JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	BLACKFIN P/L v MINERALOGY P/L [2013] WAMW 19
CORAM	**:**	WILSON M
HEARD	**:**	8, 9, 10, 11, 14, 15, 16 MAY, 9, 10 & 11 JULY 2012
DELIVERED	**:**	4 OCTOBER 2013
FILE NO/S	**:**	APPLICATIONS FOR EXEMPTION 323582-323584, 323587, 323588, 323590, 323592-323594, 334253 & 334254 OBJECTIONS TO APPLICATIONS FOR EXEMPTION KR 5-13/101 & KR 103-104/090 and APPLICATIONS FOR FORFEITURE KR 11-21/090
TENEMENT NO/S	**:**	AFFECTING EXPLORATION LICENCES 04/1515-1518, 04/1520-1525 and 04/1529
BETWEEN	**:**	Blackfin Pty Ltd (Applicant for Exemptions) (Respondent to Forfeiture Applications) v Mineralogy Pty Ltd (Objector to Exemption Applications) (Applicant for Forfeiture Applications)

Catchwords:

Application – Exploration Licences - Exemption from Expenditure Conditions – Combined Reporting Groups – Unworkable ground – Unseasonal weather – Inability to access ground – Deliberate choice to explore other Exploration Licence – Expenditure "on or in connection with mining" – Expenditure "on or in connection with exploration for minerals on combined reporting tenements" – Operation of exemption for combined reporting tenements by apportionment of aggregate exploration expenditure – Unavailability of equity funding due to GFC – Previous expenditure & exemptions – Past & planned development & expenditure on Project – "Project" exemption – Identification of JORC resource – Unsolicited takeover bids

Legislation:

Mining Act (WA) 1978: s. 8, s. 62(1), s. 68(3), s. 98, s. 102(2)(d), s. 102(2)(g). 102(2)(h), s. 102(2a)(a) & (b), s. 102(3), s. 102(4), s. 115A(4), s. 115B(1),

Mining Regulations (WA) 1981: r. 21, r 22, r. 58, r. 58A, r. 96C(2a) & (3)

Result:

Recommend to the Hon. Minister that the Exemptions for the E's by Blackfin in the Expenditure Year pursuant to s. 102(2)(d) of the Act be refused.

Recommend to the Hon. Minister that the Exemption for E 04/1518 by Blackfin in the Expenditure Year from complying with the whole of the expenditure conditions pursuant to s. 102(2)(h) of the Act be granted.

Recommend to the Hon. Minister that application for the Exemptions in the Expenditure Year by Blackfin pursuant to s. 102(2)(h) of the Act for E 04/1515 and E 04/1517 be refused.

Recommend to the Hon. Minister that the Exemptions in the Expenditure Year for the E's by Blackfin on the ground of the unavailability of equity funding during the GFC pursuant to s. 102(3) of the Act be refused.

Recommend to the Hon. Minister that the Exemptions in the Expenditure Year for the E's by Blackfin on the ground of the unsolicited takeover offers during the GFC pursuant to s. 102(3) of the Act be refused.

Recommend to the Hon. Minister that the Exemptions in the Expenditure Year for the E's by Blackfin on the ground of the conduct of Blackfin in delineating JORC resource on the duchess pursuant to s. 102(3) of the Act be refused.

Recommend to the Hon. Minister that the Exemptions in the Expenditure Year for the E's by Blackfin on the ground of previous expenditure on & exemptions pursuant to s. 102(3) of the Act be refused.

Recommend to the Hon. Minister that the Exemptions in the Expenditure Year for the E's by Blackfin on the ground of past & planned development & expenditure on the Project pursuant to s. 102(3) of the Act be refused.

Representation:

Counsel:

Applicant/Respondent Blackfin : Mr M Gerus
Objector/Applicant Mineralogy : Mr J Thompson SC & Ms F Cull

Solicitors:

Applicant/Respondent Blackfin : Gilbert & Tobin
Objector/Applicant Mineralogy : King & Wood Mallesons

Case(s) referred to in judgment(s):

Nova Resources NL v French (1995) 12 WAR 50

General Gold Resources NL v Exmin Pty Ltd [2002] WAMW 18

Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported; Full Court of Supreme Court of WA, Library No 7427; 16 December 1988)

Re: His Honour Warden Calder SM & anor; Ex Parte Lee & anor [2007] WASCA 161

Collector of Customs v Pozzolanic (1993) 43 FCR 280

Case(s) also cited:

Mowana Holdings Pty Ltd v Western Australia Mint (unreported, Kalgoorlie Warden's Court, 16 November 1990)

Kalgurli Mines Ltd v Mowana Holdings Pty Ltd (unreported, Kalgoorlie Warden's Court, 22 May 1992)

Dixon and McKnight v Baker (unreported, Perth Warden's Court, 12 April 1996)

WMC Resources Ltd v Van Blitterswyk [2006] WAMW 17

Brosnan & anor v Richmond, St Barbara Ltd & anor [2007] WAMW 2

WMC Resources Ltd v Ajax Mining Nominees Pty Ltd [2001] WAMW 13

Morellini v IPT Systems Ltd [2003] WAMW 3

Re Heaney; Ex parte Flint v Nexus Minerals NL, (unreported; Full Court of Supreme Court of WA; Library No 970065; 26 February 1997)

Brosnan v JSW Holdings Pty Ltd [2011] WAMW 8

Brosnan & ors v Meridian Mining Ltd [2010] WAMW 6

Newmont Duketon Pty Ltd & ors v Angelopoulos [2006] WAMW 20

Marymia Exploration NL v Elezac Mining Pty Ltd (Perth Warden's Court, 5 December 1997, Vol 12 No 25

Great Boulder Mines Ltd v Bailey [2000] WAMW 6

Horizon Mining Ltd v MPF Exploration Ltd [2005] WAMW 1

Kiora Holdings Pty Ltd v Gutnick Resources NL [2003] WAMW 9

Van Blitterswyk v BHP Billiton Nickel West Ltd [2009] WAMW 5

Nunn v Carnicellie (unreported, Southern Cross Warden's Court, 29 November 1990, noted 10 AMPLA Bull 63)

Flint v Brosnan [2002] WAMW 20 and 21

In the Application for the Restoration of late Mining Lease 45/1135 by Kenneth Bacon [2012] WAMW 19

Majeed v Briggs & Schulda (unreported, Warden's Court, 1988, 7 AMPLA Bull 146)

Richmond v Sub-Sahara Resources NL & anor [2006] WAMW 14

Austwhim Resources NL v Van Blitterswyk [2003] WAMW 38

Background

1. Blackfin Pty Ltd ("Blackfin") and Rey Kimberley Pty Ltd ("Rey Kimberley") are wholly owned subsidiary companies of Rey Resources Ltd ("Rey"). Blackfin and Rey Kimberley are the registered holders of about 41 exploration licences located in the West Kimberley area of Western Australia. The 41 exploration licences are known to host thermal coal deposits. It is the intention of Rey, through its various subsidiary companies including Blackfin and Rey Kimberley, to explore and eventually mine the known deposits of thermal coal. Rey proposes to truck the coal mined to Derby where it will be stock piled and then exported by ship to buyers in Asia. Rey refers to this proposal as the Canning Basin Coal Project ("the Project"). The size of the area covered by the Project is about 6,500 square kilometres.

2. Within the Project is a greenfields coal mining proposal being developed by Rey called Duchess Paradise situated within the Fitzroy Trough about 135 kilometres south east of Derby. The mining tenements that comprise the Duchess are Exploration Licence 04/1519, 04/1770 & 04/1753. These Exploration Licences are subject to applications for Mining Lease 04/453 and Miscellaneous Licence 04/58. If granted, the Mining Lease and the Miscellaneous Licence will establish the mining tenements from which the proposed Duchess Paradise mining operation will be conducted.

3. The coal resource at Duchess Paradise consists of two dipping seams of coal with an approximate combined resource of about 530 million tonnes of coal. Rey estimates the rate of extraction of coal will be approximately 2 to 2.5 million tonnes of coal per year and have a mine life of about 20 years extracting about 60 million tonnes of coal. Rey considered the excavation of coal at Duchess can be achieved by slot mining.

4. Research by Rey of drilling results from the 1960's and 1970's and its own drilling in the Liveringa Ridge area in 2008 confirms the existence of thermal coal deposits within the Project. However, there has been insufficient drilling for Rey to enable an estimation of a JORC resource, except at Duchess. Rey believe the coal sub-crop

throughout the Project is contiguous and forms part of the same single geological unit.

5. Rey considers some 320 kilometres of coal sub-crop is still to be investigated by drilling within the Project area before any preliminary indication could be obtained as to the extent of the thermal coal resource. However, Blackfin estimates the Project potentially contains billions of tonnes of coal capable of supporting a multigenerational mining operation.

6. Rey intends to conduct further drilling to identify whether it is economically feasible to develop a larger export operation including the potential for the establishment of a deep water port and railway infrastructure for the transport of coal mined within the Project.

7. On 18 June and 10 November 2009, Blackfin lodged with the Mining Registrar at Karratha a total of 11 Applications for Exemptions from Expenditure Conditions ("Exemptions") for the 2008/2009 Expenditure Year ("Expenditure Year") for 11 Exploration Licences ("the E's") of the 41 exploration licences it holds. The details of the E's the subject of the Exemptions are as follows:

Tenement Number	Date of Grant	Minimum Expenditure For 2008/2009 Year	Actual Expenditure Reported For 2008/2009 Year
E 04/1515	20 APRIL 2006	$ 70,000.00	$ 38,188.00
E 04/1516	20 APRIL 2006	$ 70,000.00	$ 38,573.00
E 04/1517	20 APRIL 2006	$ 69,000.00	$ 37,495.00
E 04/1518	13 SEPTEMBER 2007	$ 70,000.00	$ 43,930.00
E 04/1520	20 APRIL 2006	$ 70,000.00	$ 37,767.00
E 04/1521	20 APRIL 2006	$ 70,000.00	$ 37,644.00
E 04/1522	20 APRIL 2006	$ 70,000.00	$ 37,865.00
E 04/1523	20 APRIL 2006	$ 70,000.00	$ 37,867.00
E 04/1524	20 APRIL 2006	$ 49,000.00	$ 30,079.00
E 04/1525	13 SEPTEMBER 2007	$ 66,000.00	$ 37,854.00
E 04/1529	20 APRIL 2006	$ 70,000.00	$ 37,272.00

8. The grounds relied upon by Blackfin at the hearing of the Exemptions are as follows:

    a. *s. 102(2)(d) – the ground the subject of the mining tenement is for any sufficient reason unworkable;*

    b. *s. 102(2)(h) – that –*

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

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

        (in relation to E 04/1515, E 04/1517 & E 04/1518 only)

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

9. Relevant to the determination of some of the Exemptions is the grant of Combined Reporting Group status pursuant to s. 115A of the Mining Act ("Act") in respect to some of the 41 exploration licences within the Project. Rey and its subsidiaries, including Blackfin, refer to the Combined Reporting Groups by names. For the purposes of these proceedings there are 4 Combined Reporting Groups that are relevant and contain the E's affected by the Exemptions. The Combined Reporting Groups applicable to the E's for the Expenditure Year is as follows:

Myroodah Group (C50/2008) Includes tenements: E 04/1381 E 04/1382 E 04/1383 E 04/1516* E 04/1529* E 04/1728 E 04/1767 E 04/1833 E 04/1834 E 04/1842	**Liveringa Group (C52/2008)** Includes tenements: E 04/1219 E 04/1515* E 04/1517*
Duchess Paradise Group (C53/2008) Includes tenements: E 04/1385 E 04/1386 E 04/1518* E 04/1519 E 04/1753 E 04/1768 E 04/1770 E 04/1865 E 04/1943	**Nerrima-Moffats Group (C54/2008)** Includes tenements: E 04/1520* E 04/1521* E 04/1522* E 04/1523* E 04/1524* E 04/1525*

Notes
* denotes E subject to Exemption Application

10. On 12 October and 2 December 2009, Mineralogy Pty Ltd ("Mineralogy") lodged Objections to the grant of the Exemptions. The grounds for the Objections are all in similar terms being:

> "The Objector denies the truth of the reasons for exemption claimed by the Applicant. In all the circumstances (including the nature, extent of, and number of prior exemptions) and the small amount recently expended on the tenement, it would be unreasonable to grant another exemption."

11. Further, on 7 October 2009, Mineralogy lodged Applications for Forfeiture of the E's ("Forfeiture Applications") alleging that Blackfin has failed to comply with the expenditure conditions associated with the E's in the Expenditure Year and seeks the Hon. Minister for Mines ("Hon. Minister") forfeit the E's.

12. Blackfin lodged Responses to the Forfeiture Applications and denies it has failed to meet the expenditure requirements for the E's in the Expenditure Year and is seeking the Exemptions. In the alternative, Blackfin pleads that if the Exemption is not granted any shortfall in minimum expenditure on the E's is not of sufficient gravity to warrant forfeiture of the E's.

13. Orders were made previously for the evidence in the Exemptions and the Forfeiture Applications be heard together. It is the case the Exemptions should be determined first and the Forfeiture Applications then determined, if necessary.

The Law

14. The objects and policy of the Act is well outlined in ***Nova Resources NL v French (1995) 12 WAR 50*** where Rowland J said at [50] the following:

> *"A primary object is to ensure as far as practicable that land which has for may have potential for mining will be made available to those who wish to engage in prospecting, exploration and mining, and that where those objectives are not being achieved others who have an interest in achieving than are given an opportunity to acquire the subject ground."*

15. Put in simple terms the objects and policy of the Act is that the holder of a mining tenement either uses the land that comprises a mining tenement or loses it to another person who wishes to exploit the potential mineral wealth that may lie within the land.

