on E77/1772 is $102,771 below the minimum.

As the amount expended on the Mt Holland Combined Reporting Group during the expenditure years is below the minimum commitment, the applicants are not entitled to an exemption under s102(2)(h).

Section 102(3)

238. The applicants seek an exemption under s102(3) in relation to all the Tenements.

239. Section 102(3) provides that:

> *"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 on which in the opinion of the Minister is sufficient to justify such exemption."*

240. The role of the Warden is to report to the Minister on whether an applicant for exemption has raised any other reason sufficient to justify granting an exemption in what has been described as a *"catch all provision of the Act"*[120].

241. The applicants rely on a number of grounds to justify the invocation of s102(3):

> *"In the circumstances of this case, 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 Convergent on the Mt Holland Project as a whole from November 2011 (when Convergent and AFL merged, significantly changing the board composition) until Administrators were appointed to Convergent in September 2015. Convergent's expenditure for the 2013, 214 and 2105 expenditure years was approximately $4.5 million[166];*
>
> *(b) Convergent's sustained, but ultimately unsuccessful, efforts to obtain funding during the 2015 expenditure year (as noted above), which led to the Administration of Convergent in September 2015;*
>
> *(c) the prudent conduct of the Administrators in maintaining the tenements and preserving the assets comprising the Mt Holland Gold Project, and selling the company's assets (that is, the relevant subsidiaries) to Capri, which sold the entities to a proven and capable gold producer, Kidman Resources;*
>
> *(d) the substantial mineral deposits, including Mineral Resources, located on the Tenements, which are being systematically reviewed and assessed by Kidman for the purposes of the developing the Mt Holland Gold Project and the Earl Grey Lithium Project (as noted at paragraphs 168-181 above);*
>
> *(e) the significant steps already taken by Kidman to develop the Tenements, including expenditure of some $3.7 million on the*

[120] ***Newmont Duketon Pty Ltd v Angelopoulos*** [2006] WAMW 20

> *Tenements during the 2016/17 financial year and the announcement of a maiden Mineral Resource estimate for the Earl Grey lithium deposit of 128 million tonnes at 1.44% Li_2O, containing 4.54Mt of Lithium Carbonate Equivalent;*
>
> *(f) the entry by Kidman into a $110 million joint venture with SQM to develop the lithium deposit located on the Tenements, as announced to the ASX on 12 July 2017, and endorsed by the Minister for Mines, who called it a "landmark agreement" on 12 July 2017 (see affidavit of Lauren Shave sworn 13 July 2017 at page 13), and by the Premier of Western Australia on 16 October 2017 when "Level 2 Lead Agency Service" status was conferred on the Mt Holland Lithium Project (as noted at paragraphs 88-92 above);*
>
> *(g) the Minister for Mines has noted the significant number of jobs that will be created for the State of Western Australia during both the construction phase and the operational stages of the project (see affidavit of Lauren Shave sworn 13 July 2017 at page 13); and*
>
> *(h) Kidman expects to be in production within 12 months and plans include a downstream lithium refinery, which (in the words of the Minister for Mines) will increase the [State of Western Australia's] presence in this emerging field" (see affidavit of Lauren Shave sworn 13 July 2017 at page 13).”*

Events after the Expenditure Years

242. Many of the grounds advanced by the applicants refer to events after the reporting years. It must be remembered that Kidman did not acquire the Tenements until after the expenditure years. It follows that the discovery of lithium and the agreement with SQM all took place subsequent to the expenditure year.

243. The applicants’ point to a number of reasons why events post the expenditure year can be taken into account.

244. First, it is said there is no temporal limitation arising from the text of s102. Support for this proposition is to be found, according to the applicants, in reg 54

which provides that a tenement holder has 60 days to lodge an application for exemption and reg 54(3) which allows a further 28 days to lodge an affidavit.

245. The fact that some time is allowed after the expiry of the expenditure year to apply for an exemption does not, in my view, support the applicants' position.

