[2023] WAMW 22

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	PANTORO SOUTH PTY LTD & ANOR v TRUE FELLA PTY LTD [2023] WAMW 22
CORAM	**:**	WARDEN G CLEARY
HEARD	**:**	20 June 2023
DELIVERED	**:**	14 July 2023
FILE NO/S	**:**	Objection 636615
TENEMENT NO/S	**:**	E 63/2150
BETWEEN	**:**	Pantoro South Pty Ltd and Central Norseman Gold Pty Ltd (Applicant) AND True Fella Pty Ltd (Objector)

Catchwords: *application for exploration licence; s 58(1) statement; non-compliance; jurisdiction; judicial comity*

Legislation:

Interpretation Act 1984 (WA): s 10
Mining Act 1978 (WA): s 57, 58, 59
Mining Regulations 1981 (WA): r 154

Other references:

Cross and Harris *Precedent in English Law* (4th Ed 1991) 72.

Result: The application E 63/2150 does not meet the requirements of the Act and is invalid.

Representation:

Counsel:

Applicant	:	T O'Leary and L Shave
Objector	:	D Chandler

Solicitors:

Applicant	:	Austwide Legal
Objector	:	Lawton McMaster Legal

Cases referred to:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.
Azure Minerals Ltd v D & G Geraghty Pty Ltd [2022] WAMW 27.
Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd [2022] WASC 362.
Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum [2017] WASCA 153; (2017) 51 WAR 425.
Forrest & Forrest Pty Ltd v O'Sullivan [2020] WASC 468.
Forrest & Forrest Pty Ltd v Wilson & Ors [2017] HCA 30; (2017) 262 CLR 510.
Foster v Northern Territory of Australia [1999] FCA 1235.
Ex parte Hot Holdings Pty Ltd Hot Holdings Pty Ltd v Creasy & Ors (1996) 16 WAR 428.
Golden Pig Enterprises Pty Ltd v Crocker & Ors [2021] WAMW 7.
Golden Pig Enterprises Pty Ltd v O'Sullivan [2021] WASC 396.
Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149.
In re Barto Gold Mining Limited and Others [2023] WAMW 2.
In The Matter of Competing Applications For Exploration Licences By Ariela Nominees Pty Ltd And Others [2023] WAMW 4.
In The Matter of Competing Applications For Exploration Licences By Mining Equities Pty Ltd And Another [2023] WAMW 10.

In The Matter of Competing Applications For Exploration Licences By Pilbara Gold Exploration Pty Ltd And Others [2023] WAMW 8.
In The Matter of Competing Applications For Exploration Licences By Toro Energy Exploration Pty Ltd And Another [2023] WAMW 9.
Mineralogy P/L v FMG Pilbara P/L [2010] WAMW 20.
Mineralogy Pty Ltd v The Honourable Warden K Tavener [2014] WASC 420.
Nova Resources NL v French (1995) 12 WAR 50.
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors [2021] HCA 2; (2021) 272 CLR 33.
Onslow Resources Ltd v Hon William Joseph Johnston MLA in capacity as Minister for Mines and Petroleum [2021] WASCA 151.
Parisienne Basket Shoes Pty Ltd v Whyte [1937-1938] 59 CLR 369.
Re Adams and the Tax Agents Board (1976) 175 CLR 268; (1976) 12 ALR 239.
Re Brown; Ex parte Aberfoyle Resources Limited (unreported) Supreme Court of Western Australia (Full Court) del 19.4.1989.
Re His Worship Mr Calder SM; ex parte Gardner [1999] WASCA 28.
Regional Resources NW Pty Ltd v Harvest Road Pastoral Pty Ltd & Anor [2023] WAMW 11.
Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 16] [2023] WASC 192.
Sino Iron Pty Ltd v Mineralogy Pty Ltd [2023] WASCA 96.
Soia v Bennett [2011] WASC 59.
South Australia v O'Shea (1987) 163 CLR 378.
Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors [2023] WAMW 6.
True Fella Pty Ltd v Pantoro South Pty Ltd [2022] WAMW 19.
William Robert Richmond v Regis Corporation Pty Ltd [2023] WAMW 15.

1. Recently, the American author Cormac McCarthy died. In his novel *The Road* he wrote about a post-apocalyptic world. I write, apparently, in something akin to a post- apocalyptic world, at least as far as the mining industry in Western Australian sees it – the 'post ***Forrest & Forrest v Wilson'*** world, as it has been dubbed[1]
2. The applicant in the present case, Pantoro South Pty Ltd and Central Norseman Gold Pty Ltd, has lodged their statement accompanying their application for E 63/2150 purportedly in compliance with s 58(1)(b) of the *Mining Act 1978* (WA). The statement contains a proposed exploration program and budget for 1 year, and only the financial resources available to Pantoro South. The objector, True Fella Pty Ltd, says that the s 58 statement does not meet the requirements of s 58(1)(b), and the application is therefore "invalid, void, dead."[2]
3. Further, insofar as the applicant's 58(1)(b) statement is concerned, the objector says that the deficiencies are materially similar to its s 58(1)(b) statement accompanying its application for E 63/2149 which was considered not to be sufficient to meet the requirements of s 58(1) in ***True Fella Pty Ltd v Pantoro South Pty Ltd***[3] (***True Fella***). The objector says it is contrary to the public interest and the orderly administration of the Act to conclude any differently in the present case.
4. The applicant resists the objection, saying that:
    a. ***True Fella*** did not set down a principle that specific matters, such as a 5-year work plan, was required in every case;
    b. Insofar as the subsequent decision in ***Azure Minerals Ltd v D & G Geraghty Pty Ltd***[4] sets out that principle, it is wrong, and I should not follow it,
    c. The question of whether a s 58 statement meets the requirements of the Act is a subjective question, and the real question is whether I can be satisfied that the applicant can effectively explore the ground applied for, under s 57(3). If I am satisfied that it can, then I should recommend grant, but if I am satisfied that it cannot, or I am not satisfied from the material available that I can recommend grant, then I should recommend refusal, and

[1] Objector's written submissions lodged 10.3.23 [6] and [8].
[2] Objector's written submissions, 10.3.23 [12].
[3] ***True Fella Pty Ltd v Pantoro South Pty Ltd*** [2022] WAMW 19.
[4] ***Azure Minerals Ltd v D & G Geraghty Pty*** Ltd [2022] WAMW 27.

d. In any event, the compliance or otherwise of a statement under s 58(1)(b) is not a jurisdictional fact, and insofar as I found that to be the case in ***Toolonga***,[5] I was wrong.

CONTEXT OF THE PRESENT CASE – THE ROAD HERE

A HISTORY OF THIS APPLICATION AND APPLICATION FOR E 63/2149 BY TRUE FELLA

5. It is no coincidence that the application number assigned to the application in the present case is one higher than the application number assigned to the application in ***True Fella***. The history of the applications for E 63/2149 and E 63/2150 is set out in ***True Fella***,[6] but I will set it out again here. While I accept that every application is separate to others, even those over the same ground lodged at the same time, this matter has a history, the recounting of which puts the arguments of the parties, particularly those of Pantoro South and Central Norseman Gold into context and provides some perspective on what they are now attempting to argue in defence of their s 58 statement.

6. On 15 October 2021 at 3:57:20 pm two graticular blocks in the Dundas mineral field became open for mining pursuant to an outright surrender lodged by Polar Metals Pty Ltd (**Polar**). At 4:08:22 pm on that day True Fella Pty Ltd applied for E 63/2149 over the blocks. At 4:17:38pm on that day, Pantoro South Pty Ltd and Central Norseman Gold Corporation Pty Ltd together applied for E 63/2150 over the blocks.

7. Each application was on the prescribed form, accompanied by the amount of the prescribed rent for the first year of the term and application fee and lodged at a mining registrar's office. The required notifications and subsequent lodging of security were made.

8. Each application was accompanied by a statement in purported compliance with s 58(1)(b) of the Act.

9. Each applicant then lodged objections over the other's application. The objections are, in their nature, the same: each said that the other failed to comply with the requirements of the *Mining Act 1978* (WA) and *Mining Regulations 1981* (WA) in their application, and that the other party in lodging their application was acting by or on behalf of Polar or someone else who previously had an interest in the exploration licence, thus breaching section 69 of the Act.

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[5] ***Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors*** [2023] WAMW 6.
[6] ***True Fella Pty Ltd v Pantoro South Pty Ltd*** [2022] WAMW 19 [2]-[8].

10. An interlocutory application was originally before the warden as an application for consolidation of applications E 63/2149 and E 63/2150 and the objections thereto, however the parties sought a determination on actual compliance in E 63/2149 before anything else. I so dealt with that request, delivering my decision in ***True Fella***.[7]

11. After that decision, application for E 63/2149 was withdrawn and the objection lapsed.[8]

12. To understand the arguments put in this case one must travel further back in history.

AFTER *FORREST & FORREST V WILSON* – THE POST-APOCALYPTIC JOURNEY

13. Post-apocalyptic tales generally feature cataclysmic decline, with anarchy, environmental ruin, strangling government control and vigilantes and unscrupulous, merciless gangs who roam the roads. It seems that while the judgement in ***Forrest & Forrest Pty Ltd v Wilson & Ors***[9] (***Forrest & Forrest v Wilson***) caused consternation in Western Australia at the time in relation to mining leases,[10] it has only been since my determination in ***True Fella Pty Ltd v Pantoro South Pty Ltd,***[11] delivered on 18 August 2022 that the true extent of the cataclysm in this post ***Forrest & Forrest v Wilson*** world has become known.[12]

14. It cannot be lost on Pantoro South and Central Norseman Gold that the effect of the post ***Forrest & Forrest v Wilson*** world on exploration licences came to light because of the argument Pantoro South ran in ***True Fella***.

15. Post-apocalyptic literature and film is also steeped in hope. Underpinning the central characters in post-apocalyptic tales is their journey of change, a search for new, affirming life or, at least, as in *The Road*, the search for a place that can provide the hope of that

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[7] ***True Fella Pty Ltd v Pantoro South Pty Ltd*** [2022] WAMW 19.
[8] Mining Tenement Register Search for Exploration Licence E 63/2149 obtained at 2.12.2022, annexure JDL 01 to the affidavit of Jacob David Loveland affirmed on 14 December 2022.
[9] ***Forrest & Forrest Pty Ltd v Wilson & Ors*** [2017] HCA 30; (2017) 262 CLR 510.
[10] See WA Government press releases: https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/McGowan-Government-examining-solutions-for-miners-20170905, accessed 15 June 2023 and https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/New-legislation-to-be-drafted-to-validate-mining-tenements-20171128, accessed 15 June 2023 and newspaper reports such as: 'Twiggy's court ruling has Roy Hill concerned over leases,' Tess Ingram and Brad Thompson, Australian Financial Review, 6.10.2017 and 'Forrest ruling wipes out mining lease applications' Brad Thompson, Australian Financial Review 10.10.2017.
[11] ***True Fella Pty Ltd v Pantoro South Pty Ltd*** [2022] WAMW 19.
[12] See, for example: Media Statement, Hon Bill Johnston, 26.8.2022: Exploration licence decision to be examined to provide certainty | Western Australian Government (www.wa.gov.au).

affirmation. In fact, the very title of that book suggests that the hope the father and son sought was not to be found in the place in which they found themselves when the world as they knew it collapsed.

16. The decision in ***True Fella*** has not been the subject of judicial review. However, since that decision, the following reasons have required the spilling of ink[13] on the construction of s 58(1)(b) and the consequences of non-compliance with that provision:

> ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 (***Azure*****);**
> ***In re Barto Gold Mining Limited and Others*** [2023] WAMW 2;
> ***In The Matter of Competing Applications For Exploration Licences By Ariela Nominees Pty Ltd And Others*** [2023] WAMW 4;
> ***Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors*** [2023] WAMW 6 (***Toolonga***);
> ***In The Matter of Competing Applications For Exploration Licences By Pilbara Gold Exploration Pty Ltd And Others*** [2023] WAMW 8;
> ***In The Matter of Competing Applications For Exploration Licences By Toro Energy Exploration Pty Ltd And Another*** [2023] WAMW 9;
> ***In The Matter of Competing Applications For Exploration Licences By Mining Equities Pty Ltd And Another*** [2023] WAMW 10;
> ***William Robert Richmond v Regis Corporation Pty Ltd*** [2023] WAMW 15 (***Richmond***).

17. These written reasons in the present case can now be added to that list – here we are again, with an added dimension: the successful party in ***True Fella*** is now attempting to defend its s 58(1)(b) statement from deficiencies levied at it by True Fella. I will say more about that later.

18. All of these decisions have been written by wardens – me included. No where in that list is there ink spilt by a higher authority, who has the authority to settle the matter – to affirm the life of or extinguish the construction arrived at in ***True Fella*** and ***Azure*** of s 58(1)(b), the consequences of non-compliance, and the application of ***Forrest & Forrest v Wilson*** to exploration licences in Western Australia. To date, no judicial review has occurred on any of these decisions to resolve the central conflict between, it seems, the wardens and the industry; while no judicial officer of the Supreme Court has told Warden McPhee and

[13] I don't recall the use of computers in *The Road*.

I that we are wrong, it seems plenty of those in the mining industry are willing to do so in their stead.

19. It is in that context that the parties came before me in the present case.

20. True Fella now seeks a determination similar to the determination sought by Pantoro South in ***True Fella***. The allegation that there is a breach of s 69 of the Act is not pressed.[14]

21. What can be seen from the history of this matter at [5]-[11] above is that:

    a. Pantoro South and Central Norseman Gold lodged an application over the same ground within minutes of the application by True Fella.

    b. Pantoro South successfully attacked the s 58 statement of True Fella for non-compliance. By virtue of s 105A of the Act, True Fella lost any opportunity for priority against all other applicants, including Pantoro South and Central Norseman Gold, for the ground the subject of the applications.[15]

    c. Before the question of orders to be made consequential to a finding of such non-compliance were addressed, True Fella withdrew its application.

    d. The s 58 statement of Pantoro South and Central Norseman Gold is now under attack by True Fella.

    e. While the application by True Fella was withdrawn, having regard to ***Toolonga***, I most likely would have determined that the application was invalid, that outcome foreshadowed in the written decision of ***True Fella*** at [75].

    f. Therefore, Pantoro South and Central Norseman Gold's s 58 statement is under attack by an objector whose non-compliance effectively lost it priority over Pantoro South and Central Norseman Gold.

A SUMMARY OF THE ARGUMENTS BY EACH PARTY IN THE PRESENT CASE

The objector

22. True Fella, the objector in the present case, says:

    a. The s 58 statement is non-compliant in two ways:

[14] T 20.6.23, 3.

[15] ***True Fella Pty Ltd v Pantoro South Pty Ltd*** [2022] WAMW 19 [63] and [71].

i. The details of the program of work and estimated amount of money proposed to be expended are offered only for one year, contrary to s 58(1)(b)(ii) and (iii) as determined by Warden McPhee in ***Azure***,[16] and

ii. E 63/2150 is made by two applicants with 50 shares each,[17] the s 58 statement addressing the financial resources of only one applicant (Pantoro South Pty Ltd),[18] and

b. E 63/2150 is being pursued by Pantoro South and Central Norseman Gold when their s 58 statement suffers from the same deficiencies as those of E 63/2149 made by True Fella, successfully objected to by one of the applicants in this matter; it is in the public interest, having regard to the principles of judicial comity identified in ***Azure*** that E 63/2150 also be found to be non-compliant.

