

JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : FOCUS MINERALS LTD & OTHERS v ALLAN
NEVILLE BROSANAN & OTHERS [2020] WAMW 4

CORAM : WARDEN J O'SULLIVAN

HEARD : 27 November 2019

DELIVERED : 14 February 2020

FILE NO/S : Application to Extend Time to lodge Exemptions

TENEMENT NO/S : Various (see Annexure)

BETWEEN : **FOCUS MINERALS LTD**
and
FOCUS OPERATIONS PTY LTD
and
FOCUS MINERALS (LAVERTON) PTY LTD
(Applicants for Extension of Time)

AND

ALAN NEVILLE BROSANAN
and
CHADWICK DOUGHTON EVERETT
and
JEFFREY HULL
(First Interested Parties)
and
WAYNE CRAIG VAN BLITTERWYK
(Second Interested Party)

Catchwords: Application to extend time to lodge applications for exemption; tenement holders' obligations in completing a Form 5 Operations Report.

Legislation:

- *Mining Act 1978* (WA) ss 51, 68(3), 70H(1)(f), 82(i)(e), 102, 115A & 162B
- *Mining Regulations 1981* (WA); regs 23E, 32, 52, 54(1a) & 90

Result: Application to extend time dismissed.

Representation:

Counsel:

Applicant : Mr M F Gerus
First interested parties : Mr G H Lawton
Second interested party : Ms C A McKenzie

Solicitors:

Applicant : MinterEllison
First interested parties : Lawton Lawyers
Second interested party : McKenzie & McKenzie

Cases referred to:

- *Brewer v O'Sullivan [No. 2]* [2017] WASC 269
- *Carnegie Gold Pty Ltd v Maughan* [2018] WASC 366
- *Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum* [2017] WASCA 153
- *Forti v Regency Mines Australasia Pty Ltd* [2014] WAMW 23
- *Jackamarra v Krakover* (1998) 195 CLR 516
- *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170
- *Van Blitterswyk v Balagundi Gold Pty Ltd* [2019] WAMW 12

Introduction

- 1 Between 20 June 2018 and 14 January 2019 the Interested Parties lodged applications for forfeiture over tenements held by the Applicants on the basis the Applicants had failed to comply with the expenditure condition in relation to each tenement.
- 2 On 11 March 2019 the Applicants lodged applications to extend time to lodge exemptions from the expenditure conditions in relation to a number of tenements which were ultimately reduced to –
- (a) 31 of 122 tenements in Combined Reporting Group C93/2007 – Coolgardie;
 - (b) 4 of 17 tenements in Combined Reporting Group C5/2008 – Nepean;
 - (c) 34 of 59 tenements in Combined Reporting Group C11/2014 – Central Laverton; and
 - (d) Exploration Licence E15/986 – Treasure Island.¹
- 3 Except for E15/986, the tenement numbers and the length of the delay (between 7-341 days) in relation to each tenement is helpfully set out in Schedule 3 of the Applicants’ written submissions which is annexed to these reasons.
- 4 According to the Applicants when the Form 5s were lodged they believed each tenement had met the minimum expenditure commitment in its own right.²
- 5 All of the tenements for which exemptions are now sought are the subject of combined reporting groups. Except for E15/986,³ exemptions are sought in accordance with s102(2)(h) of the *Mining Act 1978* (WA) on the basis that aggregate expenditure across the combined reporting group is sufficient to meet

¹ ts; 8; Applicants’ Written Submissions 9 August 2019; [1.1]; No exemption is now sought for P15/5576 see Affidavit of Matthew Phillip Burcham; sworn 14 May 2019 (the Third Burcham affidavit); [28].

² ts; 9; Affidavit of Matthew Phillip Burcham; sworn 8 March 2019 (First Burcham affidavit) [22].

³ E15/986 relies on s102(2)(d) of the *Mining Act 1978* (WA).

the minimum commitment for each tenement if aggregate exploration expenditure is apportioned across the group. All of the exemption applications rely on s102(3).