246. As Phoenix Rise point out, the allowance of further time after the end of the expenditure year to make an application caters for the fact that the tenement holder may not know the final position on expenditure until the last day of the expenditure year. The legislation accommodates the fact that a tenement holder may need time to assess its position and prepare an application and affidavit.

247. Second, reliance is placed on the statement by Pullin JA in ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor***[121] that the reasons set out in s102(2) "*all involve showing a state of affairs which exist at the time of the application*".

248. I agree with Phoenix Rise that too much is made of the statement of Pullin JA in ***Haoma***. I do not understand his Honour to be expressing the view that events after the expenditure year can be taken into account. It is more likely that Pullin JA was referring to a state of affairs that existed during the expenditure year.

249. Third, it is said that it would be artificial for the Minister, in exercising his discretion, whether or not to grant the application, to not also consider events subsequent to the expenditure year insofar as they bear on the reasons relied upon by the applicant for exemption.

250. I agree that there may be occasions where events post the expenditure year may be relevant to what took place during the expenditure year. However, in this case the post expenditure year events relied upon by the applicants fail to explain why the minimum commitment was not met, and are therefore not relevant.

[121] (2006) 31 WAR 270 at [76]

251. The applicants' submissions ignore that the essential question posed by s102(3) is whether there is some sufficient reason why the tenement holder did not meet the expenditure commitment.

252. The approach advanced by the applicants seems to focus attention on whether there is some reason why they should be able to retain the Tenements. That is not the purpose of these proceedings.

253. For example, neither the discovery of the lithium deposits nor the $110m joint venture with SQM shed any light on why there was under-expenditure during the expenditure year in question. The same can be said for the assertion that a significant number of jobs will be created in the future.

254. Fourth, the applicants say that the text of s102 does not limit the period to be considered when determining an application for exemption. The applicants also point to the obligation on the Minister to have regard to *"the work done and the money spent on the mining tenement"* by the tenement holder. Reliance is placed on s102(4) and its interpretation by the Court of Appeal in ***Haoma***.[122]

255. As I pointed out earlier, a temporal nexus is inherent in s102 given the expenditure commitment for each tenement must be met annually.

256. Moreover, nothing in the passages from ***Haoma*** relied upon aids the applicants' construction. Section 102(4) calls for a consideration of historical expenditure and current grounds for which exemptions have previously been granted.

257. As Phoenix Rise identified this is evident from the following passage from Steytler P:[123]

> *"The legislature may well have thought that the fact of a prior exemption on the same ground was especially relevant. So, for example, it might, depending on the circumstances, indicate that, as a matter of consistent decision making, a similar exemption should again be given. Alternatively, the fact of repeated applications based upon the same ground might cast*

[122] At [61] and [78]
[123] At [60]

> *doubt on the ability, or willingness, of the tenement holder to satisfy conditions attaching to the grant of the tenement".*

258. Sixth, it is said that numerous authorities have considered events subsequent to the expenditure year. The applicants rely in particular on ***Siberia Mining Corporation Pty Ltd v Wilson.***[124] The applicants contend that in the following passage Allanson J lends support to their construction.

> *"First, the warden did not misdirect himself as to the relevant time period. He expressly considered whether, following its emergence from administration, Swan required further time to raise capital in respect of the Leases: He dealt with the evidence regarding the cash reserves available in months after the recapitalisation, the circumstances for investment between March and May 2010, the situation regarding funding between July 2010 and October 2011, and the decision in November 2010 to place Swan's assets on care and administration."* (Footnotes omitted)

259. I do not agree with the applicants' analysis of ***Siberia Mining***. Siberia's ground of review, alleged that the Warden erroneously considered that a transaction, which was completed prior to the expenditure year, had the effect that time was not required during the expenditure year to raise capital for future exploration or mining.[125]

260. The passage relied upon by the applicants is in response to the ground of review outlined above and does not directly address the relevance of events post the expenditure year. The reference by Allanson J to the matters referred to by the Warden in considering the transaction is not an endorsement that events after the expenditure year that do not explain the failure to meet the expenditure commitment ought to be taken into account.