16. The measure of the exploitation of a mining tenement is achieved by the imposition of an obligation upon the holder of a mining tenement to annually expend, or cause to be expended, in mining on or in connection with mining on the mining tenement a minimum amount of expenditure. Relevant to these proceedings is s. 62 of the Act and r. 21 of the Mining Regulations ("Regulations").

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

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

18. The provisions of s. 102(2) & s. 102(3) of the Act make provisions for certain grounds upon which the holder of a mining tenement may apply to the Hon. Minister for either whole or partial exemption from complying with the expenditure conditions associated with the grant of a mining tenement.

19. The holder of a mining tenement who makes an application for exemption from expenditure conditions bears the onus to satisfy the warden that it has established the grounds for the exemptions and that the exemption ought to be recommended to the Hon. Minister for grant.

20. A holder of a mining tenement who does not have granted by the Hon. Minister either a partial or whole exemption from compliance with minimum expenditure conditions or does not comply with minimum expenditure conditions in respect to a mining tenement is at risk that an application for the forfeiture of the mining tenement pursuant to s. 98 of the Act will be made by some person.

21. The applicant for forfeiture bears the onus to prove on the balance of probabilities there has been non-compliance with the minimum expenditure conditions for the mining tenement. (see: ***Commercial Properties Pty Ltd v Italo Nominees Pty Ltd (unreported; Full Court of the Supreme Court of WA, Library N0 7427; 16 December 1988)).***

22. If an applicant for forfeiture satisfies the warden the holder of a mining tenement has failed to comply with the minimum expenditure conditions the warden may recommend to the Hon. Minister forfeiture of the mining tenement or impose a penalty not exceeding $10,000.00 as an alternative to forfeiture or dismiss the application. A recommendation for forfeiture of mining tenement shall not be made unless the warden is satisfied the non-compliance is of sufficient gravity in the circumstances of the case to justify forfeiture.

The Issues

23. Both Blackfin and Mineralogy generally agree the issues to be ultimately determined can be characterised as follows:

    a. Upon the grounds relied upon by Blackfin should a recommendation be made to the Hon. Minister for the grant of the Exemptions for the E's for the Expenditure Year?

    b. Upon the determination of the Hon. Minister of the Exemptions for the E's by Blackfin, if there is found to be a breach of the expenditure conditions by Blackfin in respect to the E's in the Expenditure Year is the breach of sufficient gravity to justify forfeiture or the imposition of a fine?

Exemptions

s. 102(2)(d) – The ground for any sufficient reason is unworkable

24. Of significance to both the Project and the Exemptions is the existence of the Fitzroy River. The Fitzroy River was described by Mr Kevin Wilson ("Mr Wilson") the Managing Director of Rey as *"the major geographical feature of the area... …which essentially bisects the lease package from northwest to southeast.."*

25. Blackfin called Mr Kevin Pettingill ("Mr Pettingill") who was for the period 2001 to 2010, employed by the Shire of West Kimberley ("the Shire") as the Executive Manager Technical and Development Services and was responsible for the preparation of the Road Condition Reports for roads within the Shire during the Expenditure Year. The source of the information used by Mr Pettingill for the

preparation of the Road Condition Reports were described by him as from the Bureau of Metrology for rainfall as advised by local pastoral station owners, internet sites such as the WA Rivers website and river level measurements from gauge stations along the Fitzroy River.

26. The evidence of Mr Pettingill focussed on a river crossing of the Fitzroy River know as the Myroodah Crossing located about 80-85 kilometres south east of Derby. The Myroodah Crossing is generally to the south east of the town sites of Looma and Camballin and is accessible from the Great Northern Highway by the Camballin Road.

27. Mr Pettingill described the Myroodah Crossing as being a concrete roadway in the bed of the river which (conditions permitting) allows motor vehicles (including heavy motor vehicles such as those carrying drill rigs) to cross the river. The Shire closes the Myroodah Crossing to all motor vehicles apart from four wheel drive motor vehicles when the flow of the Fitzroy River reaches about 30 centimetres above the concrete roadway. The Myroodah Crossing is closed to all motor vehicles when the water level flowing over the concrete roadway reaches approximately 60 centimetres.

28. According to Mr Pettingill, the Fitzroy River water flow can peak at 6 to 7 metres above the concrete roadway at Myroodah Crossing during the "wet season". Further, Mr Pettingill stated the Fitzroy River can during the "wet season" reach approximately 1 kilometre wide (on average) and in full flood (at its peak) can be 30 kilometres wide and 12 metres deep. The "wet season" in the Kimberley region of this State runs from about October to about April. The remaining months are regarded as the "dry season".

29. Mr Pettingill produced a number of Road Condition Reports the majority of which he had prepared for the Expenditure Year. In summary, Mr Pettingill said the Myroodah Crossing was either "closed" or "not advisable to cross" to all traffic between 15 April and 19 May 2008 and also between 16 December 2008 and 8 May 2009. Between the 20 May 2008 and until about 15 December 2008 the Myroodah Crossing was open.

30. During the "wet season", Mr Pettingill said the nearest crossing to the Myroodah Crossing is the Nookanbah Road Crossing located approximately 100 kilometres to the east. The Nookanbah Road Crossing is generally open or closed at the same time as the Myroodah Crossing. The next closest crossing of the Fitzroy River is located at Fitzroy Crossing approximately 250 kilometres east of Derby. Mr Pettingill stated that during the "wet season", even if access across the Fitzroy River can be achieved at Fitzroy Crossing, access to the south of the Fitzroy River is generally not possible as roads such as Cherrabun Road are either constructed of gravel or pindan (dirt tracks) and are impassable.

31. Mr Pettingill also gave evidence that where the recommendation by the Shire is a road is suitable for four wheel drive motor vehicles only, that means, motor vehicles of that type and not motor vehicles of a heavier nature. To that extent Mr Pettingill said heavy motor vehicles of the type of a heavy drill rig or other similar associated heavy motor vehicle would not be recommended to use a road within the Shire where the recommendation is for four wheel drive motor vehicles only.

32. The consequences and concerns of the Shire if heavy motor vehicles such as drill rigs were to use roads recommended for four wheel drive motor vehicles only is that they will become bogged and the safety of people will be jeopardised. Further, Mr Pettingill said the unauthorised use of roads by heavy motor vehicles such as drill rigs when a restriction exists for four wheel drive motor vehicles only is also the economic cost to the Shire in the repair of roads damaged by roughing, severe blow-outs and severe bogginess. The Shire is also faced with the difficulty in quickly repairing roads that are severely damaged given they have some 3,500 kilometres of roads and access tracks within its boundaries.

33. The consequences of taking heavy motor vehicles such as drill rigs into areas associated with the Project at times near to or after the "wet season" was commented upon by Mr Christopher Fowers ("Mr Fowers") who was previously employed by Rey as a consultant geologist. Mr Fowers said the use of a drill rig late in the season was a concern because the drill rig could get stuck for the entire "wet season" if rains came and the Fitzroy River flooded.

34. Apart from the Road Condition Reports for the Expenditure Year, a number of Road Condition Reports for years either side of the Expenditure Year were also produced into evidence. A coloured graph outlining the closure pattern of the Myroodah Crossing for the Expenditure Year and the several years either side of the Expenditure Year were produced into evidence. It is fair to say the coloured graph and the Road Condition Reports were entirely consistent with the oral evidence of Mr Pettingill that the "wet season" in the Kimberley Region of WA generally occurs between late October and early November until late April or early May. Similarly the closure of the Myroodah Crossing generally coincides with the start and end of the "wet season".

35. Blackfin rely upon the closure of the Myroodah Crossing, the remoteness of the area of the Project and the unusually high rainfall during the Expenditure Year as the basis for the Exemptions. In summary, Blackfin submits the Myroodah Crossing was closed or advised not to cross between 19 April 2008 and 19 May 2008 and 16 December 2008 and 7 April 2009, a total of about 5 months in the Expenditure Year made the E's unworkable and as such it is entitle to a recommendation for the grant of Exemptions.

36. Mineralogy argues the evidence produced by Blackfin does not demonstrate anything other than predictable rainfall within the "wet season" in the area of the

Project that resulted in the predictable closure of the Myroodah Crossing accompanied by the usual predictable associated road closures.

37. Further, Mineralogy points to the ability of Blackfin to have carried out some of its planned exploration and drilling programs on some of the E's as demonstrated by various reports filed by both Rey and Blackfin. Those reports do not complain of unusual weather patterns or inability to gain physical access to the E's. It is the case, submits Mineralogy that Rey was focused on and prioritised the development of the Duchess Paradise, particularly E 04/1519, during the Expenditure Year.

38. Mineralogy submits for Blackfin to succeed on this ground of the Exemptions it must demonstrate that during the Expenditure Year the "wet season" was unseasonal and prolonged and made the ground that comprises the E's inaccessible.

39. Section 102(2)(d) of the Act relied upon by Blackfin for the grant of the Exemptions provides for the grant of a certificate of exemption where *"the ground the subject of the mining tenement is for any sufficient reason unworkable."*

40. The word "unworkable" is not defined by the Act but has been considered by wardens in a number of cases *(see:* ***Mowana Holdings Pty Ltd v Western Australia Mint (unreported, Kalgoorlie Warden's Court, 16 November 1990)***, ***Kalgurli Mines Ltd v Mowana Holdings Pty Ltd (unreported, Kalgoorlie Warden's Court, 22 May 1992)***, ***Dixon and McKnight v Baker (unreported, Perth Wardens Court, 12 April 1996)***, ***WMC Resources Ltd v Van Blitterswyk [2006] WAMW 17***, ***Brosnan & anor v Richmond, St Barbara Ltd & anor [2007] WAMW 2***, ***WMC Resources Ltd v Ajax Mining Nominees Pty Ltd [2001] WAMW 13)***. The Department of Mines and Petroleum ("DMP") produced an Exemption Guideline Policy for exemptions based on the ground that comprise the mining tenement is claimed to be unworkable. That policy reflects, in my opinion, most of the decisions referred to in the above cases.

41. It is not helpful, in my opinion, to attempt to define circumstances that amount to sufficient reason for a mining tenement to be "unworkable". Circumstances that may satisfy a warden as being sufficient reason for a mining tenement to be unworkable are wide and varied and may differ significantly from case to case. The obligation rests upon the applicant to produce evidence to satisfy a warden the reason relied upon, when viewed objectively, made the mining tenement unworkable.

42. In the circumstances of this case Blackfin has failed to produce sufficient reason to satisfy me the ground the subject of the E's was unworkable during the Expenditure Year.

43. The evidence of Mr Pettingill simply confirms the "wet season" came and went as it usually does in each year during the Expenditure Year. With the "wet season" in the Expenditure Year the Myroodah Crossing and other road crossings over the Fitzroy

River closed. Mr Pettingill did not suggest the "wet season" in the Expenditure Year was anything more than a normal "wet season". In fact he confirmed the weather in the Expenditure Year was, when compared to other "wet seasons" either side of the Expenditure Year, good and provided the ability to cross the Myroodah Crossing for relatively long periods of time.

44. I do not accept the evidence of Mr Pettingill can be taken to suggest the road to the south of Myroodah Crossing was closed to all motor vehicles except four wheel drive motor vehicles from 19 May 2008 until 16 December 2008. Mr Pettingill's evidence was general and sourced from material other than his direct observations of the conditions of the roads within the Project.

45. The evidence of Mr Fowers and the content of Quarterly Reports by Rey during the Expenditure Year demonstrates exploration drilling was conducted on the following: E 04/1383 within the Myroodah Combined Reporting Group ("Myroodah Group") (located to the south of the Fitzroy River) and E 04/1519 and E 04/1219 within the Liveringa Combined Reporting Group ("Liveringa Group") (also located to the south of the Fitzroy River). To have conducted that exploration drilling required a drilling rig to have passed over the Fitzroy River at either of the three road way crossings mentioned by Mr Pettingill and to have travelled along tracks and roads to drill sites. No evidence was lead by Mr Pettingill or any other person nor was any other evidence lead by Blackfin that difficulty was experienced in drill rigs travelling either across the Fitzroy River at any of the mentioned river crossings or that the drill rigs became bogged or destroyed or damaged roads over which they travelled.

46. No evidence was lead by Blackfin of any unseasonal rain that fell outside what would be regarded as the "wet season" in the area of the Project. I do not accept the proposition by Blackfin that unseasonal rain fell within the area of the Project in the Expenditure Year. In my opinion, usual patterns of seasonal rain and climatic conditions that, for a period of time, renders the holder of a mining tenement unable to access the mining tenement or to carry out planned exploration or mining programmes on the ground comprising the mining tenement does not amount to making the mining tenement unworkable. Further, in my opinion, it should be taken that a person who has applied for and been granted a mining tenement has done so in the full knowledge of the usual seasonal climatic conditions that prevail in the area of the mining tenement and any constraints those climatic conditions may place upon their ability to access, prospect, explore or mine the ground is not an impediment to compliance with all conditions of the grant of the mining tenement. The obligation is upon the holder of a mining tenement to plan and work the ground of the mining tenement around predictable climatic events.

47. However, unseasonal, unpredictable or prolonged climatic events that render the ability to access and carry out planned exploration or mining programmes on the

ground comprising the mining tenement may, depending upon the circumstances of each case, amount to the mining tenement being considered unworkable.

48. I find the evidence lead by Blackfin demonstrates usual and predictable "wet seasons" in 2007/2008 and 2008/2009 in the area of the Project. Access was able to be made to exploration licences held by Blackfin south of the Fitzroy River during the "dry season" to enable exploration drilling to occur as reported in the Quarterly Reports for the Expenditure Year by Rey. No evidence was lead by Blackfin of unseasonal, unpredictable or prolonged climatic conditions during the period between May and December 2008 when drilling rigs were deployed for the purposes of exploration drilling on some exploration licences held by Blackfin south of the Fitzroy River. No evidence was lead by Blackfin of difficulties being encountered in the movement of drilling rigs over roads for its exploration drilling in the Expenditure Year. No evidence was lead from Mr Pettingill that roads within the Shire were damaged by drilling rigs associated with Blackfin or Rey or they became bogged or stuck during the Expenditure Year.