The Law

6 Section 162B of the *Mining Act* provides:

Extension of prescribed period or time

- (1) *If this Act provides for something to be done within a prescribed period or a prescribed time, the Minister or a warden may, in a particular case, extend the period or the time for doing the thing.*
- (2) *The power in subsection (1) may be exercised whether or not the prescribed period has ended or the prescribed time has passed.*

7 While s162B is drafted in broad terms and is unfettered, it is a discretion that is to be exercised having regard to the subject matter, scope and purpose of the *Mining Act*.⁴

8 In considering whether it would be just in all the circumstances to grant or refuse the application, factors commonly taken into account include the length of the delay, the reason for the delay and the prejudice to the parties.⁵ Whether the case is arguable is also a relevant consideration in the sense that if it is bound to fail there would be little point in granting the application.

9 Kirby J in *Jackamarra v Krakouer*⁶ remarked:

The first rule is that there are no rigid rules. Procedural discretions, such as those in question here, are typically expressed in very wide language. In the exercise of such discretions, courts should not be trammelled by a rigid set of rules, whether called guidelines or principles, which would impede the application of rules of court with the flexibility needed to do justice in the particular case. This is why it is impossible to lay down fixed and binding rules for the exercise of

⁴ *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Gibbs CJ at 186; *Mining Act* (n 2).

⁵ *Forti v Regency Mines Australasia Pty Ltd* [2014] WAMW 23 at [5].

⁶ *Jackamarra v Krakouer* (1998) 195 CLR 516 at [66] (“Jackamarra”).

discretions to enlarge time. Of necessity, each case must depend upon its own particular circumstances.

Nevertheless, it is useful to keep in mind a number of considerations which have commonly been taken into account. The starting point for the exercise of any power granted under legislation is the ascertainment of the terms of the grant and a consideration of the purposes for which the power has been afforded. Thus, if a rule requires that 'special reasons' or 'special circumstances' be shown as a pre-condition to a procedural indulgence, this will indicate a need to demonstrate circumstances out of the ordinary. But where, as is usually the case (and is the case here), the discretion is conferred in unlimited terms, the question for the decision-maker is whether it would be just in all the circumstances to grant or refuse the application. Necessarily, the indulgence is not granted as of course. It is for the party seeking to persuade the decision-maker to show that it should be granted. Such persuasion will usually depend upon the provision of an acceptable explanation of how the time default occurred. Neither a party nor its legal advisers may simply assume that a request for an extension of time will always be acceded to. Inherent in the grant of a discretionary power is the assumption that it will sometimes be refused.

...

The party seeking indulgence bears the burden of persuading the decision-maker to grant its request. A consideration relevant to that exercise is whether the case is arguable. If it is hopeless, unarguable or bound to fail, the request for an extension of time will be refused. However, this is basically because to grant it would be futile.

...

In Esther Investments, the Full Court of the Supreme Court of Western Australia embraced, as relevant to applications for an extension of time, the four 'major factors' which had been identified in Palata Investments Ltd v Burt & Sinfield Ltd, viz, the length of the delay, the reasons for the delay, whether there is an arguable case and the extent of any prejudice to the respondent."

(footnotes omitted)

- 10 As Warden Ayling recently observed in *Van Blitterswyk v Balagundi Gold Pty Ltd*:⁷

"Time limits within legislation have the purpose of promoting clarity and orderly timetable for the doing of acts under those laws. There is a presumption those limits should be obeyed. The basis of the power to

⁷ *Van Blitterswyk v Balagundi Gold Pty Ltd* [2009] WAMW 12, [15].

extend time is to ensure that those limits are not so inflexible as to cause injustice.”

The Evidence

- 11 Focus Minerals Ltd (Focus) is an Australian public company listed on the Australian Stock Exchange.⁸ Amongst other things Focus operates various mining exploration projects in the Coolgardie and Laverton areas.⁹
- 12 Focus employ approximately 20 people and engages numerous external contractors to provide services related to the mining and exploration activities it undertakes.¹⁰
- 13 Matthew Phillip Burcham is employed as the tenement manager at Focus.¹¹
- 14 Mr Burcham’s employment with Focus commenced in June 2011. Since July 2017 he has been responsible for the preparation, management and lodgement of the Form 5 Operations Report for each tenement held by the Applicants.¹²
- 15 Following the lodgement of the forfeiture applications by the Interested Parties, Focus instructed, its solicitors, MinterEllison, who prepared and lodged Form 36 Responses to the applications including with respect to some of the tenements within combined reporting groups C93/2007 and C5/2008 (the Coolgardie Applications) and affecting some of the tenements within combined reporting group C11/2014 (the Laverton Applications).¹³
- 16 According to Mr Burcham at all times prior to the lodgement of the Coolgardie and Laverton Applications being lodged and served on Focus, he believed that all of affected tenements were in good standing in the sense that the requisite

⁸ First Burcham affidavit; [5].