261. In fact Allanson J concluded that s102(2)(b):

> *"[is] not so expressed as to exclude consideration of transactions entered into before the relevant expenditure year if the transactions are relevant to the question".*

[124] [2015] WASC 322
[125] At [61]

262. In ***Inca Minerals Limited v Brewer***,[126] Warden Hall in considering s102(2)(b) referred to conduct post the expenditure year in concluding that Inca's plan was credible. This is consistent with the view I expressed in ***Oz Youanmi v Gold Pty Ltd v St Clair Resources Pty Ltd***,[127] that events post the expenditure year may bear on the veracity and credibility of the plans made during the expenditure year.

263. ***Inca Minerals*** is not, however, authority for the proposition that post expenditure year events are relevant even though they do not explain the failure to meet the minimum commitment for the year in question.

264. Finally, the applicants contend that they ought to have the opportunity to demonstrate, by their conduct in relation to the Tenements after the expenditure years, that they are acting consistently with the purpose and objectives of the *Mining Act.*

265. This submission, yet again, ignores that the fundamental question posed by s102 is whether the expenditure commitment for the tenement in question was not met because of one of the reasons enumerated s102(2) or some other sufficient reason in accordance with s102(3)?

266. The applicants' desire to establish that Kidman's conduct post the expenditure year is consistent with the objects and policy of the *Mining Act* does not answer that question. On the contrary, it seems to conflate exemption from expenditure with forfeiture (as to which I express no opinion) where events post the expenditure year may be relevant in assessing the gravity of the breach.[128]

The nature of the power in s102(3)

[126] [2018] WAMW 9
[127] [2018] WAMW 5 at [78]
[128] ***Re Warden Calder; Ex parte Brosnan [No.2]*** [2012] WASC per Heenan J at [87]; ***Rose v Goldtime Australia Pty Ltd*** [2004] WAMW 8 at [43]

267. The power vested in the Minister to grant a certificate of exemption in accordance with s102(3) of the *Mining Act* is broadly expressed as *"any other reason … which in the opinion of the Minister is sufficient to justify such exemption"*.

268. The only express limitation is that derived from the use of the word *"other"*, which conveys the intention that the reason must be other than one of those found in s102(2). That does not mean, however, that the power is otherwise unconfined. The nature and extent of the power must be inferred from the *Mining Act* read as a whole and whether the circumstances relied on by the applicants constitute a sufficient reason for an exemption is to be determined having regard to its subject matter, scope and purpose.[129]

269. Section 102(2) sets out the specific circumstances in which an exemption from expenditure can be granted. The matters enumerated in s102(2) represent a range of common problems encountered by tenement holders the legislature has determined may, if established, give rise to an exemption.

270. Section 102(3) acknowledges that even a prudent and diligent tenement holder may be confronted by circumstances that are sufficient to justify an exemption even though those circumstances do not fall within the grounds of exemption in s102(2). Once such example might be a shortage of skilled labour.

271. By imposing an obligation on tenement holders to expend or risk exposing the tenement to the risk of forfeiture, whilst allowing for exemptions in certain circumstances, the *Mining Act* seeks to strike a balance between penalising those who do not mine or explore their tenements and providing security of tenure so as to encourage investment in mining.[130] If a tenement holder was to face the risk of forfeiture every time it was confronted with matters beyond its control, investing in mining may be seen as too risky.

[129] See ***R v Toohey; Ex parte Northern Land Council*** (1981) 151 CLR 170 per Gibbs CJ at 186; ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (1986) 162 CLR 24 at [39]
[130] ***Re: Minister for Resources; Ex parte Cazaly Iron Pty Ltd*** [2007] 34 WAR 403 at [24]

272. In my view, s102(3) directs attention to the identification of a sufficient reason that is of a different character to those in s102(2). It follows that a tenement holder should not receive an exemption under s102(3) simply because it failed to establish one of the grounds in s102(2). Not only does the language used in s102(3), in particular the word "*other*", support such a construction but it would undermine the purpose of s102(2), if s102(3) was used to subvert or relax the requirements imposed by the grounds in s102(2).