49. The evidence reveals programmes of works for the Expenditure Year for E 04/1516 and E 04/1518 and E 04/1522 to E 04/1524 were not carried out as Blackfin and Rey made a deliberate decision to focus attention, money and resources upon drilling and exploration of other exploration licences particularly at the Duchess Paradise. This decision was confirmed by the evidence of Mr Wilson.

50. For those reasons Blackfin have not satisfied me on the balance of probabilities the ground the subject of the E's was for sufficient reason unworkable in the Expenditure Year.

51. Accordingly, I recommend to the Hon. Minister that the applications by Blackfin for the Exemptions for the E's in the Expenditure Year made pursuant to s. 102(2)(d) of the Act be refused.

s. 102(2)(h) – Combined Reporting Group

Introduction and Application of the Law

52. This ground of the Exemptions by Blackfin relates to only 3 of the 11 E's they being E 04/1515, E 04/1517 and E 04/1518. Further, this ground of the Exemptions affects only 2 of the 4 granted Combined Reporting Groups being the Liveringa Group within which E 04/1515 & E 04/1517 is located and were authorised by the DMP for combined reporting on 28 March 2008 and Duchess-Paradise Combined Reporting Group (C 53/2008) ("Duchess Group") within which E 04/1518 is located and was authorised for combined reporting on 6 May 2008.

53. Blackfin submits the approach by Rey to the exploration and development of the Project has been holistic as it seeks to progress the Project as a whole from exploration to mining (where feasible) in an efficient and orderly manner. This "project" based approach by Rey, submits Blackfin, is consistent with the spirit of s. 102(2)(h) of the Act.

54. To properly understand the provisions of s. 102(2)(h) of the Act it is necessary to consider the obligations of the holder of an exploration licence. The holder of an exploration licence has an obligation pursuant to s. 68(3) of the Act to file in the manner and in the timeframe prescribed reports of work done on the exploration licences and money expended on or in connection with exploration on the exploration licence. The minimum amount of expenditure the holder of an exploration licence is to expend in an expenditure year is prescribed by r. 21 of the Regulations. The manner and time in which the holder of an exploration licence is to lodge a report of expenditure on an exploration licence is prescribed by r. 22 of the Regulations.

55. The holder of an exploration licence may apply pursuant to s. 115A of the Act to the Hon. Minister for 2 or more exploration licences to be granted combined reporting status for mineral exploration reports with reports of expenditure by way of Operation Reports (Form 5's). Guidelines approved by the Hon. Minister dated December 2006 have been published to facilitate the lodgement and grant of filing combined mineral exploration reports.

56. Where the holder of an exploration licence that forms part of a combined reporting group is unable to meet the prescribed minimum expenditure requirements an application may be made pursuant to s. 102(2)(h) of the Act for the issue of a certificate of exemption from complying with expenditure conditions for an expenditure year. Section 102(2)(h) of the Act provides as follows:

> ***"102. Exemption from expenditure conditions***
>
> (2) A certificate of exemption may be granted for any of the following reasons —
>
> (h) that —
>
> (i) the mining tenement is one of 2 or more mining tenements (***combined reporting tenements***) the subject of arrangements approved under section 115A(4) for the filing of combined mineral exploration reports; and
>
> (ii) the aggregate exploration expenditure for the combined reporting tenements would have been such as to satisfy the expenditure requirements for the mining tenement concerned had that aggregate exploration expenditure been apportioned between the combined reporting tenements."

57. Section 102(2)(h) of the Act has two limbs each of which must be met before this ground of exemption can be granted. The first limb requires the mining tenement the subject of the application for exemption to be part of an arrangement approved under s. 115A(4) of the Act that approves the filing of combined mineral exploration reports. There is no issue in these proceedings that combined reporting arrangements have not been granted to the exploration licences the subject of these

applications for exemptions. The second limb requires the aggregate exploration expenditure of the mining tenements that form the combined reporting tenements under s. 115A(4) of the Act if apportioned between them would satisfy the minimum expenditure requirement for the mining tenement concerned with the exemption application.

58. The term "*aggregate exploration expenditure*" is defined by s. 102(2a) of the Act and provides as follows:

> "(2a) In subsection (2)(h) —
>
> ***aggregate exploration expenditure*** means expenditure —
>
> (a) on, or in connection with, exploration for minerals on the combined reporting tenements; and
>
> (b) worked out in a manner specified in the regulations."

59. The provision of s. 102(2a) of the Act is important as it defines the nature of expenditure for the purposes of s. 102(2)(h) of the Act and provides for the prescription of the manner in which aggregate exploration expenditure is to be calculated. Accordingly, r. 58A of the Regulations prescribes the manner in which aggregate exploration expenditure is "worked out" and provides as follows:

> ***"58A Aggregate exploration expenditure (Act s. 102(2a))***
>
> (1) In this regulation —
>
> ***relevant operations report*** means a report of the kind required under section 51, 68(3), 70H(1)(f) or 82(1)(e) —
>
> (a) filed for a combined reporting tenement; and
>
> (b) covering the year or any part of the year to which the proposed exemption relates.
>
> (2) For the purposes of the definition of ***aggregate exploration expenditure*** in section 102(2a), the expenditure is to be worked out by adding together the total exploration expenditure shown in each relevant operations report.

60. On 21 January 2008 and 11 February 2010 the DMP issued Policy Guidelines pertaining to applications for exemption from expenditure conditions. Blackfin submits the Policy Guidelines issued by the DMP on 11 February 2010 are applicable to these proceedings. Further, Blackfin submits the warden may have regard and give due consideration to the Policy Guidelines when determining whether to recommend to the Hon. Minister that a certificate of exemption be granted. However, Blackfin acknowledges the decision of Warden Calder in ***Morellini v IPT Systems Ltd [2003] WAMW 3*** in which it was held that a warden is not bound to apply the Policy Guidelines.

61. It is appropriate for the purposes of this ground of the Exemptions to note the relevant provisions of the Policy Guidelines for Exemptions from expenditure conditions. The relevant provision of the Policy Guidelines states the following:

> *"The project expenditure commitment and the aggregate expenditure will be calculated on the subject tenement's anniversary date plus 60 days (or if an extension of time to lodge the Form 5 has been granted at the expiry of that extended period), thereby ensuring that the reported expenditure for the subject tenement will be included in the calculations.*
>
> *Aggregate exploration expenditure is calculated by adding the total expenditure reported on the relevant operation report (Form 5) submitted for the tenements in the group excluding any monies claimed under "Mining Activities" in those operations reports."*

62. Blackfin submits this method of calculation of project expenditure is valid when calculating expenditure for the purposes of s. 102(2)(h) of the Act in these proceedings.

63. I do not accept this submission by Blackfin and do not intend to apply the Policy Guidelines. In my opinion, the Policy Guidelines and submission by Blackfin are fundamentally flawed in that they both overlook a significant requirement of both the Act and Regulations when reporting expenditure on an exploration licences whether individually or as part of combined reporting tenements.

64. The obligation of the holder of an exploration licence pursuant to s. 68(3) of the Act is to report "*money expended in connection with, exploration in the area the subject of the licence"* in the manner prescribed by the Regulations. Regulation 21 of the Regulations prescribes the holder of a mining tenement (including an exploration licence) "*shall expend, or cause to be expended, in mining on or in connection with mining on the licence"* a certain minimum prescribed amount determined by reference to the size of the exploration licence. Mining for the purposes of these proceedings includes exploring for minerals pursuant to s. 8 of the Act.

65. The tenor of the Act and Regulations where the holder of a mining tenement has a requirement to meet minimum expenditure obligations is that expenditure claimed must be expended "*in mining on or in connection with mining on the licence"* or expressed in similar terms. To take advantage of the provisions of s. 102(2)(h) the aggregate exploration expenditure is defined by s. 102(2a)(a) of the Act to mean "*on, or in connection with, exploration for minerals on the combined reporting tenements…."*

66. Further, s. 8 of the Act defines "expenditure conditions" to mean "*in relation to a mining tenement means the prescribed conditions applicable to a mining tenement that require the expenditure of money on or in connection with the mining tenement or the mining operations carried out thereon or proposed to be so carried out."* The term expenditure "expenditure" is relevantly defined in s. 115B(1) of the Act in a provision that deals specifically with the verification of expenditure amounts in operations reports (Form 5) to mean "*expenditure on or in connection with mining on a mining tenement."*

67. For the purposes of s. 102(2a)(b) of the Act the manner in which aggregate exploration expenditure is "worked out" is by adding together the total exploration expenditure shown on the operations reports being the Form 5 prescribed by r. 22 of the Regulations. The Act and Regulations makes it clear that for work done and money spent on a mining tenement to be included in "expenditure" in operation reports (Form 5's) it must have been expended *"on or in connection with mining on a mining tenement."*

68. In my opinion, a claim that expenditure has been incurred upon a mining tenement that is not connected with mining *"on or is in connection with mining"* on a mining tenement does not advance the policy of the Act to exploit the mineral wealth of the State. That is precisely why the Act and Regulations defines and specifies that expenditure must be *"on or in connection with mining on a mining tenement."* It is not the case, in my opinion, the term used in s. 102(2a)(a) of the Act that defines the term *"aggregate exploration expenditure"* is inconsistent with the definitions or requirements of the Act for expenditure contained within s. 68(3), 102(2)(h) or s. 115B of the Act. In my opinion, when the Act is read as a whole the definitions referred to above are all consistent with the policy of the Act.

69. Further, the Act and Regulations does not ask for the reporting of <u>any</u> or <u>all</u> expenditure rather it asks specifically for the reporting of expenditure *"on or in connection with mining on a mining tenement."* This is one of the issues raised by Mineralogy being that Blackfin has reported <u>all</u> expenditure on the E's rather than expenditure *"on or in connection with mining on a mining tenement"* or for the purposes of s. 102(2)(h) of the Act *"on, or in connection with, exploration for minerals on the combined reporting tenements."*

70. Not all expenditure is *"expenditure on or in connection with mining on a mining tenement."* Regulation 96C of the Regulations prescribes a number of activities that are either allowable or not allowable for the purposes of calculating expenditure *"on or in connection with mining on a mining tenement."* Further, the Supreme Court and wardens have for years heard many appeals and proceedings dealing with and identifying various activities and circumstances in which expenditure is either allowable or not allowable based on whether expenditure claimed is *"on or in connection with mining on a mining tenement."* Many of those decisions have been summarised and collated in "*Mining Law in Western Australia*" (4th Ed) by Michael Hunt at pages 181 to 187.

71. It is regrettable the Policy Guidelines issued by the DMP in both January 2008 and February 2010 and the Form 5 fails to make any reference to the requirement of the Act and Regulations that expenditure must be "*on or in connection with mining on a mining tenement*" before it can be claimed as expenditure in operations reports (Form 5's).

72. Mineralogy submits that some of the expenditure claimed by Blackfin for the purposes of calculating the *"aggregate exploration expenditure"* is not *"on, or in connection with, exploration for minerals on the combined reporting tenements…."* In simple terms, Mineralogy submits Blackfin has claimed all expenditure incurred on the Project in the Expenditure Year and has used various methods of allocation of the expenditure to various exploration licences, including the E's, that has the effect of inflating expenditure on some of the E's such that the provisions of s. 102(2)(h) of the Act becomes applicable when it should otherwise not be applicable.

73. I agree with the submissions of Mineralogy that the manner in which Blackfin has claimed expenditure on each of its E's is not in compliance with the Act and Regulations.

74. In my opinion the correct application of the provisions of s. 102(2)(h) of the Act is as follows:

> a. *The application for exemption must be demonstrated to be in respect to an exploration licence that is part of a combined reporting tenement pursuant to s. 115A(4) of the Act,*
> b. *The expenditure claimed in the Operations Report (Form 5) and used for the purposes of calculation of the* ***aggregate exploration expenditure*** *must be demonstrated to be expenditure that is "on, or in connection with, exploration for minerals on the combined reporting tenements",*
> c. *The expenditure for the combined reporting tenements when added together and forms the* ***aggregate exploration expenditure*** *must satisfy the expenditure requirements for the mining tenement had they been apportioned between the combined reporting tenements.*

75. What amounts to expenditure that is *"on, or in connection with mining on a mining tenement*" has been the subject of a decision of the Supreme Court of Western Australia in ***Re: His Honour Warden Calder SM & anor; Ex Parte Lee & anor [2007] WASCA 161 ("Lee Decision").*** That decision involved, inter alia, the determination of proper construction of the words *"in connection with mining"* in r. 31 of the Regulations, a regulation that deals with mining leases but is in similar terms to that of r. 21 of the Regulations that deals with expenditure obligation for exploration licences, s. 102(2)(h) and s. 102(2a) of the Act.

76. Her Honour Justice McLure, in the ***Lee Decision***, referred to the decision of Kennedy J in ***Re Heaney; Ex parte Flint v Nexus Minerals NL, (unreported; FCt SCt of WA; Library No 970065; 26 February 1997)*** in which Kennedy J said at (4):

> "It is important for the present purposes to note that the expenditure does not have to be on mining, as such, to satisfy the terms of r. 31. It may be 'in connection with' mining. The words 'in connection with' are words of wide import and, as with the words 'connected with', and, subject to the context in which the words are used, are capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote - see *Collector of Customs v Pozzolanic Enterprises Pty* Ltd (1993) 115 ALR, at 10-11. See also *Berry v Federal*

> *Commissioner of Taxation (1953) 89 CLR 65, at 658-659*, and *Australian National Railways Commission v Collector of Customs (SA) (1985) 8 FCR 26*, at 269, 275-277. In the present context, the words 'in connection with' can readily extend to matters leading up to mining - see *Johnson v Johnson [1952] P 4, at 50-51*, and *Nanaimo Community Hotel Ltd v Board of Referees [1945]) [sic] 3 DLR 22*, cited in *Claremont Petroleum NL v Cummings (1992) 110 ALR 23, at 280*."