⁹ First Burcham affidavit [8].

¹⁰ First Burcham affidavit [11].

¹¹ First Burcham affidavit [1].

¹² First Burcham affidavit [12].

¹³ First Burcham affidavit [14]-[21].

Form 5s were all materially accurate and had been filed with the Department¹⁴ within time.¹⁵

- 17 Mr Burcham explained that for the purposes of preparing and lodging the Form 5s, during 2017, he verified the quantum of expenditure on the tenements by collating available invoices and comparing them with Focus “Pronto” accounting software which identified the expenditure allocated to each tenement.¹⁶
- 18 He did not, however, undertake further enquiry by way of verification or confirmation concerning the work actually completed and resulting in the raising of those invoices showing on the accounting system as rendered and paid or what corresponding work had been the subject of any reports by Focus to the Australian Stock Exchange.¹⁷
- 19 Mr Burcham said he did not undertake these further enquiries because he understood his role to be limited to ensuring the accuracy of the Form 5s as against the invoices raised and paid.¹⁸
- 20 His expectation was that the work or the need to meet an expense had been validated by the respective responsible departmental managers prior to the submission of invoices for payment and the entry of the data onto the Pronto System.¹⁹
- 21 When the Coolgardie and Laverton Applications were served on Focus, MinterEllison requested that Mr Burcham review, in more detail, the activities underpinning the Applicants’ tenement expenditure (the Review). The Review commenced on about 14 December 2018 and involved the review of many lines of expenditure totalling in excess of \$67m together with amongst other things all

¹⁴ Department of Mines, Industry Regulations and Safety.

¹⁵ First Burcham affidavit [22].

¹⁶ First Burcham affidavit [23].

¹⁷ First Burcham affidavit [24].

¹⁸ First Burcham affidavit [25].

¹⁹ First Burcham affidavit [26].

of the corresponding geological data, tenement data, pay records and invoices in relation to each item of expenditure.²⁰

22 Mr Burcham attests that the review:

“... is major undertaking in circumstances where I must perform my other ongoing tasks and responsibilities for the tenements including reporting and compliance with the Mining Act and Mining Regulations.”²¹

23 Mr Burcham says there are reasonable grounds for seeking an extension of time for the Exemption Applications because, among other things:

“the Review will require substantial additional work, including a complete scrutiny of over 150 tenements and their underlying expenditure information, invoices and documentations, including by reference to exploration and mining activities explained by other former and current Focus employees.”²²

24 According to Mr Burcham the reason for the delay in seeking to extend time can be summarised as follows:

- (a) at all times he was confident in material accuracy of the Form 5s lodged in respect of the tenements but had not felt the need to direct his attention to the:
 - (i) fact that Focus had incurred several large discrete expenditure items from third party contractors which in and of themselves are likely to meet the aggregated minimum expenditure conditions for each of the Combined Reporting Groups;
 - (ii) order of magnitude by which Focus may have exceeded its minimum expenditure conditions on each of the Combined Reporting Groups; or

²⁰ First Burcham affidavit [28].

²¹ First Burcham affidavit [29].

²² First Burcham affidavit [31(c)].

(iii) availability of an application for exemption to be made in relation to the Combined Reporting Groups.

(b) he was not aware until Focus sought external advice that for the purposes of calculating administration and overhead costs, it is not considered appropriate simply to report 20% of total expenditure on each tenement. Consequently as part of the review he has been required to determine the administration and overhead costs allocated to each tenement.²³

25 Mr Burcham goes on to explain that –

“in conducting the review he has had considerable difficulty identifying documentary evidence to demonstrate the items of administration and overhead costs that have been incurred and are claimable in connection with each tenement individually and not generally which had contributed to the delay in lodging the Exemption Application.”²⁴

26 Under the heading “Prejudice” Mr Burcham says:

“I am aware that administration and overheads are difficult to identify and extremely time consuming to identify, consider, apportion and prove.”²⁵

27 As at 21 March 2019 Mr Burcham was continuing to undertake the Review he commenced in December 2018.²⁶

The Form 5

28 As a general rule the grant of a mining tenement carries with it the obligation to spend a prescribed amount each year developing the tenement. This is the principal means of promoting the primary object of the *Mining Act* which is to ensure that land suitable for mining or worthy of exploration is exploited.