23. The result of non-compliance is that E 63/2150 is invalid, and cannot progress to the Minister by way of a recommendation.[19]

The applicant

There is no principle in True Fella

24. To succeed in its defence of its s 58 statement, Pantoro South and Central Norseman Gold sought to distance themselves from the determination in ***True Fella***, both legally and in terms of the fact that it was Pantoro South who brought the original objection against True Fella that their one year program of works did not meet the requirements of the Act. Their first argument was that ***True Fella*** did not set out a principle that the proposed exploration works should cover 5 years, because:

i. there were other deficiencies in True Fella's s 58 statement rendering it unnecessary to consider the one year plan, and therefore any statements I made about True Fella's plan, and the requirement of the Act for a plan of longer than one year, were obiter,[20] or

ii. in any event, I either misread or misunderstood the objection raised by Pantoro South in ***True Fella***, as to there being the need for a s 58 statement to be for the life of the licence, being 5 years, or

[16] Objector's written submissions 10.3.23 [13].
[17] Statement of agreed facts lodged 15.6.23 [16].
[18] Objector's written submissions 10.3.23 [18].
[19] Objector's written submissions 10.3.23 [12].
[20] Applicant's written submissions dated 3.2.23 [54] and [61].

iii. if that was Pantoro South's objection in ***True Fella***, Pantoro South now resiles from that objection, or at least counsel now appearing on behalf of Pantoro South and Central Norseman Gold, having been instructed by the same solicitors as represented Pantoro South in ***True Fella***, now resiles from that objection or contention.[21]

25. It is implicit in the applicant's argument, in my view, that if ***True Fella*** does set down some form of principle on what is required in a s 58 statement, it is wrong. I acknowledge that the applicant proffered a way to avoid the application of ***True Fella***, rather than directly submitting it to be wrongly decided. Rather, Pantoro South and Central Norseman Gold submitted ***True Fella*** does not have to be followed, because it did not set out any principle or precedent. However, ***Azure*** was a case where the reasons and outcome in ***True Fella*** were under consideration, in that the applicant in that case, Azure Minerals, said ***True Fella*** was wrongly decided,[22] and Warden McPhee found that it was not.[23] Therefore, if ***Azure*** is wrong, ***True Fella,*** insofar as it sets out any principle, is wrong.

Azure **is wrong**

26. Secondly, in so far as ***Azure*** is concerned, the applicant says that Warden McPhee was plainly wrong, not following the binding authority of ***Re Brown; Ex parte Aberfoyle Resources Limited***[24] (***Aberfoyle***), ***Golden Pig Enterprises Pty Ltd v O'Sullivan***[25] (***Golden Pig***), and ***Ex parte Hot Holdings Pty Ltd Hot Holdings Pty Ltd v Creasy & Ors***[26] (***Hot Holdings***).

The question of compliance with s 58(1)(b) is a subjective question

27. Having addressed why neither ***True Fella*** nor ***Azure*** provide any authority or guidance on the requirements of a compliant statement, Pantoro South and Central Norseman Gold

[21] These two propositions were not set out in the applicant's written submissions, but came in answer to questions I put to counsel about the "curiosity" as the objector described it that the applicant was running a case contrary to the case Pantoro South put in ***True Fella***. These answers seemed to me to also go to explain the applicant's views on why ***True Fella*** was not applicable in this case, so I have included them here for completeness.
[22] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [6].
[23] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [10a].
[24] ***Re Brown; Ex parte Aberfoyle Resources Limited*** (unreported) Supreme Court of Western Australia (Full Court) del 19.4.1989.
[25] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396.
[26] ***Ex parte Hot Holdings Pty Ltd Hot Holdings Pty Ltd v Creasy & Ors*** (1996) 16 WAR 428.

argued that the correct construction of the Act is that the question of 'sufficiency' of a s 58 statement is a subjective question.[27] The only question for the warden at this stage is whether the applicant has sufficiently "addressed" the details required under s 58(1)(b). That question is not to be confused with a consideration of 'sufficiency' in terms of an assessment under s 57(3) (an error, according to the applicant, that both Warden McPhee and I have fallen into). That is because, Pantoro South and Central Norseman Gold submit, the question of compliance under s 58(1)(b) is not a jurisdictional fact as far as the warden is concerned, and there is no hinderance to the warden making a recommendation, having considered s 57(3), under s 57(1) and 59(5) to the Minister if the s 58 statement does not appear to meet the requirements of s 58(1)(b).

28. That is, it is for the Minister to determine compliance and jurisdiction to grant, not the warden at the earlier stage - it is not a question of the warden having the power to determine their own jurisdiction in this circumstance; there is no jurisdiction to be determined.

29. Accordingly, an assessment of the s 58 statement at this stage does not amount to a jurisdictional question, although may be the subject of comment in the recommendation. That being the case, it is the warden's task in the present case to hear the objection and the evidence put on by either party, and make a recommendation having had regard to s 57(3).

Even a statement that does not appear to meet the requirements of the Act does not render the warden incapable of making a recommendation on the application

30. Therefore, according to the applicant, the question of compliance not being a jurisdictional fact, a finding that the s 58 statement may not meet the requirements of the Act does not render the application, at the stages under s 59(3) or s 57(3) and 59(5), invalid.[28]

***Golden Pig Enterprises Pty Ltd v O'Sullivan*[29] endorses compliance with an exploration plan of less than 5 years**

31. Lastly, and perhaps alternatively, ***Golden Pig***, being binding authority on a warden, the applicant says, is authority for the proposition that a work program containing details of less than the full term of the licence may be compliant, given that the proposed plan in

[27] Applicant's written submissions 3.2.23 [11].
[28] Applicant's written submissions 6.6.23 [30].
[29] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396.

Golden Pig was for two years, and there was no comment by Justice Allanson on that period of time for that program.

32. These propositions need to be seen in the context of the legislative scheme and general policies of the Act, after which I will address them in more detail.

THE LEGISLATIVE SCHEME

THE LEGISLATION

33. By s 57 of the Act, the Minister may, on the application of any person, and after receiving a recommendation of the mining registrar or the warden in accordance with s 59, grant to that person a licence to be known as an exploration licence.

34. By s 57(3), the mining registrar or warden shall not recommend the grant of an exploration licence under this section unless they are satisfied that the applicant is able to effectively explore the land in respect of which the application has been made.

35. Section 58 of the Act provides, relevantly:

> (1) An application for an exploration licence -
>
> (a) shall be in the prescribed form; and
>
> (b) shall be accompanied by a statement specifying —
>
> i. the proposed method of exploration of the area in respect of which the licence is sought; and
>
> ii. the details of the programme of work proposed to be carried out in such area; and
>
> iii. the estimated amount of money proposed to be expended on the exploration; and
>
> iv. the technical and, subject to subsection (1aa), financial resources available to the applicant; and
>
> accompanied by the amount of the prescribed the first year of the term of the licence or portion thereof as prescribed; and
>
> (d) shall be lodged in the prescribed manner; and
>
> (e) shall be accompanied by the prescribed application fee.
>
> …
>
> (3) An applicant shall at the request of the mining registrar or warden furnish such further information in relation to his application, or such evidence in support thereof, as the mining registrar or warden may require but the mining registrar or warden shall not require information or evidence relating to assays or other results of any testing or sampling that the applicant may have carried out on the land the subject of his application.

36. Section 59 provides for the determination of an application for an exploration licence. Under s 59(1) and (2), where no objection is lodged to the grant, the mining registrar shall forward a report to the Minister and recommend the grant of the exploration licence, if the mining registrar is satisfied that the applicant has complied in all respects with the provisions of the Act, or recommend the refusal if not so satisfied.
37. Under s 59(4) and (5) where an objection is lodged, the warden shall hear the application and give the objector an opportunity to be heard. The warden shall then forward to the Minister the notes of evidence, any maps or documents referred to, and a report which recommends the grant or refusal of the licence and the reasons for the recommendation. Under s 59(6) the Minister may, on receipt of the report of the mining registrar or the warden, grant or refuse the exploration licence:

    irrespective of whether –

    (a) The report recommends the grant or refusal of the exploration licence; and
    (b) The applicant has or has not complied in all respects with the provisions of the Act.

38. Under s 61 an exploration licence shall remain in force for a period of five years, and may be extended.
39. During the currency of the licence, the holder must comply with prescribed expenditure conditions, unless an exemption is granted, and is liable to forfeiture for failure to comply with terms and conditions, including expenditure conditions.
40. The holder of an exploration licence has priority for the grant of a mining lease or general purpose lease over the land.

PRIORITY OF APPLICATIONS

41. By s 105A(1), the applicant who first complies with the 'initial requirement' in relation to an application for a mining tenement in respect of the same land has, subject to the Act, priority over every other applicant, unless a ballot is required.

THE POLICY OF THE ACT

42. The ‘primary object’ of the *Mining Act* is to encourage and promote exploration for, and the mining of, mineral deposits.[30] Having regard to the oft-cited cases of ***Nova Resources NL v French***[31] and ***Forrest & Forrest Pty Ltd v The Honourable William***

[30] ***Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd*** [2022] WASC 362 [151].
[31] ***Nova Resources NL v French*** (1995) 12 WAR 50.

Richard Marmion, Minister for Mines and Petroleum[32] in summary, the primary principle of the Act is that land should be open for mining, or being mined.

JUDICIAL COMITY AND BEING TOLD YOU ARE EACH WRONG

43. In ***Azure*** his Honour addressed the risks in departing from another warden's decision.[33] There is a public interest in wardens, as far as possible, particularly on questions of construction, not departing from another warden's construction without good cause. I also accept, as Warden McPhee has, that we are sufficiently independent that we must come to our own views on matters, particularly where it is submitted that the previous interpretation is in error.

44. This extends to decisions made previously by the same warden, as, it must be now recognised in relation to the issues raised in the present case, each of Warden McPhee and I have been asked to adjudicate and consider the question of construction on s 58, and the consequences of non-compliance on several separate occasions. There are inherent difficulties in a judicial officer, including a warden, at first instance receiving and considering submissions contending that they erred in a previous matter. I recognise an "inescapable level of decision-maker and author's bias," having "laboured"[34] many hours over these cases and reasons for decision.

45. Further, unlike his Honour in ***Azure***, however, where it was at least put to him that he could depart from ***True Fella*** without fear of much occurring in change of practice in the short time between the ***True Fella*** decision being published and the hearing in ***Azure***, which he found to be undermined by other evidence that was put before him in any event,[35] there has been almost a year since the reasons in ***True Fella*** were published.

46. In my view the uncertainty that his Honour found may occur in relation to those who had taken the commercial decision to make applications for exploration licences afresh in the wake of ***True Fella***[36] is compounded here by the passage of time, a passage which has, it

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[32] ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153; (2017) 51 WAR 425.
[33] ***Azure Minerals Ltd v D & G Geraghty Pty*** Ltd [2022] WAMW 27 [112] – [133].
[34] As his Honour Justice Kenneth Martin recognised in a substantive application for a stay of orders against a decision he had made in ***Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 16]*** [2023] WASC 192 [37], that difficulty recognised by Beech and Vaughn JJA in ***Sino Iron Pty Ltd v Mineralogy Pty Ltd*** [2023] WASCA 96 [63].
[35] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [119] – [120].
[36] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [124] – [125], [127].

appears, not involved any travel down the road to the Court which could settle the matter for certain.

47. The uncertainty that such a change would bring, in me departing from ***Azure*** and ***Toolonga***, on both the construction and invalidity points, for all of the reasons illustrated by Warden McPhee, is a relevant consideration in assessing whether something is so plainly wrong that I must depart from those cases, including my own views in them.

48. In addition, any departure by one or both of us on factually similar matters, from previous decisions, of ourselves or each other, may result in an allegation that the decisions are unreasonable, in a "***Wednesbury***"[37] sense, giving rise to inconsistent decisions arising from a commonality of underlying subject matter.

49. Having recognised those risks, I now address the parties' submissions and contentions.

WHAT DOES S 58 REQUIRE?

THE LENGTH OF THE SPECIFIED EXPLORATION PROGRAM

The objector's position

50. The objector says:

    a. ***Azure*** sets out the law on s 58 statements in relation to the length of time of the proposed method of exploration that will meet the requirements of the Act, and should be followed.

    b. In ***Azure*** Warden McPhee found that for a s 58 statement to meet the requirements of the Act, it will be:[38]

> *a statement detailing the proposed method of exploration of the area referred to in the application (being the whole of the relevant ground) in respect of which the licence is sought (the licence being an exploration licence), which must necessarily import the effect of section 61(1) of the Act, which refers to an exploration license which is granted, being for 5 years.*

His conclusion was that "the words of the text simply do not support" the reading into s 58(1)(b) a term of 12 months, or any months less than the term of the licence.[39]

[37] ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223.
[38] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [154].
[39] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [150].

That is, it will not meet the requirements of the Act unless the statement contains a proposed method of exploration for the whole of the relevant ground, for the whole of the term of the proposed licence, being 5 years.

c. ***Azure*** is to be followed because:

i. the question of the length of time of the proposed exploration program was squarely raised, argued and comprehensively addressed by Warden McPhee.[40] In fact, it was the only point raised and argued in relation to the applicant's s 58 statement in that case, and

ii. to the extent that ***True Fella***, ***Azure*** and ***Toolonga*** are inconsistent with ***Aberfoyle*** or any other analogous case determined prior to ***Forrest & Forrest v Wilson***, ***Aberfoyle*** is not good law post ***Forrest & Forrest v Wilson***.

d. Therefore, the program in the present case not being for the entire life of the licence, being 5 years, Pantoro South and Central Norseman Gold's s 58 statement is not compliant, that is, it does not comply with the requirements of the Act.

The applicant's position and my determination on those arguments

Is there a principle in True Fella?

51. The applicant's argument about ***True Fella*** is:

a. The s 58(1)(b) statement in ***True Fella*** was, leaving aside the question of a one-year plan and the application of its finances to that one year plan, significantly deficient in other respects.

b. As a result, there was no need for me to determine the question of whether and if so how the length of time of the exploration plan was not compliant. As a result, any apparent principle taken from the determination in ***True Fella*** of the question of the sufficiency of a one-year plan is not principle at all, merely comment. Being comment, it does not need to be followed.

52. In my view, whether ***True Fella*** sets out a principle or not is no longer a live issue. In ***Azure*** Warden McPhee considered ***True Fella*** in light of submissions made to him, separate to ***True Fella***, and separate to ***Golden Pig***, about the construction of s 58. Warden McPhee made it clear that while judicial comity was an important factor in

[40] T 20.6.23, 64.

running the wardens' jurisdiction,[41] he would depart from any principle or precedent set out in ***True Fella*** if he was satisfied that aspect of ***True Fella*** was plainly wrong.[42] Not only was he not so satisfied, but he was positively satisfied, having undertaken the construction exercise separate from an analysis of ***True Fella***,[43] that any conclusions I had come to in ***True Fella*** about the construction of s 58 were correct.

53. I discuss the applicant's approach to ***Azure*** later. However, despite my view that it is ***Azure*** that now sets out the law, the submission from Pantoro South that ***True Fella*** does not set down any principle is relevant in another way, which I discuss next.

Pantoro South and Central Norseman Gold are defending deficiencies in their s 58 statement for which Pantoro South successfully attacked the s 58 statement of True Fella- the public interest and a consideration of when something is plainly wrong

54. As the hearing of the present case developed, it became clear that Pantoro South and Norseman Central Gold were attempting to distance themselves from the very argument run by Pantoro South in ***True Fella*** that obtained for Pantoro South and Central Norseman Gold the opportunity for priority at least over True Fella in relation to their respective applications over the same ground.