77. In the ***Lee Decision***, McLure J at [38] agreed with Kennedy J who in ***Flint*** held that what is a sufficient connection depends upon the context in which the words are used. McLure J added the additional requirement that what is considered to be of sufficient connection should also take into account the scope and purpose of the Act in which the requirement appears. That requirement by McLure J was reflective of the decision in ***Collector of Customs v Pozzolanic (1993) 43 FCR 280*** when the Federal Court was considering the construction of the *Customs Act (1901)* (Cth) and the *Excise Act (1901)* (Cth) and whether fuel used for trucks delivering feed was "other operations" connected with the rearing of livestock for the purposes of the Act. The Federal Court said (at 288 - 289):

> *"The words 'connected with' are capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote. As Sheppard and Burchett JJ observed in Australian National Railways Commission v Collector of Customs (SA) at 378, the meaning of the word 'connection' is wide and imprecise, one of its common meanings being 'relation between things one of which is bound up with, or involved in, another' … The range of relationships to which the words apply for the purpose of the Act depends upon a judgment about that purpose."*

78. Her Honour Justice McLure went on, in the ***Lee Decision***, to deal with the issue of what amounted to expenditure "incurred on or in connection with mining" pursuant to r. 31 of the Regulations (see: [39] to [49]). In my opinion, the decision by McLure J in the ***Lee Decision*** can equally be applied to these proceedings.

79. McLure J cited with approval in the ***Lee Decision*** at [41] the submissions made to Her Honour by the second respondent the approach to be taken to establish whether expenditure on a mining lease can be categorised as being "incurred on or in connection with mining" pursuant to r. 31 of the Regulations.

80. In my opinion, a similar approach to that approved by McLure J in the ***Lee Decision*** can be used to determine if expenditure incurred on exploration on an exploration licence is expenditure that is "*on or in connection with mining on a mining tenement*" pursuant to r. 21 of the Regulations or is "*on, or in connection with, exploration for minerals on the combined reporting tenements..*" pursuant to s. 102(2)(h) and s. 102(2a) of he Act.

81. Applying the second respondents submissions approved by McLure J in the ***Lee Decision*** at [41] to the expenditure provisions relevant to an exploration licence results in the following analysis of what amounts to expenditure that is "*on or in connection with mining on a mining tenement*" pursuant to r. 21 of the Regulations

or is "*on, or in connection with, exploration for minerals on the combined reporting tenements..*" pursuant to s. 102(2)(h) and s. 102(2a) of the Act:

a. The expenditure in question must relate to the land (ground) the subject of the exploration licence or the combined reporting tenements.

b. The expenditure will be for the provision of goods or services (for convenience compendiously referred to as activities).

c. Regard should be had to the nature and purpose of the activity the subject of the expenditure in determining whether it is in connection with exploration for minerals.

d. It is not necessary that there be current active exploration for minerals, or an intention to carry out exploration for minerals, on the exploration licence in the relevant expenditure year. This flows from the nature of exploration for minerals and where combined reporting status is granted pursuant to s. 115(4)A of the Act there is often a long lead time before it is possible to form a definitive intention to carry out exploration for minerals on all exploration licences and such an intention can be frustrated by activities beyond the control of the holder of the exploration licence.

e. If the purpose of an activity is to assist, investigate, assess or facilitate exploration for minerals **and** the nature of the activity is such that it is reasonably capable of contributing to such assistance etc, then that purpose and nature will supply the nexus between the expenditure and the exploration for minerals.

f. Exploration for minerals does not cease when the process or operations of exploring for minerals ceases. Managing the consequences of exploration for minerals, including the requirement to rehabilitate any land or other aspect of the environment imposed as a condition of the grant of the exploration licence continues beyond the physical act of exploration and would fall within the ambit of being in connection with the exploration for minerals.

82. In my opinion, the application of these tests above will assist in the determination of whether expenditure incurred by the holder of an exploration licence is "*on or in connection with mining on a mining tenement*" pursuant to r. 21 of the Regulations or is "*on, or in connection with, exploration for minerals on the combined reporting tenements..*" pursuant to s. 102(2)(h) and s. 102(2a) of the Act.

83. The requirement that expenditure claimed be expenditure that is "*on or in connection with mining on a mining tenement*" pursuant to r. 21 of the Regulations or is "*on, or in connection with, exploration for minerals on the combined reporting tenements*" pursuant to s. 102(2)(h) and s. 102(2a) of the Act is important and should be strictly applied because if <u>all</u> expenditure is claimed in the operations reports (Form 5) the holder of an exploration licence to which combined reporting

status has been granted may take advantage of the provisions of the exemption provisions of s. 102(2)(h) of the Act because the aggregate exploration expenditure reported exceeds the minimum expenditure for all of the combined reporting tenements when it may not otherwise do so. Further, in my opinion, the policy of the Act being to exploit the mineral wealth of the State is not advanced when claims for expenditure are made that are not "*on or in connection with mining on a mining tenement*" pursuant to r. 21 of the Regulations or is "*on, or in connection with, exploration for minerals on the combined reporting tenements*" pursuant to s. 102(2)(h) and s. 102(2a) of the Act.

84. The importance of the accurate completion of operation reports (Form 5) was the subject of comments by me in ***Brosnan v JSW Holdings Pty Ltd [2011] WAMW 8*** at [10] – [14] when I stated the following:

> *"The completion of the Form 5 by the holder of a mining lease is an important task. It is the method prescribed by Parliament by which the Honourable Minister can satisfy him or herself that a condition of grant of a mining lease, to meet a minimum prescribed level of expenditure on the mining lease, has been complied with in each expenditure year. The failure of the holder of a mining lease to either lodge a Form 5 or to expend the prescribed minimum level of expenditure "in mining on or in connection with mining operations" may result in the forfeiture of the mining lease.*
>
> *The task of completing the Form 5, in my opinion, goes further than merely reporting the amount of expenditure in an expenditure year on the mining lease. The registered holder of a mining lease is required to not only show the amount expended in dollar value but must also provide sufficient particulars of the activity undertaken on the mining lease such that the Honourable Minister can determine the amount expended was "in mining on or in connection with mining operations" on the mining lease.*
>
> *It is not the case, from the plain reading of the Mining Act or Regulations, that the Honourable Minister should be required to speculate or infer whether the expenditure claimed by the holder of a mining lease in a Form 5 was expended "in mining on or in connection with mining operations" on the mining lease.*
>
> *A Form 5 contains 2 pages of detailed instructions on how a Form 5 is to be completed. The detailed instructions on how to complete a Form 5 are prescribed to assist the registered holder of a mining lease to provide accurate details of activity conducted upon a mining lease. Further, the detailed instructions on how to complete a Form 5 are explicit in the need for there to be particulars or details of not only how much was expended but also the activities that were carried out on the mining lease in expending the amount claimed. In my opinion, the purpose of the 2 pages of detailed instructions in a Form 5 is to inform the Honourable Minister the minimum expenditure has been met, but also the expenditure has a link or nexus "in mining on or in connection with mining operations" on the mining lease.*
>
> *The completion of a Form 5 in accordance with its detailed instructions will also aid a registered holder of a mining lease to resist applications for forfeiture for non-compliance with expenditure conditions brought by "jealous neighbours" who Parliament has "cunningly co-opted as an enforcement agency for the conditions impose*

by the Act." (see ***Roberts v Hugill (unreported, Mt Magnet Warden's Court, 26 February 1997 and noted in 16 AMPLJ 115)***

85. It is necessary to make a further comment regarding the manner in which expenditure has been allocated in this proceeding to the various exploration licences. Mineralogy submits that in some cases Blackfin has allocated expenditure claimed based on the number of exploration licences and not in accordance with the exploration licence upon which the expenditure was incurred. This submission by Mineralogy is more than supported by a consideration of some of the evidence of expenditure produced by Blackfin. In fact in some cases it would seem that little if any effort was put into attempting to identify which exploration licence the expenditure was incurred on. For example, some accounts for services rendered by McMahon Mining Title Services make no reference whatsoever to the mining tenements upon which work was performed or the nature of the work performed in a specific month to which an account rendered related. If any contractor to the holder of a mining tenement would be expected to understand the significance of specifying the mining tenement to which services were rendered for the purposes of accounting for expenditure it would be a mining tenement management company. Similarly, it would be expected a drilling company and other geological based professionals would be able to account to the holder of a mining tenement or mining tenements upon which they have provided their services and understand the importance of doing so.

86. It is unacceptable that the most fundamental condition upon which a mining tenement is granted, that the holder of a mining tenement be required to accurately account for expenditure *"on or in connection with mining on a mining tenement"* in each expenditure year is treated as an administrative hindrance or bureaucratic "red tape" when it is in fact the requirement laid down by Parliament to ensure the policy of the Act is complied with.

87. Compliance with the requirement to account for expenditure requires the holder to make every effort to precisely identify the mining tenement upon which the expenditure was incurred and to not simply arbitrarily allocate or apportion expenditure between a number of mining tenements except when there is some activity that does not allow the expenditure to be otherwise precisely allocated to a mining tenement as indicated by Warden Calder in ***Brosnan & ors v Meridian Mining Ltd [2010] WAMW 6***.

88. I agree with the decision of Warden Calder in ***Brosnan & ors v Meridian Mining Ltd (supra)*** that the proper method of the allocation of expenditure amongst a number of mining tenements where the actual expenditure on each mining tenements cannot be identified and the expenditure cannot be identified but has indiscriminate application to all of the mining tenements is a pro rata apportionment based upon the area of each tenement as the total area of all the tenements.

89. I would add to the decision of Warden Calder that circumstances may exist in which the departure from a pro rata apportionment based upon the area of each tenement as the total area of all the tenements. However, where such a departure occurs, the holder of the mining tenement should be in a position, when called upon either under the Act or Regulations or before the warden in proceedings, to justify why such a departure was considered appropriate and to demonstrate the method and calculation used in the allocation of each amount to expenditure on each mining tenement.

Duchess Group – C 53/2008 – E 04/1518

90. There appears to be no issue between Blackfin and Mineralogy that the prescribed combined minimum expenditure for the Duchess Group during the Expenditure Year was $350,000.00 with reported aggregate exploration expenditure amount for the same period being $4,578,885.00.

91. Blackfin submits a certificate of exemption for E 04/1518 should be issued as the Duchess Group as the aggregate exploration expenditure for the Expenditure Year exceeded combined minimum expenditure requirement by $4,228,855.00.

92. Mineralogy conditionally concedes the Duchess Group is entitled to the issue of a certificate of exemption subject to the warden being satisfied the expenditure claimed by Blackfin to have been expended was in fact expended *"in connection with mining"* as required by s. 62(1) of the Act and r. 21 of the Regulations.

93. The submissions by Mineralogy that some of the expenditure claimed by Blackfin within the Duchess Group was not expended *"on, or in, connection with mining"* or is expenditure that is "*on, or in connection with, exploration for minerals on the combined reporting tenements…"* and should not be taken into account for the purposes of the application of the provisions of s. 102(2)(h) of the Act, is in the circumstances of this case, in my opinion, a moot point.

94. Mineralogy does not challenge the correctness of expenditure claimed by Blackfin for E 04/1519 in the Form 5 for the Expenditure Year under the heads of expenditure of "Mineral Exploration Activities" as "Drilling (257 RC holes for 24,296 metres) - $1,583,757.00" and "Annual Tenement Rent and Rates" totalling $11,056.00.

95. Mineralogy also does not challenge the expenditure claimed in the Form 5's in the Expenditure Year by Blackfin for E 04/1518, E 04/1358 and E 04/1386 for Annual Rent and Shire Rates totalling $45,244.00. The combined value of the unchallenged expenditure upon the exploration licences that comprise the Duchess Group in the Expenditure Year amounted to $1,640,057.00.

96. I find there is no question the expenditure by Blackfin on drilling as claimed in the Form 5 for E 04/1519 within the Duchess Group is expenditure that is clearly "*on,*

or in connection with, exploration for minerals on the combined reporting tenements…" and the payment of Annual Rent and Rates for the exploration licences within the Duchess Group is allowable expenditure pursuant to r. 96C(2a) of the Regulations.

97. Accordingly, in my opinion, by application of the provisions of s. 102(2)(h) and s. 102(2a) of the Act and r. 58 of the Regulations to the unchallenged aggregate exploration expenditure for drilling and Annual Rent and Rates on each of the exploration licences that form the Duchess Group for the Expenditure Year reveals the combined minimum expenditure for each of the exploration licences for the Expenditure Year of $350,000.00 when apportioned between each of the exploration licences is met and well exceeded.

98. In those circumstances, Blackfin is entitled to a recommendation to the Hon. Minister for the grant of a certificate of exemption for E 04/1518 for the Expenditure Year. Accordingly, I recommend to the Hon Minister that a certificate of exemption be granted to Blackfin from complying with the whole of the expenditure conditions in the Expenditure Year for E 04/1518 pursuant to s. 102(2)(h) of the Act.