273. While the circumstances to which s102(3) extends is unlimited and each case will depend on its own facts, I doubt it was intended it be used to agitate what is in reality a ground to which s102(2) relates that the tenement holder accepts it could not establish or failed to establish having attempted to do so.

274. In short, where the legislature has by s102(2) stipulated the circumstances capable of giving rise to an exemption, the criteria or limitations that apply to each subparagraph of s102(2) should not be ignored.

275. For example, where a tenement holder is not eligible for an exemption under s102(2)(h) because expenditure across the combined reporting group in connection with exploration fails to meet the minimum requirement, it is doubtful an exemption under s102(3) should be granted on the basis that expenditure of mining activities across the group exceed the minimum requirement. The legislature having expressly turned its mind to the circumstances in which expenditure across a group of tenements can be aggregated, it is unlikely it intended that the general power in s102(3) could be used in a way that is inconsistent with that objective.

276. Returning now to the grounds relied on under s102(3), in my view, the only grounds that arose during or before the expenditure years are expenditure by Convergent between 2013-2015 of $4.5m on the Mt Holland Project and capital raising to pay down debt and develop Blue Vein.

Past expenditure

277. The "*past expenditure*" ground was considered in detail by Warden Wilson in ***Berkley Resources Ltd & Anor v Limelight Industries Pty Ltd.***[131] Warden Wilson's admonishment of "mathematical gymnastics" is explained in the following passage:[132]

> *"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."*

278. I see no reason why Warden Wilson's observations are not apposite to this case.

279. In addition, of the $4.5m referred to, the majority was expenditure in relation to Blue Vein. Other than as provided for in s102(2)(h), the *Mining Act* does not countenance expenditure occurring on one tenement to the exclusion of the others. Section 102(2)(h) sets out the circumstances in which expenditure on one tenement in a combined reporting group can be taken into account in assessing whether that group of tenements has met the minimum requirement. The applicants seek to do via s102(3) that which they were unable to establish in accordance with s102(2)(h).

[131] [2013] WAMW 2
[132] At [105]

Capital raising for Blue Vein

280. The applicants rely on the evidence of Mr Price concerning the capital raising undertaken by Convergent. As I observed in considering s102(2)(b), extensive efforts were made by Convergent to raise capital to develop Blue Vein and pay down the debt to Capri.[133]

281. The evidence of Mr Price establishes that as at 6 February 2012 Convergent had raised $5m. Over time, in attempting to develop Blue Vein, that money dwindled until the point that Convergent went into voluntary administration on 15 September 2015.

282. Unlike liquidation,[134] the fact that Convergent was under voluntary administration of itself is not a ground of exemption. When in liquidation a company is being wound up. Administration, in the context in which it was invoked in this case, involved the company continuing to operate with a view to maximising the chances of the company, or as much as possible of its business, continuing in existence.[135]

283. Convergent was only in voluntary administration from 15 September 2015 to 14 January 2016. As the administrators were continuing to operate the business during this period, in my view, it is only relevant to the extent that it evidences Convergent was in a precarious financial position.

284. The applicants argue that essentially Convergent had no choice but to adopt the strategy that it did. Raising money to develop Blue Vein, the best short term option, was the only way it could repay the debt to Capri and self-fund the development of the Tenements. Implicit in the applicants' argument is the contention that had Convergent tried to raise capital to develop all of the Tenements that strategy was unlikely to succeed.