²³ First Burcham affidavit [31(a)] & [34].

²⁴ First Burcham affidavit [36].

²⁵ First Burcham affidavit [39].

²⁶ Affidavit of Matthew Phillip Burcham; sworn 21 March 2019; (Second Burcham affidavit [36].

- 29 At the end of the reporting year a tenement holder has 60 days within which to lodge its Form 5 Operations Report²⁷ for each tenement and if need be, apply for an exemption from the expenditure conditions applicable to each tenement in accordance with s 102(2) and (3) of the *Mining Act*.²⁸
- 30 In the context of this case, if during the allotted 60 days from the end of the reporting period the tenement holder determines that a tenement is under expended, an application for an exemption can be made on the basis that it is part of a combined reporting group and the aggregate exploration expenditure for the group is such as to satisfy the expenditure requirements for the tenement concerned had the aggregate exploration expenditure been apportioned between the group in accordance with s 102(2)(h) of the *Mining Act*.²⁹
- 31 A Form 5 Operations report means a report of the kind required under ss 51, 68(3), 70H(1)(f) or 82(1)(e).³⁰
- 32 The importance of a Form 5 is underscored by reg 32(2) of the *Mining Regulations*³¹ which provides that it is an offence to give information in a Form 5 that the person knows is false or misleading in a material respect.
- 33 A properly completed Form 5 requires that the following certification is signed by the tenement holder or agent:

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

(emphasis added)

²⁷ *Mining Regulations 1981* (WA) ("*Mining Regulations*"), Reg 32(1); Form 5 – Instruction 1.

²⁸ *Mining Regulations* (n 27), Reg 54 (1a); an application for exemption may be made even if the applicant claims to have met the expenditure conditions: see *Carnegie Gold Pty Ltd v Maughan* [2018] WASC 366; [94].

²⁹ *Mining Act* s 102(2)(h).

³⁰ *Ibid* s 115A.

³¹ *Mining Regulations* (n 27), reg 32(2).

34 As reg 90 of the *Mining Regulations*³² makes clear the form prescribed shall be completed in accordance with such directions as are specified in the form.

35 The Form 5³³ contains the following instructions:

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

(2) The Form 5 and attachments must show expenditure incurred on the activities undertaken during the annual period of the mining tenement ...

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

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

The reason for lodging late applications for exemption

36 With commendable clarity Mr Gerus explained the Applicants’ position:³⁴

“... one can’t have a conception of reporting that is totally divorced from the practicality of mining and exploration and reporting. That is to say that it’s clear that in this court when examining expenditure one goes to the fine detail of every item of expenditure potentially. For the purposes of reporting it is reasonable to rely on the accounting systems and the system of reporting that exists within a company, and what I mean by that ... is where geologists are tasked with inputting information into the accounting system that is drilling costs and apportioning them to tenements it is in fact reasonable for a tenement manager in these circumstances to rely on that system.”

37 According to the Applicants a tenement holder is entitled to rely on the system it has in place for reporting expenditure and is not required to go back to each

³² *Mining Regulations* (n 27), reg 90.

³³ *Mining Regulations* (n 27), Sch 1, Form 5.

³⁴ ts; 16.

and every invoice that demonstrates the expenditure claimed over various reporting periods when preparing its Form 5s.³⁵

38 If an application for forfeiture is lodged, then inevitably the expenditure claimed will be scrutinised in great detail in the course of proceedings before the Warden. The Applicants say that in those circumstances it is not unreasonable for a tenement holder to conduct a detailed investigation of its expenditure in preparation for the forfeiture proceedings.

39 In so doing, if it becomes apparent that an application for exemption should have been lodged, then time should be extended to allow this to occur.

40 The Applicants' submissions advance two related propositions:

- (1) tenement holders are entitled to rely on the system of recording expenditure in completing their Form 5s; and
- (2) given the practical difficulties involved in scrutinising expenditure, it is not unreasonable to expect that a detailed investigation into expenditure would be undertaken in the event of an application for forfeiture and that if there are grounds for an exemption, a late application should be granted.

41 This application squarely raises important questions about the nature of a tenement holder's obligations in completing a Form 5.