99. In making the above finding and recommendation, in a somewhat simple manner given the facts pertaining to drilling on E 04/1519, it should not be taken as ratification that the balance of the expenditure claimed by Blackfin for each of the exploration licences that comprises the Duchess Group in the Expenditure Year was expenditure that meets the obligation of the Act to be *"on, or in, connection with mining"* or is "*on, or in connection with, exploration for minerals on the combined reporting tenements…"*. The conclusion reached, irrespective of whether the balance of the expenditure claimed in the operation reports (Form 5's) is correctly allocated to an exploration licence or is not *"on, or in, connection with mining"* or is "*on, or in connection with, exploration for minerals on the combined reporting tenements…"* is not capable of challenging the amount or correctness of the expenditure claimed for drilling and payment of Annual Rates and Rent during the Expenditure Year simply because what has been expended on E 04/1519 in the Expenditure Year is significantly more than the amount of the combined minimum expenditure required for the exploration licences within the Duchess Group.

Liveringa Group – C 52/2008 – E 04/1515 & E 04/1517

100. The circumstances that apply on the Duchess in respect to this ground of the Exemptions do not apply, in my opinion, to the exemptions sought for E 04/1515 and E 04/1517 within the Liveringa Group during the Expenditure Year.

101. Blackfin submits the aggregate of the combined minimum expenditure for the Expenditure Year for the Liveringa Group is $209,000.00. There appears to be no dispute the exploration licences that comprise the Liveringa Group in the Expenditure Year are E 04/1515, E 04/1517 & E 04/1219. The combined

expenditure claimed to have been expended on the Liveringa Group in the Form 5's by Blackfin for the Expenditure Year amounts to $254,430.00.

102. Therefore, Blackfin submits certificates of exemption for E 04/1515 and E 04/1517 should be issued because the aggregate expenditure for the Expenditure Year for the Liveringa Group exceeded aggregate minimum expenditure requirement by $45,430.00.

103. Mineralogy challenges some of the expenditure claimed by Blackfin on E 04/1515 and E 04/1517 within the Liveringa Group during the Expenditure Year as being either, not attributable to the Liveringa Group, is not expenditure that has been incurred "*on or in connection with mining*" or the expenditure claimed has been allocated to an exploration licence arbitrarily by the division of the number of exploration licences into the expenditure claimed and as such the expenditure claimed should not be taken into account for the purposes of the Exemptions under the provisions of s. 102(2)(h) of the Act.

104. Specifically, Mineralogy outlines a number of items of expenditure claimed by Blackfin as being objectionable for the purposes of the application of the provisions of s. 102(2)(h) of the Act as follows:

Exploration Licence	Nature of Claim	Amount of Claim	Reason for Objection
E 04/1515 & E 04/1517	Accommodation & Meals at Looma	$415.00 per tenement	Allocation based on the number of mining tenements rather than work actually performed. Not on or in connection with mining.
	Gordon Marshall	$361.50 per tenement	Allocation based on the number of mining tenements rather than work actually performed. Expenditure not sufficiently substantiated or particularised to assert it is "on or in connection with mining."
	Roger Buzacott	$1,833.60 per tenement	Allocation based on the number of mining tenements rather than work actually performed.
	West Kimberley Computers	$73.02 per tenement	Allocation based on the number of mining tenements rather than work actually performed. Expenditure not sufficiently substantiated or particularised to assert it is "on or in connection with mining."
	Expenses incurred by Bruce Preston	$3,500.00 per tenement	Allocation based on the number of mining tenements rather than work actually performed. Expenditure not sufficiently substantiated or particularised to assert it is "on or in connection with mining." Many expenses claimed appear to be for food, accommodation which is not connected with mining and appear to be day to day living expenses.
	CPG Consulting	$517.50 per tenement	Allocation based on the number of mining tenements rather than work actually performed.
	Economic Consulting Services	$375.00 per tenement	Allocation based on the number of mining tenements rather than work actually performed.

			Expenditure not sufficiently substantiated or particularised to assert it is "on or in connection with mining."
	Featherstone Geological Consultant	$798.38 per tenement	Allocation based on the number of mining tenements rather than work actually performed.
	International Coal Consulting	$1,306.50 per tenement	Allocation based on the number of mining tenements rather than work actually performed.
	MBA Petroleum Consultants	$397.50 per tenement	Allocation based on the number of mining tenements rather than work actually performed.
	Resources Intermap P/L	$1,027.27 per tenement	Allocation based on the number of mining tenements rather than work actually performed.
	SMG Consultants	$266.60 per tenement	Allocation based on the number of mining tenements rather than work actually performed.
	Kimberley Land Council	$3,939.23 per tenement	Allocation based on the number of mining tenements rather than work actually performed. While land access costs including native title costs and fees to access private land have been held to be expenditure in connection with mining, compensation are not considered to be expenditure in on or in connection with mining. Invoices only state that they are for quarterly payment pursuant to a funding agreement signed between Rey Resources Ltd, Blackfin P/L and Rey Kimberley P/L and the Kimberley Land Council.
	Administration and Overheads	$7,017.29 per tenement	Allocation based on the number of mining tenements rather than work actually performed. Many of the administration & overhead expenses claimed are not sufficiently particularised so unable to determine if they are "on or in connection with mining." Food & accommodation expenses claimed are not "on or in connection with mining." Only reasonable costs of travel to & from a tenement can be claimed. The hire of Toyota Camry from Kimberley Car Hire was to travel between Broome and Derby not to & from the E's.
	McMahon Title Services	$1,390.65 per tenement	Allocation based on the number of mining tenements rather than work actually performed on the tenement.

105. Blackfin submits that substantial evidence has been lead in respect to work done and expenditure incurred on the Liveringa Group during the Expenditure Year. Blackfin concedes the only drilling conducted on the Liveringa Group during the Expenditure Year was on E 04/1219 upon which only 9 RC drill holes for 659 metres were drilled being a shortfall of some 41 holes. The reason for the shortfall in the number of holes drilled was the death of an elder of the Nyikina Managla people upon which a request was made to stop drilling on the land. That request was respected by Blackfin and the drilling rig was deployed elsewhere.

106. It is those circumstances Blackfin submits the evidence shows that drilling was conducted, various camps were established, drilling sites were prepared and various expenses incurred that were attributable to the Liveringa Group. However, Blackfin submits it was difficult for the witnesses for Blackfin to precisely identify and allocate all expenses in these circumstances and agrees some costs were allocated in error and no documentary system was in place for tracking allocation decisions. As a consequence Blackfin submits the passage of time has affected the memory of some of Blackfin's witnesses, some staff members have left the employ of Blackfin or Rey and those that were left were unable to precisely identify the manner in which expenses were allocated. The expenditure on the Liveringa Group relied upon and reported by Blackfin in the Form 5's for the Expenditure Year were allocated by Mr Wilson from a corporate perspective, Mr Bruce Preston ("Mr Preston") from a site/operational perspective, Mr Fowers from a geological perspective and Mr Roland Tinoco ("Mr Tinoco") for the overheads and administration perspective.

107. Despite the difficulties Blackfin has experienced in the Expenditure Year in the allocation of expenditure to the appropriate exploration licences it holds it submits the warden can be satisfied on the balance of probabilities the expenditure claimed by Blackfin to have been expended was in fact genuinely incurred *"on mining or in connection with mining"* and as such it is demonstrated for the purposes of s. 102(2)(h) of the Act that the minimum expenditure has been exceeded for the Liveringa Group and when apportioned a recommendation for the grant of an Exemption can be made to the Hon. Minister.

108. Having considered all the evidence and submissions by Blackfin on this ground of the Exemptions I do not accept the evidence lead by Blackfin satisfies me on the balance of probabilities the expenditure incurred on the Liveringa Group in the Expenditure Year is all expenditure *"on mining or in connection with mining"* or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements."*

109. In those circumstances, I cannot be satisfied on the balance of probabilities that the threshold has been met for recommendation to the Hon. Minister pursuant to s. 102(2)(h) of the Act, that is, the aggregate exploration expenditure of the combined reporting tenements within the Liveringa Group is sufficient to satisfied the expenditure requirements for the exploration licences had the aggregate exploration expenditure been apportioned between the combined reporting tenements.

110. In my opinion, the provisions of s. 102(2)(h) of the Act provides a significant advantage to the holder of an exploration licence that forms part of a group of exploration licences approved for an arrangement under s. 115A(4) of the Act in that it allows the holder of the exploration licence to focus its exploration expenditure on a specific exploration licence or licences within the group and in essence ignore any expenditure obligations on any other of the exploration licences

within the group but later take advantage of the aggregation of the expenditure by apportioning between all exploration licences within the combined reporting group. Accordingly, because the advantage under the provisions of s. 102(2)(h) of the Act is significant the provisions of that section should be, in my opinion, applied strictly to ensure the policy that underlies the Act, to exploit any mineral wealth that may be within the ground that comprises the exploration licence, is not abused.

111. Mineralogy has, in my opinion, correctly objected to the manner in which Blackfin has sought to rely upon the provisions of s. 102(2)(h) of the Act to seek an exemption for the exploration licences that comprise the Liveringa Group. The allocation of expenditure incurred by Blackfin by spreading equally the expense across all exploration licences within the Project or by some mathematical formula it cannot not explain or justify based on its own estimations of expenditure incurred on a specific exploration licences is not acceptable.

112. The advantage then had, in these proceedings, is that expenditure incurred on exploration licences within other Combined Reporting Groups is able to be spread across all of the exploration licences held by Blackfin and thus increase the ability to take advantage of the provisions of s. 102(a)(h) of the Act. In other words, where the vast majority of expenditure by Blackfin has been focused on the Duchess Group it has been able to be allocated across all exploration licences within all the Combined Reporting Groups expenditure it cannot readily identify as being expended in respect to a specific exploration licences or that it at will says affects all exploration licences it holds in the Project.

113. Blackfin has provided, it would appear, almost every invoice and receipt for the expenditure it has claimed in respect to the E's. Very few of the invoices or the receipts bear any identifying material specific to one of the exploration licences the subject of the Project.

114. Further, the evidence in this case clearly identifies that some significant portions of expenditure claimed within the Form 5's lodged for the E's in the Expenditure Year cannot be classified as being *"on mining or in connection with mining"* or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements."*

115. In my opinion, by the use of the words *"on mining or in connection with mining"* Parliament intended to establish only expenditure on certain activities by holders of mining tenements is capable of advancing the policy of the Act to exploit the mineral wealth of the State by ensuring an appropriate level of exploration or mining occurs on a mining tenement. To that extent McLure J in the ***Lee Decision*** established guidelines aimed at identifying whether expenditure incurred by holders of mining tenements falls into the category of being *"on mining or in connection with mining"* such that the policy of the Act and Regulations is advanced.

116. That is not to say other expenditure that falls outside the test formulated in the ***Lee Decision*** is not expenditure that Parliament considers should not be incurred. It simply means certain activities conducted and expenditure incurred are not to be included in the calculation of expenditure because there is not sufficient nexus between achieving the underlying policy of the Act and what a holder of a mining tenement may choose to expend or be otherwise obliged to expend for other reasons on a mining tenement.

117. For example, the rental of the apartment in Broome for what in essence was entertainment and rest and relaxation for those that attend the Project simply cannot be regarded as expenditure that is *"on mining or in connection with mining"* when the test formulated in the ***Lee Decision*** is applied. For the same reason, I do not accept the cost of the hire of the Toyota Camry in Derby, including the cost of accident repairs, is *"on mining or in connection with mining"*. A review of the invoices from International Coal Consulting Pty Ltd at pages 151 and 152 of Exhibit 17 pertaining to expenditure relating to be E 04/1515-1518, 1520-1525 and 1529, raises in respect to page 151 whether it is expenditure *"on mining or in connection with mining"* and in respect to page 152 to which mining tenement it relates.

118. Further, I do not accept the various food supplies purchased in Derby for consumption in Derby or Looma or that the accommodation claimed at Looma can be regarded as expenditure *"on mining or in connection with mining"*. The application of the ***Lee Decision*** to this item of expenditure reveals, in my opinion, that food and accommodation does not relate to the land or the ground the subject of the E's, the nature and purpose of the provision of food and accommodation is not in connection with exploration for minerals and the purpose of the supply of food and accommodation does not assist, investigate, assess or facilitate exploration for minerals nor is it reasonably capable of contributing to such assistance. There have been a number of cases, with which I agree, that have held the supply of food and accommodation is part of normal living expenses and is not expenditure. (see: ***Nunn v Carnicellie (unreported, Southern Cross Warden's Court, 29 November 1990, noted 10 AMPLA Bull 63)***, ***Flint v Brosnan [2002] WAMW 20 and 21***, and ***In the Application for the Restoration of late Mining Lease 45/1135 by Kenneth Bacon [2012] WAMW 19***.

119. Mineralogy submits the allocation of expenditure incurred by Blackfin for the services of Mr Buzzacott were allocated by Mr Preston without independent verification of the amount of service provided to a specific exploration licences by Mr Buzzacott. Timesheets for Mr Buzzacott were seen by Mr Preston but not produced. As a result, Mineralogy submits the allocation by Mr Preston of the expenditure by Mr Buzzacott is questionable and may relate primarily to the Duchess Group.

120. Blackfin responds to the challenge by Mineralogy to the allocation of expenditure for the services of Mr Buzzacott by stating Mr Preston gave evidence that Mr

Buzzacott was the Chief Geologist for Rey for the ground work and exploration in the 2008 calendar year including the drilling on the Liveringa Group. The allocation of invoices from Mr Buzzacott were, according to Mr Preston, made to a number of exploration licences that Mr Buzzacott planned work on and from when the drilling started were mainly allocated to E 04/1519 and later E 04/1219. In those circumstances, Blackfin says the allocation of expenditure pertaining to Mr Buzzacott to the Liveringa Group would have been appropriate given he was involved in the managing of the drilling program on E 04/1219. Further, Blackfin refers to invoices totalling some $201,519.65 from Mr Buzzacott.

121. If the submission by Blackfin in respect to the allocation of the expenditure it incurred with Mr Buzzacott is that I infer the allocation of expenditure by Blackfin must be correct because he worked on the Liveringa Group in the Expenditure Year then I reject such proposition.