55. There is a public interest in the efficient allocation of judicial resources.[44]

56. Further, while perhaps not extending to estopel in an administrative proceeding, making an argument as to the construction of an enactment that is contrary to an argument previously run by that same party, whether in the same proceedings or not, is relevant to my deliberations on the question of whether ***Azure***, if not ***True Fella***, is wrong.

57. In ***Azure***, Warden McPhee addressed the approach to take when a warden is asked to decline to follow another warden's decision.[45] The parties in the present case did not seek to controvert that approach. In particular, his Honour noted that the "bar required to be met for a departure on principle, ought be high, and particularly so on questions of jurisdiction, compliance and statutory construction."[46] I agree, for the reasons and examples his Honour then set out. Particularly, I agree that uniformity of approach creates certainty and fairness for all parties that come before the decision maker on that point.

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[41] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [112]- [114].
[42] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [115] and [130]-[131].
[43] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [131].
[44] ***Soia v Bennett*** [2011] WASC 59 [53].
[45] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [112]-[117].
[46] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [116].

58. In ***True Fella***, Pantoro South urged me to accept a particular construction of s 58(1)(b). Understandably, it did that from its own self-interest – it meant their objection to the application would succeed. Now, Pantoro South is urging me to accept that that same construction is wrong. Again, perhaps understandably, it is making that submission from its own self-interest – it means that its application will be maintained, and the objection against its application will fail. Self-interest itself is not a legal submission. There must be more to a legal submission than 'this week, it suits us to make the opposite argument,' particularly in the areas Warden McPhee identified: on questions of jurisdiction, compliance and statutory construction.

59. The self interest shown by Pantoro South is stark. The willingness to run an argument exactly the opposite to the argument it urged upon me against the same party, over the same ground, suggests a lack of regard for the efficient and fair running of the wardens' jurisdiction and the process of adjudication in such matters. As the proposition now put to me by Pantoro South is so overwhelmed by self-interest it immediately suggests a lack of reliability to the argument, bringing into stark relief the high bar of a determination that a previous decision is 'plainly wrong,' especially considering that if I came to a result different to Warden McPhee in ***Azure***, and therefore to my own determination in ***True Fella*** and ***Toolonga***, the consequence would be an "intolerable division between the two sitting Perth Wardens on a key issue of statutory construction,"[47] and the uncertainty, that that would invoke.

60. In addition to that general apparent lack of reliability, in my view the manner in which Pantoro South and Central Norsemen Gold went about distancing themselves from the argument Pantoro South put in ***True Fella*** brings them no credit, and casts further doubt on the reliability or substantiveness of any legal arguments put to me, which in turn effects their credibility.

61. To illustrate how Pantoro South and Central Norseman Gold's arguments contain a lack of reliability, I will first address their objection in ***True Fella***, and then set out the manner in which Pantoro South and Central Norseman Gold attempted their distancing.

The objection in True Fella

62. In ***True Fella*** I set out the complaints of Pantoro South at [39], worth repeating here:

[47] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [127]-[128].

[39] The objector raises the following objections to the s 58(1) statement:

i. In relation to the initial phase of exploration for the first year the details provided are only in relation to the initial phase and do not provide details of how the applicant will ensure the full area of the application will be explored during the full five year term of the license.
ii. Neither does the statement include details of the selection rationale for the proposed target mineral or minerals for the application.
iii. In relation to the technical resources available to the applicant, the statement only indicates that the applicant intends to outsource the activity by utilising the services of Resource Potentials. …
iv. There are no details of the applicant's agreement with Resource Potentials or their availability during the term of the license.
v. In relation to the financial resources, the objector has undertaken an exercise of setting out the tenements held or subject to application by the applicant and the minimum expenditure required for each. The objector has determined that the minimum expenditure requirements, should all those under application be granted, in addition to those already granted, is $463,560 in the next 12 months. Accordingly, the objector says that the funds available to the applicant are not sufficient to comply with the prescribed expenditure across the tenement, or its entire portfolio.
vi. Furthermore, the objector claims that the applicant's statement that it has the ability to secure funds in excess of $250,000 is a bold conclusory statement that does not specify the actual resources available to it or that the resources available are sufficient. Also, there is no identification of whether the funds would be available to a parent company or the applicant itself.

63. That is, Pantoro South said that a program which does not specify the work to be conducted during and for the life of the grant, being the full 5 years of the life of the licence, is a program which does not meet the requirements of s 58(1). I agreed. Now that that complaint is being levied at it, Pantoro South is seeking to resile from that submission. The portion of transcript that records my exchange with counsel for the applicant on their previous arguments, and the consequences, is as follows:[48]

THE WARDEN: Right. So then I've got a couple of questions for you in relation to that, then. How do you reconcile that[49] with the submissions your client made in relation to the application for E63/2149?
O'LEARY, MR: Well, I was not counsel in relation to that application.
THE WARDEN: It's your client and it's your client in this matter, isn't it?
O'LEARY, MR: Well, this is a separate matter to that matter.

[48] T 16.6.23, 30-32.
[49] Counsel for the applicant had just completed his submissions about why ***Golden Pig*** endorsed a work or exploration program of less than 5 years.

THE WARDEN: It's the same ground and the two – exact two same parties are in direct competition. They are arguing over who should have priority on this ground.
O'LEARY, MR: Well, the - - -
THE WARDEN: Doesn't that make it - - -
O'LEARY, MR: Well - - -
THE WARDEN: - - - the same matter?
O'LEARY, MR: Well, with respect, Warden, they're not in this application arguing about who – but as between them – should have access to the ground. In this application - - -
THE WARDEN: What's the point? What's the point of this objection then?
O'LEARY, MR: Well, that's not really a matter that – other than the fact that there is an objection it has no bearing on the assessment of the application as to the reason why the objection's brought or whether that is a good reason or a bad reason or a - - -
THE WARDEN: I can't escape the facts that the applications were made, what is it, eight minutes – 13 minutes apart, can I?
O'LEARY, MR: Well, it's actually – this is not – it bears no part of your consideration in relation to this application, we say.
…
O'LEARY, MR: And – but to address your initial question what – how does that sit with the – with the submissions in relation to True Fella's application. Well, if there was a submission to the effect that there had to be a five year work program then that's not a – not a submission that we would support.
THE WARDEN: But that was your client. At paragraph 39 of True Fella:
I've set out the submissions in relation to the proposed method of exploration. …
> The objector raises the following objections. In relation to the proposed method of exploration the details provided are only in relation to the initial phase of exploration for the first year –

so "initial phase" –
> and do not provide details of how the applicant will ensure the full area of the application will be explored during the full five year term of the licence.

Now, I didn't make that up. That was the submission. That's recorded in the judgment because that's the submission that was made. …
O'LEARY, MR: … Sorry, I will just – well, on its face the submissions that the objector there raises are observations about what was – what was said … observations about the section 58(1)(b) statement lodged by True Fella, that is, it says here:
> The details provided are only in relation to the initial phase of exploration for the first year and don't provide details of how the applicant will ensure the full area of

> the application will be explored during the full five year term of the licence.
> Well, that's either true or not. But that's not a submission that it had to be for the full five years of the licence. That's an observation about what was said. …
> Neither does the statement include details of the selection rationale for the proposed target mineral or minerals for the application.
> Again, that's an observation about the statement. So, as I said, I was not counsel in relation to that application. But we – and I think the key point about True Fella – True Fella's application is that it was for other reasons set out in your – in the – in the Warden's reasons – deficient. The section 58 statement was …quite apart from this issue about whether it had to be one year or five years.

64. Therefore, having put to counsel for Pantoro South and Central Norseman Gold that it was his client that originally had argued that the s 58 statement, to meet the requirements of the Act, needed to provide details of how the applicant will ensure the full area of the application will be explored during the full five year term of the licence, and asked what the consequences of such a reversal are, his responses were:

    a. He was not counsel in the ***True Fella*** matter;
    b. The comparison cannot be made because this is a separate matter to the ***True Fella*** matter;
    c. The reason for the objections from his client and True Fella have no bearing on the outcomes of the present matter;
    d. In any event, if that was the submission that was made "we would not support that submission," and
    e. Because the s 58 statement in ***True Fella*** was deficient in so many ways, it was not necessary for me to make a finding as to the one-year program, and neither was it necessary for the submission to be made as to the apparent need of a plan covering the life of the grant, being 5 years by Pantoro South. On that point counsel for Pantoro South and Central Norseman Gold also said, given "the other significant deficiencies in the statement… it wasn't one [a contention] that needed to be pursued." [50] In any event, said counsel "whether the comments were obiter dictum or part of the ratio decidendi they're not binding on – on you in this matter."[51]

[50] T 20.6.23, 33.
[51] T 20.6.23, 33.

f. Further, the 'submission' which I have set out above, according to Pantoro South and Central Norseman Gold, is not actually to be read as a submission. Rather, it should be read as Pantoro South's comment as to the existence of a state of facts – that is, the program covered one year, and not 5.

65. Each of these submissions, in my view, reveals the disingenuousness of Pantoro South, in particular, in defending the objection by True Fella in the way it has, and makes me cautious as to the reliability of their argument. I will address some of them to illustrate why.

Who's "we"?

66. I find it curious that counsel used "we" in this exchange. If counsel meant the party he represented as "we" does not support the submission that a s 58 statement which does not specify the work to be conducted during and for the life of the grant, being the full 5 years of the life of the licence, does not meet the requirements of the Act, then that is suggesting that his client is being disingenuous before the warden, willing to say one thing when it suits them, and the opposite when it does not. By that, counsel has revealed, in my view, that his clients have illustrated a lack of respect for the work of the wardens court, the legislative process for resolving mining disputes and the Minister's position as the decision maker when a recommendation has been made.

67. Alternatively, if counsel means himself, counsel has revealed his own views about the principles in ***True Fella***, ***Azure*** and ***Toolonga***, also revealing a misunderstanding of the role of counsel.

68. If counsel means by "we" his instructing solicitors, Mr O'Leary was instructed by Austwide Legal.[52] Austwide Legal also instructed Mr Rogers in ***True Fella***. Therefore, it may be Austwide Legal who instructed Mr Rogers to run an argument in ***True Fella*** which is directly contradictory to the argument they are instructing Mr O'Leary to run. If that was on instructions from their client, then that again illustrates the lack of credibility on their client. If that was not with instructions, in the present matter or ***True Fella***, then I will leave that to Pantoro South and Central Norseman Gold to deal with, noting, nevertheless, my views on, the effect on Pantoro South's submissions, at least, and the effect on my view of them, those submissions supported by the actions of the instructing solicitors.

[52] T 20.6.23, 2.

69. Mr Chandler who was counsel in the present case for the objector, True Fella, was counsel for Azure Minerals in ***Azure***, being the party defending their s 58 statement on the basis that my determination in ***True Fella*** was wrong. Mr Chandler's instructing solicitors in the present case were also instructing solicitors for True Fella in ***True Fella***. In this case, therefore, Lawton McMaster and Mr Chandler may appear to be running a case that my determination was correct in ***True Fella***, contrary to Mr Chandler's submissions in ***Azure***, and True Fella's submissions in ***True Fella***. They are not. The objection run by True Fella in the present case is that there is no doubt as to Warden McPhee and my view of the law from (at least) ***Azure*** (where Azure Minerals did not run its case based on ***Aberfoyle*** still being the applicable law in Western Australia) and ***Toolonga***, that law having been tested before us on several occasions, and that law should now be applied consistently. There is no resiling from their client's or previous counsel's submissions on the matter therefore in their submissions in the present case.

"I was not counsel"

70. Not being counsel in the previous matter, Mr O'Leary nevertheless sought to challenge my understanding of the objections and underlying submissions made by his client in ***True Fella***. Mr O'Leary spent some time in his submissions addressing why I did not set out a binding principle in ***True Fella***, and it cannot have escaped his attention in preparing for that submission that the objections set out at [39] of that decision were made by his client. It is difficult to accept a proposition that I have misread, misunderstood or mischaracterised his client's previous objection and submissions from someone who, as he said, was not counsel in that matter. As can be seen from the ***True Fella*** written reasons, the matter was ultimately dealt with on the papers; the papers would have been available to clarify the matter, Mr O'Leary being briefed by the same solicitors as represented his client in ***True Fella***.

71. Alternatively, of course, it may have been that I had not accurately reproduced those particulars of objection, which I raised by querying Mr O'Leary that he was not suggesting I made the submission, or the extent of that submission, up. It would not have been difficult for counsel to produce the written submissions, given they were produced in ***True Fella*** by his client, through his instructing solicitor. Mr O'Leary did not seek to prove that I have not accurately reproduced the objection in my written decision in ***True Fella***, and neither did he seek to produce the submissions or any other document on that basis. Instead, as I have set out, he sought to controvert me on my understanding of the

objection or submission made, and submitted that the submission did not mean what I thought it had, when, as he admitted, he was not counsel on that matter.

72. As I have identified, True Fella did not seek judicial review, at all, but specifically on whether I had made a determination on a case or submission that was not in fact put by the parties, thus not affording procedural fairness. Given, the frequent challenges in this jurisdiction and the outcry at the principle now set out in ***Azure*** about the need for a plan which addresses the full term of the licence, I would have thought any party would be keen to take any error they could on review to have that finding overturned, and the absence of judicial review on any procedural error I made in ***True Fella*** suggests the parties believed I did not make any such error, such that the submission made as I have reproduced it, and interpreted it, in ***True Fella*** is the submission actually made.

73. I deal more fully with, then, the proposition that I have misread or misunderstood the submission in ***True Fella***, next.

The submission made was simply a statement of fact, not a contention about the non-compliance of the s 58 statement

74. At the hearing of the present case, counsel said[53]

> …on its face the submissions that the objector there raises are observations about what was – what was said…observations about the s 58(1)(b) statement lodged by True fella, that is…[and here, counsel read back to the court [39i] of ***True Fella***] Well, that's either true, or not. But that's not a submission that it had to be for the full five years of the licence. That's an observation about what was said.

75. Whether counsel means that that was an observation of mine as to a submission, or an observation of counsel for True Fella in that matter as to the state of the s 58 statement, my reasons reflect that it is neither. I have identified it in [39] of the ***True Fella*** reasons for decision as a submission supporting the objection made by his client as to why the s 58 statement should be rejected.

76. Having had that contention made, I dealt with it. It is not, on the face of it, or at all, an 'observation' on the state of the s 58 statement. Why, if that was the case, did Pantoro South specifically 'observe' that the statement was not "for the life of the licence"? That was 'observed' because, clearly, that was the requirement under the law Pantoro South was urging for, at that time. Any suggestion otherwise, by counsel who was not counsel

[53] T 20.6.23, 32.

in ***True Fella***, must be rejected, and any suggestion by the instructing solicitor or client must also be rejected as, from them, they know it is not the case.

*Any consideration and conclusion in **True Fella** on the law in relation to the length of a program in a s 58 statement is obiter only, and no principle*

77. The applicant's proposition in this regard appears to be that as long as there is some other reason to make a determination on an issue, any pronouncements or findings on what the law might be, and how the facts are applied to that law, in relation to another issue in the same matter, are not then part of the reasons for decision, but are mere comment, to be ignored, or adopted, as it suits, in other matters. The consequence of that proposition is that if there were 4 issues that were determined, leading to a particular outcome, then none of those issues could ever be said to be the reason for coming to that outcome.