42 So far as reliance on a system for recording expenditure is concerned, the starting point is to note that it is incumbent of the tenement holder to ensure that it has properly analysed the expenditure of each tenement and lodged a duly certified Form 5 within 60 days of the end of the reporting year.

43 A tenement holder is taken to know that they have 60 days to lodge a Form 5. Accordingly, it is their responsibility to ensure sufficient resources have been put in place to meet that obligation within the prescribed period. The nature of

³⁵ ts; 20.

the obligation is spelt out in the certification in the Form 5 which requires that the information therein –

“constitutes a true statement of the operation carried out and the money expended on this mining tenement during the reporting period specified.”³⁶

- 44 If the certification is to mean anything, then the tenement holder or its agent must be sufficiently well informed as to the activities and expenditure on each tenement to duly sign the certification.
- 45 In the event that the tenement holder has in place a system of recording information as to the activities and money expended on its tenement on which it relies to complete the Form 5s, a question arises as to on what basis the system is said to be reliable.
- 46 The mere fact a system is said to exist is insufficient to enable the tenement holder to certify that the information derived from it is true.
- 47 In this case other than to assert that there is a system, there is no evidence as to the instructions issued to those inputting information into the system or whether those instructions were reinforced on a regular basis. Nor is there any evidence that the Applicants took steps to test that all the relevant data is included, accurately recorded, appropriately characterised and apportioned, if need be.
- 48 Central to the efficacy of the Applicants’ system is the role performed by Mr Burcham.
- 49 Although Mr Burcham has worked for Focus since 2011 and has been responsible for tenement management since July 2017, there is no evidence as to what duties he performed before taking on tenement management and in particular whether he had any experience in tenement management. Nor is there any evidence as to the instruction or training Mr Burcham received or what steps were taken to ensure he knew what to do.

³⁶ *Mining Regulations* (n 27) Sch 1, Form 5, p 2.

- 50 The fact that Mr Burcham understood that his role was limited to verify the quantum of expenditure, and was unaware of the requirements in calculating administrative expenses, of itself raises a doubt about the reliability of the system.
- 51 In addition, as the Review conducted by Mr Burcham demonstrates, at the time he completed the Form 5s he did not direct his attention to the fact that Focus had incurred several large discrete expenditure items from third party contractors.
- 52 For present purposes there is no evidence upon which it could reasonably be concluded that the Applicants were entitled to rely on let alone certify that the information in the Form 5s is true.
- 53 While I am not suggesting that relying on the system for recording expenditure could never give rise to a reasonable belief that the information is true, the foundation for such a belief has not been established in this case.
- 54 In my view, a reasonable belief would not arise simply by relying on the fact that Form 5s have been lodged previously and have not been challenged. The fact that the Department has accepted the Form 5s without further investigation proves nothing.
- 55 I turn now to the Applicants' second proposition that upon the initiation of proceedings for forfeiture, a tenement holder ought to be entitled to lodge an application for exemption upon carrying out a detailed analysis of its expenditure.
- 56 Implicit in the Applicants' extension of time application is the contention that an extension of up to 341 days is an acceptable period in which to carry out this process and lodge an application for exemption.

- 57 I appreciate that accurately completing a Form 5 can be difficult and time consuming. This is recognised by the reg 32(1) which allows 60 days from the end of the reporting year to lodge the Form 5.
- 58 I also acknowledge that calculating aggregate expenditure across a combined reporting group presents additional challenges such as differing reporting dates and minimum expenditure requirements and the need to apportion.
- 59 However, if a tenement holder acquires multiple tenements and wants to take advantage of the benefits combined reporting provides, it does so in the knowledge that it must properly resource its tenement management to account for the work required to complete the Form 5s by the due date.
- 60 To put the issue in perspective, the Applicants say they spent \$67m on mining and exploration across some 150 tenements during the relevant reporting periods, yet employed only one tenement manager whose responsibility it was to lodge all of the Form 5s for those tenements within 60 days of the end of each reporting year.
- 61 Mr Burcham may have managed to lodge all of the Form 5s by the due date, however, he did not have time to properly identify and include all of the items of expenditure in addition to verifying those items of expenditure which were already included. It is for this reason that nothing I have said should be interpreted as a criticism of Mr Burcham.
- 62 While each case will turn on its own facts, I have some difficulty accepting that a failure to devote adequate resources to tenement management is a sufficient reason to grant an extension of time. This is particularly so given the Applicants between them had the resources to acquire 150 tenements and now say they spent \$67m on them in the respective reporting periods.
- 63 In my view, it is inconsistent with the subject matter, scope and purpose of the *Mining Act* to extend time in circumstances where a tenement holder simply

failed to take its obligations seriously. If this were a sufficient reason to extend time, there would be no point imposing a time limit in the first place.