122. The evidence from Blackfin was drilling was planned to occur in the 2008 Calendar Year on E 04/1518, E 04/1519, E 04/1770 & E 04/1753 within the Duchess Group, E 04/1219 within the Liveringa Group, E 04/1516 within the Myroodah Group, and E 04/1522 to E 04/1524 within the Nerrima–Moffats Group.

123. Drilling occurred in the 2008 Calendar Year principally on E 04/1519 within Duchess Group and on a restricted basis, due to a request by the local aboriginal land holders following the death of an elder, on the E 04/1219 within the Liveringa Group. In those circumstances it is difficult to understand in the absence of an explanation why any allocation has been make for expenditure by Mr Buzzacott to E 04/1517 and E 04/1515 within the Liveringa Group, E 04/1529 within the Myroodah Group and E 04/1521 and E 04/1525. Further, there is no explanation as to the manner of allocation of Mr Buzzacott's expenditure. My calculation of the allocation for Mr Buzzacott's expenditure is that it was done by simple mathematics being of the $183,359.71 to be allocated 1% or $1833.60 was allocated to each of E 04/1515, E 04/1516, E 041517, E 04/1520 to E 04/1524 and E 04/1529, 80% or $ 146,687.77 was allocated to E 04/1519 and the balance to another exploration licence that I am asked to infer was E 04/1219.

124. That division of expenditure is not in keeping with the statement of Mr Tinoco that expenditure incurred across various E's were allocated according to land size of the various exploration licences held within the Project. By the keeping of proper records it is possible to accurately and appropriately identify which of the E's work in planning and drilling for the drilling programme was conducted without the need to embark on some forensic audit of what was incurred, how it was incurred, how it was later allocated and to what exploration licences it was allocated.

125. I have no issue Blackfin incurred expenditure with Mr Buzzacott for the Project and is properly able to claim that expenditure upon E's within the Project. That is also the position of Mineralogy. However, it is unacceptable and, in my opinion, not in

compliance with the obligation of reporting expenditure in Form 5's that the holder of a exploration licences should report expenditure that is incurred "*on mining or in connection with mining*" or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements*" in a fashion that is not accurate or is allocated in a contrived fashion that is not in keeping with actual expenditure on a exploration licences for the purposes of giving the impression expenditure conditions have been met when they have in fact not been met.

126. In the face of the evidence, I am unable to be satisfied on the balance of probabilities how much of the expenditure incurred by Blackfin through the services of Mr Buzzacott has been correctly allocated to which mining tenements within the Project let alone to which, if any, of the E's the subject of the Exemptions.

127. In my opinion, the same can be said of the expenditure claimed by Blackfin in the Expenditure Year for the E's and other exploration licences for CPG Consulting, Featherstone Geological Consultant, International Coal Consulting, MBA Petroleum Consultants, SMG Consultants, Derby Mechanical Services, Geoscience Associates, Rangott Mineral Exploration and others including McMahon Mining Title Services.

128. Mineralogy submits a similar position exists with expenditure claimed for Mr Marshall, Mr Buck, Mr Milgin and Ms Wise in that there exists no detail as the exploration licences the work or services rendered by them relates or that their work or services is incurred "*on mining or in connection with mining*" or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements.*" Blackfin submits it has a requirement under the agreement with the local native title group and the Kimberley Land Council to employ a certain number of local aboriginal people. That was done and each of these people was employed to assist in the advancement of the Project particularly in the case of Mr Buck and Mr Milgin who were employed in the drilling program and Ms Wise as a general assistant on the Liveringa Group. As such Blackfin says the amount paid to these people is expenditure appropriately allocated between the E's. If that is the case there appears to have been no allocation for their services on any exploration licences within the Liveringa Group.

129. The allocation of expenditure for Mr Marshall would appear to be appropriate across all exploration licences held by Blackfin but should have been allocated on the basis of the size of the exploration licences.

130. The salaries for Mr Preston, Mr Wilson and Mr Tinoco is, in my opinion, incurred "*on mining or in connection with mining*" or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements.*" However, for the reasons previously expressed, I do not accept that all other expenditure on overheads or administration claimed by Blackfin is capable of being regarded as being expended incurred "*on mining or in connection with*

mining" or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements."*

131. In my opinion, any item expended in administration or overheads must met the test in the ***Lee Decision*** before it can be regarded as being incurred "*on mining or in connection with mining"* or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements"* and capable of being considered within the limits of r. 96C of the Regulations. For the reasons expressed earlier not all expenditure on exploration licences is capable of being claimed as being *on mining or in connection with mining"* or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements."* It is erroneous for there to be any belief the provisions of r. 96C of the Regulations entitles the holder of a exploration licences to claim expenditure for administration and overheads by simply applying the formula provided without that expenditure having in fact been expended.

132. I do not propose to consider the large number of items recorded on the various lists and receipts produced by Blackfin as supporting expenditure its claims is "*on mining or in connection with mining"* or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements"*. I find by application of the principles within the ***Lee Decision*** makes it clear that a large majority of the items within the various lists and receipts produced by Blackfin simply cannot be regarded as expenditure for the purposes of the Act.

133. For the same reasons I do not consider the claim by Blackfin relating to expenditure on the services of Arnason Consulting and IIR Ltd can be regarded as being "*on mining or in connection with mining"* or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements."*

134. The payments made pursuant to the provisions of the Native Title and Heritage Protection Agreement ("KLC Agreement") between Rey, Blackfin and the Kimberley Land Council is expenditure "*on mining or in connection with mining"* or as stated in s. 102(2a) of the Act "*on, or in connection with, exploration for minerals on the combined reporting tenements."* The obligation to pay the fee equal to 2½% of the minimum expenditure on the exploration licences within the area covered by the KLC Agreement is for access to land and is a statutory prescribed and allowable expenditure pursuant to r. 96C(3) of the Regulations. In my opinion, where the land access fee is payable for multiple exploration licences the division of that amount should be according to the area of the exploration licences not a division based upon the number of exploration licences.

135. A significant expenditure item claimed in the Form 5 for the Expenditure Year for E 04/1219 by Blackfin for the purposes of s. 102(2)(g) of the Act is for drilling and is noted under the heading of Mineral Exploration Activities. That expenditure is within the Liveringa Group and is noted in the Form 5 for E 04/1219 as follows:

A. Mineral Exploration Activities	
Geological Consultants	26,642.00
Contractors	49,512.00
Drilling (9RC holes for 659 metres)	79,215.00
Total	$155,369.00

136. Evidence lead by Blackfin was that drilling as conducted by Belldale Drilling who became part of the Haddington Group on E 04/1219. I can find no invoices from Belldale Drilling or the Haddington Group amongst those produced for the Expenditure Year for E 04/1219. According to Mr Wilson the drilling on the Liveringa Group was also conducted by Underdale Drilling. I note the ledgers and spreadsheets produced by Mr Tinoco make reference to Haddington and Underdale. There are accounts and invoices from Underdale Drillers within the file produced by Blackfin for E 04/1219 in the Expenditure Year. The invoices all refer to the Canning Basin Project and give no indication of the exploration licences upon which drilling or work was conducted. No invoice is for the amount of $79,215.00. The closest that any invoice can come to the above amount is an invoice dated 1 August 2008 for $52,773.27 for drilling of approximately 665 metres. Another invoice from Underdale Drilling is for $79,804.01 dated 30 May 2008 and appears to be for the supply of drill bits.

137. In reply, Blackfin submits that documents prepared by Mr Tinoco and his evidence reveals expenditure of $125,243.00 on drilling was expended by Haddington Drilling of which $100,195.03 of this amount was allocated to E 04/1519 being for drilling at the Duchess Group. Inferences can be drawn that, submits Blackfin, the amount of $25,047.97 was allocated to E 04/1219 for the drilling program at Liveringa Group.

138. Further, Mr Wilson contends Underdale Drilling was also contacted to conduct drilling exploration on E 04/1219. That is demonstrated, submits Blackfin, by the evidence of Mr Tinoco who says that $2.4 million was expended on Underdale Drilling of which $2.3 million was allocated to the Duchess Group and the remaining $100,000.00 was allocated as expenditure to Liveringa Group. It is difficult to understand this submission as Blackfin suggests a total of $125,000.00 was expended on drilling E 04/1219 in the Expenditure Year. That submission is not supported by the documentary evidence.

139. The evidence from Blackfin is in the Expenditure Year it expended on the Liveringa Group, particularly E 04/1219 a sum of $25,000.00, $79,215.00 or $125,000.00 in the drilling of some 9 holes. This is demonstrable of the inability of Blackfin to satisfy me of the amount of expenditure it actually incurred on the Liveringa Group is sufficient to meet the threshold pursuant to s. 102(2)(g) of the Act.

140. The consequence is if the amount expended on drilling as claimed in the Form 5 was $25,000.00 then the threshold pursuant to s. 102(2)(h) of the Act has not been met by Blackfin. If the amount expended on drilling is $79,215.00 or $125,000.00

then the threshold may be met subject to any other objection by Mineralogy to other expenditure claimed.

141. I do not doubt the 9 holes were drilled on E 04/1219 on behalf of Blackfin in the Expenditure Year. I simply cannot be satisfied upon the evidence presented to me to the requisite standard as to the exact cost for that drilling. In those circumstances, the threshold test has not been met pursuant to s. 102(2)(h) of the Act and Blackfin are not eligible to a recommendation to the Hon. Minister for a grant of the Exemptions.

142. One of the prerequisite for the holder of an exploration licence to claim an exemption pursuant to s. 102(2)(h) of the Act is to demonstrate the amount of the aggregate expenditure reported for a combined reporting group exceeds the amount of the combined minimum expenditure. When challenged on such an application by an objector the obligation rests with the applicant to satisfy the warden on the balance of probabilities that the amount of expenditure reported has been spent on or in connection with exploration for minerals on the combined reporting tenements and in accordance with the calculations in the Regulations.

143. It is not the role of the Hon. Minister or his delegate or that of the warden to conduct an audit of masses of accounting records in search of the manner in which the applicant for exemption claims to have expended money or carried out work commensurate with expenditure on a mining tenement. In this case that is precisely what has occurred. I have spent an enormous amount of time attempting to act fairly to both Mineralogy and Blackfin by trolling through the accounting records and various other documents produced by the parties in an attempt to satisfy myself that amounts claimed to have been expended have in fact been expended and more importantly correctly allocated as expenditure to the correct exploration licences.

144. Accordingly, I recommend to the Hon. Minister the application by Blackfin for the Exemptions pursuant to s. 102(2)(h) of the Act for E 04/1515 and E 04/1517 be refused.

s. 102(3) – Any other Reason Sufficient to Justify Exemption

Introduction

145. The provision of s. 102(3) of the Act empowers a Warden to recommend to the Hon. Minister that an exemption be granted to the holder of a mining tenement for any other reason the Hon. Minister considers sufficient.

146. A warden when considering an application for exemption pursuant to s. 102(3) of the Act may have regard to facts that are relevant to the grounds of exemption prescribed in s. 102(2)(a)-(h) of the Act. (see: ***WMC Resources Ltd v Ajax Mining Nominees Pty Ltd (supra))***. The consideration of the facts that may be relevant to the grounds of exemption prescribed by s. 102(2)(a)-(h) of the Act is not, in my opinion, to exclude consideration of the same facts that give rise to other circumstances that may fall under the provisions of s. 102(3) of the Act. However, I

agree with Warden Sharrett in ***Austwhim Resources NL v Van Blitterswyk [2003] WAMW 38*** that a warden should not consider any of the grounds listed in s. 102(2) of the Act that are sought to be re-argued under the provisions of s. 102(3) of the Act.

147. The role of the warden is to report to the Hon. Minister on whether the holder of a mining tenement an applicant for exemption has raised any other reason sufficient to justify the granting of an exemption in what has been described as a "catch all" provision of the Act. (see: ***Newmont Duketon Pty Ltd & ors v Angelopoulos [2006] WAMW 20*** and ***Marymia Exploration NL v Elezac Mining Pty Ltd (Perth Warden's Court, 5 December 1997, Vol 12 No 25***).

148. Blackfin submits a warden can recommend to the Hon. Minister the grant of a certificate of exemption to the holder of a mining tenement based on the operations and mining and exploration operations of the applicant (see: ***Great Boulder Mines Ltd v Bailey [2000] WAMW 6***). Further, Blackfin submits in ***Horizon Mining Ltd v MPF Exploration Ltd [2005] WAMW 1*** a recommendation to the Hon Minister was made for exemption where current plans for further exploration to commence immediately and where there is planned and methodical process in train for exploration existed and the warden noted that it *"was not appropriate given all the circumstances of this matter to embark upon a campaign of spending for the sake of spending it."*

149. Against that background, Blackfin makes application for Exemptions pursuant to s. 102(3) of the Act for all of the E's based upon the following circumstances:

    a. the conduct of Rey/Blackfin in delineating a JORC resource on Duchess,
    b. the effect of the Global Financial Crisis ("GFC") in and around the expenditure year and its economic effects on raising capital;
    c. the unsolicited takeover offers during the Expenditure Year,
    d. the significant past development and expenditure on the Project, including the E's, and;
    e. the significant planned development and expenditure on the Project, including the E's.