[133] Ex 7; Affidavit of David Price sworn 30 March 2017; [8], [27]-[45], [149]-[155], [166] & [177]-[218]
[134] See reg 102(2) of the *Mining Regulations 1981 (WA)*
[135] See s435A *Corporations Act 2001 (Cwth)*

285. Against that background the applicants contend that Convergent implemented the only reasonable strategy available to it in all the circumstances. This strategy, according to the applicants, was consistent with the objects of the *Mining Act* as it was demonstrative of a plan directed to the ultimate development of all the Tenements.

286. The fact that a tenement holder is making sound commercial decisions that are in the best interests of the company does not mean it is acting consistently with the objects of the *Mining Act*. The question under s102(3) is not whether a tenement holder is doing its best but whether the basis on which an exemption is sought promotes the objects of the *Mining Act*. The policy of the *Mining Act* involves broader considerations than whether a tenement holder is acting in its own best interests given its precarious financial position.

287. In considering whether an exemption ought to be granted under s102(3) it is also important to consider the operation of s102 as a whole.

288. Sections 102(2) deals with a wide variety of circumstances in which a tenement holder can hold its tenements despite not having met the minimum commitment for each tenement.

289. Of particular relevance to the applicants' contention is s102(2)(b), s102(2)(h) and s102(2)(f). Section 102(2)(b) specifically sets out the criteria that relates to capital raising. Section 102(2)(h) outlines the circumstances when it is legitimate to expend on one tenement whilst holding others that are under expended. Section 102(2)(f) provides another example where it is permissible to hold under expended tenements when they are required to sustain the development of future operations on other tenements.

290. The situation confronting Convergent did not involve circumstances that fell outside those contemplated by the grounds of exemption is s102(2). A tenement holder almost running out of money and having to make decisions about which of its tenements it will actively pursue is not unusual or novel.

291. Importantly, s102(2)(b) acknowledges that a tenement should not be exposed to the risk of forfeiture where the tenement holder is acting consistently with the objects of the *Mining Act* by actively working during the expenditure year to raise capital to plan for future exploration or mining on the tenements for which an exemption is sought.

292. Convergent could have chosen to raise capital to plan for future mining or exploration of the Tenements in compliance with s102(2)(b) but instead elected to focus on attempting to raise $43m to develop a mine at Blue Vein.

293. From Convergent's perspective this option may have been a sound commercial decision that was in the company's best interests. It may also have represented Convergent's best chance of ultimately funding the development of the Tenements.

294. However, Convergent, having made a strategic decision to focus on Blue Vein at the expense of the Tenements, did not actively attempt to raise capital to develop the Tenements. Notably, Convergent was not doing what s102(2)(b) required; it was not actively raising capital to plan for future exploration or mining on the Tenements.

295. It is not the need for capital per se that grounds an exemption under s102(2)(b), it is the attempts to raise capital during the expenditure year. It is doubtful the legislation intended that an exemption would be granted because time was required during the expenditure year to raise capital in relation to the tenement the subject of an application for exemption, but no action was taken.

296. Not every commercial decision will sit comfortably with objects of the *Mining Act*.

297. Having failed to establish an entitlement to an exemption under s102(2)(b), what is it about this situation that justifies the invocation of s102(3)?

298. As I pointed out earlier, s102(3) is not a mechanism by which a ground that failed under s102(2) is to be resurrected. Nothing in the *Mining Act* supports the view

that a tenement holder ought to be able to hold on to its tenements at all costs. Security of tenure is dependent on the tenement holder complying with, among other things, the expenditure conditions. In ***Haoma Mining NL v Tunza Holdings Pty Ltd***[136] Pullin JA remarked:

> *"The Mining Act 1978 provides for the grant of mining tenements subject to conditions, and in particular conditions as to the expenditure of money in relation to tenements. The intention of the legislature revealed by reading the Act as a whole is that persons who secure a mining tenement should carry out work on or in relation to them if they are to retain title. In the case of a prospecting licence, the persons holding them should expend money in relation to prospecting for minerals on the tenements.*
>
> *A person who meets the conditions and meets expenditure requirements will have a secure title. A person who holds a tenement but does not meet the expenditure requirements faces the possibility of forfeiture of the tenement. However, the Act also provides for a person to seek exemption from the expenditure conditions attaching to a mining tenement."*

299. Nor are the objects of the *Mining Act* served by a tenement holder holding on to its tenements until it is ready to develop them. As is often the case given the *Mining Act* encourages "*self-policing*" of compliance with expenditure conditions by the "*jealous neighbour*",[137] there are others who are desirous of developing the Tenements. The *Mining Act* does not support the warehousing of tenements that could be exploited by others.