64 This is not a case where a tenement holder doing its best was confronted by unforeseen difficulties or an error in what was a demonstrably reliable and accurate system of reporting expenditure. In this case it was simply impractical to carry out the necessary inquiries within the prescribed time with the resources allocated to the task.

65 With the benefit a lease or licence bestows, comes the burden of compliance.³⁷ With the acquisition of a tenement comes the concomitant obligation to ensure sufficient resources are devoted to tenement management. The fact that managing a large number of tenements may be labour intensive, and time consuming, as Mr Burcham attests, only serves to underscore why tenement holders need to devote sufficient resources to the task so that it is completed within the prescribed period. Nothing about these difficulties is unexpected.

66 The Applicants' second proposition also calls into sharp focus the objects of the *Mining Act* and case management principles.

67 The certification in the Form 5 requires that the information contained therein is true. To lodge a Form 5 on the basis that further inquiry may be necessary casts doubt on the authenticity of the certification. The scheme of the legislation requires that expenditure be scrutinised before the certification is signed.

68 Nowhere in the legislation is there any support for the view that absent a threat to the tenement, all that is required in completing a Form 5 is a perfunctory analysis of expenditure.

69 Nor do the instructions in the Form 5, including the certification, support the view that a tenement holder need only include sufficient expenditure to meet the minimum expenditure commitment. Nothing in the Form 5 suggests that it is

³⁷ *Forrest & Forrest v Richard Marmion, Minister for Mines and Petroleum* [2017] WASCA 153, [96].

preliminary and that in the event of an application for forfeiture, the tenement holder is invited to search for additional items of expenditure in case the expenditure claimed is not claimable or cannot be verified.

- 70 In my view, it would also be inconsistent with the subject matter, scope and purpose of the *Mining Act* to allow extensions of time where to do so would only encourage tenement holders to believe they do not need to take their obligations seriously unless and until there is an application for forfeiture.
- 71 One of the objects of a Form 5 is to make publicly available certain information about tenements with a view to interested parties making informed decisions about whether to attempt to acquire tenements that are under expended.
- 72 Prospective applicants for forfeiture ought to be entitled to rely on the accuracy of the information included in the Form 5 in making decisions as to whether to initiate proceedings for forfeiture.
- 73 It undermines the jealous neighbour principle if applicants for forfeiture, having expended time and money identifying tenements that appear vulnerable, are confronted by a late application for exemption and/or additional items of expenditure simply because the tenement holder lodged Form 5s without properly scrutinising its expenditure.
- 74 As I pointed out earlier time limits serve an important function. So far as the *Mining Act* is concerned they have a role to play in promoting the objects of the legislation. In particular, time limits are intended to ensure that land is not in dispute for any longer than is necessary.
- 75 For example, the longer a tenement is subject to an unresolved application for forfeiture, the longer its status is unclear and it is subject to a reduction in the minimum expenditure commitment.³⁸ While this is going on there is no requirement that the tenement's full potential is realised.

³⁸ *Mining Regulations* (n 27) reg 52.

The length of the delay

76 The delay in this case ranges between 7 and 341 days. As a general rule an extension of shorter duration may be looked upon more favourably than a long delay. However, in the circumstances of this case, where there is no acceptable explanation for the delay, in my view, even a short delay cannot be justified.

Prejudice

77 The Applicant's submissions are primarily directed to the prospect that their tenements may be exposed to the risk of forfeiture in the event that the exemption applications do not proceed.

78 In particular, the Applicants point to not only the number of tenements the subject of applications for forfeiture, but their already considerable investment in mining in these areas to date and their future plans.

79 While I accept that the Applicants will be deprived of the opportunity to argue that they should receive exemptions if time is not extended, it does not follow that forfeiture of the tenements is an inevitable consequence.

80 The question of whether the tenements should be forfeited is the subject of a further hearing and involves a broad inquiry. It is not inevitable that in the absence of exemptions, the forfeiture applications will succeed. Nor is it inevitable that a tenement will be forfeited even if the expenditure condition has not been met. It may be that the gravity of the breach is insufficient to justify forfeiture.