78. For example: in ***Golden Pig*** there were 2 complaints about the s 58 statement. Warden O'Sullivan, and later Justice Allanson, found the complaints to be made out. However, on Pantoro South and Central Norseman Gold's proposition, no statement about the law underpinning a finding on those facts would ever amount to a principle to be applied, let alone binding, on anyone. For example, if the objection against Pantoro South and Central Norseman Gold was that they had provided a deposit slip of one director, without further explanation, as the financial resources available, they could claim that there was no binding principle set out by Justice Allanson about the adequacy of unexplained term deposit slips, because there was another reason he found the s 58 statement non-complaint (not naming the experts available to them). Then, if the objection raised against Pantoro South and Central Norseman Gold was that they had not named the experts available to them, they could claim that there was no binding principle set out by Justice Allanson about naming experts, or the need for specificity in that sub-section, because there was another reason he found the s 58 statement non-complaint (the adequacy of the term deposit slips as specifying the financial resources available to the applicant). Effectively, then, nothing in ***Golden Pig*** would be binding on anyone, despite the fact that it is a Supreme Court decision.

79. In my view that proposition of the applicant ignores notions of certainty and precedent in decision-making, and ignores the principles of what are the reasons for decision, and why they must be followed. In considering whether a decision of a court is binding in a particular case, it is necessary to determine whether a decision is in point. Generally, any rule of law expressly or impliedly treated by the decision maker as a necessary step in

reaching their conclusion, having regard to the line of reason adopted by that decision maker, is the principle for which the case is a binding precedent,[54] if in a higher jurisdiction, or, at least, persuasive in a jurisdiction of the same level. Having regard to the factors outlined by Warden McPhee on judicial comity, there is no reason why that general proposition should not apply to administrative decision making by wardens.

80. Each of the reasons Justice Allanson found the s 58 statement produced by Golden Pig did not comply, was a necessary step in his conclusion, albeit that minus one, or the other, he still would have come to the decision that the statement did not meet the requirements of the Act. The basis of his Honour's ultimate finding is the same – his construction of s 58(1)(b) is that each particular must be 'specified.'

81. Each of the reasons I found that the s 58 statement in ***True Fella*** did not comply was a necessary step in coming to my conclusion that the statement did not meet the requirements of the Act, albeit minus one I would still have come to the same conclusion, having applied the principles of ***Golden Pig***.

82. The fallacy of the applicant's reasoning in this proposition is illustrated by its own, subsequent proposition that ***Golden Pig*** endorses an exploration plan and budget of less than the life of the licence as meeting the requirements of the Act, and that, therefore, that is binding authority on me. The applicant cannot submit that that part of the decision is binding on a warden when the consequences of their argument that there was no principle in ***True Fella*** because there were several reasons why the statement did not meet the requirements of the Act, is that no one proposition would be binding or even persuasive. Therefore, even if I accept that ***Golden Pig*** does endorse a 2 year plan as being compliant, which I discuss later in these reasons, and reject, it may still not be binding on me, on that reasoning.

83. Having reviewed the applicant's criticisms of and attempts to distance itself from ***True Fella***, I find them baseless I reject them entirely. They do not go any way to satisfying me that ***True Fella*** does not in some way set out at least a guide to the requirements of the s 58 statement, if not a principle. In addition, they cast an unreliability over the applicant's attempts to argue that ***Azure*** and ***Toolonga*** are also wrong, and inform how I assess whether I am satisfied that those cases are plainly wrong, or that ***Aberfoyle*** is still good law in Western Australia.

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[54] ***Foster v Northern Territory of Australia*** [1999] FCA 1235 [30] citing Cross and Harris *Precedent in English Law* (4th Ed 1991) 72.

84. The real hurdle the applicant faces is the decision of Warden McPhee in ***Azure***. To succeed, the applicant has no choice but to submit that ***Azure*** is plainly wrong, and I address its submissions next.

While ***True Fella*** is meaningless, ***Azure*** is wrong

85. The objector says that given the way ***Golden Pig*** was argued, it is not currently the leading case on the construction of s 58; ***Azure*** is.[55] In summary, says True Fella, ***Azure*** is authority for the principles that, to meet the requirements of the Act:[56]
    a. There must be a program of work for 5 years, and
    b. There must be a specification of financial resources and technical resources for the purpose of five years.
86. The applicant says that the argument before Warden McPhee in ***Azure*** caused Warden McPhee to fall into error, because the arguments in that case proceeded on the assumption that ***True Fella*** did set out the principle that the Act required the specification of a program and finances that addressed the full term of the licence. Being lead into such error, it submits, His Honour failed to recognise that ***Aberfoyle*** is binding on wardens in Western Australia, that is, that the question of the sufficiency of the s 58 statement is a subjective question and not one which a warden can be said to be in error over.
87. The failure to recognise that means that both Warden McPhee and I have failed to recognise that it is the Minister who must determine whether the s 58 statement meets the requirements of the Act, not the warden. As counsel for Pantoro South and Central Norseman Gold said in oral submissions:[57]

> …the difficulty that the Warden confronts in Azure Minerals is that, the Warden is purporting to supplant their assessment of the sufficiency of the section 58(1)(b) statement with the Minister's assessment. And so, perhaps the most efficient way to deal with what was said in True Fella or in Azure is that, those decisions are inconsistent with what the High Court said in Forrest & Forrest v Wilson, the Warden … cannot do.

88. At the heart of the applicant's submissions therefore is the applicability of ***Aberfoyle***, as was the applicant's submission in ***Toolonga***. The warden must be satisfied that ***Aberfoyle*** is still binding authority in Western Australia. The applicant in the present case sought

[55] T 20.6.23, 62, 65.
[56] T 20.6.23, 65.
[57] T 20.6.23, 34.

to make good this proposition by showing that neither ***Forrest & Forrest v Wilson***, nor ***Golden Pig***, are inconsistent with ***Aberfoyle***, and that all contend for the same outcome – that it is not for the warden to determine whether the s 58 statement meets the requirements of the Act such that it determines the warden's jurisdiction, and, consequently, whether the proposed exploration plan covers 1, or 5 years is not a matter the warden should be concerned with.

89. I accept the objector's contention that as the law stands, a s 58 statement must contain a program of works that covers 5 years, and there must be a specification of financial resources and technical resources for the purpose of five years and that that is a concern of the warden such that it is a jurisdictional fact. That is because:

    a. I consider that Warden McPhee is not plainly wrong, or wrong at all, and
    b. ***Aberfoyle***, whatever it once stood for, is no longer applicable in Western Australia, it being inconsistent with ***Forrest & Forrest v Wilson***, and
    c. A plain reading of the legislation, in the context of the Act and regime it regulates, does not allow for the construction for which the applicant argues.

*What is the principle in **Aberfoyle**?*

90. I have set out in ***Toolonga***[58] the contentions and findings of the Full Court of the Supreme Court in ***Aberfoyle***.

91. In summary, the Court declined to quash the warden's decision that the s 58 statement was 'sufficient' and therefore to dismiss the objection as to the sufficiency of the applicants' section 58 statement. The applicant in the present case primarily relies on a statement of Justice Rowland at page 11 of his judgement:

> In my view, this is primarily a question of fact; but, apart from that, it does not affect the validity of the application. The relevant statement in accordance with section 58 is simply a statement that is to accompany the application. The warden has found as fact that the statement which accompanied the application was sufficient. Views may differ on what is sufficient for the purpose; but this is for the warden to resolve and, even if he be wrong, then that error would not invoke the supervisory jurisdiction of this court at this stage, because it's such an error has nothing to say on the question of whether a proper application has been filed. It does not go to the jurisdiction of the warden to direct a ballot.

[58] ***Toolonga Mineral Sand Pty Ltd v Callum and Belinda Carruth & Ors*** [2023] WAMW 6 [162]-[167].

92. In its written submissions, the applicant highlights what it says is the importance of that passage:[59]

> ***Aberfoyle*** *confirms that there is no objective standard that must be met with respect to the information that is provided by the applicant (that is,"views may differ"), so long as the applicant has specified its proposed method of exploration of the area, its program of work, its estimate of money proposed to be expended on exploration and the technical and financial resources available to it.*

93. Therefore, it is not for the warden to apply some form of objective standard against which all s 58 statements are assessed in relation to compliance before the warden can move to assess the application under s 57(3), and make a recommendation. Accordingly, any assessment of whether the application is 'sufficient' is a subjective consideration.

94. As the court pointed out in ***Aberfoyle***, it says, wardens may differ on whether a particular statement is sufficient. Being subjective, 'assessment' of the s 58 statement is not reviewable at the stage of the warden determining whether to proceed. That is, it is a decision therefore that has no bearing on any power the warden has to move to the next step of an assessment under s 57(3), and the recommendation.

95. Rather, the decision to grant or refuse is reviewable over the manner in which the Minister exercised their jurisdiction to grant or refuse, once that has occurred.

96. The consequences of accepting that an assessment of a s 58 statement involves only a subjective consideration of the statement were addressed in oral submissions by the applicant:[60]

> … in any event, this whole question about whether it has to be one year or five years, properly considered, isn't for the warden anyway, for all the reasons that we said earlier; it is for the Minister. So our – _as we said, the warden's role, effectively, is to receive the statement, consider whether it addresses each component of section 58(1)(b). And ultimately …whether the information that the applicant has provided is sufficient will be a matter for the Minister when making a decision of whether to grant the application.

97. The objector in the present case agreed that the Full Court in ***Aberfoyle*** determined that the view of a warden that the s 58 statement does or does not meet the requirements of the Act is subjective, and is not, at that stage, reviewable. Where the applicant and

[59] Applicant's written submissions 3.2.23 [19].
[60] T 20.6.23, 39.

objector differed was whether that proposition is still the applicable law in Western Australia. The objector says it is not, because that proposition is inconsistent with ***Forrest & Forrest v Wilson***, which is applicable to exploration licences in Western Australia. As I have pointed out, the applicant says ***Aberfoyle*** is applicable, because it is consistent with ***Forrest & Forrest v Wilson***.

98. I will address whether ***Aberfoyle*** is still applicable in Western Australia in the following way:
    a. Are ***Forrest & Forrest v Wilson*** and ***Golden Pig*** consistent, or inconsistent with ***Aberfoyle***? I find that they are inconsistent, that is:
        i. They do not stand for the proposition that only at grant stage, in the hands of the Minister, is the sufficiency of a s 58 statement relevant to jurisdiction, and
        ii. ***Forrest & Forrest v Wilson*** does not stand for the proposition that a warden may not determine their own jurisdiction in a matter.
    b. Being inconsistent, is it the case that wardens can, or cannot, determine their own jurisdiction? They can.
    c. I test that outcome with some consequences discussed in the hearing of this matter.
99. The outcome of those findings is that there must be some fact upon which the warden may determine their jurisdiction, without which any recommendation to the Minister is tainted, tainting any grant. The relevant facts are those set out in s 58(1)(b), according to the standard as his Honour found them to be in ***Azure***.

Golden Pig *and* ***Forrest & Forrest v Wilson*** *do not stand for the proposition that only at grant stage does jurisdiction come to be determined*

100. The applicant relied on one paragraph in ***Golden Pig*** and a number of paragraphs and the reference to ***Parisienne Basket Shoes Pty Ltd v Whyte***[61] (***Parisienne Basket***) in ***Forrest & Forrest & Wilson*** to show that those cases are consistent with the reasoning in ***Aberfoyle.***
101. In summary, the applicant's argument is that in each case the courts determined that it is in and at the time of grant that the question of jurisdiction arises, and no earlier.
102. Those paragraphs, now, have been oft repeated, and I will add to that here:

[61] ***Parisienne Basket Shoes Pty Ltd v Whyte*** [1937-1938] 59 CLR 369.

Golden Pig:

> [46] The filing of an application in the prescribed form, accompanied by the statement required by s 58(1)(b), and accompanied by rent of the prescribed amount and the prescribed application fee, are elements in the regime prescribed for the grant of an exploration license and must be followed if there is to be a valid grant.

Forrest & Forrest v Wilson:

> [64] Regrettably, the Court of Appeal was not referred to, and did not consider, the line of authority which establishes that where a statutory regime confers power on the executive government of a State to grant exclusive rights to exploit the resources of the State, the regime will, subject to provision to the contrary, be understood as mandating compliance with the requirements of the regime as essential to the making of a valid grant. When a statute that provides for the disposition of interests in the resources of a State "prescribes a mode of exercise of the statutory power, that mode must be followed and observed". The statutory conditions regulating the making of a grant must be observed. A grant will be effective if the regime is complied with, but not otherwise.

103. The applicant points to the word "grant" in those passages as being "significant."[62] In written submissions the applicant said:[63]

> *It follows that the decision in **Aberfoyle** is entirely consistent with **Forrest & Forrest v Wilson**: that is, lodging a compliant s 58(1)(b) statement is an "essential preliminary" to the exercise of the Minister's power to grant exploration licenses under s 57 of the Mining Act.*

104. The applicant explained the submission in oral submissions:[64]

> What I'm saying is the view that the warden forms does not determine the question of sufficiency because it is a question for the Minister to consider on grant. And that's what we say is what is meant in Golden Pig when – _at paragraph 46, where … Allanson J identified that in order to validly grant an exploration licence, the application must be in the prescribed form, accompanied by the statement required by 58(1)(b) and the other requirements.

105. Therefore, the applicant says, because both decisions focused on the "grant" as opposed to the initial stages while the application and any objection lodged are before the warden, each of those cases is endorsing the principle in ***Aberfoyle*** that it is not until the grant stage, that is, the stage at which the Minister determines whether to grant or refuse, that

[62] Applicant's submissions 6.6.23 [4].
[63] Applicant's submissions 6.6.23 [24].
[64] T 20.6.23, 27-28.

the question of the application and its compliance becomes relevant to jurisdiction. Further, that reading may come from ***Aberfoyle*** because:

a. Rowland J says that the warden may make an error in determining whether the s 58 statement is 'sufficient,' however
b. Even if the warden makes a mistake as to whether it is 'sufficient' or not, the warden may proceed to make a recommendation to the Minister, as the decision as to sufficiency is not reviewable, and therefore not jurisdictional, at that stage.

106. The applicant suggested that [64] in ***Forrest & Forrest v Wilson*** must be read in conjunction with the views expressed in that case on the power of a warden to consider its own jurisdiction. I will discuss those separately.

107. In relation to the paragraph in ***Golden Pig***, that passage's foundation comes from the passage I have set out from ***Forrest & Forrest v Wilson,*** above. The objector submitted that the paragraph from ***Golden Pig*** is a general statement of the process to grant – a "motherhood statement" counsel called it.[65]

108. Further, the objector said, the focus of the passages relied on by the applicant is the decision-making process as a whole, which, of course, ends in the grant stage. Accordingly, the objector said, those passages may be read as that the warden must determine, even at the initial stage of a matter, that the warden has the power to make a lawful recommendation, otherwise, "it infects the decision-making process the whole way through."[66]

109. Of note is the High Court's reference in [81] of ***Forrest & Forrest v Wilson*** to the process under sections 74 and 75 of the Act as steps in a sequential process prescribed for the exercise of the power to make a grant, departure from which led to legal invalidity. The steps referred to by the High Court commence with the fact that the application for a mining lease must be accompanied by particular items (s 74(1)(ca)) and follows through to the mineralisation report being provided (s 74A(1)), the hearing where an objection is lodged (s 75(4)) and the embargo on hearing the application under s 75(4a). Accordingly, the High Court were commenting on a process, while it had differences of requirement, which is a process like the exploration application process, which commences with the lodging of the application with an accompanying document.

[65] T 20.6.23, 73.
[66] T 20.6.23, 71.