150. Mineralogy in its opening submissions raised some issue in respect to the particulars relied upon pursuant to s. 102(3) of the Act in the application for the Exemptions in the Expenditure Year is not reflective of the circumstances now relied upon above. It is clearly desirable that the holder of a mining tenement seeking an exemption from compliance with expenditure conditions pursuant to the provisions of s. 102(3) of the Act should formulate and particularise its grounds with precision before lodging the Form 18 with the mining registrar. It certainly is not the case that the particulars now relied upon by Blackfin have caught Mineralogy by surprise or that Mineralogy has not been able to properly prepare the Objections. Quite to the contrary Mineralogy has provided a detailed and wholesome argument in its Objections to the Exemptions.

s. 102(3) – Conduct of Blackfin in Delineating JORC Resource on the Duchess

151. The evidence of Mr Wilson was Blackfin focused its exploration during the Expenditure Year on the Duchess Group, in particular E 04/1519, E 04/1770 and E 04/1753, with the intention of delineating a JORC resource that would then enable Rey to raise market interest, raise capital and apply for a mining lease. As a consequence, during the Expenditure Year, approximately 269 holes were drilled on the Duchess Group in the area Blackfin and Rey deemed to be the most prospective to achieve that end. The result of the drilling campaign was on 1 April 2009 Rey announced a maiden JORC resource of 498 million tonnes of thermal coal had been confirmed with 126 million tonnes classified as "measured" or "indicated". The JORC resource on the Duchess Group was upgraded in April 2011 following a further drilling campaign.

152. Accordingly, it is upon this basis Blackfin seeks the Exemptions because it prioritised the delineation of the JORC resource on the Duchess Group rather than expend as required by the Act upon the remaining E's. Blackfin submits the Act does not require expenditure for the sake of expenditure but rather a well planned approach to expenditure based on exploration and potentially exploitation of any minerals found within or upon the exploration licences.

153. Mineralogy rejects this submission by Blackfin and submits the Act does not allow the holder of an exploration licences the discretion to make a commercial decision to prioritize expenditure on the exploration of some exploration licences it holds over other exploration licences it holds. Further, Mineralogy submits Blackfin has failed to provide any evidence that by focussing on the Duchess it was prevented from meeting its expenditure obligations on the remaining E's in the Expenditure Year.

154. In support of its argument, Mineralogy submits the evidence of Mr Wilson confirms the commercial decision made by Rey and Blackfin to prioritize exploration and expenditure on the Duchess Group in the Expenditure Year, the statement by Rey in the quarter ending 31 March 2008 that its aim of drilling was to obtain a JORC resource by the end of 2008 or early 2009 and the statement by Rey that its strategy was to develop a thermal coal resource to support an initial export mining operation as a precursor to a larger scale operation in the extensive coalfield within the Project.

155. Mineralogy further submits the case law makes it clear the objects of the Act nor s. 102 of the Act provides any basis for the holder of a mining tenement to make such a commercial decision to focus on a particular mining tenement and then rely upon that commercial decision to seek an exemption from meeting expenditure obligations under the Act. The Act, submits Mineralogy, places a significant emphasis on the exploration, exploitation and development of individual mining

tenements, irrespective of the total number of mining tenements held by the holder. This proposition submits Mineralogy is demonstrated by the following cases:

a. ***Kiora Holdings Pty Ltd v Gutnick Resources NL [2003] WAMW 9*** in which the warden, having reviewed the manner in which the holder conducted its expenditure on its mining tenements, concluded the holder was aware of its expenditure obligations and should have been aware the failure to comply with expenditure on all its mining tenements could result in forfeiture created its own predicament as a result of its own prioritizing of expenditure.
b. ***Van Blitterswyk v BHP Billiton Nickel West Ltd [2009] WAMW 5*** in which the warden having considered the various applications for exemption noted the evidence demonstrated the holder of the mining tenements had prioritized other mining tenements for expenditure and neglected the grounds the subject of the proceedings.

156. The only basis Mineralogy submits it might be suggested the delineation of a JORC resource could be significant as forming the basis of a recommendation for an exemption from expenditure conditions pursuant to s. 102(3) of the Act is if any JORC resource delineated is geologically or economically connected with the exploration licences that have not been explored. However, in this case Mineralogy says such a suggestion cannot be made because Rey has made repeated suggestions to the public in its 2010 and 2011 Annual Reports that forfeiture of the E's will have no impact upon the Duchess Group. Rey and Blackfin's position was confirmed, says Mineralogy, by the evidence of Mr Fowers, Mr Bryans, Mr Wilson and Mr Preston. Mineralogy submits that Mr Fowers, a geologist, went so far as to suggest there was no geological connection between the E's and the Duchess. In those circumstances Mineralogy submits this ground of the Exemptions cannot be sustained.

157. Blackfin is at odds with the submissions by Mineralogy over the geological relationship between the E's held by Blackfin in the identification by Blackfin of a JORC resource at the Duchess. In summary, Blackfin and for that matter Rey maintains the only evidence given by its witness is a regional coal potential exists within the Project signified by the fact all of Blackfin's exploration licences are located within the Fitzroy Trough and all our host Permian stratigraphy and all host the Lightjack formation believed to contain coal potential. Mr Fowers said it was the Lightjack formation that defines the geological relationship between the E's in the Project that are relevant to Rey and Blackfin's attempts to produce a coal mine in the area.

158. The provision of s. 102(3) of the Act relied upon by Blackfin for the grant of the Exemptions must be read with the provisions of s. 102(4) of the Act. The effect of these two provisions is that a certificate of exemption may be granted for any other reason which may either be prescribed or which, in the opinion of the Hon. Minister,

is sufficient to justify such exemption when regard is had to the current grounds upon which any exemption has been granted and to the work and money spent on the mining tenement by the holder.

159. The ground of the Exemptions sought by Blackfin pursuant to s. 102(3) of the Act is exemptions should be granted to the E's because of "the conduct of Rey/Blackfin in delineating a JORC resource on Duchess Group." The evidence of Mr Wilson is a commercial decision was made by Blackfin not to meet the minimum expenditure commitment on each of the E's in the Expenditure Year when funds were available and diverted for use on other exploration licences particularly E 04/1519 within the Duchess Group.

160. That commercial decision should be viewed, in my opinion, with the evidence of both Mr Fowers and Mr Wilson that the tenement holdings of Blackfin corresponds with the belief of Blackfin as to the distribution of coal within the Project. Mr Wilson said Blackfin had no other resources other than the Duchess Group as it does not have sufficient geological evidence and knowledge of the coal it believes exists in the ground within the area of the Project.

161. In that regard, the evidence lead by Blackfin was during the Expenditure Year Blackfin focussed upon the drilling program upon exploration licences within the Duchess Group for the purposes of identifying a JORC resource that could then be used to raise capital to develop a mine on the Duchess Group. There was no evidence lead by Blackfin the drilling program on the exploration licences within the Duchess Group was of any benefit in obtaining sufficient geological evidence that was capable of identifying the extent of the potential distribution of coal on other exploration licences within the Project and particularly on the E's.

162. The documentary evidence, including Annual Reports and Quarterly Reports of Rey and Programmes of Works prepared by Rey or Blackfin, and the evidence of Mr Fowers and Mr Wilson was that Blackfin had in 2008 planned a drilling campaign in the Expenditure Year on some of the E's comprising of some 27 drill holes. Only 2 of the planned drill holes were completed being drilled in December 2009 and outside the timeframe of the Expenditure Year. The 2 holes were drilled on E 04/1524 within the Nerrima-Moffats Group in December 2009 and were said by Mr Fowers to have been an opportunistic drilling program to attempt to identify if the coal resource attached to the Duchess Group extended to the south. A drilling rig was located nearby and was being demobilised from other work so it was hired to drill several holes at a cost saving to Blackfin.

163. In my opinion, the evidence relative to this ground of the Exemptions is the sole focus of Blackfin in the Expenditure Year was to use its available funds and other resources upon the exploration licences within the Duchess Group, particularly E 04/1519, for the purposes of the delineation of a JORC resource to then use that delineation for the purposes of raising further capital to later mine the resource.

164. Blackfin has referred to a number of authorities that suggest the intention or policy of the Act does not require the holder of a mining tenement to use monetary resources ineffectively or in a wasteful manner simply to promote the overall objective of the mineral exploitation (see: ***WMC Resources Ltd v Ajax Mining Nominees P/L (supra)*** at [46]) or that expenditure occur for the sake of expenditure rather than approaching the exploitation of the mineral wealth of the State in a planned and methodical way with compliance of all State and Federal legislation and within existing financial and economic circumstances that prevail at the time (see: ***General Gold Resources NL v Exim P/L (supra)*** at [92] – [93]).

165. I agree with the authorities cited by Blackfin and Mineralogy relevant to this ground of the Exemptions. In my opinion, there is no conflict between the authorities cited and the Act in respect to this ground of the Exemptions.

166. The facts in this proceeding relevant to the Exemptions are that Blackfin held a belief the exploration licences within the Project contain coal. The accuracy of that belief and the extent of any coal contained within the Project could only be determined by expenditure on exploration in accordance with its obligations under the terms of the grant of the E's under the provisions of the Act. Blackfin made a commercial decision not to meet its minimum expenditure obligations on the E's as it sought to divert its funds to the Duchess Group to establish a JORC resource.

167. There is no suggestion in this proceeding that it would be wasteful or unnecessary to expend upon the E's. There is no suggestion in this proceeding that Blackfin at the time of making the commercial decision not to meet its minimum expenditure obligations on the E's did not have a methodical plan to explore most of the E's, was not financial enough even in the economic circumstances that prevailed at the time nor that it did not have the appropriate approvals to drill. There is clear evidence from Mr Wilson that Blackfin needed to establish geological evidence and knowledge of the coal it believes existed in the ground within the area of the Project.

168. I agree with Mineralogy that at the time Blackfin made its commercial decision not to meet its expenditure requirements on the E's and diverted its financial and other resources to its plans for the Duchess Group it did so at its own peril and in the full knowledge of the potential consequences. There is no evidence that any benefit, in the sense of the gathering of geological evidence or knowledge applicable to the E's, would flow from the commercial decision made by Blackfin to divert its attention from the E's to Duchess Group and thereby not meet the minimum expenditure on the E's in the Expenditure Year when it was well within Blackfin's plans and financial resources to do so.

169. It is also necessary to consider, pursuant to s. 102(4) of the Act, any grounds upon which an exemption has been granted and the work done and money claimed to have been expended. It is noted that exemptions were granted for the E's in the

previous expenditure year pursuant to s. 102(2)(g) of the Act. The evidence in this proceeding is that all matters pertaining to the grant of the previous exemption had been overcome on each of the E's.

170. The evidence in this proceeding was that little work was performed upon the E's in the Expenditure Year. Some work and expenditure was allocated to the E's based on the number of exploration licences not work actually done and expenditure incurred in relation to each of the E's. I have made comment concerning that previously. However, I should make this further observation regarding the expenditure reported in the Form 5's for the E's in the Expenditure Year. I do not accept on the balance of probabilities that all expenditure claimed by Blackfin was incurred *"on mining or in connection with mining'* or that it has been properly allocated to the correct E. In my opinion, the allocation of the invoices received by Blackfin was done in many cases on a "guesstimation" by Mr Preston, Mr Wilson, Mr Tinoco or Mr Fowers. I have previously commented that few of the invoices make any reference to which of the E's the expenditure or work was carried out on despite the fact almost all of the contractors responsible for work carried out on the Project are professionals working within the mining sector and must or should know of the need for the holder of the mining tenement to report its expenditure accurately each year.

171. Further, some of the expenditure claimed by Blackfin simply cannot be appropriately and fairly allocated to the E's given no drilling or other exploration occurred on the ground during the Expenditure Year. It cannot be the case the allocation of expenditure based on a division of the number of exploration licences held in the area by Blackfin is appropriate when the evidence in this proceeding is of little or no work being conducted on the E's in the Expenditure Year.

172. For the reasons that I have expressed earlier and for these reasons above I recommend to the Hon. Minister that the application for Exemptions for the E's pursuant to s. 102(3) of the Act on the ground of the "Conduct of Blackfin in Delineating JORC Resource on the Duchess" should be refused.

s. 102(3) – Unavailability of Equity Funding due to GFC

173. During the Expenditure Year, a downturn in stock markets with a flow on to Equity funding for exploration and mining projects occurred in what has become known as the Global Financial Crisis (GFC). According to the evidence of Mr Wilson, equity funding was essentially unavailable at any price to the period from approximately October 2008 until April 2009, and for some months thereafter was available at a significant premium.

174. The financial position of Rey was said by Mr Wilson to have been in June 2008 holding cash of $5.2 million and by June 2009 it had reduced its cash holdings to $528,000.00 which he says restricted exploration activity.

175. Mineralogy correctly points out that Rey and Blackfin during the Expenditure Year conducted drilling on the Duchess Group as part of plans made and prioritised in 2008 for the purposes of delineating a JORC resource of coal and enabling Rey to seek further funding for feasibility studies. The evidence of Mr Wilson, Mr Preston, Mr Bryan's and documentary evidence including various reports all confirm that Rey and Blackfin achieved all their planned drilling targets in the Expenditure Year and were able to identify a JORC resource on the Duchess Group.

176. The reduction in the financial position of Rey from cash holdings of $5.2 million in June 2008 to holding only $528,000.00 in June 2009 is the mere consequence of both Rey and Blackfin carrying out its plans to conduct a significant drilling campaign on the Duchess Group with the intention of delineating a JORC resource. It was not the case during the Expenditure Year and at that stage of the GFC that Rey was without funds or that it was then embarking upon a fundraising campaign to fund its plans and those of Blackfin. It was the case that Rey held sufficient funds to carry out its prioritised plans on the Duchess Group.

177. There is no dispute from the evidence of Mr Wilson and the documentary evidence that by July 2009 a further $2.7 million had been raised by non-renounceable rights issue. In October 2009, Rey announced its intention to undertake further capital raisings subject to shareholder approval. In December 2009, Rey undertook a placement of shares which resulted in it raising approximately $15 million to fund a definitive feasibility study for the Duchess Group.