300. If the *Mining Act* is interpreted in such a way that exemptions are to be granted to every tenement holder who runs out of money on the basis that it will focus its resources on one tenement and develop the others when it is ready, large tracts of land would potentially be tied up indefinitely.

301. This is inconsistent with the primary object of the *Mining Act* which is to encourage and promote the prospecting and exploration for, and mining of mineral deposits of the State.[138] It would also undermine the operation of s102(2)(b) which gives effect to that principle by requiring tenement holders to

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[136] [2006] 31 WAR 270 at [73]-[74]

[137] ***Berkley Resources Ltd & Anor v Limelight Industries Pty Ltd*** [2013] WAMW 2 at [105]

[138] ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd*** [2007] 34 WAR 403 per Buss JA at [70]

actively be raising (or at least attempting to raise) capital in relation to the tenements for which an exemption is sought.

302. The fact that the obligation to expend is annual and that "*time is required*" during the expenditure year for which an exemption is sought, underscores the immediacy inherent in s102(2)(b).

303. For completeness, even if s102(2) has no bearing on the operation of s102(3), I remain of the view that the grounds advanced by the applicants do not promote the objects of the *Mining Act*. Furthermore, even having given consideration to all of the grounds relied on under s102(3) in combination, I also remain of the view that the applicants are not entitled to an exemption under s102(3).

304. Having now dealt with this ground of exemption there are, two further matters worthy of mention.

305. First, at 31 March 2014 Convergent had cash on hand and at bank in the amount of $347,000. On 30 April 2014 Convergent announced it had executed a bridging finance agreement with Capri which resulted in the initial loan of $2.5m.

306. On 27 May 2014 Convergent purchased three tenements from Southern Cross Limited for $200,000. According to Mr Price the purchase "*added to Convergent's dominant position in the Mt Holland Goldfield*".[139]

307. Not only had Convergent prioritised the development of one tenement (Blue Vein) over expending money on the Tenements, including on, or in connection with exploration so far as the Mt Holland Combined Reporting Group was concerned, but it also chose to acquire further tenements during this period.

308. Second, St Barbara had a 20% share in M77/0477, M77/0522, M77/523, E77/158 and E77/1363. Despite St Barbara being registered as a tenement holder, no evidence was led as to its financial position or its capacity to fund expenditure on these tenements.

[139] Ex 7: Affidavit of David William Price; sworn 30 March 2017 at [137], [139] & [151]-[153]

309. Moreover, the Tenement Acquisition Agreement dated 10 April 2010 provides that Montague (80% share) will solely fund all expenditure until Montague, in its sole discretion, reaches a decision to mine in respect to any of the tenements.[140]

310. Section 118A(2) of the *Mining Act* provides for the holder of an exploration licence or mining lease to authorise another person to carry out mining. Subsection (4) acknowledges that mining carried out under an authorisation is to be regarded as mining carried out by the holder. Similarly, subsection (5) deems expenditure incurred under an authorisation to be regarded as expenditure by the holder.

311. Section 118A(6) stipulates, however, that the giving of an authorisation does not affect the duties or obligations of the holder under the *Mining Act.*

312. It follows that St Barbara, notwithstanding the Tenement Acquisition Agreement, was still obliged to comply with conditions to which the mining lease or exploration licence are subject.