81 It must also be said that whatever the prejudice to which the Applicants are subjected, it arises from a failure to take their obligations seriously and is therefore entirely of their own making. In my view, little weight ought to be attributed to prejudice that is self-inflicted.

82 By contrast the Applicants argue that the applicants for forfeiture (ie the Interested Parties for the purposes of this proceeding) do not have a sufficient

interest so as to be likely to suffer any prejudice in the event the applications to extend time are granted.

83 Reliance is placed on remarks made by Pritchard J in *Brewer v O'Sullivan [No. 2]*.³⁹ There the question was whether there was a requirement to afford procedural fairness in circumstances where an applicant for forfeiture was not served with the application to extend time to lodge a late exemption. Pritchard J held that the interests of the Applicants for forfeiture was not such as to attract a duty to afford them procedural fairness.

84 Pritchard J observed that the test most commonly applied in the authorities is whether the decision under challenge would have an immediate or direct impact on the applicant's interests, rather than an indirect or inconsequential impact.⁴⁰

85 As Pritchard J goes on to say that:

*"[d]ecisions which have merely an indirect impact on an individual will not give rise to a requirement to afford procedural fairness. So for example, a decision to impose rates or general charges for services rendered to ratepayers, each of which affects the rights and interests of citizens generally, and in an indirect way, will not attract the duty to afford procedural fairness."*⁴¹

86 Pritchard J found that the Applicants had no interest at all in the outcome of the applications to extend time.⁴²

"The Applicants were not a party to those applications, and no right or interest of theirs could be adversely affected by the grant of an extension of time ..."

87 Her Honour was not required to address whether the Applicants would have had a right or interest had they objected to the application to extend time and been a party to the application.

³⁹ *Brewer v O'Sullivan [No. 2]* [2017] WASC 269.

⁴⁰ *Ibid* [93].

⁴¹ *Ibid* [94].

⁴² *Ibid* [104].

- 88 Nor was Pritchard J called upon to determine whether, if the Applicants had objected, they would not have had standing? As her Honour points out in the standing context, there is a debate as to the level of directness or remoteness of a connection with the decision under challenge which is required before an applicant for relief has standing.⁴³
- 89 Unlike other provisions of the *Mining Act*, s162B does not stipulate who ought to be served with the application to extend time or who can object.
- 90 A further question arises as to whether merely because a party does not have an interest capable of attracting a duty to be afforded procedural fairness, they are incapable of suffering prejudice?
- 91 By way of example, it could scarcely be said that an increase in rates does not prejudice ratepayers. That, however, is a different question to whether an individual ratepayer has a direct interest over and above that of a member of the public so as to attract the duty to be afforded procedural fairness.
- 92 For present purposes I do not need to resolve these questions. Having regard to the circumstances of this case, whether the Interested Parties specifically have suffered prejudice or not is, in my view, not central to the outcome.

Do the Applicants have an arguable case?

- 93 As the passage from the judgment of Kirby J in *Jackamarra v Krakover*⁴⁴ to which I referred earlier explains, some consideration should be given to whether the Applicants have an arguable case for an exemption. Extending time to bring an application that is hopeless is an exercise in futility.
- 94 In considering whether time should be extended it is generally the case that there is “*limited material and argument*” as to the merits. To avoid applications to

⁴³ Ibid [93].

⁴⁴ *Jackamarra* (n 6).

extend time turning into a full rehearsal of the substantive hearing an assessment of the merits is carried out in a “*rough and ready way*”.

- 95 Applying that test, albeit that it is not supported by documentary evidence, there is in my view, sufficient information provided in Mr Burcham’s third affidavit⁴⁵ to meet what is ultimately a relatively low threshold.

Conclusion

- 96 Weighing up the various factors to which I have referred, I am not satisfied that it is just in all the circumstances of this case to extend time. Significantly, the Applicants have not demonstrated there is an acceptable explanation for the delay.



Warden J O’Sullivan

14 February 2020

⁴⁵ Third Burcham affidavit; sworn 14 May 2019.