178. It is difficult in those circumstances to understand the basis of this ground of the Exemptions by Blackfin. There is no evidence by Blackfin that during the Expenditure Year its plans or ability to expend was in any way affected by the GFC. In fact, the only conclusion that can be reached is that Blackfin through its parent company Rey was in an enviable position in that it held some $5.2 million will in cash in June 2008 and was able to carry out its prioritised and planned drilling campaign on the Duchess Group despite the onset of the GFC. Further, despite the GFC and the expenditure of all but $528,000.00 of its cash reserves, Rey and Blackfin were able to complete further fundraising in the aftermath of the GFC no doubt as a consequence of the success of the Duchess Group drilling campaign in the Expenditure Year.

179. Rey and Blackfin had significant cash reserves in the Expenditure Year. Those cash reserves were spent in accordance with prioritised plans by Rey and Blackfin in the Expenditure Year. The GFC was no doubt a cause of significant financial difficulties for many mining companies who sought to raise capital with the intention of advancing plans to explore and/or mine mining tenements held by them. However, the evidence produced by Blackfin and Mineralogy does not substantiate that Rey or Blackfin were affected to any degree in their capacity to expend upon the E's in the Expenditure Year or that when Rey sought to raise capital it was

unable or restricted in doing so such that it was unable to meet any expenditure obligations that either Rey or Blackfin had.

180. This ground of the Exemptions by Blackfin is, in my opinion, without merit. Accordingly, I would recommend to the Hon. Minister the Exemptions not be granted to Blackfin on the ground of unavailability of equity funding during the GFC pursuant to s. 102(3) of the Act.

s. 102(3) – Unsolicited Takeover Offers

181. During the Expenditure Year, or at least until the end of September 2009, unsolicited takeover offers were made for Rey. According to the evidence of Mr Wilson the unsolicited takeover offers were made for Rey by Gujarat NRE Minerals Ltd and Crosby Capital (Holdings) Ltd and the effect was to further restrict the ability during the GFC to have access to equity markets to raise capital and also consumed management time. Despite that Mr Wilson acknowledges that after delineating the JORC resource on the Duchess Group, Rey was able to raise $15 million in capital and at a price at a price above the takeover offers that were made by Gujarat and Crosby.

182. It is noted at the time of the unsolicited takeover offers by Gujarat and Crosby the Expenditure Year for 9 of the 11 E's had passed. Further, the planned and prioritised drilling campaign on the Duchess Group had been completed and results were being compiled.

183. There is no evidence from Mr Wilson or any other witness for Blackfin or document produced by Blackfin that suggests the unsolicited takeover offers by Gujarat all Crosby interfered with Blackfin carrying out its proposed and planned expenditure in the Expenditure Year. For all intents and purposes the unsolicited takeover offers came at a time in which the Expenditure Year was or but passed and finances were depleted as a consequence of carrying out the exploration program. The evidence of Mr Wilson was the unsolicited takeover offers were no more than an annoying distraction and interference.

184. There is no evidence the unsolicited takeover offers impeded the capacity of Rey or Blackfin to advance its expenditure obligations in the Expenditure Year or for that matter to raise additional capital as evidenced by the successful raising of approximately $17 million in or about the time and in the face of the GFC as previously discussed.

185. This ground of the Exemptions by Blackfin is, in my opinion, without merit. Accordingly, I recommend to the Hon. Minister the Exemptions not be granted to Blackfin on the ground of the unsolicited takeover offers during the GFC pursuant to s. 102(3) of the Act.

s. 102(3) – Previous Expenditure & Exemptions for the E's

186. Blackfin submits because it exceeded its expenditure obligation in the 2 expenditure years prior to the Expenditure Year it should be granted the Exemptions for the E's in the Expenditure Year. I do not accept this submission has any merit as a ground upon which the Hon. Minister may consider is a reason sufficient to grant the Exemptions in the Expenditure Year.

187. The Hon. Minister granted to Blackfin, pursuant to s. 102(2)(g) of the Act, exemptions from complying with the whole of the expenditure obligations for each of the E's in the 2 expenditure years prior to the Expenditure Year the subject of this proceeding. In doing so, the Hon. Minister pursuant to s. 103 of the Act relieved Blackfin from the obligation to comply with the prescribed expenditure condition under the Act.

188. The effect of the grant by the Hon. Minister of an exemption from the obligation to comply with the whole of the prescribed expenditure condition under the Act will, without more, automatically place the holder of a mining tenement capable of saying they have expended more than the minimum expenditure condition. That is because the exemption granted does not relieve the holder of the mining tenement from paying rent or local government rates and committing to ongoing administration and overheads, all of which are prescribed expenditure under the r. 96C(2a) & (3) of the Regulations. Accordingly, it is always the case following the grant of an exemption from complying with the whole of the prescribed expenditure condition under the Act an argument such as this can be run.

189. In my opinion, that is precisely why the provisions of s. 102(3) & (4) of the Act must be read and applied together so that the veracity of the ground of the exemption applied for can be considered in its context of any current ground of exemption and work done and money spent in the preceding and current expenditure years. Applying those considerations to the Exemptions it can be seen that in all but 1 of the E's, being E 04/1518 associated with E 04/1519 on the Duchess Group, the claimed expenditure on exploration is severely restricted in the previous expenditure year commensurate with the grounds upon which the exemption was granted pursuant to s. 102(2)(g) of the Act.

190. In those circumstances, when the evidence surrounding the ground of the Exemptions for the E's is considered in the context of the provisions of s. 102(4) of the Act and particularly the work done and money expended on the E's in the current and previous expenditure year it is concluded that Blackfin no longer had any of the difficulties pursuant to s. 102(2)(g) of the Act in accessing the E's and was therefore capable of exploring the E's in the Expenditure Year and that it made a decision not to commit sufficient funding to meet the minimum expenditure conditions as it was obliged to do.

191. For those reasons, I recommend to the Hon. Minister the Exemptions for the E's in the Expenditure Year not be granted to Blackfin on the ground of previous expenditure on & exemptions for the E's pursuant to s. 102(3) of the Act.

s. 102(3) - Past & Planned Development & Expenditure on the Project

192. Blackfin submits the Hon. Minister may consider the grant of the Exemptions because of its past & planned development and expenditure on all of the exploration licences within the Project in the years from 2007 - 2011. In those years, Blackfin relies upon a table indicating expenditure of some $21 million on various exploration licences within the area of the Project including many that are not directly relevant to these proceedings.

193. In the Expenditure Year, Blackfin submits it has spent some $4.2 million on the various exploration licences within the Project of which $2.8 million was spent on E 04/1519. As a consequence of the expenditure on the exploration licences within the Project, Blackfin says it has achieved in April 2009 the delineation of a JORC resource on the Duchess Group, in December 2010 made application for a mining lease and a miscellaneous licence at the Duchess Group over E 04/1519, E 04/1770 and E 04/1753 and between June 2011 and April 2012 significant advancement for obtaining environmental approvals for obtaining all statutory approvals to the development at the Duchess Group to a mine capable of exporting coal in 2014.

194. The evidence of Mr Bryans was that financial budgets have been prepared for Blackfin in the 2011/2012 expenditure year to expend some $6.5 million on drilling and exploration between the Duchess Group and the other exploration licences within the Project. Subject to board approval further plans exist for the expenditure of some $20 million for the development of the Duchess Group. It is the plan and intention of Blackfin and Rey to develop the Project from exploration to a long term coal mining and export company that will have long term benefits for the State.

195. In response, Mineralogy submits the relevance of future expenditure or plans for the E's is not relevant to the Exemptions because s. 102(4) of the Act sets the criteria for consideration being the "current grounds" upon which exemptions have been granted, the work done and the money spent. In that regard, Mineralogy refers to the decision of ***Majeed v Briggs & Schulda (unreported, Warden's Court, 1988, 7 AMPLA Bull 146)*** wherein it was held that "as a general principle the emphasis should be on the nature and extent of the non-compliance and not on future proposals." Further, Mineralogy submits Blackfin should not be given the benefit of the opportunity it has in buying itself out of its under spending in the Expenditure Year by overspending in subsequent years. In that regard, Mineralogy referred to the decision of Warden Sharrett in ***Richmond v Sub-Sahara Resources NL & anor [2006] WAMW 14*** in which the warden regarded as relevant subsequent spending and acknowledged the holder of the mining tenement had advanced plans but refused to give much weight to the subsequent expenditure on the basis that:

> *" If a tenement holder could sleep on its obligations knowing that it could if challenged by way of plaint simply later overspend and avoid forfeiture, it would seriously undermine the jealous neighbour" principle upon which the industry depends to police compliance with the principles of the Mining Act."*

196. These comments by Warden Sharrett were made in the context of an application for forfeiture of a mining tenement. However, I agree with the comments of Warden Sharrett and am of the opinion the same principles should apply to holders of mining tenements who seek exemption from expenditure conditions where a deliberate decision has been made to not meet expenditure conditions. Confronted with an objection to an application for exemption and an application for forfeiture for failing to comply with expenditure conditions it would be surprising and unusual for the holder of a mining tenement not to demonstrate its capacity to meet expenditure conditions if it wished to oppose the objection and the application and was of the opinion some advantage could be had from doing so.

197. Mineralogy also submits any reference to consideration of expenditure on "projects" as a ground for exemption was deliberately removed by Parliament in amendments to s. 102(2)(h) of the Act contained within the *Mining Amendments Act 2004* and that criteria is no longer regarded as a relevant consideration in determining whether a mining tenement should be exempt from expenditure conditions.

198. In my opinion, the removal of reference to a "project" by the *Mining Amendments Act 2004* as a specific prescribed ground of exemption under s. 102(2)(h) of the Act has not totally removed the ability of the holder of a mining tenement from claiming an exemption on the basis it regards a "group" of mining tenements as a "project" or that it has a "plan" to develop the mining tenements in a certain fashion. The provisions of s. 102(3) of the Act provides the Hon. Minister may grant an exemption from complying with minimum expenditure conditions for any other reason sufficient to justify exemption. Accordingly, the exemption provisions of the Act do not provide a closed category of grounds upon which the holder of a mining tenement may seek an exemption from complying with expenditure conditions.

199. The word "project" is not defined within the Act. The ordinary meaning of the word "project" within the *Macquarie Dictionary* includes the word "plan." A "project" should merely be seen as a "plan" for the mining or exploration of a mining tenement or number of mining tenements.

200. In those circumstances the holder of a "group" of mining tenements may apply to the Hon. Minister pursuant to s. 102(3) of the Act for exemption from complying with minimum expenditure conditions on the basis they intend to explore or mine the "group" of mining tenements in a manner that is consistent with a "plan" that will result in its inability to comply with its minimum expenditure conditions on some of the mining tenements. There is nothing within the provisions of s. 102(1) of

the Act that, in my opinion, prevents the holder of a mining tenement from making an application for exemption at the very commencement of an expenditure year when it is aware its "plans" for the "group" of mining tenements is unlikely to comply with its minimum expenditure obligations. It would be more prudent to make such an early application for exemption than to wait until the end of the expenditure year when it may be too late to comply with expenditure conditions if the application is refused.

201. Such an application must reveal the holder of the mining tenements in making the applications for exemption has clear objective evidence the advancement of the "plan" for the "group" of mining tenements will promote the objectives of the Act taking into account the matters within s. 103(4) of the Act.

202. I find the evidence on this ground of the Exemptions is that Blackfin made a commercial decision to focus solely in the Expenditure Year to use its available funds and other resources upon the exploration licences within the Duchess Group, particularly E 04/1519, for the purposes of the delineation of a JORC resource to then use that delineation to raise further capital to later mine the resource. In the 2008 expenditure year and in the Expenditure Year, Blackfin lacked sufficient knowledge of the accuracy of the belief it held of the extent of any coal that may be contained within other exploration licences, including the E's, within the Project and that could only determine that additional information by expenditure on exploration on the E's in accordance with its obligations under the terms of the grant.

203. That Blackfin now says it intends to expend some of the funds it now has access to upon the E's and it has met the minimum expenditure on the E's in subsequent years is noted. However, the meeting of those obligations is not the primary focus under s. 103(4) of the Act of whether a further exemption should be granted. Blackfin had the plans to expend similar amounts of funds on the E's in the Expenditure Year in circumstances where it lacked sufficient knowledge of the accuracy of the belief it held of the extent of any coal that may be contained within other exploration licences, including the E's, but did not do so because of its own decision to prioritising the exploration on other exploration licences it held.

204. I find the Expenditure by Blackfin in the Expenditure Year that was "*on mining or in connection with mining*' on the E's was insufficient to met its minimum obligations under the Act. There is no evidence to suggest it was not capable of having met its expenditure obligation in the Expenditure Year. In those circumstances, Blackfin cannot now seek to rely upon subsequent expenditure on the E's and a plan and promise to carry out the same plans and expend the same sum of money it deliberately chose not to do in the Expenditure Year and thereby be afforded the benefit of "buying" the Exemptions.

205. For those reasons, I recommend to the Hon. Minister that the Exemptions in the Expenditure Year for the E's by Blackfin on the ground of past & planned

development & expenditure on the Project pursuant to s. 102(3) of the Act be refused.

Forfeiture Applications

206. In light of my recommendations to the Hon. Minister it is inappropriate that I should attempt in anyway to deal with the Forfeiture Applications for the E's. The Hon. Minister may accept or reject any of my recommendations. The decision by the Hon. Minister on the Exemptions will dictate whether the Forfeiture Applications need be further considered by me.

207. Further, to attempt to deal with the Forfeiture Applications by making known any view I may have as to the disposition or recommendation I may make to the Hon. Minister at this time may have the effect of influencing the deliberations of the Hon. Minister in his considerations of my recommendations on the Exemptions.

208. In those circumstances it is appropriate to adjourn the Forfeiture Applications for fixed period of time to await the outcome of the consideration by the Hon. Minister of my recommendations for the Exemptions, with liberty to the parties to relist the matter on 72 hours notice in writing to the other party.