110. It is also of note that the High Court specifically found that the Court of Appeal erred in finding that those steps are not characterised as steps in a sequential process prescribed for the exercise of the power to make a grant, departure from which leads to invalidity.

111. With those factors in mind, it is useful to review the wording of s 57 of the Act.

Section 57

112. Under sections 57(1) and s 59(6) the Minister's jurisdiction is only enlivened "after" and "on receipt of" receiving a recommendation; that is, while the Minister cannot make a determination without an application being lodged, neither can the Minister make a determination without a recommendation being made. The warden's recommendation is constituted under s 57(5)(c). In that context, the reading of the two passages about grants must be seen in light of the process to get to grant. That is, an application and a recommendation is a requirement under the Act as essential to the making of a valid grant.

113. A grant being effective only if the regime prescribed by the Act is followed and observed, or complied with,[67] a grant will not be effective (valid) if made on an invalid recommendation. To be a valid recommendation, the warden must have the power to make that recommendation.

114. Under s 59(4) the warden's power to make a recommendation is enlivened by an application, and an objection being lodged to the application. Having heard the application, under s 59(5) the warden is to forward to the Minister items which constitute the recommendation. There can be no objection to an application if there is no application, and neither can there be a hearing if there is no application. Even on the applicant's case, if the Minister rejects the s 58 statement as not meeting the requirements of the Act, then the Minister forms the view that there is no application. However, without an application, there cannot be a recommendation, or, at least, a valid one. That is clear from the proposal that comes from the 3 scenarios posed by the applicant, which I discuss in [142] and following.

115. However, on the applicant's case, there will never be a time that the warden does not have the power to make a recommendation, provided there is an objection, it being a choice of the warden not to hear and make a recommendation if the warden believes the

[67] ***Forrest & Forrest Pty Ltd v Wilson & Ors*** [2017] HCA 30; (2017) 262 CLR 510 [64].

Minister will reject the application, by virtue of rejecting the s 58 statement. I will consider this point later.

116. The consequence of that argument is that it may be the case that the warden has heard an objection and made a recommendation on a matter that does not have an application. That raises two questions:

    a. does the Act enable a warden to make a recommendation without an application, and, if not,

    b. does the Act enable the Minister to make a decision to grant or refuse an application, including a decision that the application does not meet the requirements of the Act, on a recommendation that has not been validly made?

117. On the reading of s 57, and how the Minister's power is enlivened to consider an application, and make a decision as to grant or refuse, the answer to both those questions is "no."

118. The natural extension of the applicant's case is that the answer to a. is that there will always be an application, before the warden at least, no matter how significantly it does not meet the requirements of the Act, and, therefore, any recommendation made on any such application is nevertheless a valid recommendation. That is, a recommendation in fact, irrespective of its lawfulness, enlivens the Minister's discretion.

119. The High Court have recently addressed such a submission. In ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors***,[68] having reiterated [64] of ***Forrest & Forrest v Wilson*** at [56], the Court found that where a recommendation is a mandated precondition to the making of a decision by the Minister to grant or reject an application for a mining lease in the event of an objection, a recommendation cannot simply be a recommendation in fact. Rather, it is a "recommendation which is the product of compliance with all of the express and implied conditions of the statutory process by which the recommendation is required to be produced."[69] The High Court therefore specifically rejected the notion that a recommendation in fact only is sufficient to enliven

[68] ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2; (2021) 272 CLR 33.
[69] ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2; (2021) 272 CLR 33 [57].

the Minister's jurisdiction,[70] Justice Edelman saying "when a step in a decision making process is mandatory, an interpretation that permits the steps to be performed in any invalid way will often defeat the intention of parliament."[71]

120. As sections 57 and 59 of the *Mining Act 1978* (WA) prescribe, the recommendation of the warden in relation to an exploration licence application is mandatory, or a precondition to grant under that Act. Accordingly, that general principle in ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** applies to the exploration licence regime in Western Australia. That weighs against the applicant's submission that any view taken by a warden on a s 58 statement being 'sufficient' is subjective, and not jurisdictional, and that ***Aberfoyle*** is still applicable law in Western Australia.

121. I also note that in rejecting New Acland Coal's submission that a recommendation in fact is all that is required to meet the statutory precondition to a decision to grant, the High Court rejects the decision of ***Hot Holdings Pty Ltd v Creasy***[72] as being helpful in determining the question of the need for validity of a recommendation.[73]

122. Therefore, on a reading of s 57, and considering the purpose of the process of the warden, and noting the High Court's determination in ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors***, it is my view that those factors weigh against the applicant's submission that it is only at grant stage that the question of the of the application, and whether it meets the requirements of the Act, becomes relevant.

123. The applicant's argument also suggests that a warden does not need or in fact have the power to determine their own jurisdiction, however, in my view, that is contrary to current authority, and inconsistent with ***Forrest & Forrest v Wilson***, which I discuss next.

The power of a warden to determine their own jurisdiction

124. As I have identified, the applicant's proposition is that it is for the Minister to determine whether the Minister has the jurisdiction to decide to grant or refuse upon the application,

[70] ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2; (2021) 272 CLR 33 [58] per Kiefel CJ, Bell, Gaegler and Keane JJ; [78(3)] per Edelman J.
[71] ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2; (2021) 272 CLR 33 [95].
[72] ***Hot Holdings Pty Ltd v Creasy*** (1996) 185 CLR 149.
[73] ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2; (2021) 272 CLR 33 [59].

not the warden. Having cited ***Parisienne Basket Shoes Pty Ltd v Whyte***,[74] the majority in ***Forrest & Forrest v Wilson*** said:

> [79] The approach explained by Dixon J does not give rise to a presumption that a decision by the warden as to whether facts exist is within his or her jurisdiction: the warden is not one of the ordinary courts of justice. There is no occasion to presume that the warden is authorised by the Act to make a mistake as to the facts upon which his or her jurisdiction depends.

125. On the applicant's reading of that passage, the warden has no power, at least in relation to an application for an exploration licence, to decide the limits of their own authority.

126. Reading the above passage in context of the preceding passages, and the submission with which the High Court was dealing, is useful. The passage from ***Parisienne Basket*** itself, reproduced in ***Forrest & Forrest v Wilson*** at [78], concerns the difference between a court of justice determining facts within its jurisdiction, and that court making decisions as to facts which go to its jurisdiction. Principally, the concern was how to determine, when it is not clearly expressed in the legislation, that a court of justice has the power, and must, determine facts which will determine whether it has jurisdiction to make a decision on the application before it.

127. Being a court of summary justice, jurisdiction was set out in its governing legislation and in the types of offences with which it could deal. The offence in question was one with which it could deal, however the prosecution notice (information) had been lodged out of time. The question was whether the court could refuse to hear the prosecution on the basis that there was no jurisdiction, the prosecution notice having been lodged out of time.

128. His Honour Justice Dixon conceded that where it is not so obvious in the legislation, there are practical consequences of assuming a court may decide facts to determine whether it has jurisdiction to proceed. That is, the validity of any decision made on liability after a determination on facts determining jurisdiction will always remain uncertain until a court of review determines that the decision ultimately made on the application before it was validly made. That, Justice Dixon took the view, is such an inconvenient result that the higher courts should be reticent to infer from legislation the ability of a decision-maker to determine facts which go to its own jurisdiction.

[74] ***Parisienne Basket Shoes Pty Ltd v Whyte*** [1937-1938] 59 CLR 369.

129. In ***Parisienne Basket*** the Court found that the summary court was not empowered to make a determination as to jurisdiction based on the time at which an information had been laid. Rather, a submission that an information had been lodged out of time was a factor to be adjudicated on in the court's determination of the liability of the accused, that is, within their jurisdiction. One factor Dixon J relied on in coming to that view was the impractical consequence, as I have described, of a summary court of justice being able to determine facts as to its own jurisdiction leading to the potential need to review such decisions to determine the validity of any finding of liability. There is less risk of inconvenience, it seems, in a court of summary justice hearing charges that are within its jurisdiction, but incorporating any such facts into the determination as to liability itself. Hence, the assumption that that will be the case unless the alternative intention "is clearly expressed."[75]

130. It is also useful to note the reason the High Court in ***Forrest & Forrest v Wilson*** recited a passage from that case, and made comment. In ***Toolonga***[76] I summarised the four principle strands the High Court identified as the reasons for decision in the Court of Appeal in ***Forrest & Forrest Pty Ltd v Wilson***.[77] The third strand relates to President McLure relying on ***Parisienne Basket Shoes Pty Ltd v Whyte*** and from which she noted the need for caution in assuming a fact or legislative criterion is jurisdictional. The High Court found that that caution was not warranted under the *Mining Act*.

131. Having recited the passage referred to by President McLure, the majority made some observations about the application of that passage to the case before it, having regard to "the text of the Act, bearing in mind that it established a regime to facilitate the grant of rights to exploit the valuable resources of the State."[78] In my view, and having regard to those factors as expressed, and the facts in ***Parisienne Basket***, those paragraphs mean as follows:

    a. [79]: it is not the case that the approach by Dixon J gives rise to a presumption that any decision by a warden as to whether facts exist is a decision always within jurisdiction;

[75] ***Parisienne Basket Shoes Pty Ltd v Whyte*** [1937-1938] 59 CLR 369, 391.
[76] ***Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors*** [2023] WAMW 6 [105].
[77] ***Forrest & Forrest Pty Ltd v Wilson*** (2016) 10 ARLR 81.
[78] ***Forrest & Forrest Pty Ltd v Wilson & Ors*** [2017] HCA 30; (2017) 262 CLR 510 [81].

b. [79]: the warden is not an ordinary court of justice as the court was in ***Parisienne Basket Shoes Pty Ltd v Whyte;***

c. [79]: in order to determine its jurisdiction, the warden, unlike an ordinary court of justice, whose jurisdiction is usually clearly set out in legislation, may have to determine whether facts exist in order to determine whether it has jurisdiction to hear a matter. A warden may not make an error that those facts exist, but proceed to make a valid recommendation**.** That is, the warden has the opportunity to make that mistake, but not being authorised to do so, any recommendation made as a result of that mistake will be invalid;

d. [81]: the requirements under sections 74 and 75 of the Act are steps in a sequential process prescribed for the exercise of the power to make a grant, departure from which leads to invalidity.

132. That reading promotes a principle that, having the opportunity to make that mistake, the warden may not make such a mistake but then continue on to make a determination on the merits of the matter before them, that is, make a recommendation, without that recommendation being impugned. The recommendation being impugned, it is not a valid recommendation, and the Minister's jurisdiction to consider the matter – both application and recommendation, is not enlivened. That is, the Minister does not have the power to consider the s 58 statement, whether as a jurisdictional matter or on its merits, as the Minster has no jurisdiction to do so.

133. By its very nature, the warden may only act within its statutory authority, which is limited according to Part IV of the *Mining Act*. The warden, being an administrative body, may not exceed those limits. A duty to not exceed those limits confers upon the administrative body a competence to consider the legal limits of that authority.[79] Put more plainly: an administrative body, including the warden, has jurisdiction to determine its own jurisdiction.[80]

134. The passages from ***Golden Pig*** and ***Forrest & Forrest v Wilson*** can only be read, at their highest in favour of the applicant, and in isolation, that for a grant to be valid, there must have been lodged an application that meets the requirements of the Act. Otherwise, according to the applicant, the Minister must reject the application, and may not grant.

[79] ***Re Adams and the Tax Agents Board*** (1976) 175 CLR 268; (1976) 12 ALR 239, 242.
[80] ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468 [82].

Forrest & Forrest v Wilson *and* ***Golden Pig*** *are not consistent with* ***Aberfoyle****, and* ***Aberfoyle*** *is inconsistent with those cases*

135. Having set out the context of the quote in ***Parisienne Basket Shoes Pty Ltd v Whyte,*** and my reading of the conclusions the High Court drew from that paragraph in the context of the *Mining Act* and its regime, the fact that the High Court found President McLure's reliance on ***Parisienne Basket Shoes Pty Ltd v Whyte*** in error[81] and the wording of s 57 of the Act, it is my view that the reading of [64] and [79] of ***Forrest & Forrest v Wilson*** and [46] of ***Golden Pig*** that the applicant contends for is not available. Further, it is my view that given the factors I have considered, and ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors***, [64] of ***Forrest & Forrest v Wilson*** is to be read as mandating compliance of each step of the application process and are to be assessed for that compliance as the assessment arises, a consideration by the warden that the application does not meet the requirements of the Act, no matter how significant or otherwise, results in there being no power under which the matter moves to the stage of recommendation. With no power to make a recommendation, any recommendation is made without power, and is invalid. An invalid recommendation cannot enliven the Minister's power to consider the application, especially where the application itself is not, then, a valid application.

136. Insofar as [46] of ***Golden Pig***, it may well be a general statement as to the path to grant, neutral to where, in that process, validity must lie for a grant to be valid. However, reading that passage with the outcome of a review of the passages referred to in ***Forrest & Forrest v Wilson***, there is therefore no inconsistency between that passage in ***Golden Pig*** and ***Forrest & Forrest v Wilson***, that passage supporting a proposition that each of the steps set out by Justice Allanson must be valid to produce a valid grant.

137. In ***Toolonga***[82] I formed the view that I was bound to follow ***Forrest & Forrest v Wilson***, as applied to exploration licences due to ***Golden Pig***, and mining tenements in general in Western Australia due to ***Forrest & Forrest Pty Ltd v O'Sullivan***.[83] Nothing the applicant has submitted has altered my view of why I believe I am bound by ***Forrest & Forrest v Wilson***. I then also, separately, explained why I was of the view that ***Aberfoyle*** no longer

[81] ***Forrest & Forrest Pty Ltd v Wilson & Ors*** [2017] HCA 30; (2017) 262 CLR 510 [81].
[82] ***Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors*** [2023] WAMW 6 [132]-[154].
[83] ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468.

applies in Western Australia,[84] including why another case Toolonga and now Pantoro South rely upon to support the application of ***Aberfoyle***, ***Hot Holdings v Creasy & Ors***[85] no longer applies.[86] Again, nothing the applicant has submitted has altered my view of why I believe ***Aberfoyle*** no longer applies in Western Australia. Neither has anything the applicant submitted satisfied me that the objector's argument that ***Aberfoyle*** is inconsistent with ***Forrest & Forrest v Wilson*** and ***Golden Pig*** and is no longer the law in Western Australia should be rejected.

138. That being the case, whatever principle can be extracted from ***Aberfoyle*** is inconsistent with ***Forrest & Forrest v Wilson***– it is not at grant stage but at the stage at which the warden's jurisdiction is enlivened to hear an application that the question of compliance arises, mistake over which renders any recommendation invalid, with or without the matter proceeding to a determination by the Minister. That is, in accordance with ***Forrest & Forrest v Wilson***, the question of whether an application meets the requirements of the Act is a jurisdictional fact, to be determined by the warden. ***Golden Pig***, at the applicant's case at its highest, in relation to [46] specifically, being neutral to that proposition, is therefore not inconsistent with ***Forrest & Forrest v Wilson***, and cannot be claimed in favour of a reading that Justice Allanson was following, or somehow being consistent with, ***Aberfoyle***. In any event, the fact that Justice Allanson specifically relies on ***Forrest & Forrest v Wilson*** in ***Golden Pig*** significantly diminishes any submission that such a reading favoured by the applicant of [46] is possible.