Schedule 3 – EOT Tenements

Coolgardie Tenements				
No.	Tenement	Tenement Year End Date	Exemption Period Expiry	Period of Delay
1.	M15/150	31 March 2018	30 May 2018	282
2.	M15/1789	30 April 2018	29 June 2018	252
3.	M15/277	30 April 2018	29 June 2018	252
4.	M15/781	31 May 2018	30 July 2018	221
5.	M15/981	31 May 2018	30 July 2018	221
6.	M15/391	31 May 2018	30 July 2018	221
7.	M15/636	30 June 2018	29 August 2018	191
8.	M15/662	30 June 2018	29 August 2018	191
9.	M15/1153	30 June 2018	29 August 2018	191
10.	M15/761	31 July 2018	29 September 2018	160
11.	M15/791	31 July 2018	29 September 2018	160
12.	M15/515	31 July 2018	29 September 2018	160
13.	M15/711	31 July 2018	29 September 2018	160
14.	P15/6002	31 August 2018	30 October 2018	129
15.	M15/385	31 August 2018	30 October 2018	129
16.	M15/384	31 August 2018	30 October 2018	129
17.	M15/237	30 September 2018	29 November 2018	99
18.	M15/1432	30 September 2018	29 November 2018	99
19.	M15/1434	30 September 2018	29 November 2018	99
20.	M15/1433	30 September 2018	29 November 2018	99
21.	M15/871	31 October 2018	30 December 2018	68
22.	M15/675	31 October 2018	30 December 2018	68
23.	P15/5946	31 October 2018	30 December 2018	68
24.	M15/410	31 October 2018	30 December 2018	68
25.	P15/5527	30 November 2018	29 January 2019	38
26.	M15/770	30 November 2018	29 January 2019	38
27.	P15/5807	31 December 2018	01 March 2019	7
28.	M15/1341	31 December 2018	01 March 2019	7
29.	P15/5729	31 December 2018	01 March 2019	7
30.	P15/5949	30 April 2018	29 June 2018	252
31.	P15/6006	30 June 2018	29 August 2018	191

Nepean Tenements				
No.	Tenement	Tenement Year End Date	Exemption Period Expiry	Period of Delay
1.	M15/709	31 May 2018	30 July 18	221
2.	P15/5625	31 July 2018	29 September 2018	160
3.	P15/5629	31 July 2018	29 September 2018	160
4.	P15/5626	30 November 2018	29 January 2019	38
Central Laverton Tenements				
No.	Tenement	Tenement Year End Date	Exemption Period Expiry	Period of Delay
1.	M38/73	31 August 2018	30 October 2018	129
2.	M38/89	30 September 2018	29 November 2018	99
3.	E38/1861	30 September 2018	29 November 2018	99
4.	E38/3050	30 November 2018	29 January 2019	38
5.	E38/3051	30 September 2018	29 November 2018	99
6.	E38/3217	30 November 2018	29 January 2019	38
7.	E38/3238	30 November 2018	29 January 2019	38
8.	M38/38	31 October 2018	30 December 2018	68
9.	M38/101	31 August 2018	30 October 2018	129
10.	M38/143	31 August 2018	30 October 2018	129
11.	M38/236	31 July 2018	29 September 2018	160
12.	M38/264	28 February 2018	29 April 2018	313
13.	M38/270	30 June 2018	29 August 2018	191
14.	M38/318	31 August 2018	30 October 2018	129
15.	M38/345	30 April 2018	29 June 2018	252
16.	M38/363	31 August 2018	30 October 2018	129
17.	M38/364	31 August 2018	30 October 2018	129
18.	M38/376	31 January 2018	1 April 2018	341
19.	M38/377	31 January 2018	1 April 2018	341
20.	M38/387	30 November 2018	29 January 2019	38
21.	M38/401	31 January 2018	1 April 2018	341
22.	M38/507	31 March 2018	30 May 2018	282
23.	M38/535	30 September 2018	29 November 2018	99
24.	M38/547	30 November 2018	29 January 2019	38
25.	M38/693	31 December 2018	1 March 2019	7
26.	M38/1032	31 March 2018	30 May 2018	282
27.	M38/1042	30 November 2018	29 January 2019	38
28.	M38/1272	31 July 2018	29 September 2018	160

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29.	P38/4163	30 June 2018	29 August 2018	191
30.	P38/4347	31 October 2018	30 December 2018	68
31.	P38/4348	31 October 2018	30 December 2018	68
32.	P38/4349	31 October 2018	30 December 2018	68
33.	M38/37	30 November 2018	29 January 2019	38
34.	M38/159	31 August 2018	30 October 2018	129