313. Section 82(1) relevantly provides:

> *"Every mining lease shall contain and be subject to the prescribed covenants by the lessee and in particular shall be deemed to be granted subject to the conditions that the lessee shall –*
>
> …
>
> *(b) comply with the prescribed expenditure conditions applicable to such land unless partial or total exemption therefrom is granted in such a manner as is prescribed".* [141]

314. Where, as in this case, an exemption is sought, under s102(2)(b) (or s102(3)) on the basis that there is a need to raise capital, surely the financial position of both the joint tenement holders is relevant.

[140] Applicants Book of Documents; Vol 8; 182 at [12.1]

[141] s62(1) imposes a similar obligation with respect to the holders of exploration licences

315. The legislature cannot have intended that an exemption should be granted because only one of the joint tenement holders requires time to raise capital without recourse to the financial position of the other or its capacity to contribute.

316. It is implicit in considering an exemption under s102(2)(b) on the basis that "*time is required … to raise capital*" that the tenement holder(s) do not already have the capital.

Section 102(4)

317. Section 102(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."*

318. In ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor***,[142] the Court of Appeal considered the meaning of s102(4). Having examined three possible constructions Steytler P [143] concluded:

> *"I can see nothing untoward in a construction which requires that, in considering an application for exemption, regard must be had to current grounds which have previously resulted in exemptions. The legislative may well have thought that the fact of a prior exemption on the same ground was especially relevant.*
>
> *So for example, it might, depending on the circumstances, indicate that, as a matter of consistent decision making, a similar exemption should again be given. Alternatively, the fact of repeated applications based upon the same ground might cast doubt on the ability, or willingness, of the tenement holder to satisfy the prescribed conditions attaching to the grant of the tenement".*

[142] (2006) 31 WAR 270

[143] At [60] with whom Wheeler & Pullin JA agreed

319. Other than Mr Hull, neither of the other parties made detailed submissions about the application of s102(4) to the facts of this case.

320. With respect to M77/1066, Mr Hull pointed out that for the years 2012-2014 expenditure was well below the minimum commitment.

321. To the extent that the applicants' relying on the fact that Convergent spent $4.5m, as I observed earlier, most of that amount was spent on Blue Vein.

322. As Blue Vein is part of the Mount Holland Combined Reporting Group, I do not see how money spent on Blue Vein can be attributed to those tenements in the Van Uden Combined Reporting Group. Nor, in my view, has it been demonstrated that expenditure on Blue Vein should be attributed to other tenements in the Mount Holland Combined Reporting Group.

323. Membership of a combined reporting group provides a measure of protection to those tenements in the group that have been under expended as long as the minimum commitment for the group has been met. Absent the operation of s102(2)(h), it is quite another thing to then positively assert that expenditure on one tenement within the group should be held as expenditure against other tenements in the group for the purposes of s102(4) (or s102(3)).

324. In simple terms if $100,000.00 is spent on tenement A which is part of a combined reporting group that includes tenements B and C (on which there was no expenditure), that $100,000.00 can be taken into account in calculating whether the aggregate minimum commitment for the group has been met. If the minimum commitment for the group has not been met, it does not follow, in my view, that for the purposes of s102(3) or (4) the $100,000.00 spent on tenement A can be treated as if it was spent on the tenements B and C. Absent compliance with s102(2)(h), each tenement must fend for itself.

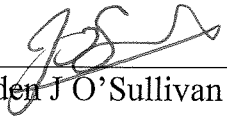
325. For the purposes of s102(3) or (4) it cannot be said that $100,000.00 was spent on tenements A, B and C. Section 102(2)(h) is a shield not a sword.

326. In my view, consideration of the matters raised in s102(4) does not assist the applicants.

Conclusion

327. For the reasons set out above I recommend that the Minister refuse to grant certificates of exemption from expenditure in accordance with s102(2)(b), (f) and (h) and s102(3) of the *Mining Act*.

328. The parties have liberty to apply.



Warden J O'Sullivan

12 September 2018