Some practical consequences of the applicant's submissions

139. While it appears to have been accepted that ***Aberfoyle*** was, at one point, good law, it is appropriate, in my view, to test the practical outcome of the construction of the warden's powers urged by the applicant in light of ***Forrest & Forrest v Wilson***. The consequences of the applicant's submission in the present case, in my view, is that it is lawful, and in fact required, for a warden to make a recommendation under s 59(5), irrespective of whether the statement under s 58 complies with the Act or not. Consistent with the applicant's reading of the words of the High Court in ***Forrest & Forrest v Wilson*** at [79],

[84] ***Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors*** [2023] WAMW 6 [161]-[173].
[85] ***Ex parte Hot Holdings; Hot Holdings Pty Ltd v Creasy*** (1996) 16 WAR 428.
[86] ***Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors*** [2023] WAMW 6 [83].

the warden cannot make any decision in relation to its jurisdiction, having no power to decide their jurisdiction wrongly, or correctly.

140. It will illustrate the applicant's point by reciting the applicant's submission on the practical consequences of their proposition.

A. There are times when a warden does not have to make a recommendation

141. The applicant proposed 3 scenarios:[87]

a. An application is not accompanied by a s 58 statement;

b. An application is accompanied by a s 58 statement, but is missing some aspects of the required details, for example: This application has a document titled Section 58 Statement. That has addressed the financial capability, but not the technical capabilities as prescribed in 58(1)(b), and

c. Third and final example – _for the purposes of this illustration – _a section 58 statement that has addressed all the components of section 58(1)(b)…

But the warden looks at this statement and has doubts about whether it is sufficient.

142. The applicant's explanation of what a warden should do, under its construction of s 58, in those scenarios, is as follows:

143. As to scenario a.:

> The warden, on receiving that statement, can be confident that the minister has no jurisdiction to grant that application. The minister has no jurisdiction to grant, so the consequence of that is that the warden need not consider that application further.

144. As to scenario b.:

> Again, the warden – _in looking at that application – _can be confident that the minister does not have jurisdiction to grant that application and the warden need not consider that application further.

145. As to scenario c.:

> But the warden looks at this statement and has doubts about whether it is sufficient. If it has addressed those components, we say the minister's jurisdiction to grant the application has been enlivened and the warden's role is – _after hearing the objection – _to make their recommendation in which the warden can express its views

[87] T 20.6.23, 5-6.

> about the sufficiency of the statement that accompanies this application.
> And potentially also – _because it might well bear on it – _potential also under section 57, subsection (3) this issue might bear on the warden's view about the applicant's ability to effectively explore the land in respect of which the application is being made. So we say in that circumstance where there's an application with a section 58 statement that addresses all those components, the minister's jurisdiction is enlivened and the warden's role then is to make their recommendation. And if they have some doubts about compliance, they can be addressed in the recommendation.
>
> But ultimately the assessment of whether the section 58(1)(b) statement is sufficient for the purposes of that section, is the minister's assessment.

146. However, in describing the then power of the Minister, the applicant described this in oral submissions, having regard to s 59(6) of the Act as follows:

> Now, that's not to say that the minister can ignore the requirements of section 58(1)(b). Quite to the contrary. The minister must assess the sufficiency of the statement and, indeed, if the minister forms the view that the statement is insufficient, then the minister cannot grant that application. Simply, the point we make is it is for the minister to make that assessment, not the warden.

147. There are some internal inconsistencies in the applicant's arguments, as is illustrated by its scenarios. Firstly, in the passage I have recited above, the applicant's counsel suggested that

> …where there's an application with a section 58 statement that addresses all those components, the minister's jurisdiction is enlivened…

148. In my view, that is not a correct reading of the relevant sections, but it is a necessary reading if the applicant's argument is to succeed.

B. The applicant's view does not sit with s 57

149. Under s 57(1), the Minister may not consider an application for an exploration licence unless a recommendation has been made to the Minister by the warden or registrar. Therefore, it is something the warden or registrar does that enlivens the Minister's role. The warden, where an objection has been lodged, cannot make a recommendation unless the warden has considered the question of whether the applicant can effectively explore the land. The warden, where an objection has been lodged, cannot consider the question of whether the applicant can effectively explore the land unless an application, with the

accompanying requirements, has been lodged. So, while it may be that an application commences a process where ultimately the Minister may make a decision to grant or refuse, the lodging of an application does not automatically trigger the Minister's jurisdiction.

150. There is a difference between the Minister's power to decide in a particular application, and the Minister's general power to grant or refuse exploration licences. There is no question that without the lodgement of an application, the Minister will never have any power to grant or refuse an application. The applicant's reading of the legislation promotes a process where the Minister's jurisdiction is enlivened at the outset of the lodgement of the application, being a general jurisdiction to consider any and all applications that come to them, albeit if they do not meet the requirements of the Act, they are unable to grant.

C. The applicant's view does not sit with s 59(6)

151. In my view, s 59(6) neither does not allow for the applicant's construction, and is inconsistent with that construction. Section 59(6) provides for a wide, unfettered discretion; once the Minister has received the recommendation, the Minister may determine the application on the recommendation, or determine it against the recommendation. Under s 59(6)(b) the Minister may grant, even though the application was not compliant.

152. Therefore, under s 59(6) the Minister may decline to grant, where there is non-compliance, but the wording is clear – the Minister is not forbidden to grant. On the applicant's argument, therefore, s 59(6)(b) would have no work to do. As the applicant's counsel explained in the 3 scenarios, where an application is non-compliant, the Minister does not have the power to grant- the Minister is forbidden to grant. That is, it becomes a question of jurisdiction to grant at the time it has reached the Minister, and not before.

153. An alternate reading, favoured, by analogy, by the High Court in ***Forrest & Forrest v Wilson,*** which I addressed in ***Toolonga***,[88] of s 59(6) is that the only non-compliant applications that reach the Minister are where the non-compliance does not effect the Minister's jurisdiction. In that reading, s 59(6)(b), and the general unfettered discretion, has work to do in every single application, because the Minister will always have the

[88] ***Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors*** [2023] WAMW 6 [125] – [129].

jurisdiction to grant or refuse, the Minister's jurisdiction enlivened by the recommendation. Should there have been a mistake as to the jurisdiction to make a valid recommendation, that is a question about the warden's jurisdiction to do so, and if the Minister's decision is infected, it will be by the warden's decision to proceed under s 57(3), not the Minister's to grant or refuse.

154. That inconsistency in the applicant's argument is highlighted by the consideration I undertook on whether s 59(6) leads to or away from invalidity in ***Toolonga***,[89] about which the objector in the present case agreed, saying that that section does not save non-compliance by a warden, only by an applicant. A failure of the s 58 statement to meet the requirements of the Act means that any recommendation made by a warden on that application is invalid. S 59(6) does not save such a recommendation. However, it is the recommendation that leads to the lack of ability to save, not the application itself.

D. The Minister does not delegate their jurisdictional decisions

155. In relation to applications that are clearly not compliant, the applicant's submission was that the warden need not consider them, or, if not so clear, may proceed to the next step of considering the question under s 57(3), but comment on the issue of non-compliance.

156. The applicant's proposal gives power to the warden to make a determination on the Minister's jurisdiction, by assuming the Minister will not have the power to deal with certain applications. There is nothing in the Act that suggests that the Minister delegates their power to determine jurisdiction to the warden. However, if the warden is to make decisions as to whether a Minister has jurisdiction, that is what the warden is doing. The applicant cannot have the luxury of the warden not having to determine their own jurisdiction, but then being able to decide jurisdiction of the Minister, when the warden feels it is necessary.

157. If the warden does not have the authority to determine their own jurisdiction, because the jurisdiction lies in the Minister, not the warden, then there is no authority for a warden to determine not to make a recommendation on an application, no matter how deficient it appears to be, including if it is lodged without a s 58 statement at all. While the applicant, in their scenarios, appears to be arguing that there is a point below which the warden can determine jurisdiction, in my view, the power to determine jurisdiction cannot be split -

[89] ***Toolonga Mineral Sand Pty Ltd v Callum And Belinda Carruth & Ors*** [2023] WAMW 6 [125] – [129].

the warden either has the power to determine jurisdiction, or they do not. In the applicant's case, they do not, and all applications, no matter how deficient, should be the subject of a hearing, and proceed to the Minister.

E. The applicant's argument ignores or misstates the filtering role of the warden

158. Determining the Minister's jurisdiction, in my view, does not extend to the filtering role of the warden.

159. Further, as a result of ***Forrest & Forrest v Wilson***, it appears to be settled law that where a document is to "accompany" an application, that document must be lodged at the same time as the application was lodged. Not lodged at the same time, such an application is invalid.[90] Therefore, it is not a question of whether the warden considers that they "need not consider the application further." The warden is simply not empowered to do so. That is a question of jurisdiction, clearly within the power of the warden to recognise and determine themselves.

160. On the applicant's case, however, even applications that are not accompanied by a s 58 statement, or one which does not 'address' all of the items in s 58(1)(b), cannot be determined by the warden to be in any way deficient, because the warden would be determining that there is in fact no jurisdiction, yet that is not in the power of the warden to determine. In my view that submission is contrary to settled law. Conversely, if it is the case that the warden, with no power to determine their jurisdiction themselves, feels compelled to make a recommendation on the lacking application, that cannot be a valid recommendation enlivening the Minister's jurisdiction.

161. That path to the Minister is contrary to the established role of the warden, where, in recommending the grant or refusal of exploration licences, and in fact any licence, the warden is performing an administrative function,[91] as a 'filter.'

162. It also disregards the separate and distinct roles of the warden and Minister. Although the Minister does have the unfettered discretion under s 59(6) to disregard the recommendation or decision of a warden, that fact does not, of itself, make the warden subordinate to the Minister in the context of the discharge of their necessary functions.

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[90] ***Forrest & Forrest Pty Ltd v Wilson & Ors*** [2017] HCA 30; (2017) 262 CLR 510 [67] and see ***Onslow Resources Ltd v Hon William Joseph Johnston MLA in capacity as Minister for Mines and Petroleum*** [2021] WASCA 151 [50] and [51].

[91] ***Mineralogy Pty Ltd v The Honourable Warden K Tavener*** [2014] WASC 420 [69] and ***Re His Worship Mr Calder SM; ex parte Gardner*** [1999] WASCA 28 [16].

Rather, the Minister and the warden each have distinct decision making responsibilities in respect of the mode of decision making established by the Act in terms of the various species of mining tenure.[92]

163. That filtering role is relevant to another matter I raised with counsel at the hearing, the suggestion that a hearing may be held which in fact did not need to occur at all, because the Minister later forms the view that the s 58 statement is not compliant. That is, despite a lengthy hearing with perhaps multiple objectors and all parties giving evidence before the warden, the warden spending some time preparing a recommendation on that evidence, none of the notes of evidence or report or recommendation from the warden have any bearing on the Minister, even if that evidence does then supply information that may assist in the s 58 statement becoming compliant.

F. The applicant's argument ignores the need for, as much as possible, procedural fairness

164. There was an additional issue that I raised regarding the Minister then differentiating between the evidence given, and the s 58 statement itself which also relates to the filtering role of the warden, which then raised a further question as to the process:[93]

> **THE WARDEN:** But if that's formed – if that extra material has formed part of the warden's recommendation, how does the Minister then separate the two roles?
> **O'LEARY, MR:** Well, the warden – sorry, the Minister sees the recommendation, reads the recommendation, but also looks at the 58(1)(b) statement, and if it considers that while it has addressed each of the components, it is not sufficient for whatever reason, then it – the Minister cannot grant that application. Even if on the basis of the further information and the warden's assessment - - -
> **THE WARDEN:** That's right. The person has come in, they've given evidence, it's magnificent. It addresses everything. … It doesn't matter – too late.
> **O'LEARY, MR:** Too late, because the 58(1)(b) statement must comply with that section – with section 58(1)(b). And if the Minister is not satisfied that it complies, the Minister can't grant the application, no matter what other information it has – the Minister has received.
> **THE WARDEN:** Practically, and we go back to this practical ramification of that process, isn't that an incredible waste of time and resources?

[92] ***Regional Resources NW Pty Ltd v Harvest Road Pastoral Pty Ltd & Anor*** [2023] WAMW 11 [531] -[532].
[93] T 20.6.23, 22.

> **O'LEARY, MR:** Well, I don't think it is necessarily in the sense that at all stages prior to that, there's no way to tell how the Minister is going to assess – so this is a – let me put it this way. We are in an administrative process, and we are considering whether to grant an application. Ultimately, the power to grant is in the possession of the Minister, and it is the Minister's view that matters. Now, Parliament for – has established this regime and has established this process to consider aspects of the application before that – the Minister makes their decision.
> Now, while the concern that you raise about whether your time as the warden might be wasted in – you're talking about a situation I take it, where the application comes in, you look at the 58(1)(b) statement, it has addressed all the components, you have your doubts about whether it complies but you're bound to pass it onto the warden, you're bound to hear the objection, you're bound to make a recommendation and the Minister might look at it and say, well, the section 58(1)(b) statement doesn't comply, so I can't grant it. Well, that's the – that is the statutory scheme. The Minister always has a discretion. The wording of section 59(6), the words that Parliament has chosen are:
>
> > On receipt of a report under subsection (2) or (5) the Minister may grant or refuse the exploration licence as the Minister thinks fit and irrespective of whether the report recommends a grant or refusal of the exploration licence, and the applicant has or hasn't complied.
>
> So with respect, they're not the words of – they're not words aimed to necessarily ensure efficiency in the process. That is, the Act expressly contemplates the situation where, as you suggest, a lot of work and effort and time can be expended in coming to the view that in recommending that an application should be granted and the Minister can, as they think fit and irrespective of that recommendation, can refuse it.

165. The next matter I put to the applicant's counsel was that that proposition, that it is for the Minister, at the stage after evidence is complete, submissions have been made to the warden and the after the recommendation is made, to assess compliance puts a significant portion of the decision making as to the very application itself, as opposed to the merits of the matter, in the hands of the Minister. Part IV of the Act and Part VIII of the Regulations set out the process and rules by which a warden is to proceed. Specifically, r 154 requires the warden to comply with the rules of natural justice to accord procedural fairness.

166. In contrast, there are no provision s of the Act or regulations which regulate the manner in which the Minister makes a determination.

167. The High Court in ***Forrest & Forrest v Wilson*** identified as an important factor in their decision the policy of strict compliance as set out in [64] of its decision. That approach, they said, at [65]:

> … had its origin in colonial times in legislation which vested the disposition of land not already disposed of by the Crown in the legislatures of the Australian colonies. … Adherence to this approach supports parliamentary control of the disposition of lands held by the Crown in right of the State. It gives effect to an abiding appreciation that the public interest is not well served by allowing non-compliance with a legislative regime to be overlooked or excused by the officers of the executive government charged with its administration. To permit such a state of affairs might imperil the honest and efficient enforcement of the statutory regime, by allowing scope for dealings between miners and officers of the executive government in relation to the relaxation of the requirements of the legislation. One can be confident that such a state of affairs was not intended by the Act.

168. In my view that statement of principle in relation to compliance can be applied to a situation where there are two regimes: firstly, the warden's with the requirement that the warden act in accordance with the rules of natural justice, and, a secondly, a regime vested in the Minister that has a wide unfettered discretion, and no rules regulating the manner of application of that discretion.

169. While the High Court refers to the question of compliance in [65] the underlying principle is that it is for the legislature to control the important task of vesting of the state's resources, rather than the executive. Therefore, the legislature having set rules for the wardens, and having chosen not to in relation to the Minister, it cannot be that the legislature envisaged that a question as important, as the High Court found it to be, of compliance, is dealt with by the Minister, away from the rules of natural justice.

170. The discussion with counsel for the applicant was then as follows:[94]

> **THE WARDEN:** … the Warden's Court is dealt with in the open, it is the most appropriate place for evidence to be given, submissions to be made, and responses to be provided. That is where…to provide true procedural fairness, that is where arguments should be had. If it's the Minister that is deciding whether in fact the warden had jurisdiction at all, and therefore whether the Minister has jurisdiction to grant, isn't that taking away that prospect of procedural

[94] T 20.6.23, 23.

fairness to the parties? So if the Minister makes a decision, looks at the section 58 statement, and says, I don't know that this complies, I'm just going to refuse. Don't the parties at that point deserve the opportunity to address why their section 58 statement does not comply – sorry, does comply or does not comply? Aren't you taking that process behind closed doors, and which is what the High Court effectively said shouldn't be allowed to happen?

O'LEARY, MR: Well, I'm not – I'm not familiar with where you say the High Court has said that shouldn't be allowed to happen in respect of grants of mining tenure but - - -

THE WARDEN: Isn't that the tenure [sic: tenor] of the High Court's decision and isn't that the reason that they set out the paragraph that you have referred to, the paragraph that Allanson J reported, I think Tottle J put it in. It's the paragraph about, these are the resources of the state, and everything has to be done to the letter – that's my paraphrase – but there must be strict compliance. And then, they are perhaps circumspect – to put it politely – about the process that our Court of Appeal went through in Forrest & Forrest v Wilson, that suggested that a more relaxed attitude to the way in which the process should be handled. They did not like that suggestion at all.

O'LEARY, MR: Flexible non-compliance.

THE WARDEN: That's right. So aren't they saying that it must all be complied with in a process that is fair to everybody, and aren't you saying that – well, my suggestion is that to then make or enable the Minister to make an assessment of the sufficiency of a section 58 statement in terms of jurisdiction itself, is taking away that procedural fairness that the High Court appear to believe is so important in the process of granting access to the state's resources.

… **O'LEARY, MR:** … well, the protection, I suppose, for someone who disagrees with the Minister's decision is in seeking Judicial Review of the Minister's – of that decision. If someone considers that it's a decision that hasn't been made in compliance with what the High Court tells us has to occur. And it's – but it's ultimately – it's a matter that the Parliament – it's a matter as to which the Parliament has conferred discretion upon the Minister. Now, the Minister has to have regard to the warden's recommendation and - - -

THE WARDEN: But if it's not incorporated in the warden's recommendation, perhaps nobody has made submissions on it.

O'LEARY, MR: I'm sorry, made submissions as to what?

THE WARDEN: Compliance.

O'LEARY, MR: Well, well, okay. I was addressing there how procedural fairness is ensured in the Ministerial process, so there's a process the Minister has to have regard to the warden's recommendation and there's availability of Judicial Review. But – so the question is what if the warden hasn't considered sufficiency of the statement, well, the protection

> there is that the Minister must consider sufficiency of compliance, because the Minister can't grant the application unless the Minister is satisfied that there has been compliance, so. And the Minister, you know, makes that decision in the knowledge that there are – there are avenues for people to – for people to look at the way in which the decision was made. There's freedom of information processes that people can exercise, there's also the right to Judicial Review. … procedural fairness is in the potential for judicial review. But also, regardless of what occurs for the mining warden when there's an objection to an exploration licence: as you say, the warden doesn't address it and the objector makes a submission directly to the Minister. The applicant can also make a submission directly to the Minister at that point. They're not prevented from doing so.
> And in recent times, the Department of Mines has gone to significant trouble to ensure that there is adequate opportunity to do the – or there is an equivalent opportunity where one party makes submissions directly to the Minister. The Department has sought to give some order to that process. But in any event, they're not prevented from doing so. And, indeed – correct. My junior notes that, of course, the applicant can address the sufficiency of the section 58(1)(b) statement before the warden. It's just that, ultimately, the view that the warden forms in relation to that is not determinative.
> **THE WARDEN:** But the warden shouldn't – from what you're saying, the warden shouldn't form a view at all. There's no point.
> **O'LEARY, MR:** Well, there's no point to – well, sorry. I'm not saying they shouldn't form a view, because they do have to give a recommendation to the Minister. What I'm saying is the view that the warden forms does not determine the question of sufficiency because it is a question for the Minister to consider on grant.

170. I accept that the proposition of the applicant is that there are safeguards built in to ensuring that the Minister makes decisions according to the principles of administrative law. However, in my view, examples given by the applicant in that exchange with the applicant's counsel do not, having regard to ***Forrest & Forrest v Wilson*** and the caution they expressed in relation to dealing with the resources of the state, provide much comfort to the public of Western Australia.

171. For example, one of the safeguards, or assurances of natural justice relied upon by the applicant is a process, after a recommendation has been made, organised by the Department to receive submissions direct to the Minister. I have no doubt that submissions made to the Minister at the point of the consideration of whether to grant or not may be helpful, particularly given that the Minister may take into account much wider

public policy considerations, and consider other legislation beyond what the warden may consider in their recommendation,[95] however, in that process there is no legislative oversight, nor the opportunity of any party to test the other party's submissions with the calling of evidence and cross examination of witnesses, or in the way of competing oral submissions before the decision maker, with the decision-maker expressly putting to a party concerns or queries over the party's case.

172. Further, as I raised with counsel, it cannot be an effective and efficient system where an aggrieved party who has run a compliance and substantive case before the warden, who must then await the decision of the Minister that the Minister has no jurisdiction to grant before that party may seek review. The alternative, that the warden has the authority to determine its own jurisdiction, provides, as it did in ***True Fella*** and ***Golden Pig*** and other decisions that have made their way to the Supreme Court, an avenue of determination and review before significant expense is incurred in running a substantive hearing, then perhaps having to make those further submissions at the request of the Department, direct to the Minister, then awaiting the Minister's decision, all to be told in fact that the warden should not have held any hearing, because the application did not meet the requirements of the Act, with a decision not to grant as a consequence.

173. In ***Oakey Coal v New Acland Coal***[96] the High Court was concerned with the question of affording natural justice, and made some apt comments about the mining regime in that regard. The Queensland regime "entails the holding of an inquiry by a body authorised to make a recommendation to a minister who may make a decision rejecting the recommendation without conducting any further enquiry."[97] Therefore, that regime is largely similar in practical terms to the Western Australian regime, with an administrative court which makes recommendations to the Minister. Such a body that undertakes that first step in the process, the High Court concluded, provides a sufficient opportunity for a party to present its case so that the decision-making process, viewed in its entirety, entails procedural fairness.[98]

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[95] As I discussed in ***Telupac Holdings Pty Ltd v Hoyer*** [2022] WAMW 26.
[96] ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2; (2021) 272 CLR 33.
[97] ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2; (2021) 272 CLR 33 [59], citing ***South Australia v O'Shea*** (1987) 163 CLR 378, 389.
[98] ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2021] HCA 2; (2021) 272 CLR 33 [55].

174. In a regime which, as Justice Edelman described it, involves the second act, being the Minister's decision, depending on the existence of a valid first act, being the warden's recommendation, and having regard to the caution as to "flexible" or "relaxed" non-compliance expressed by the High Court in ***Forrest & Forrest v Wilson***,[99] there must be a principle that given the warden has the benefit of and ability to hear evidence and submissions in an open forum, in an adversarial setting, that is the most effective and efficient manner in which questions of jurisdiction may be addressed. That is what parliament must have intended. This adds weight to a submission that it is the warden who is to determine questions of jurisdiction prior to recommendation, as opposed to the Minister after recommendation.

175. In ***Azure***, his Honour undertook an exhaustive review of the construction of s 58(1), incorporating other relevant sections of the Act into that review, such as s 61. He did this to assess the meaning and application of s 58(1) as a "harmonious whole"[100] with the regime of the Act. There is nothing particular in the construction review undertaken in ***Azure*** that the applicant has pointed to as being in error.

176. As a consequence of my findings, and the analysis in relation to the applicant's scenarios and practical considerations, I am satisfied that while ***Azure*** and ***Toolonga*** may be inconsistent with ***Aberfoyle***, they are not erroneous. That being the basis of the applicant's contention that I should not apply ***Azure*** because it is plainly wrong, I cannot find that it is plainly wrong, or wrong at all. That being the case, ***Azure*** applies.

A legal consequence of the applicant's submissions - that a section 58 statement merely must "address" the factors required to meet the requirements of the Act

177. The applicant also submitted that if a 2 year program is specified, "with some degree of certainty or detail," then that is sufficient to satisfy the requirements of s 58(1)(b), that is "it could satisfy the requirement."[101] Therefore, says the applicant, if "that information" is provided, that is sufficient for the assessment of s 58 compliance.[102]

178. As I have identified, in proposing the 3 scenarios, the applicant said the following as to the third:[103]

[99] ***Forrest & Forrest Pty Ltd v Wilson & Ors*** [2017] HCA 30; (2017) 262 CLR 510 [53], [69], [89].
[100] ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 [95].
[101] Submissions lodged on behalf of the applicant, 3.2.2023 [30].
[102] Submissions lodged on behalf of the applicant, 3.2.2023 [27].
[103] T 20.6.23, 6-7.

> But the warden looks at this statement and has doubts about whether it is sufficient. If it has addressed those components, we say the minister's jurisdiction to grant the application has been enlivened and the warden's role is – after hearing the objection – to make their recommendation in which the warden can express its views about the sufficiency of the statement that accompanies this application…
>
> But ultimately the assessment of whether the section 58(1)(b) statement is sufficient for the purposes of that section, is the minister's assessment.
>
> So we say in that circumstance where there's an application with a section 58 statement that addresses all those components, the minister's jurisdiction is enlivened and the warden's role then is to make their recommendation. And if they have some doubts about compliance, they can be addressed in the recommendation.
>
> But ultimately the assessment of whether the section 58(1)(b) statement is sufficient for the purposes of that section, is the minister's assessment.

179. In contrast, as I have set out in [92], in written submissions the applicant used the word "specify" as opposed to "address."

180. This passage, and the slipping of counsel's language from "specify" to "address" illustrates in my view that the contention by the applicant is that it is sufficient to "address" the criteria set out in s 58(1)(b). That is because, according to the applicant, under ***Aberfoyle*** the assessment of the s 58 statement is a subjective assessment of sufficiency, not an evaluative conclusion as to jurisdiction; the question of whether an application meets the requirements of the Act is not for the warden to determine. It is sufficient therefore that each factor is 'addressed,' not in the manner in which a question of jurisdiction would require, but merely sufficient to have the warden consider that the Minister may have jurisdiction to grant. In other words, something less than what may be expected to satisfy a Minister's review of sufficiency will suffice at the warden's stage.

181. A similar submission was made about the 'sufficiency' of a s 58 statement in ***Golden Pig***. In [63] Justice Allanson identified the submission as Golden Pig submitting that their application was compliant, if not clear:[104]

> [63] Counsel for Golden Pig submitted that the section must be read as a whole, and in a practical way. Counsel submitted that an application will not fail to comply by reason only of the 'quality' or 'sufficiency' of information in the accompanying statement, provided the statement 'addressed' the matters in s 58(1)(b). Provided that the application is compliant in that sense, assessments

[104] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [64].

> as to the quality or sufficiency of the information supplied within an application are matters for the mining registrar or warden to determine. In particular, it is not necessary to state the name or entity that will conduct exploration activities on behalf of the applicant in order to submit a valid application, and it may in fact be impractical to require the names of workers or contractors.

182. That submission was rejected by Justice Allanson:

> [65] One difficulty with that submission is that s 58(1)(b), by its words, requires a statement accompanying the application and 'specifying' not simply 'addressing' the four prescribed matters. A s 58 statement is not required merely to indicate that an applicant has the resources available to it to carry out a program of exploration, but to say what those resources are.
>
> [66] The power to request further information does not overcome the legislative policy that the required information must be in the statement that accompanies the application.

183. Justice Allanson specifically considered the words of the section, and particularly "specify," and determined that that meant more than "addressing" the requirements, such that the intention of the section will be frustrated unless the matters prescribed by s 58(1) are stated definitely and in sufficient detail,[105] such that the warden or registrar, when considering the application, can be satisfied whether the applicant has complied in all respects with the provisions of the act, and accordingly, whether to recommend the application be granted or refused and the reasons for that recommendation.[106]

184. Therefore, Justice Allanson determined that 'addressing' each of the factors in s 58(1)(b) is not sufficient to meet the requirements of the Act, and that is an assessment the warden or registrar must make not at the stage of making a determination under 57(3), but in determining whether to make any recommendation at all.

185. Therefore, any submission that the application will be sufficient in terms of the task of the warden if it merely addresses the factors in the section has been recently rejected by the Supreme Court, in the light of ***Forrest & Forrest v Wilson***. In that determination, again, ***Golden Pig*** is not consistent with ***Aberfoyle***, and, as Supreme Court authority, works against the applicant's case.

Golden Pig endorses a plan less than the life of the grant

189. The applicant in the present case has urged me to find that there is no principle in ***True Fella*** regarding a 'life of the licence' s 58 statement, despite the fact that that contention

[105] ***Golden Pig Enterprises Pty Ltd v Crocker & Ors*** [2021] WAMW 7 [62].
[106] ***Golden Pig Enterprises Pty Ltd v Crocker & Ors*** [2021] WAMW 7 [61].

was squarely raised before me. That is because that is the opposite of what they are urging me to find in relation to ***Golden Pig*** – that there is in that case an endorsement that a two year plan, as it was in that case, is acceptable as specifying to the requisite degree the requirements of s 58(1)(b) of the Act, when that was not raised before either Warden O'Sullivan in ***Golden Pig Enterprises Pty Ltd V Crocker & Ors***[107] nor before Justice Allanson on review.

190. The statement relied on by the applicant to show that ***Golden Pig*** does endorse a plan of less than the life of the licence is contained in the following paragraphs of ***Golden Pig***:

> [67] Turning to the facts, Golden Pig relies on one sentence in the 'Proposed Two Year Work Programme', where, under the heading 'Proposed Exploration 2016 to 2018', it states:
>
> > *The following work programme will be conducted by consultant geologists, geochemists and geophysicists with a strong emphasis on initially evaluating past geological and geochemical work programs.*
>
> [68] In Golden Pig's submission, that sentence must be read with the proposed program to spend $204,000 in the first two years – a budget that substantially exceeded the minimum annual expenditure and was well within the amount in the term deposit in Mr Miasi's name.

191. In the applicant's submission, that reference to the 2 year program, without criticism, can be read as positive acknowledgement, and therefore principle, that a 2 year program, or, if the applicant's argument is to succeed in the present case, something less than a 5 year program, is an acceptable method of completing the s 58 statement.

192. However, there are several factors which speak against the proposition that Justice Allanson has effectively set out a principle of that nature by those paragraphs, as follows.

<u>The question of whether a 2 year program satisfied the requirements of s 58(1)(b) was not what Justice Allanson was asked to consider</u>

193. It is helpful to review the structure of the written decision in ***Golden Pig***. The first part of the decision is headed "Background facts." In his summary of the facts,[108] Justice Allanson noted:

    a. When the application was lodged;

[107] ***Golden Pig Enterprises Pty Ltd v Crocker & Ors*** [2021] WAMW 7, see objections recited at [3]-[5].
[108] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [19]-[24].

b. The application was accompanied by a s 58 statement and a term deposit record showing $369,438.11 held in the name of Mr Miasi, maturing on 6 January 2017;
c. That Mr Miasi is the sole director and shareholder of Golden Pig;
d. The contents of the s 58 statement, outlining a strategy which included evaluation of past exploration programs, reviewing and re-interpreting data from previous surveys, assessing the effectiveness of previous drilling and undertaking exploration programs;
e. In a section headed 'Proposed exploration 2016 to 2018,' the document included the statement "The following work program will be conducted by consulting geologists, geochemists and geophysicists with a strong emphasis on initially evaluating past and geochemical work programs" and
f. There was a statement of proposed exploration, 2016 to 2018, with estimated expenditure of $85,000 in the first year and $118,500 in the second year.

194. As a result of that background, True Fella suggested that ***Golden Pig*** being specific to the facts was not a case about the proper construction of s 58 in its entirety; Justice Allanson was determining a discrete point.
195. True Fella highlighted what can be taken from the judgement as being the issues in that case. Firstly, by looking at the facts, including the objections raised at first instance, the issues were:
    a. Whether Mr Miasi, a director of the applicant, but not the applicant, and his term deposit constituted something capable of being the financial resources available to the applicant,[109] and
    b. Whether the statement of technical resources available to the applicant satisfied the requirements of the Act.[110]
196. From the grounds of review sought:
    a. Grounds one and two complained that the warden erred when he found that the statement did not specify the technical and financial resources available to the applicant, when it did, and that, more specifically, the warden had misconceived the meaning and effect of the requirement to specify technical and financial resources. Therefore, both were directed towards the evidence, the objection and

[109] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [34].
[110] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [28] and [29].

the warden's consideration of section 58(1)(b)(iv), and not the factual question of the length of the proposed work as required in s 58(1)(b)(i) and (ii).

b. Ground three related to the ability of the warden to consider subsequently received information in determining whether a s 58 statement is compliant.

197. Therefore, True Fella submitted, it can be taken from the judgement in ***Golden Pig*** that the issue of a two year proposed exploration strategy itself was never raised as an issue; it was never a ground of objection. I agree.

198. A failure to comment does not in those circumstances amount to an endorsement.

<u>And Justice Allanson only determined the matters raised before him</u>

199. With that background, the next paragraph in ***Golden Pig*** to those relied on by the applicant in the present case creates perspective, that is, it shows that Justice Allanson was factually focusing on the question of consultants being named, and whether the term deposit slip supported Golden Pig's claims that it had financial resources available to it:

> [69] But that one reference to consultants, together with the term deposit slip, cannot reasonably be read as a statement specifying the technical and financial resources available to the applicant to carry out the proposed exploration program. It is not sufficient that a s 58 statement indicate in some way that an applicant has resources available to it to carry out a program of exploration. The section requires that it specify what those resources are.

200. That is, Justice Allanson properly determined the "application before him, and no more."[111] As counsel for True Fella said, the relevance of Justice Allanson referring to the 2 year program is that therefore the proposition was a two year budget which must be referenced back to the issue that was raised before him, that is, the financial resources available to the applicant.

201. Therefore, it cannot be said that Justice Allanson's decision is, as counsel for True Fella put it, "an endorsement of a 2 year program being compliant."[112]

202. Pantoro South and Central Norseman Gold urge me to accept that despite it not being an issue raised in ***Golden Pig***, I can accept that ***Golden Pig*** endorses, and therefore sets a precedent for, a program of less than the life of the lease. However, at the same time, they urge me to accept that despite it being squarely raised that one of the failings of True Fella's s 58 statement was that it did not provide details of how the applicant would ensure the full area of the application would be explored during the *full five year term* of

[111] T 20.6.2023, 64.
[112] T 20.6.2023, 64.

the license, my determining that issue was unnecessary, such that the determination I made now lacks any form of precedent or principle value. I have already commented on the inconsistency and therefore unreliability of such an argument.

203. That factor, combined with the fact that that question or issue was not raised before either Justice Allanson nor Warden O'Sullivan, leads me to find that I cannot accept that Justice Allanson addressed the question of the length of the program, and I cannot accept that that case creates binding authority on the length of the work program being anything less than the life of the licence.

THE S 58 STATEMENTS IN THE PRESENT CASE AND IN *TRUE FELLA*

171. The objector tendered in the hearing of application E 63/2150 the s 58 statement that accompanied application E 63/2149.[113] I have the s 58 statement accompanying E 63/2150.[114] Given the attacks and comparisons on both, I will set out both s 58 statements in as much detail as I consider necessary.

HEADING	E 63/2149	E 63/2150
Proposed method of exploration and Exploration Program (E 63/2149) / details of the work program proposed (E 63/2150)	"The goal for this exploration strategy is to discover economic mineralisation. True Fella is a diversified mineral exploration company that primarily explores for gold but will consider exploring for all other viable commodities including iron ore." "The initial phase of exploration for year one will include:" The statement then sets out the "Proposed first year activities and expenditure – 5 blocks" "These activities are expected to occupy the first phase of	"The goal of the work program is to determine whether gold and base metals are present within the area of the application. The program will be carried out in a number of stages. Subject to aboriginal heritage clearance processes and other access issues, and exploration program budgeted expenditure of $15,000 for the first year is expected to be completed." "The progress of exploration will accelerate rapidly, and budgets increased significantly should a discovery be made during that time." The statement then sets out the "steps to be taken (objectives)" in a year one program.

[113] Affidavit of Jacob David Loveland 14.12.2022, which became exhibit 2, annexure JDL02.
[114] Through the joint Trial Bundle marked TB2, and also attached to the affidavit of Paul Robert Humberston, 18.11.22, which became exhibit 2, marked as annexure PRH-7.

	exploration during which time it is anticipated that the minimum expenditure requirement of $15,000… will be exceeded. Subsequent phases will depend on the results obtained from previous phase of exploration."	"In relation to the following four years further exploration will be carried out based on the results of the first years work."
Financial Resources	[Not relevant in the present case]	"Pantoro is financially capable of conducting the proposed exploration program and meeting its statutory expenditure commitments of the term of the license. Exploration by the subsidiaries of Pantoro (including Pantoro South) is funded by Pantoro." The statement attaches a quarterly report for the period ending 30 June 2021 for Pantoro and a letter signed by the managing director of Pantoro "evidencing" that the company will make the relevant funds available, being a minimum of $15,000 per year to Pantoro to meet the annual minimum commitments, with further funding available.

172. The objector True Fella having the two complaints about the s 58 statement of the applicant, specifically declined to submit that there were any other deficiencies. As a result, any finding I make on the 2 aspects raised by the objector, and given my finding on the deficiency in relation to the length of the work program, should not be taken to endorse any other particular aspect of the s 58 statement. That is, simply because I have not specifically addressed and found the statement to be lacking in other areas, it should not be assumed it is not lacking in other areas; it is simply that in this case I have not had to consider and make findings on the remainder of the statement.

THE OBJECTION IN THE PRESENT CASE

THE ONE YEAR PROGRAM DOES NOT MEET THE REQUIREMENTS OF THE ACT

204. As I have found, the principles in ***Azure*** and ***Toolonga*** apply to the present case.

205. As can be seen from the comparison of the s 58 statements, each of them has a program of work which addresses only 1 year, albeit they vaguely address what might occur in the future, should minerals be found.

206. In accordance with ***Azure*** and ***Toolonga***, and the reasons I have expressed in those cases, the s 58 statement in the present case containing only details setting out a one year program and budget, the s 58 statement, and therefore the application, does not meet the requirements of the Act.

THE FINANCIAL RESOURCES AVAILABLE TO THE APPLICANT

207. The objector alleges that as E 63/2150 is made by two applicants, to meet the requirements of the Act, the s 58 statement should specify the financial resources available to both. The objector relies on s 10 of the *Interpretation Act 1984* (WA) which reads, relevantly:

> 10. **Gender and number**
> In any written law —
> …
> vii. words in the singular number include the plural and words in the plural number include the singular.

208. However, the construction of the Act, and the meaning of the referral in s 58(1)(b)(iv) must also be determined in light of the policies of the Act, and the purpose of s 58(1)(b) and the statement lodged under it.

209. The form entitled "APPLICATION FOR MINING TENEMENT," commonly known as the "Form 21," in the present case, is as follows:

For each applicant:	(d) and (e)	(f) Shares
(d) Full Name and ACN/ABN	PANTORO SOUTH PTY LTD (ACN: 633 003 737)	50
(e) Address	C/- AUSTWIDE MINING TITLE MANAGEMENT PTY LTD, PO BOX 1434, WANGARA, WA, 6947	
(f) No. of shares	CENTRAL NORSEMAN GOLD CORPORATION PTY LTD (ACN: 005 482 860)	50
(g) Total No. of shares	C/- AUSTWIDE MINING TITLE MANAGEMENT PTY LTD, PO BOX 1434, WANGARA, WA, 6947	
		(g) Total 100

210. Therefore, while there is but one application, E 63/2150, the Form 21 allows for the prospect of more than one entity, jointly, applying for that tenement.

211. Section 58(1)(b)(iv) requires a statement specifying "the technical …and financial resources available to the applicant."

212. The purpose of s 58(1)(b)(iv) is to ensure an application is accompanied by a statement specifying the technical and financial recourses available to the applicant. An assessment of whether that statement specifies that information is not, of course, at that stage, an exercise in determining whether the applicant has the financial and other resources available to it to carry out the work program,[115] or whether it can, or cannot, effectively explore the land.[116]

213. However, without the information to the requisite standard, the warden cannot move to make any assessment under s 57(3). That purpose informs the type and level of information that is required for a s 58 statement to meet the requirements of the Act.

214. Warden Roth was of the view a warden should not have to imply or calculate the financial resources available to the applicant,[117] to determine whether the s 58 statement meets the requirements of the Act. It appears to have been his view that, if a warden must do that, the information has not been specified to the requisite degree.

215. The majority of matters where wardens have commented on the specificity of financial resources available to an applicant focus on situations where, as Warden Roth found, the warden has had to infer, or make their own calculations from balance sheets or corporate reports or, as in ***Golden Pig***, financial documents which bear no apparent connection to the applicant.

216. The strict application of the *Interpretation Act* would require the technical and financial resources being specified in relation to both applicants, as they are so named in the Form 21. However, there is another, in my view more contextual application of s 10 to s 58(1)(b)(iv), having regard to s 58's objectively discerned statutory purpose: that is, there is only one application. That one application forms the basis of the commencement of the process of the steps to grant.

217. Section 58 commences:

> (1) *An* application for *an* exploration licence —

[115] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [37].
[116] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [40].
[117] ***Mineralogy P/L v FMG Pilbara P/L*** [2010] WAMW 20 [83], [84].

218. That in my view informs the reading of the remainder of the sub section. That is, were the legislation concerned to identify that there may be more than one applicant within an application, it would have identified that possibility within s 58(1)(b) as to who is required to provide information. Consistent with the Chief Justice's views in relation to determining the construction of s 57(2), and corn,[118] the "applicant" is the applicant, as a whole. While the Form 21 might suggest there are two or more applicants, there being only 1 application, there is, effectively, only 1 applicant.

219. In the context of the Act and the purpose of s 58(1), in my view the applicant will meet the requirements of the Act if the applicant specifies what financial resources are available to it, irrespective of the number of actual people or legal entities who have joined to make the application. If the applicant chooses to provide financial details of only 1 party, but they are specified, such that, in the examples I have cited, there is a connection between the information provided and the applicant, or it is a clear statement of the financial resources that are specifically available, then that will be sufficient to meet the requirements of the Act.

220. Therefore, True fella's objection on this basis cannot be upheld.

THE PUBLIC INTEREST IN MAKING A SIMILAR DETERMINATION TO THAT IN *TRUE FELLA*

221. As I am satisfied that there is a public interest in wardens not departing from another warden's construction of a section of the Act without good cause, I am also of the view that there is a public interest in as far as possible treating like cases alike. It creates certainty and consistency in what those who come before wardens may expect, and supports the orderly administration of the Act.

222. There is an additional factor in relation to the public interest raised by the objector in this case, and that is the connection between this case and my determination in ***True Fella***. I have set out the way in which these two matters are related, and their history. I have also set out the way Pantoro South, and by virtue of them being a joint applicant, Central Norseman Gold, sought to distance themselves from ***True Fella***.

223. I am satisfied that in the present case, having regard to the need for judicial comity and certainty within the industry, and the orderly administration of the Act, there is a public

[118] Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd [2022] WASC 362 [128].

interest in finding that the s 58 statement in the present case, bearing in effect the same deficiency in terms of the proposed work plan, should be found to not meet the requirements of the Act. I come to that view given I can find no reason to accept that ***True Fella***, ***Azure*** and ***Toolonga***, and now ***Richmond***, and the other cases over which ballots were sought, are plainly wrong.

224. The reasons expressed in the paragraph above, alone would have been sufficient for me to find so, however, adding weight to that finding is the history between these two matters and the attempts made by the applicant to manoeuvre away from Pantoro South's submissions in ***True Fella***.

225. Therefore, the objection is upheld in relation to the s 58 statement, and the application does not meet the requirements of the Act. Having rejected the applicant's argument that the question of sufficiency of a s 58 statement is not a jurisdictional fact for the warden to determine, and having upheld in ***Toolonga*** the argument that where an application does not meet the requirements of the Act, that application is invalid, and having found this application does not meet the requirements of the Act, the application E 63/2150 is invalid.

CONCLUSION

226. In its opposition to the objection, the applicant has effectively sought a review of the principles set out in ***True Fella***, obiter or otherwise, ***Azure*** and ***Toolonga***. Therefore, the present case involved two courses:

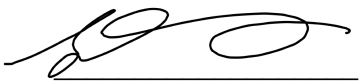
    a. The assessment of the s 58 (1)(b) statement to determine whether it meets the requirements of the Act, in a context where a materially similar statement had accompanied another application over the same ground, at the same time, by the objector in this case, which was successfully objected to by this applicant, who raised the argument about the 1 year program in that objection, and

    b. Consequently, seeking review, in the same jurisdiction, of ***True Fella, Azure***, ***Toolonga*** and the many published decisions in relation to ballots in the last 10 months.

227. While warden's administrative decisions are not binding on any other, it does not serve the public of Western Australia well to have competing determinations on matters of principle, or fact, in the same jurisdiction. There are now two wardens who have had

considerable argument and submissions before them, and given considered, separate yet consistent determinations on matters of similar fact and construction to the application in the present case. There appears to have been no movement down the road, to a place other than where this cataclysm commenced, to resolve what appears to be, given the number of times the same constructional question has arisen before Warden McPhee and I, disagreement with the way in which we have determined that construction.

228. In relation to this objector and applicant, it would be contrary to public interest and the orderly administration of the Act to conclude E 63/2150 is sufficient and valid, when E 63/2149, and many others like it, were considered not sufficient, and invalid. Recognising the risk relating to making another decision on this same construction point, having been told I was wrong in the previous matters, I am satisfied I have properly dealt with that risk in my review of the law and the applicant's submissions. I am nevertheless not satisfied that ***Azure*** or ***Toolonga*** are plainly wrong or unreasonable, or that for some other reason, including the Court's decision in ***Aberfoyle***, I should reject their reasoning.
229. I recognise that there was a slightly different argument put to me about s 58 in the present case, however now on two occasions I have found that ***Aberfoyle*** is not applicable law in Western Australia, given this, the post ***Forrest & Forrest v Wilson*** world.
230. I am not satisfied that the s 58(1)(b) statement in the present case meets the requirements of the Act and in accordance with ***Toolonga***, the application is invalid, and there can be no recommendation to the Minister.
231. I will hear from the parties as to costs.
232. This matter is to be listed at the next Perth mention date convenient to the parties.



Warden Cleary